1-16-2013

Bremer v. East Greenacres Irrigation Dist. Respondent's Brief Dckt. 39942

IN THE SUPREME COURT OF THE STATE OF IDAHO

BREMER, LLC, an Idaho limite liability Liability company, and KGG PARTNERSHIP Plaintiff/Appellant, vs. EAST GREENACRES IRRIGATION DISTRICT Defendant/Respondent.	)	DOCKET NO. 39942-2012 RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

HONORABLE LANSING L. HAYNES
DISTRICT JUDGE, PRESIDING

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I. INTRODUCTION

Plaintiffs Bremer, LLC and KGG Partnership (hereafter collectively referred to as "Bremer") extended a water main located within Hayden Avenue to serve a manufacturing building Bremer had constructed off of Hayden Avenue. In the Complaint filed in this matter, Bremer claimed that the water main line extension it constructed to obtain water from East Greenacres Irrigation District ("EGID") constituted an illegal hook up fee because: (1) the extension was unrelated to the value of the system capacity used by Plaintiffs, and (2) the improvements were wholly unrelated to Plaintiffs' use of Defendant's irrigation system. (R., p. 9). Contrary to its position below, on appeal Bremer concedes that irrigation districts may enter into a contract with the owner of a subdivided parcel for the construction by the landowner of a pressurized system for the proper distribution of irrigation water to the landowner's parcel pursuant to I.C. §§43-330A-G (Appeal Brief, p. 9). On appeal, Bremer vacillates between claiming no construction agreement was reached between Bremer and EGID, and claiming that the construction agreement reached between EGID and Bremer was the result of economic duress exercised by EGID.

Although Bremer advances the untenable position that a water main extension was not necessary to serve its new building, all the facts in the record are to the contrary. Even Bremer's own expert acknowledges the extension of the main line for water service was necessary to service Bremer's new industrial building. (R. p. 22A, 1.)

Bremer's real grievance is that EGID did not pay for the construction of the water main extension, and later looped the extension to the benefit of all members of the irrigation district. Bremer contends because there was a benefit to all users by this action that EGID should have paid for and constructed the extension.

II. STATEMENT OF THE CASE

A. Nature of the Case

Bremer owns a subdivided parcel within EGID. Bremer requested EGID provide service to this parcel for a new manufacturing facility. EGID required Bremer submit a proposal for construction of improvements to EGID's system to achieve water service to Bremer's new facility. EGID granted approval for Bremer to construct the water main extension to Bremer's subdivided parcel for the purpose of serving Bremer's newly constructed manufacturing facility with water. Bremer alleged in its suit that the improvements it constructed were unrelated to Bremer's use of the property and amounted to an illegal hook up fee. Bremer sought damages in the amount expended for construction of the water main line extension, claiming it was an exaction, and therefore an illegal tax.

B. Course of Proceedings

On March 4, 2011, Bremer filed a complaint against EGID. (R., p. 8.) EGID answered the complaint on June 1, 2011. (R., p. 2.)

On November 16, 2011, Bremer moved for partial summary judgment. (R., pp. 30-31.) Bremer filed a memorandum in support of the motion. (R., pp. 32-42.) Bremer filed affidavits from Phil Hart (R., pp. 20-23), Gary Bremer (R., pp. 24-26) and Brian Crumb (R., pp. 27-29) in support of the motion. Defendant filed its opposition to Bremer's summary judgment request on November 30, 2011. (R., pp. 173-186.) Bremer filed a reply memorandum in support of its motion for summary judgment on December 8, 2012. (R., pp. 222-227.)

On November 17, 2011, EGID filed a motion for summary judgment. (R. pp. 43-44.) EGID filed a memorandum in support of the motion. (R., pp. 45-55.) The supporting affidavits of Ron Wilson (R., pp. 56-134), Susan Weeks (R., pp. 135-142) and Jim Sappington (R., pp. 143-172) were filed November 17, 2011. Bremer filed its opposition to EGID's summary judgment motion on November 30, 2011. (R., pp. 187-190.) On December 1, 2011, EGID filed Bob Skelton's Affidavit.[1] (R., pp. 197-200.) On December 7, 2011, EGID filed its reply memorandum in support of its motion. (R., pp. 208-216.)

On November 30, 2011, Bremer filed a motion to strike Ron Wilson's affidavit. (R., pp. 195-196.) A memorandum was filed in support of the motion. (R., pp. 191-194.) On December 6, 2011, Bremer filed a Motion to Strike the Affidavit of Jim Sappington. (R., pp. 206-207.) A memorandum in support of the motion was also filed. (R., pp. 201-205.)

On December 7, 2011, EGID filed its response to Bremer's motions to strike portions of the affidavit of Jim Sappington and to strike the affidavit of Ron Wilson. On December 8, 2011, Bremer filed a supplemental motion to strike portions of the Affidavit of Jim Sappington

[1] The Affidavit referenced an attached Exhibit A, and indicated a full size copy would be provided to opposing counsel. One was not. More importantly, one was not provided to the trial court.

and the affidavit of Ron Wilson. (R., pp. 228-229.) On December 8, 2011, Bremer filed a motion to shorten time to hear its motion to strike the affidavit of Jim Sappington and Supplemental Motion to Strike Portions of the Affidavits of Jim Sappington and Ron Wilson. (R. pp. 230-231.) Bremer filed a supporting memorandum for the supplemental motion to strike on December 8, 2011. (R., pp. 232-234.)

On December 13, 2012, the motions for summary judgment proceeded to hearing, as well as the motions to strike, the subsequent motion to shorten time for the supplemental motion to strike, and the supplemental motion to strike. (R., p. 235.) The district court initially addressed the motions to strike and the supplemental motion to strike. The district court denied the motion to shorten time to hear the supplemental motion to strike. (Tr., Motions for Summary Judgment, p. 3, L. 2 – p. 7, L. 6.)[2] The district court denied Bremer's original motions to strike. (Tr., Motions for Summary Judgment, p. 10, L. 3 – p. 12, L. 2; R., pp. 237-238.) Following the hearing, the district court took the motions for summary judgment under advisement. (Tr., Motions for Summary Judgment, p. 35, Ll. 23-24.) On January 3, 2012, the Court entered its order denying Bremer's Motion to Strike Portions of the Affidavits of Jim Sappington and Ron Wilson. (R., p. 5.)

On January 5, 2012, Bremer filed the Affidavit of Scott Jones.[3] (R., pp. 239-240.)

[2] Respondent would typically provide a volume citation for the transcript. However, the Reporter's transcripts were not labeled by Volume, so the label of the Reporter's transcript is utilized herein to avoid confusion.
[3] Respondent believes that Mr. Jones' unverified affidavit was lodged with the Court pending obtaining the verified signature of Scott Jones. Respondent had agreed the affidavit could be lodged with the Court and considered by the Court if Plaintiff filed the verified complaint by the date of hearing. (R., p. 175.) However, EGID does not object to the untimely filed affidavit on appeal.

