UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs

7-21-2008

Boise Tower Associates, LLC v. Hogland Respondent's Reply Brief Dckt. 34333

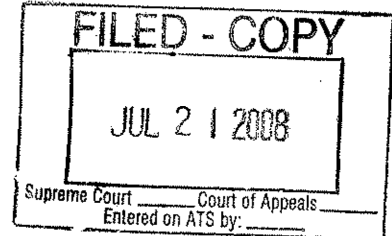
Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation
"Boise Tower Associates, LLC v. Hogland Respondent's Reply Brief Dckt. 34333" (2008). *Idaho Supreme Court Records & Briefs*. 1615.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/1615

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

BOISE TOWER ASSOCIATES, LLC, a Washington limited liability company Plaintiff-Appellant-Cross Respondent, vs. **TIMOTHY J. HOGLAND**, an individual acting under color of state law, and **THE CITY OF BOISE**, an Idaho municipality, Defendants-Respondents-Cross Appellants.	Docket No. 34333



RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF RE: ATTORNEY'S FEE ISSUE

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
The Honorable Darla Williamson District Judge

Eric S. Rossman
Erica S. Phillips
ROSSMAN LAW GROUP, PLLC
737 N. 7th Street
Boise, ID 83702
Attorneys for Plaintiff, Appellant

Scott Muir
Boise City Attorney's Office
150 N. Capitol Boulevard
P.O. Box 500
Boise, ID 83701-0500

Phillip J. Collaer
Mark D. Sebastian
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
P. O. Box 7426
Boise, ID 83707-7426
Attorneys for Defendants, Respondent

COPY

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CASES AND AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

A. THE CORRECT STANDARDS OF REVIEW 2

B. THE DISTRICT COURT ABUISED ITS DISCRETION BY FAILING TO CONSIDER THE CAUSATION EVIDENCE WHEN AWARDING ATTORNEY'S FEES 3

C. IDAHO CODE §12-117APPLICABLE 7

CONLUSION 8

TABLE OF AUTHORITIES

Cases

Browning v. Browning, 136 Idaho 691, 696, 39 P3d. 631, 636 (2001) 4
Dickey-John Corp. v. Int'l Tapetronics Corp., 710 F2d. 329, 349 (7th Cir. 1983) 5
Deere & Co. v. Int'l Harvester Co., 658 F2d. 1137, 1148 (7th Cir. 1981) 5
Farner v. Idaho Falls Sch. Dist. No. 91, 135 Idaho 337, 342, 17 P3d. 281, 286 (2000) 2
Lowder v. Minidoka County Joint Sch. Dist. No. 331, 132 Idaho 834, 841, 979 P2d. 1192, 1199 (1999) 2
Nation v. State, __ Idaho __, 158 P3d. 953, 969 (2007) 2
Parsons v. Mut. of Enumclaw Ins. Co., 143 Idaho 743, 747, 152 P3d. 614, 618 (2007 2
Rincover v. Dept. of Finance, 132 Idaho 547, 549-50, 976 P2d. 473, 475-76 (1999) 3
Sun Valley Potato Growers, Inc. v. Texas Refinery Corp., 139 Idaho 761, 765, 86 P3d. 475, 479 (2004) 2
Shangold v. Walt Disney Co., 2006 U.S. LEXIS 748, Case No. 03 Civ. 9522 (S.D.N.Y. Jan. 12, 2006) 5
Tamko Roofing Prods, Inc. v. Ideal Roofing Co., 282 F3d. 23, 33 (1st Cir. 2002) 5
Tomich v. City of Pocatello, 127 Idaho 394, 400, 901 P2d. 501 (1995) 7
United States v. Univ. Savings Assoc., 666 F2d. 312, 314 (5th Cir. 1982) 5
Yankee Candle Co. v. Bridgewater Candle Co., 140 F. Supp. 2d. 111, 118 (D. Mass. 2001) 5

Statutes

42 U.S.C. §1988 2
42 U.S.C. §1988(b) 2
I.C. § 6-918A 3
I.C. § 12-117 3
I.C. § 12-117(1) 3
C.F.I.C. §6-914A 7
I.R.C.P. 54(d)(5) 4
I.R.C.P. 54(e)(1) 4
I.R.C.P. 54(e)(5) 4
I.R.C.P. 54(e)(6) 4

I.

INTRODUCTION

The fundamental basis of the complaint filed by Plaintiff/Appellant Boise Tower Associates, LLC ("BTA") is the factual allegation that Respondents/Cross-Appellants City of Boise and Timothy Hogland (collectively, "the City") rescinded BTA's building permit, causing BTA to lose the financing it needed to complete the Boise Tower project. The specific legal claims are all mechanisms for obtaining damages for the loss of the financing. Thus, if BTA's factual premise is wrong—that is, if the City's actions did not cause BTA to lose financing—then BTA has suffered no cognizable damages, and its suits were brought frivolously and vexatiously.

