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Hobson Manufacturing Corp. v. SE/Z Const. Appellant's Reply Brief 2 Dckt. 38202

IN THE SUPREME COURT OF THE STATE OF IDAHO

HOBSON FABRICATING CORP., an Idaho Corporation,

Plaintiff/Co-Appellant,

vs.

SE/Z CONSTRUCTION, LLC, an Idaho limited liability company,

Defendant/Co-Appellant

vs.

STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works

Supreme Court No. 38216-2010 and 38202-2010

REPLY BRIEF OF CO-APPELLANT HOBSON FABRICATING CORPORATION

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I. INTRODUCTION

Co-Appellant Hobson Fabricating Corporation, by and through its counsel of record, hereby respectfully submits its Reply on this appeal.

The Respondent's brief is replete with wholesale irrelevancies, fanciful retellings of the "facts" and speculative, conclusory assertions about what DPW "would have proven" at trial. None of the "facts" around which DPW builds its Response are relevant on this appeal, because the issue before this Court is straightforward: after finding that DPW's counter-crossclaim was "barred," and that by defeating that claim the Contractors "prevailed in part" below, did the District Court err by not making an award to the Contractors under I.C. § 12-117, and particularly under I.C. § 12-117(2)? The District Court's denial of costs and fees to the Contractors failed to give meaning to I.C. § 12-117, and DPW's Response provides no reason why this Court should not overturn the District Court's error.

The District Court's findings that DPW's counter-crossclaim was "barred," and that the Contractors were "prevailing in part" below should not be disturbed by this Court, because DPW has neither appealed from nor assigned error to those findings. Rather, Idaho authority states that those findings are conclusive. Even this Court's "free review" over an award made or denied under I.C. § 12-117 does not allow it to either revisit or revise the District Court's findings regarding the counter-crossclaim and the determination that the Contractors

"prevailed in part." Therefore, the central issue to be decided here is—in light of those unchallenged findings—was the District Court required to have made an award of costs and attorney's fees under I.C. § 12-117 to the Contractors?

Since the District Court determined that DPW's counter-crossclaim was "barred", nothing DPW's "expert" argued on summary judgment, nor what reliance DPW may have placed on such assertions is germane to this Court's consideration. Therefore, DPW's arguments that the "reasonableness" of the counter-crossclaim is demonstrated by opinions expressed by its expert or alternately, by "what it would have proven" at trial, are not properly considered on this appeal.

DPW's claim was determined to have been "barred" by the District Court because of DPW's failures to have adhered to the contractual prerequisites that presumably would have allowed it. Here and inexplicably, DPW urges the Court to determine that regardless if a claim is wrongfully brought and maintained by a state agency at great expense to the "person" pursued is determined by a trial court to be "barred" *ab intio,* I.C. § 12-117 is not implicated. In light of the interpretations made of that statute by this Court, and the purposeful misinterpretations of the SE/Z contract repeatedly made by DPW in order to keep the counter-crossclaim from being dismissed, an award under I.C. § 12-117 was just not appropriate below, it was mandatory.

Since an award under the statute is mandatory upon a determination an agency's wrongful conduct in litigation, and since the District Court's finding that the DPW counter-crossclaim was "barred" clearly indicates that DPW's pursuit of the Contractors was without the requisite reasonable basis in fact or law, the District Court erred when it did not even address the applicability of I.C. § 12-117 in denying the Contractors' motions for costs and attorney's fees.

Given the interpretations of I.C. § 12-117 established as controlling precedent by this Court, the Contractors respectfully request that this Court, on its free review: a) determine that the District Court's denial of costs and fees to the Contractors under I.C. § 12-117 was error; b) reverse the District Court's denial of costs and attorney's fees to the Contractor, and remand the matter with instructions that the District Court make and enter such award based on the previous motions of the Contractors; and c) award the Contractors their costs and attorney's fees on this appeal.

II. AUTHORITY

A. "FREE REVIEW" DOES NOT PERMIT DPW TO REARGUE THE FINDINGS OF FACT DETERMINED BY THE DISTRICT COURT, BUT ONLY PERMITS REVIEW OF THE PROPER APPLICATION OF THE LAW TO THE FINDINGS OF FACT THE DISTRICT COURT MADE.

The District Court concluded as a matter of law that DPW's counter-crossclaim was "barred," because it found as a matter of fact that DPW failed to satisfy the contractual prerequisites that would presumably have allowed that claim to be brought. In its Response, DPW mistakenly asserts that "free review"

allows this Court to revisit the District Court's factual findings, in apparent hope that DPW can avoid liability under I.C. § 12-117 for the wrongful prosecution of its "barred" counter-crossclaim.

This Court has set out many times that its review in cases like this one is limited to the "free review" only of *how the law was applied* by the District Court, and that it does not engage in any reweighing of facts determined below:

> This Court will overturn a lower court's finding of fact only if clearly erroneous, and the existence of merely conflicting evidence does not meet this standard. It is not this Court's role to reweigh facts already found by the designated fact finder.

Anderson v. Rex Hayes Family Trust, 145 Idaho 741, 745, 185 P.3d 253 (2008); *accord, Hogg v. Wolske*, 142 Idaho 549, 556, 130 P.3d 1087 (2006) ("It is not our role to reweigh the evidence"); *see also*, I.R.C.P 52(a) ("findings of fact shall not be set aside unless clearly erroneous").