On January 13, 2012, the district court issued its memorandum decision and order granting EGID's motion for summary judgment and denying Bremer's motion for partial summary judgment. (R., pp. 241-247.) On January 23, 2012, Bremer filed a motion for reconsideration. (R., pp. 248-249.) A memorandum in support of the motion to reconsider was filed at the same time. (R., pp. 250-253.) EGID filed a response to the motion on March 8, 2012. (R., pp. 253-255.) On March 13, 2012, Bremer filed its response. (R., pp. 256-258.) The motion to reconsider was heard and denied by the trial court on March 14, 2012. The district court denied the motion for reconsideration. (R. p. 259.)

On March 22, 2012, the district court entered judgment in EGID's favor and dismissed Bremer's suit. (R., pp. 260-261.) On March 23, 2012, the Court entered its order denying Bremer's motion for reconsideration. (R., p. 5.)

On April 6, 2012, Bremer filed a motion to alter or amend the judgment and/or to set aside the judgment and to consider additional evidence. (R., pp. 262-263.) A supporting memorandum was filed with the motion. (R., pp. 264-268.) The affidavits of Gary Bremer (R., pp. 269-271) and Brent Schlotthauer (R., pp. 273-275) were filed in support of the motion. A memorandum opposing the motion was filed April 23, 2012. (R., pp. 276-281.) On April 26, 2012, Bremer filed a reply memorandum in support of the motion. (R., pp. 282-285.) On April 27, 2012, the district court heard the motion. The motion was denied. (R., p. 286.) The district court entered its order denying the motion on April 30, 2012. (R., p. 7.)

Bremer filed a Notice of Appeal on May 4, 2012. (R., pp. 287-292.) On May 22, 2012, an Amended Notice of Appeal was filed. (R., pp. 293-298.) A final judgment was entered by the District Court on June 1, 2012. (R., pp. 299-300.)

C. Concise Statement of Facts

On appeal, Bremer ignores most of the facts in the record in its Concise Statement of Facts, choosing only those that support its positions. Thus, EGID provides the following additional facts from the record.

Bremer, LLC is an Idaho limited liability company. (R., p. 8.) KGG is an Idaho partnership. (R., p. 8.)

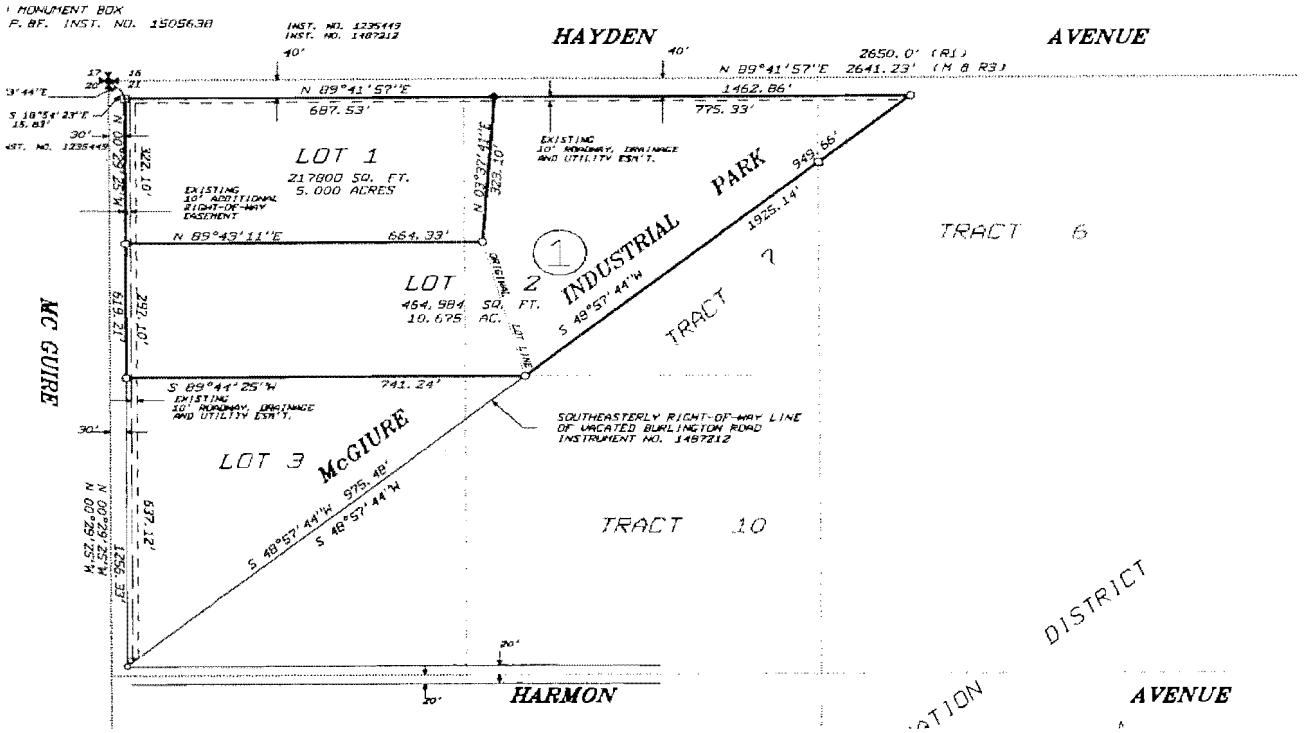
East Greenacres Irrigation District ("EGID") is an Idaho irrigation district organized pursuant to Title 43, Idaho Code. The District operates a single pressurized irrigation system that delivers both irrigation and potable water to its members through its works. Tracts 6, 7, 8, 9 and 10, Greenacres Plat No. 4, and the subsequent subdivisions of these tracts, lay within the boundaries of East Greenacres Irrigation District. (R., p. 56, ¶ 1.)

These tracts of land were subsequently subdivided. McGuire Industrial Park subdivision was recorded in Book J of Plats, Page 66 and 66A, Records of Kootenai County, Idaho on August 16, 2004 at the request of Double "B" Ranch and KGG Partnership. This plat subdivided Tracts 6, 7, 8, 9 and 10 of Greenacres Plat No. 4. The plat contained a sanitary restriction imposed by Panhandle Health District. (R., pp. 137-138.)

On April 30, 2008, a re-plat of the McGuire Industrial Park, designated "McGuire Industrial Acres Subdivision," was recorded on April 30, 2008, in Book K of Plats, Page 144 and 144A, Records of Kootenai County, Idaho at the request of Double "B" Ranch and KGG Partnership. This subdivision re-platted Lots 1 and 2 of the McGuire Industrial Park. The plat contained a sanitary restriction imposed by Panhandle Health District.

This re-plat caused Lot 2 to have frontage on both McGuire Road and Hayden Avenue, and made Lot 1 much smaller. (R., pp. 139-140.) Lot 2 became an irregularly shaped parcel containing approximately 10.675 acres. Bremer owned Lot 2. (R. p. 108.)