The BTA responds to the City's position by arguing that because the materials in the "document dump" were not germane to the issues upon which the District Court ultimately granted summary judgment, the trial court correctly declined to consider this evidence in determining whether attorney fees should be awarded. In other words, although it is now undisputed that the allegation the City caused BTA to lose its financing is, and was always false, because the City did not receive timely discovery responses establishing this fact, the Court is now powerless to hold BTA accountable. This position encourages frivolous litigation and should not be approved by the Court. BTA mischaracterizes the document dump materials as only relevant to mitigation. In fact, those materials actually speak to causation. Specifically, the document dump shows that the City's temporary revocation of the building permit for the project was not the cause of BTA's loss of financing. Moreover, BTA was aware of this fact at the time its suit against the City was filed. The suit against the City was baseless and frivolously brought. The suit in federal court against Washington Capital Management merely underscores the fact

that the suit against the City was frivolous.

The error made by the District Court, and repeated in BTA's arguments, is the assumption that the District Court was limited to the record presented at the summary judgment hearing when determining whether attorney's fees should be awarded. Since the District Court was not limited to the facts presented in support of summary judgment, and the facts belatedly disclosed by the BTA show that its allegations against the City were baseless, the City is entitled to attorney's fees, both below and on appeal.

II.
ARGUMENT

A. THE CORRECT STANDARDS OF REVIEW.

1. 42 U.S.C. § 1988.

BTA is correct that the award of attorney's fees under the Civil Rights Act is governed by 42 U.S.C. § 1988. ***See*** **42 U.S.C. § 1988(b)**. Thus, the proper standard of review is one for abuse of discretion. ***See Parsons v. Mut. of Enumclaw Ins. Co.,*** 143 Idaho 743, 747, 152 P.3d 614, 618 (2007). This Court must determine whether the district court (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason. ***Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.,*** 139 Idaho 761, 765, 86 P.3d 475, 479 (2004). Nevertheless, as noted in the City's prior briefing, this Court has held that attorney's fees under § 1988 must be awarded if the moving party meets the applicable requirements. ***See, e.g., Farner v. Idaho Falls Sch. Dist. No. 91,*** 135 Idaho 337, 342, 17 P.3d 281, 286 (2000); ***Lowder v. Minidoka County Joint Sch. Dist. No. 331,*** 132 Idaho 834, 841, 979 P.2d 1192, 1199 (1999). Those standards are: "[W]here the action is 'unreasonable, frivolous, meritless, or vexatious.'" ***Nation v. State,*** __ Idaho __, 158 P.3d 953,

969 (2007).

2. <u>I.C. § 6-918A</u>.

An award of attorney's fees under Section 6-918A is also discretionary. ***See*** **I.C. § 6-918A**. The standard for awarding the fees is that "the party against whom or which such award is sought was guilty of bad faith in the commencement, conduct, maintenance or defense of the action." ***Id.***

3. <u>**Idaho Code § 12-117**</u>.

Attorney's fees under Idaho Code § 12-117 are <u>not</u> discretionary. ***Rincover v. Dep't of Finance,*** 132 Idaho 547, 549-50, 976 P.2d 473, 475-76 (1999). The statute provides that "the court <u>shall</u> award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law." **I.C. § 12-117(1)** (emphasis added). The Supreme Court may conduct free review of the decision to award or deny an award of attorney's fees under § 12-117. ***Rincover,*** 132 Idaho at 550. In such review, the two issues confronting the court are: (1) Whether the party requesting fees successfully achieved some form of favorable relief; and (2):

> [An] assessment of the conduct of the other party to decide if that party's activities can be characterized as having been unreasonably premised or undertaken upon either a set of facts or under relevant legal principles applicable to the situation in which the parties were engaged.

Id.

B. <u>THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER THE CAUSATION EVIDENCE WHEN AWARDING ATTORNEY'S FEES</u>.

BTA argues that the District Court correctly ruled that it could only consider the evidence presented in support or opposition to summary judgment, rather than considering all evidence

pertaining to the conduct of the litigation in determining whether the City had established a factual basis to recover attorney fees. The District Court abused its discretion because, by not considering all evidence available to it, the Court did not recognize, and did not employ, the full extent of its discretion. By continuing to assert this reasoning, BTA is essentially shifting the responsibility for its own wrongdoing in failing to timely disclose critical evidence—the document dump—from itself to the City. BTA's position is that the City that should be faulted for not uncovering BTA's concealment of critical evidence. There is no legal basis for this position, and it is contrary to Idaho policy.

Motions for attorney's fees are governed by Rule 54 of the Idaho Rules of Civil Procedure. Under the Rules, the prevailing party is entitled to its costs. **I.R.C.P. 54(d)(1)**. To obtain costs, a memorandum of costs must be filed no later than 14 days following entry of final judgment. **I.R.C.P. 54(d)(5)**. Attorney's fees may also be awarded as costs when authorized by statute or contract. ***See*** **I.R.C.P. 54(e)(1)** and **54(e)(5)**. However, unlike costs, "the claim for attorney fees as costs shall be supported by an affidavit of the attorney stating the basis ... [for] the attorney fees claim." **I.R.C.P. 54(e)(5)**. If there are objections made to the motion for fees, "[t]he court may conduct an evidentiary hearing, if it deems it necessary, regarding the award of attorney fees." **I.R.C.P. 54(e)(6)**. And, in fact, the Rules specifically provide that:

> [A]ttorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation....

I.R.C.P. 54(e)(1). Thus, the Rules contemplate that a party requesting fees will support its request with the applicable facts establishing the opposing party litigated the case in a frivolous manner. The court may go so far as to hold an evidentiary hearing to consider those facts. ***See also Browning v. Browning,*** 136 Idaho 691, 696, 39 P.3d 631, 636 (2001) (upholding denial of

attorney's fees where the part requesting fees failed to provide any citations to the record and/or to supply additional evidence considering the factors supporting such an award).

When attorney's fees are based on the conduct of one or the other party, "[i]t is the totality of the circumstances, rather than a particular item alone, that suffice for an award of attorney's fees." ***Tamko Roofing Prods., Inc. v. Ideal Roofing Co.,*** 282 F.3d 23, 33 (1st Cir. 2002) (considering award of fees for trademark infringement where fees could only be awarded where the acts of infringement were malicious, fraudulent, deliberate or willful). ***See also Yankee Candle Co. v. Bridgewater Candle Co.,*** 140 F.Supp.2d 111, 118 (D. Mass. 2001) (awarding attorney fees in part because the plaintiff's "hardball conduct" in pursuing the litigation provided evidence of improper motive); ***Shangold v. Walt Disney Co.***, 2006 U.S. Dist. LEXIS 748, Case No. 03 Civ. 9522 (S.D.N.Y. Jan. 12, 2006) (dismissing action and awarding attorney's fees and costs because of the plaintiff's conduct in fabricating evidence and manipulating the judicial process). Where the conduct justifying fees is different from the conduct establishing liability, courts have also recognized that the evidence between the two may differ. ***See Dickey-John Corp. v. Int'l Tapetronics Corp.,*** 710 F.2d 329, 349 (7th Cir. 1983) (in a patent infringement case, noting that the arguments and facts to support an award of fees for willful and wanton infringement differ from that of pursuing litigation in bad faith). ***See also United States v. Univ. Savings Assoc.,*** 666 F.2d 312, 314 (5th Cir. 1982) (in relation to federal fee statute similar to I.C. § 12-117, applying different evidentiary standard for fees versus the underlying issue); ***Deere & Co. v. Int'l Harvester Co.,*** 658 F.2d 1137, 1148 (7th Cir. 1981) (refusing to award attorney fees in patent infringement suit where there was no evidence of misconduct in pursuing the case).

In short, the rules of procedure do not prohibit a court from considering additional

evidence as to attorney's fees, and, in fact, encourage such evidence. Moreover, the evidence to support to an award of attorney's fees based on the conduct of the party depends on the totality of the circumstances, and the evidence to be considered may differ from the evidence relevant to the underlying claim. Thus, in deciding to award attorney's fees, the District Court should have considered the evidence that BTA pursued this litigation with full knowledge that the reason BTA lost its financing was due to negotiation strategies it undertook with potential financiers and not the City's actions vis-à-vis the building permit.1 This evidence shows that the BTA's claims against the City were brought frivolously and were not well grounded in fact or law. That BTA brought a separate suit in federal court against Washington Capital Management alleging it caused BTA to lose its financing merely underscores this fact.[2]

BTA has also claimed that it did not have an opportunity to fully litigate the facts in the document dump. This argument is flawed for three reasons. First, there is nothing to litigate—the documents all came from BTA and speak for themselves. Second, BTA could have litigated the

---

1 The evidence provided to the District Court revealed the BTA's financing problems were caused by its refusal to pay application and lending fees. The stop work order and any disputes concerning the building permit had no bearing on those negotiations. *See* R143, Exhibit 12, Alan Affidavit, Exhibit H, Bates #08251 (April 24, 2003 letter from AMS Commercial, LLC stating that "It appears that the conversation [with CMI] bogged down on the topic of the $25,000 fee."; Exhibit H, Bates #08256 (May 14, 2003 letter from BTA asking for a waiver of the $25,000 fee); Exhibit H, Bates #08324 (May 16, 2003 letter from AMS Commercial, LLC noting that but for the dispute over the $25,000 fee, "The loan could have probably been closed by now."). As explained by CMI loan officer, J. Kim Powell, any circumstances surrounding the building permit were never an issue or a barrier to funding. Instead, as explained by Ms. Powell, the "barriers to financing through CMI included the failure of Mr. Peterson to provide [CMI] with any meaningful documentation supporting his loan application, his unwillingness to pay an application fee, sign and execute the loan application, and his untenable attitude." *See* R143 (Powell Affidavit).