A depiction of McGuire Industrial Acres from the record is contained in the following depiction from the record, showing Lot 2, bordered by Hayden Avenue to the north of the lot, and McGuire Road lying to the west of the lot. (R. p. 139.)



On April 21, 2010, after construction of the irrigation extension that is the subject of this suit, Bremer Subdivision was recorded in Book K of Plats, Page 287 and 287A, Records of Kootenai County, Idaho at the request of KGG Partnership. This subdivision divided Lot 2 into two lots, approximately five acres each. These lots were designated as Lots A and B, Block 1, Bremer subdivision. Lot A contained the area which fronted McGuire Road and Lot B contained the area which fronted Hayden Avenue. (R., pp. 141-142.) The lots were divided along the line shown within Lot 2 in the above depiction and designated "original lot line."

Bremer owns FMI-EPS, which operates a foam insulation business in Post Falls, Idaho on some of the Lot 2 property owned by KGG Partnership. (R., p. 24, ¶ 3.) In 2007, Bremer constructed a new building for use by FMI-EPC, LLC on Lot 2. (R., p. 25, ¶ 5.) There was no water service installed to this building as the building did not exist at that time. (R., p. 57, ¶ 4; p. 143, ¶ 3.) Kootenai County Fire & Rescue required that the building be serviced by two fire hydrants, one on each side of the building, and required that the building include a fire sprinkler system. (R., p. 144, ¶ 5.)

On March 4, 2008, a representative for Bremer, LLC, Jim Nirk, appeared before the District Board and verbally informed the Board and District Manager Ron Wilson that Gary Bremer needed approval of a connection to the District's water system for new construction related to Foam Molders for that portion of Lot 2 that fronted Hayden Avenue. The District informed Mr. Nirk that engineered plans and DEQ approval for construction were needed before the District would grant conceptual approval of plans. (R., p. 57, ¶ 2.)

On March 18, 2008, Wilson met with Gary Bremer regarding extension of the water main on Hayden Avenue to accommodate a new industrial facility for Foam Molders. (R., p. 57, ¶ 3.) Following the meeting, Bremer contacted his attorney because he felt the main water extension had nothing to do with his company's hook-up. Bremer's attorney negotiated on his behalf, but in Bremer's view did not make any progress. (R., p. 25.) Bremer testified he would have incurred costs of approximately $6,000 per day if he did not move forward with the water main extension. (R., p. 25, ¶ 9.) The source of these costs was not included in the record. Bremer retained engineer Scott Jones to design the mainline extension to service the building and the site to EGID's system. (R., p. 25, ¶ 6.)

On April 3, 2008, Panhandle Health District wrote to Emmett Burley regarding the McGuire Industrial Acres re-plat indicating it would grant plat approval when the District issued a "will serve" letter committing to serving water to both lots 1 and 2 of the re-plat. (R., p. 58, ¶ 6; pp. 62-63, exhibit A.)

On April 17, 2008, the District forwarded Panhandle Health District a previous will serve letter from April 10, 2006 issued in connection with the first subdivision, McGuire Industrial Park, and inquired if it satisfied Panhandle Health District's will serve letter requirement. This previous letter indicated a water main line extension was required along Hayden Avenue in order to serve the subdivision that was proposed by Emmett Burley. (R., p. 58, ¶ 7; pp. 64-67, exhibit B.)

On May 2, 2008, Jones was provided the District's standard application for conceptual review of a project. (R., p. 58, ¶ 8; pp. 68-72, exhibit C.) On May 5, 2008, Jones submitted

engineered plans to Idaho Department of Environmental Quality (DEQ) for the water main extension project. On the same date, Jones submitted the engineered plans to EGID. (R., p. 58, ¶¶ 9 and 10; pp. 73-76, exhibits D and E.)

On May 6, 2008, EGID's Board of Directors granted conceptual approval for the extension of the Hayden Avenue water main to Bremer's parcel. (R., p. 58, ¶ 11.) By letter dated May 7, 2008, Jones was informed by EGID of the approval. (R., p. 58, ¶ 12; exhibit F, pp. 77-78.) On May 13, 2008, EGID issued a will serve letter to DEQ indicating that an extension of the water main in Hayden Avenue was being proposed to serve the parcel. (R., p. 58, ¶ 13; pp. 79-80, exhibit G.)

On May 16, 2008, the water main extension construction plan was submitted to DEQ by Jones. (R., p. 58, ¶ 14; pp. 81-82, exhibit H.) By letter dated June 17, 2008, DEQ wrote to KGG Partnership disapproving the proposed Hayden Avenue water main extension project, which consisted of construction of approximately 800 feet of 8-inch PVC water main in Hayden Avenue, as well as an 8-inch dedicated fire supply line to serve the parcel. DEQ indicated the project appeared to be an extension of a previously approved water main extension on Hayden Avenue issued to Emmett Burley on November 28, 2007. DEQ noted that Burley had not finalized his project with DEQ and that DEQ needed the record drawings. DEQ also informed Bremer that the design engineer had to demonstrate that the plan the engineer proposed was capable of meeting minimum fire flow requirements. (R., p. 58, ¶ 15; pp. 83-34, exhibit I.)

By letter dated June 27, 2008, DEQ informed KGG Partnership that it had received a letter from the local fire authority stating the local fire authority had received evidence that the required fire flows were met by Jones' plan. Based upon this information from the local fire authority, DEQ withdrew its disapproval of the project and approved the plans for construction. (R., p. 59, ¶ 16; exhibit J, pp. 85-86.)

EGID requires fire hydrants be located in a public right of way. (R., p. 144, ¶ 6.) At the time the building was being constructed, EGID's water main dead ended on Hayden Avenue at Emmett Burley's parcel immediately west of the Bremer parcel. (R., p. 144, ¶ 7.) In order to obtain service from EGID for the Bremer parcel, including the fire hydrants and sprinkler system required by Kootenai County Fire & Rescue, it was necessary to extend the existing 8" water main in Hayden Avenue east to the Bremer parcel. (*Id.*) Bremer extended the water main approximately 800 lineal feet to service the new building.[4] (R., p. 144, ¶ 8.)

By letter dated September 19, 2008, Jones submitted as-built project plans (engineered drawings showing construction components of the works as actually constructed) for both Burley and Bremer to EGID, along with a request that EGID forward an approved copy to DEQ. The as-builts showed the water main had been extended along Hayden Avenue, two fire hydrants had been installed in the public right of way, and a dedicated fire sprinkler line was connected to the main to service the new factory building. (R., p. 59, ¶ 17; pp. 87-90, exhibit K.) Bremer paid approximately $48,340.00 for the construction of the water main line extension. (R., p. 25, ¶ 10.) Brian Crumb, the owner of Copper Creek Environmental Land

[4] In his affidavit, Bremer contradicts his engineer's plans and claims he extended the water main 1,500 feet. However, this disputed fact is not material.

Clearing, LLC, testified that it would cost another $56,820.00 to reclaim the north side of Bremer's property adjacent to Hayden Avenue. (R., pp. 27-29.)

By letter dated September 19, 2008, EGID provided Jones with its pressure tests of the new line extension that served the new construction, which indicated the line had passed pressure test requirements. (R., p. 59, ¶ 18; pp. 91-97, exhibit L.) On September 26, 2008, the District informed DEQ that it approved the construction as a continuation of the 2007 Burley water main extension. (R., p. 59, ¶ 19; pp. 98-99, exhibit M.)

On October 31, 2008, Foam Molders paid a domestic connection fee of $2,250 and an irrigation connection fee of $600 (for a total of $2,850) to connect to the pressurized water system. (R., p. 59, ¶ 20.) This fee was not challenged in the litigation.

By letter dated December 11, 2008, DEQ informed EGID that all requirements under the Idaho Rules for Public Drinking Water Systems were completed. (R., p. 59, ¶ 21, pp. 100-101, exhibit N.)

By letter dated July 22, 2009, EGID received notice from Empire Surveying and Consulting, Inc. that Gary Bremer was applying to subdivide Lot 2 of McGuire Industrial Acres. Bremer requested a will serve letter for the new parcel being created, and an affirmative statement from EGID that no water main extensions would be required to serve the subdivision given the previous water main extension in Hayden Avenue. (R., p. 59, ¶ 22; pp. 102-104, exhibit O.) On August 7, 2011, EGID responded that given the previous water main extension in Hayden Avenue, no further extension was necessary to serve the subdivided parcel. (R., p. 59, ¶ 23; pp. 105-106, exhibit P.)

On September 1, 2009, EGID received a letter from Kootenai County notifying it that KGG Partnership was subdividing Lot 2, Block 1 of McGuire Industrial Acres into two (2) lots and requesting comments from EGID. (R., p. 108.) The cover letter indicated that both proposed lots were developed with Lot A having access from McGuire Road and proposed Lot B having access from Hayden Avenue, and that EGID was serving both proposed lots. (R., p. 108.) The narrative supplied with the application indicated that domestic water to both lots was being supplied by EGID, and all water lines had been installed to serve the existing buildings on proposed Lots A and B. (R., p. 114.) The footprints of the two existing buildings were depicted in the subdivision materials and showed one building on each proposed lot. (R., p. 116.) Included in the county packet were the District's May 13, 2008 will serve letter, the District's September 26, 2008 approval of the constructed water main extension along Hayden Avenue, and the District's August 7, 2009 letter that no water main extension was required for service to the newly subdivided parcel given the previous extension. (R., p. 59, ¶ 24; pp, 107-128, exhibit Q.) By letter dated September 2, 2009, Panhandle Health District sought an affirmation from EGID that the subdivision would be served from an existing water main and required no extensions of the water main. (R., pp. 129-130.) Had the previous water main extension not been completed, EGID would have commented that each lot would be required to have its own service connection and meters, and an extension of the water main in Hayden Avenue to serve Lot B would be required. (R., p. 60, ¶ 27.) On April 12, 2010, EGID provided John Monaco, Bremer's engineer, a will serve letter for the new subdivision. (R., p. 134).

Approximately two and one-half (2 ½) years after the Hayden Avenue water main extension was completed by Bremer, EGID extended the Hayden Avenue water main to connect to another main line within the water system, which is known as "looping" the line. EGID paid for this extension and did all the related work for the extension. (R., p. 144, ¶ 10.) According to Bremer's expert, water districts attempt to loop their systems whenever possible. (R., p. 22A, ¶ 4.) Bremer's expert testified that a looped configuration tends to equalize pressure within the entire system and generally provides increased flows at any point within the looped system. Looping provides a benefit to the entire water system and its users. (R., p. 22A, ¶ 5.) Bremer did not bear the cost of the Hayden Avenue water main extension to loop the line. (R. p. 145, ¶ 10.) The line was looped to better serve all members of the district, including Bremer. (R., p. 145, ¶ 10.)

Bremer's expert, Philip Hart, provided an expert opinion of his assessment of the water line required by EGID. Hart's assessment was that the building needed to utilize EGID's service, and that the water main was extended 1,500 feet for this service. (R., p. 22A, ¶1.) Hart commented that he was informed by Gary Bremer that Bremer's building was placed on a lot next to an existing building which already had service. (R., p, 22A, ¶3.) No explanation was given why this observation was relevant to Hart's assessment. (R., p. 20-23.)

Jones also submitted an expert affidavit indicating he was hired to engineer the connection to EGID's system. (R. p. 239, ¶3.) Jones testified EGID told him he would be required to extend the [Hayden Avenue] main line across Bremer's property. (R., p. 239, ¶ 4.)

Jones testified he gained the understanding that EGID wanted the line extended incident to its plan to loop the line. (R., p. 240.)

In its concise statement of facts, Bremer indicates that Bremer's contiguous property was already provided service by EGID, and the existing water main could have been extended to provide service to the new property from that contiguous property. EGID disagrees with this characterization of the facts.

EGID addressed Hart's affidavit and provided some explanation to the Court regarding Hart's comment that there was an adjacent building with service adjacent to McGuire Road. EGID testified if this testimony was presented by Hart to infer that a water main branch off the McGuire water main could be installed and routed across and through Bremer's private property, such an inference was not correct. EGID testified it disfavors routing water main line extensions through private property and promotes routing main line extensions within public rights of way for several reasons. When main water lines are contained within private property, future system additions and expansions of the water main can require acquisition of easements through private property. (R., p. 146, ¶ 11.) Routing water mains through private property potentially leads to encroachment issues at a later date. (R., p. 146, ¶ 11.) It is less expensive and simpler to operate and maintain main lines that lie within public rights of way. (R., p. 146, ¶ 11.) Further, EGID has a policy that water main extensions must provide for the proper present and future circulation of water. Water mains that dead-end at the back of private properties do not meet this policy. (R., p. 146, ¶ 11.)

III. ARGUMENT

A. Standard of Review

This Court reiterated the standard of review for a matter scheduled for court trial in its recent decision issued in the case of *Kootenai County v. Harriman-Sayler*, ___ Idaho ___, ___ P.3d ___ (2012 Opinion No. 151), holding that:

> This Court conducts a *de novo* review of a district court's grant of summary judgment, using the standard the trial court used in ruling on the motion. *Taylor v. McNichols*, 149 Idaho 826, 832, 243 P.3d 642, 648 (2010) (quoting *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 394, 224 P.3d 458, 461 (2008)). Therefore, the Court affirms a grant of summary judgment when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "When there is no question of material fact, only a question of law remains, over which this Court exercises free review." *Youngblood v. Higbee*, 145 Idaho 665, 668, 182 P.3d 1199, 1202 (2008) (citing *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007)). Under this standard, "disputed facts are construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." *Stonebrook Const., LLC v. Chase Home Fin., LLC*, 152 Idaho 927, 929, 277 P.3d 374, 376 (2012) (quoting *Curlee*, 148 Idaho at 394, 224 P.3d at 461).