[2] BTA argues that the suit against Washington Capital Management is akin to alternate pleadings. The difference here is that BTA appeared before one court, arguing that Washington Capital Management was responsible for the failure of its project, and then appeared before another court to allege that the City was responsible for the failure of its project. Unlike pleading in the alternative, BTA presented mutually exclusive theories to two different courts such that neither court would be able to decide or apportion liability between the two theories.

documents either by requesting a hearing pursuant to I.R.C.P. 54(e)(6) and/or by submitting affidavits and argument in opposition to the request for attorney's fees. Third, to the extent that BTA actually was not able to litigate the facts, it was due to its own failure to timely disclose those documents in response to the City's discovery requests.

Accordingly, the facts show that BTA filed and/or pursued this claim frivolously and without a reasonable basis in fact or law. Similarly, BTA has pursued this appeal frivolously and with a reasonable basis in fact or law. Accordingly, the City is entitled to attorney's fees both before the District Court and on appeal.

C. IDAHO CODE § 12-117 IS APPLICABLE.

BTA argues that Idaho Code § 12-117 is not applicable to its claims brought under Idaho law, but that only Idaho Code § 6-918A is applicable. BTA's reasoning is flawed for two reasons.

First, this Court has held that as to tort actions brought pursuant to the Idaho Tort Claims Act, I.C. § 6-918A is to be applied in favor of § 12-121 because § 6-918A was the later statute and "a more specific statement of the legislature's intent about the award of attorney fees in tort claims cases." ***See Tomich v. City of Pocatello,*** 127 Idaho 394, 400, 901 P.2d 501, 507 (1995). This reason does not entirely apply in this case because § 12-117 (enacted in 1984) is the later of the two statutes. ***C.f.*** **I.C. § 6-914A** (enacted in 1978).

Second, and more significantly, is that not all of the claims brought by BTA against the City defendants (exclusive of the federal claims) were state tort claims. Count Five of BTA's Complaint alleges a denial of due process under both the federal and Idaho constitutions. ***See*** **R. 22**. Count Six alleges a denial of equal protection under both the federal and Idaho constitutions. ***See*** **R. 23**. Count Seven alleges an unlawful taking under the Idaho constitution. ***See*** **R. 23-24.**

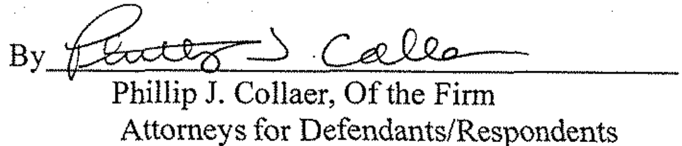
Count Ten alleges that the City defendants owe a duty of indemnification to BTA for certain claims brought by the Capital City Development Corporation (CCDC). ***See*** **R. 27.** Thus, irrespective of whether the City is entitled to attorney's fees as to the two state law torts alleged against the City defendants, the City defendants are also entitled to attorney's fees pursuant to § 12-117 for at least those non-tort state law claims described above.

III.
CONCLUSION

For the reasons set forth above, the District Court's Order denying the Respondent/Cross-Appellant's attorney fees should be reversed.

DATED this 21st day of July, 2008.

ANDERSON, JULIAN & HULL LLP

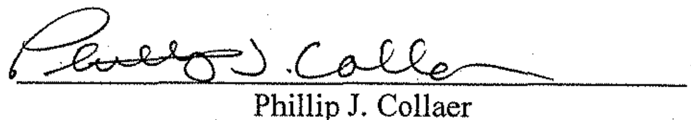


By ________________
Phillip J. Collaer, Of the Firm
Attorneys for Defendants/Respondents

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of July 2008 I served a true and correct copy of the **RESPONDENTS/CROSS-APPEALLANTS' REPLY BRIEF RE: ATTORNEY'S FEE ISSUE** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Eric S. Rossman	[X]	U.S. Mail, postage prepaid
Erica S. Phillips	[ ]	Hand-Delivered
ROSSMAN LAW GROUP, PLLC	[ ]	Overnight Mail
737 N. 7th Street	[ ]	Facsimile (208) 342-2170
Boise, ID 83702		
Tel: (208) 331-2030		



Phillip J. Collaer