Id.

With respect to the standard of review when statutory construction is involved, this Court set forth the standard of review in *Kootenai County v. Harriman-Saylor*, ___ Idaho ___, ___ P.3d ___ (2012 Opinion No. 151) when it held that:

> "Interpretation of an ordinance or statute is a question of law over which this Court exercises free review." *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 89, 175 P.3d 776, 778 (2007) (citing *Friends of Farm to Market v. Valley Cnty.*, 137 Idaho 192, 196, 46 P.3d 9, 13 (2002)). "We apply the same principles in construing municipal ordinances as we do in the construction of statutes." *Friends of Farm to Mkt.*, 137 Idaho at 197, 46 P.3d at 14 (quoting *Cunningham v. City of Twin Falls,*

125 Idaho 776, 779, 874 P.2d 587, 590 (Ct.App.1994)).

Id.

B. The District Court did not Err in Granting EGID's Motion for Summary Judgment

1. The District Court did not err in holding an agreement was reached between EGID and Bremer even though it was not written.

In its memorandum decision in this matter, the district court found that I.C. § 43-330A allowed an irrigation district and an owner of a subdivided parcel to enter into a contract for the construction of a pressurized system for the property distribution of irrigation water to the parcel. (R., p. 245.) The district court noted the Idaho Legislature intended that irrigation districts have the power to require landowners who subdivide to pay for the costs of extending the pressurized water system to the improved land. (R., p. 245.)

Idaho Code provides two mechanisms for an individual to obtain an extension of an irrigation district's system to service a parcel. The first mechanism is encompassed within I.C. §§ 43-328-330, and requires the holder of title of property within the district to petition the board of directors for construction of any improvement for the efficient irrigation of lands within the district. If this route is taken, and the Board approves the petition, an election is held, and the benefited parcel is assessed the cost of the improvement.

In the event the land is subdivided land within the District, a contract may be entered into with the owner of the parcel proposed for development. Idaho Code § 43-330A provides:

> When a parcel of land lying within an irrigation district has been subdivided and the owner or owners of the entire parcel propose to develop that

> parcel or any of the tracts therein for residential, commercial, industrial or municipal use, the board of directors of the district may enter into a contract with the owner or owners of the entire parcel, or of any tract therein, for the construction of a pressurized system for the proper distribution of irrigation water to the parcel or to the designated tracts within the parcel.

The agreement reached in this matter was that Bremer would be responsible for construction of the improvements to serve the parcel, and EGID would serve the deliver water to Bremer's facility.

However, I.C. § 40-330D indicates the contract is to be recorded, and until it is recorded, the landowner remains liable for the cost of construction. It appears the legislature contemplated the agreement would be placed in writing and recorded to secure payment to the district for costs expended. The district court found EGID did not comply with this portion of the statute, but that such non-compliance did not invalidate the agreement.

Bremer maintains that the failure to comply with I.C. §40-33D invalidates the agreement. Bremer presents no legal authority in support of this argument. Contracts for the construction of irrigation works are not one of the categories of contracts that are invalid unless placed in writing pursuant to Idaho's statutes of fraud, I.C. § 9-505.

It is clear from the provisions of I.C. §40-330A-G that the requirements that the recording of the contract was to secure payment to the irrigation district of the improvements. It was also intended to allocate the cost of construction to the benefitted parcels over time. Thus, the district court did not err in finding that this omission by EGID was not fatal to the claim that the parties reached an agreement as allowed under I.C. §40-330.

2. There was no question of fact regarding business compulsion that precluded summary judgment.

The district court concluded from the facts before it that Bremer and EGID reached an agreement whereby Bremer was responsible for construction of the system improvements to serve its parcel. (R., p. 245.) It is this holding Bremer challenges on appeal. Bremer contends there was no agreement because his acquiescence was coerced.

As a point of clarification before moving to the substance of Bremer's arguments, it should be noted that Bremer did not pay EGID for construction of the water main extension. Instead, Bremer constructed the water main extension at its own cost utilizing plans developed by Bremer's engineer, which were approved by EGID.

Bremer's assertion on appeal that EGID did not raise the voluntary payment rule on summary judgment is correct. Under the voluntary payment rule, a person may not, by way of set-off, counterclaim, or direct action, recover money that he or she voluntarily paid with full knowledge of all the facts and without any fraud, duress or extortion, although no obligation to make such payment existed. *Medical Recovery Servs., LLC v. Carnes*, 148 Idaho 868, 871, 230 P.3d 760, 763 (Ct. App. 2010). Since Bremer made no payment to EGID that was challenged in the suit, this affirmative defense is inapplicable to the present case and was not raised by EGID in any of its pleadings.

Bremer tries to manufacture a question of fact regarding the voluntary payment rule by claiming the district court *sua sponte* raised the voluntary payment rule at the hearing on Bremer's Motion to Reconsider. Bremer claims because the district court uttered the phrase

"was acceded to by the plaintiffs" that the district court was abandoning its written memorandum decision and holding that summary judgment was proper under the voluntary payment rule. This argument is disingenuous and disregards the context of the entire hearing.

Bremer opened at the reconsideration hearing by arguing reconsideration was appropriate because there was a question of fact whether the subdivision required the extension to the Hayden Avenue water main in order to provide proper distribution of water to the subdivision. (Tr., Motion for Reconsideration, p. 4, Ll. 8-23.) EGID responded that the undisputed evidence before the court was that Bremer, through its representative, approached EGID about obtaining water for its new manufacturing facility. EGID responded that it would provide water, but Bremer had to provide an engineered proposal showing how it would connect the building to EGID's water system. Bremer's engineer provided an engineered proposal to achieve Bremer's objective, and therefore it represented a plan for the proper distribution of water. EGID argued that these facts fell within *KMST, LLC v. County of Ada*, 138 Idaho 577, 67 P.3d 56 (2003); that there was a meeting of the minds and agreement on Bremer constructing a water main extension along Hayden Avenue. EGID argued Bremer could not come in after performance and argue there was no meeting of the minds on a term it supplied (i.e., the Hayden Avenue line extension proposal provided for the proper distribution of water). (Tr., Motion for Reconsideration, p. 4, L. 25 – p. 6, L. 15.) In reply, Bremer objected to the application of *KMST*, *supra*, to the present case. Bremer argued it was coerced into submitting the line extension routing proposal because it would have lost money if it didn't acquiesce to EGID's desires. Bremer argued there was a question of fact whether it was

coerced by EGID. Bremer maintained it wanted to construct the water main line along the back of its properties. (Tr., Motion for Reconsideration, p. 6, L. 17 – p. 8, L. 5.)

The district court ruled on the motion at the hearing. The district court stated that it recognized it was governed by I.R.C.P. 11 and the issue was a matter of discretion. The district court noted, although not required, that there were no new facts presented or new theories of law. The district court then held that it was paraphrasing its initial decision and affirming it, indicating that it believed that Bremer submitted the plans to EGID for extending the main line, the plan was accepted, and that plan was finalized. (Tr., Motion for Reconsideration, p. 8, L. 6 – p. 10, L. 17.)

The district court concluded its ruling by stating:

> Instead, the record seems to this court to be clear that plaintiffs responded with here's our plan for extending the main line, and that plan was finalized. The water – the job was done, and so therefore this court finds there to be no issues of material fact as to whether this was a proper action by the defendant because the action was acceded to by the plaintiffs, and therefore no cause of action lies at this point, and summary judgment as a matter of law was appropriate for the defense, so with that, the Court denies the motion for reconsideration and asks defense to prepare an order for the Court and a proposed judgment to finalize this matter.
>
> (Tr., Motion for Reconsideration, p. 10, Ll. 5-17.)

Nothing in the above pronunciation by the district court indicates that the district court *sua sponte* raised the voluntary payment rule as an alternate ground for its previous decision and order granting summary judgment. Further, nothing indicates that the district court was changing its written memorandum decision. To the contrary, the district court specifically indicated it was paraphrasing its earlier decision.

Nonetheless, Bremer continues to argue there was a question of fact regarding coercion that precluded a grant of summary judgment. Taking this argument out of the context of the voluntary payment rule, and placing it within the context of a contract, the issue becomes whether there was a question of fact regarding economic duress or business compulsion raised by Bremer that precluded summary judgment. In *Country Cove Development, Inc., v. May*, 143 Idaho 595, 150 P.3d 288 (2006), this Court held:

> In *Lomas & Nettleton Co. v. Tiger Enters.*, 99 Idaho 539, 542, 585 P.2d 949, 952 (1978) (quoting *W.R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957), the Court declared that an actionable claim of duress requires three elements: "(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party." Mere reluctance to accept is not sufficient to constitute duress; the party claiming duress must show that there was no reasonable alternative. *Id.* Moreover, that party must prove causation, that is, that "the duress resulted from [the other party's] wrongful and oppressive conduct" rather than from the party's own necessities. *Id.* This Court stated in *Inland Empire Refineries, Inc. v. Jones,* "[g]enerally, the demand by one party must be wrongful or unlawful, and the party must have no other means of immediate relief from the actual or threatened duress other than by compliance with the demand." 69 Idaho 335, 339-40, 206 P.2d 519, 522 (1949) (citations omitted).

Id.

Gary Bremer testified in his affidavit he needed water from EGID, he retained Scott Jones to engineer the connection from the building to EGID's system, the Hayden Avenue improvements would ultimately require Bremer to expend approximately $80,000 to construct, and he believed the Hayden Avenue water main extension had nothing to do with his company's hook-up to the water main. (R., p. 25.) Mr. Bremer indicated that he hired an attorney to negotiate on his behalf with EGID, but his attorney "could not make any progress."

(E., p. 25, ¶ 8.) Mr. Bremer testified his company would have incurred costs of approximately $6,000 per day if he did not move forward with the Hayden Avenue water main, so he was coerced into installing the line. (R., p. 25, 9.) The source of these alleged costs are not contained in the record. However, the inference Bremer believes the district court should have drawn from this testimony is that he was economically coerced into entering into the agreement to construct the Hayden Avenue water main, and therefore summary judgment for EGID was improper. Bremer never raised this defense in his response to EGID's motion for summary judgment. He did raise economic coercion in his motion to alter or amend the judgment, which motion was denied, and is addressed later in this brief. Had the motion been granted, the district court would have considered the testimony of attorney Brent Schlotthaur that Schlotthaur met with Bremer and discussed the matter. Schlotthaur also met with EGID's district manager, who was unable to enunciate EGID's legal authority and referred him to EGID's bylaws. Schlotthauer testified that Bremer's company could not use the facility it had just constructed without water from EGID. Schlotthaur testified he informed Bremer that even though EGID's requirement that Bremer construct the improvement was illegal, it would take a lot of time to litigate. Schlotthaur advised Bremer the delay caused by litigation would interrupt Bremer's business and cost it money if the litigation were instituted against EGID before connecting to EGID's system. (R., pp. 273-274.)

Several decisions have addressed the second prong of the business compulsion defense. In *Inland Empire Refineries, Inc. v. Jones*, 69 Idaho 335, 339-40, 206 P.2d 519, 522 (1949), this Court held "Business compulsion is not established merely by proof that consent is secured

by pressure of financial circumstances; or that one party insisted upon a legal right and the other party yielded to such insistence." *Id.* Later, in *Lomas & Nettleton Co. v. Tiger Enters.*, 99 Idaho 539, 542, 585 P.2d 949, 952 (1978) the court expanded on this concept, holding:

> Business compulsion is not established merely by proof that consent is secured by pressure of financial circumstances; or that one party insisted upon a legal right and the other party yielded to such insistence. Neither will a mere threat to withhold from a party a legal right which he has an adequate remedy to enforce, constitute duress. Generally, the demand by one party must be wrongful or unlawful, and the other party must have no other means of immediate relief from the actual or threatened duress than by compliance with the demand. (citations omitted.)

Id.

Pursuant to I.C. 40-330A, EGID had the right to require Bremer to construct the improvements to serve its parcel. Therefore, there was no unlawful demand or wrongful act by EGID. Further, financial pressures do not constitute business compulsion. Thus, even had the district court granted the motion to alter or amend pursuant to I.R.C.P. 60(b) as requested by Bremer, there was no evidence of business compulsion.

Further, this case fits within the principals expressed in *KMST, LLC v. County of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003). This Court specifically rejected a similar development tactic. KMST proposed a dedication of a road and construction of the road to obtain approval of a subdivision, knowing that Ada County Highway District staff would recommend it to the Board. After approval and completion of the subdivision, KMST sued the highway district, claiming the highway district had taken its property without compensation because the road was a system improvement, and therefore an exaction. This Court rejected this argument, noting that the decision to dedicate land for the road and to build the road was

included in the application and was done to expedite the project, and having voluntarily made the decision to dedicate and improve the street to speed approval of its development, KMST could not come back and claim its property was taken.

The same principles are present in this case. Bremer presented a plan of construction to EGID to obtain service to its subdivided parcel. EGID accepted the proposal for extending its irrigation system. Now Bremer claims the extension it proposed was not necessary for Bremer to acquire water. Under the *KMST* holding, Bremer is precluded from making such a claim.

3. There were no questions of fact regarding the routing of the line that precluded summary judgment.

The multitude of undisputed facts set forth herein establish that EGID's irrigation system did not extend to the manufacturing facility Bremer was constructing, and Bremer needed to have the irrigation system extended to provide water. It is undisputed that Bremer's agent approached EGID and inquired into extending EGID's irrigation system to deliver water to Bremer's facility. It is undisputed that EGID directed Bremer's agent to provide EGID with an engineered proposal for delivery of water from EGID's system to Bremer. There is no dispute that Bremer's engineer, Scott Jones, provided plans to the District DEQ for approval of a proposed Hayden Avenue water main extension to deliver water to Bremer's new manufacturing facility, including its fire flow needs.

There is no dispute that all agencies that received the plans approved them as being appropriate to meet the agency's requirements regarding water delivery for the parcel. Initially, DEQ disapproved the engineered plans, noting that the design engineer needed to demonstrate

that the conceptual water system design was capable of meeting minimum fire flow requirements. Later, DEQ informed Bremer that the local fire authority had affirmed that the plans met minimum fire flow requirements. DEQ then approved the construction plans, as did the District. As the district court found in its memorandum decision, it is undisputed that Bremer's engineer requested EGID's standards and engineered a plan to achieve Bremer's objective of obtaining water from EGID's system. These plans also satisfied the requirements of all other involved agencies.

Despite this whole host of undisputed facts, Bremer maintains there is a question of fact whether a water main extension was necessary to service the parcel based upon the affidavits of Scott Jones and Bob Skelton. Bremer also claims there is a question of fact whether the routing of the main line along Hayden Avenue provided for the proper distribution of water to Bremer's parcel.

Bremer claims that Skelton testified in his affidavit that a water main extension was not necessary to meet the fire flow needs of the facility, and therefore summary judgment was not appropriate because there was a question of fact whether the system provided for the proper distribution of water. Bremer overstates Skelton's affidavit testimony. Skelton testified that his fire protection plan did not require a main line extension to provide for proper fire flow. (R. p. 198, ¶ 6.) Skelton also testified that the hydrant fire flows provided to him by the local fire district showed adequate fire flow for the facility. (R., p. 198, ¶¶ 5-6.) Skelton does not testify that the extension engineered by Jones was unnecessary. Since Bremer chose not to include the

fire protection plan for the district court's review in the summary judgment proceeding, it is impossible to know if it addressed anything outside the building.

Further, Skelton testified the fire flow he utilized in his design was based upon the fire hydrant flow information he obtained from the local fire district. (R., p. 198, ¶ 4.) As previously noted, Jones was required by DEQ following disapproval of his engineered plans to demonstrate to the local fire district that his design, which included two fire hydrants, would meet minimum fire flow requirements. (R., p. 84.) The local fire district reviewed Jones' plans and determined the proposed Hayden Avenue main line extension, including the two fire hydrants, met the requirements for minimum fire flow. (R., p. 86.) Thus, Skelton indirectly relied upon Jones' water main extension plan because Skelton relied upon the local fire district's information that the fire hydrants would meet minimum fire flow requirements. The local fire district's information was predicated on Jones' plan.

While Skelton's affidavit is technically correct, it ignores how the fire suppression system designed by Skelton for the building was intended to obtain water. The answer to that question lies in Jones' plan submittal and as-builts. Jones' design included an 8" PVC dedicated fire sprinkler supply pipeline from EGID's Hayden Avenue water main to the building to operate the fire suppression system designed by Advanced Fire Systems, Inc. Thus, even though Skelton's design may not have included a mainline extension, the engineer hired by Bremer and assigned the task of actually presenting an engineered plan to the District, DEQ and Kootenai County Fire & Rescue to meet all agency requirements included a mainline

extension along Hayden Avenue, with an 8" dedicated fire sprinkler line branching to the building as the option to accomplish the task at hand.

The most salient fact in the record that the Hayden Avenue water main extension provided for the proper distribution of water to Bremer's parcel is that it was designed by Bremer's own engineer as the proposal that best suited Bremer's desire to obtain water from EGID, and met the requirements of DEQ and Kootenai County Fire & Rescue. Bremer argues that this Court should disregard this fact because Jones testified that he "gained an understanding" that EGID wanted the Hayden Avenue water main line extended "incident to" its plan to loop the line. (R. p, 240, ¶5.) Jones did not testify that the water main extension was not required to serve Bremer's parcel. He did not testify that his engineered plans were inappropriate or unnecessary to Bremer's desire to obtain water from EGID. He did not even testify that he had an alternative proposal through Bremer's adjacent property that would have better served Bremer's needs for service of water. Rather, he testified that he understood at some point EGID wanted to loop the Hayden Avenue water main.

Bremer claims because EGID extended the Hayden Avenue water main line 2 ½ years later and looped it for the benefit of all water users, it creates a question of fact whether the water main extension was necessary to provide proper service to Bremer's parcel. Jim Sappington, Superintendent of Maintenance and Operations for EGID, testified in his affidavit that EGID attempts to loop lines whenever feasible, but the extension was not required by EGID for the purpose of facilitating a looped line. (R., p. 145, ¶10.) As testified to by Bremer's expert, Philip Hart, all water companies plan on looping lines when possible because

it equalizes pressure in the system and provides more flexibility, better service and better fire protection for its members. Thus, the fact that EGID looped the line at no cost to Bremer two and one-half years later does not create a material question of fact whether the Hayden Avenue water main line extension was needed to extend water to Bremer's building.

Bremer notes in its appeal brief that Sappington's testimony reveals that the water main serving Bremer's property adjacent to McGuire Road could have been extended east across and through Bremer's property to serve the new manufacturing building. Exhibit B in this matter reveals that it is at least 664 feet from the edge of McGuire Road to the portion of the property where the facility was built. (R., p. 139.) It is at least another 329 feet to take the water main north to Hayden Avenue for installation of the two fire hydrants required by the local fire district. (R., p. 139.) Bremer implies on appeal that this configuration across and through its parcel would have been better to properly served its needs for water. Bremer placed nothing in the record to support this contention. Thus, the trial court did not err by failing to find a question of fact whether the Hayden Avenue water main as designed by Bremer's engineer properly distributed water to Bremer's parcel.

C. The District Court did not Abuse its Discretion by Denying Bremer's I.R.C.P. 60(b) Motion

Bremer claims the district court erred in denying its I.R.C.P. 60(b)(1) motion for relief from the court's judgment for reasons relating to mistake, inadvertence, surprise, or excusable neglect. Bremer claims there were erroneous and misleading acts by the court or the opposing party because the trial court *sua sponte* raised the voluntary payment rule in hearing on

Bremer's motion for reconsideration. Bremer further claims the district court should have allowed the motion because EGID never argued Bremer voluntarily agreed to pay for the mainline extension, so Bremer did not focus on the negotiations surrounding the mainline extension, or the defense of coercion.

The standard of review for a claim of error related to I.R.C.P. 60(b) was set forth in *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 283 P.3d 757, 765-766 (2012), wherein this Court held:

> A trial court's decision whether to grant relief pursuant to I.R.C.P. 60(b) is reviewed for abuse of discretion. The decision will be upheld if it appears that the trial court (1) correctly perceived the issue as discretionary, (2) acted within the boundaries of its discretion and consistent with the applicable legal standards, and (3) reached its determination through an exercise of reason. A determination under Rule 60(b) turns largely on questions of fact to be determined by the trial court. Those factual findings will be upheld unless they are clearly erroneous. If the trial court applies the facts in a logical manner to the criteria set forth in Rule 60(b), while keeping in mind the policy favoring relief in doubtful cases, the court will be deemed to have acted within its discretion. *Eby v. State,* 148 Idaho 731, 734, 228 P.3d 998, 1001 (2010) (internal citations omitted).

Id.

EGID agrees it never argued that Bremer had voluntarily agreed to pay EGID for the mainline extension, which was discussed previously in this brief. As previously set forth, EGID disagrees the district court *sua sponte* raised the issue at the reconsideration hearing. In its oral pronunciation of its decision at the motion to alter hearing, the district court reiterated its previous rulings. The court observed that the matter was initially pled as an illegal tax on the basis that EGID had no authority to require Bremer to construct improvements to obtain the

delivery of water. (Tr., Motion to Alter or Set Aside Judgment, p. 14, L. 12-21.) The district court confirmed that it found that I.C. § 43-330(A) allowed EGID to require landowners to bear the costs of extensions of the irrigation system designed to improve the landowner's subdivided and improved parcel. The district court concluded that it had found there to be no genuine issues of material fact that the extension was an illegal tax. (Tr., Motion to Alter or Set Aside Judgment, p. 14, L. 22 – p. 15, L. 5.) The court reiterated it also found the parties entered into a lawful agreement for Bremer to construct the improvements. (Tr., Motion to Alter or Set Aside Judgment, p. 15, L. 6-8.)

EGID disagrees with Bremer's contention that EGID contributed to its failure to raise business compulsion as a defense due to the memorandum and affidavits if filed. Bremer claims these pleadings only gave it notice that EGID was claiming the constructed improvements provided for the proper delivery of water and the correct routing of the water main. EGID strongly disagrees the thrust of its arguments did not involve a claim that the parties reached an agreement. In fact, EGID specifically argued:

> In the event the land is subdivided land within the District, a contract may be entered into with the owner of the parcel proposed for development. Idaho Code § 43-330A provides "[w]hen a parcel of land lying within an irrigation district has been subdivided and the owner or owners of the entire parcel propose to develop that parcel or any of the tracts therein for residential, commercial, industrial or municipal use, the board of directors of the district may enter into a contract with the owner or owners of the entire parcel, or of any tract therein, for the construction of a pressurized system for the proper distribution of irrigation water to the parcel or to the designated tracts within the parcel." **The agreement reached in this matter was that the applicant would be responsible for construction of the improvements to serve the parcel.** (Emphasis added.)

(R. pp. 53-54.) Thus, Bremer's argument on appeal is founded upon an incorrect premise.

To reiterate what has been argued at length previously, EGID never raised the voluntary payment rule. EGID maintained an agreement was reached between the parties which provided for Bremer to construct the improvements to serve the Bremer parcel in conformance with the engineered plans submitted by Bremer.

Bremer initially claimed an extension to the irrigation district's system was not necessary to obtain water from EGID. At the motion for reconsideration, Bremer argued that there was a question of fact as to whether the improvements constructed by Bremer provided for the proper distribution of water. After the motion for reconsideration, Bremer again shifted its argument, claiming that the construction of improvements constituted a payment to EGID, and a question of fact regarding the coercion exception to the voluntary payment rule precluded summary judgment.

The district court did not abuse its discretion in denying Bremer's motion to alter or amend the judgment. The district court perceived the matter as one of discretion. (Tr., Motion to Alter, p. 15, Ll. 17-22.) It gave a reasoned decision why it was not granting the motion, stating that Bremer had not presented any new evidence which showed mistake, inadvertence, surprise or excusable neglect which allowed relief from the judgment. (Tr., Motion to Alter, p. 16, L. 1-7) Therefore, the district court acted within the bounds of its discretion. Thus, the trial court did not commit error in denying the motion. Further, as noted above, the additional evidence would not have added any new information for the district court to consider. It

merely reiterated that Bremer's decision to construct the Hayden Avenue water main line improvements was driven by economic considerations.

IV. ATTORNEY FEES

Bremer argues on appeal it is entitled to attorney fees pursuant to I.C. § 12-117. By its terms, I.C. § 12-117 applies to a state agency or political subdivision. A political subdivision is defined as a city, a county, or any taxing district or a health district. I.C. § 12-117(4)(b). An irrigation district has no power to tax its members. It may assess certain costs as allowed in Title 43, but it may not tax its members. Thus, an irrigation district is not included within the ambit of I.C. § 12-117. Unlike a health district, an irrigation district is not specifically defined by this statute as a political subdivision. Thus, neither party may pursue attorney fees pursuant to this statute.

EGID hereby requests attorney fees pursuant to I.C. § 12-121. This Court in *Stevenson v. Windermere Real Estate/Capital Group, Inc.*, 152 Idaho 824 275 P.3d 839, 843 (2012) held:

> Attorney fees are only appropriate under I.C. § 12-121 if the court finds " that the case was brought, pursued or defended frivolously, unreasonably or without foundation." I.R.C.P. 54(e)(1). These circumstances do not exist " [i]f there is a legitimate, triable issue of fact or a legitimate issue of law...." *Kiebert v. Goss,* 144 Idaho 225, 228-29, 159 P.3d 862, 865-66 (2007) (citing *Thomas v. Madsen,* 142 Idaho 635, 639, 132 P.3d 392, 396 (2006)).

Id.

In the present case, Bremer has taken the irrational position, following a request to EGID for delivery of water, that it did not need the water. Bremer has also taken the illogical position that, having provided the proposal for achieving delivery of water to its facility, the proposal

did not provide for the proper distribution of water. Bremer further complains that EGID did not consider an alternative route through the back of Bremer's property which violated EGID's policies and that Bremer did not propose. Thus, the appeal was frivolous.

V. CONCLUSION

Bremer's real complaint in this matter is that EGID connected to the portion of water main Bremer constructed and looped the line for the benefit of all members of the irrigation district. Bremer did not sue EGID until this event occurred. It was not improper for EGID to require Bremer to build the water main extension to service Bremer's subdivided parcel. The mere fact that EGID looped the line a few years later to the benefit of the members of the district served by that particular main line later does not vitiate the fact that Bremer required the water main extension, both for delivery of water to his foam insulation manufacturing facility and later to support its application for a subdivision of Lot 2. The trial court did not err in granting summary judgment to EGID.

Submitted this 14th day of January, 2013.

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of January, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Arthur M. Bistline
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1423 N. Government Way
Coeur d'Alene, ID 83814

☑ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail

Christine Elmore