This Court has repeatedly held that it will not find the existence of "clear error," in a matter in which the trial court's findings are supported by substantial and competent—even if conflicting--evidence. *See, e.g., Rhodes v. State,* 107 Idaho 1120, 695 P.2d 1259 (1985); *In Interest of Crum,* 111 Idaho 407, 408-09, 725 P.2d 112 (1986), *citing inter alia, Rhodes*; see also, *Roell v. Boise City*, 134 Idaho 214, 216, 999 P.2d 251 (2000) c*iting, Conley v. Whittlesey*, 133 Idaho 265, 985 P.2d 1127 (1999). No clear error exists in this matter.

The evidence on which the District Court relied that DPW failed to comply with the contractual prerequisites of notice and opportunity to cure was not merely "substantial and competent." Rather, those findings of fact were undisputed, and *they were admitted* by DPW:

> Under the terms of the contract, the State was required to give the contractors a written notice of allegedly defective work and the opportunity to cure the alleged defect...[N]o such notice and opportunity to cure were given.

R., Vol. IV, p.625.

> ...the Court has ruled that the State's cross-claims and offsets are barred by the notice and opportunity to cure provision...

R., Vol. IV, p. 738. The District Court cited to the Deposition testimony of DPW's interim administrator in its March 26, 2010 Order, which first held DPW's claim to be "barred." *See*, R. Vol. IV, p.625, *citing*, Deposition of Jan Frew, September 18, 2008, p.263, ll. 20-22 ("Well, after termination they were no longer under this contract, so we did not give them the opportunity nor want them to return to the jobsite."); p. 264 ll. 1 (In response to a question as to whether the contractors were provided with notice or an opportunity to repair: "I don't believe so."; 22-23. ("My understanding is that after termination we did not notify them to come and fix anything"). And, DPW's counsel also admitted in open court that DPW had not complied with the contractual prerequisites: "Now, did we give them an opportunity to cure? No." Tr., September 29, 2008, 20:8-9.

An Idaho appellate court's review is limited to determining whether the evidence presented at the trial court supports the findings of fact, and then whether those findings support the trial court's conclusions of law. *See, e.g., Baxter v. Craney*, 135 Idaho 166, 171, 16 P.3d 263 (2000). Based in no small part on DPW's admissions that it did not provide the Contractors with the requisite notice and opportunity to cure, the District Court determined that DPW's "cross-claims and offsets are barred by the notice and opportunity to cure provision..." R., Vol. IV, p. 738. In denying DPW's Motion to Reconsider its March 26, 2010 ruling, the District Court cemented its determination that DPW's counter-crossclaim was inefficacious, when its said that at trial, DPW would be prohibited from "present[ing] evidence that would support a counter or cross claim.." *Id.* at 744.

Given a determination by this Court that substantial evidence supports the District Court's findings of fact with regard to DPW's failure to comply with the notice and opportunity to cure requirements of its contract with SE/Z, therefore "barring" the counter-crossclaim, under *Baxter*, supra, and like authority, the only consideration by this Court now is whether or not the District Court correctly applied the law to those findings of fact. Over that consideration alone, this Court exercises "free review." "[W]e exercise free review *over the lower court's conclusions of law* to determine whether the trial court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts

found." *Conley v. Whittlesey,* 133 Idaho at 169-70 (emphasis added), *citing, Burns v. Alderman,* 122 Idaho 749,752-53, 838 P.2d 878, 881-82 (Ct. App. 1992).

With free review exercised only over the correct application to facts found, this Court should not engage in any re-analysis of the factual issues raised or argued in the various summary judgment motions reversed by the District Court's Orders of March 26, 2010 (R. Vol. IV, pp.619-28) and April 6, 2010 (R. Vol. IV, pp.730-44). The factual assertions made in those motions are superfluous to the issues before the Court on this appeal, because with DPW's counter-crossclaim held to be "barred," this Court exercises "free review" only over whether or not the District Court then correctly applied the law when it denied the Contractors' Motion for Award of Costs and Attorney's Fees.

B. **THE DISTRICT COURT'S DENIAL OF COSTS AND FEES TO THE CONTRACTORS WAS ERROR, BECAUSE THAT DENIAL FAILED TO CARRY OUT THE PURPOSES OF I.C. § 12-117.**

This Court has determined what the purposes of I.C. § 12-117 are:

> We believe the purpose of that statute is two-fold: (1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never had made.

Bogner v. State Dept. of Revenue and Taxation, State Tax Com'n, 107 Idaho 854, 859, 693 P.2d 1056 (1984); accord, *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091 (2005), *citing, Bogner* at 859.

Here, the District Court unquestionably held that the Contractors prevailed "in part" against DPW. See, R. Vol. VIII, p. 1558; p. 1559. Though the Contractors assert that it was error not to have determined them to be the sole prevailing party, the authority established by this Court makes clear that upon determining the Contractors to have prevailed "in part" by defeating DPW's "barred" counter-crossclaim, the District Court was required to make an award of costs and attorney's fees to the Contractors under I.C. § 12-117(2), and erred by not doing so.

Idaho courts are instructed by this Court that "[s]tatutes must be read to give effect to every word, clause and sentence." *Wright v. Willer*, 111 Idaho 474, 476, 725 P.2d 179 (1986), *citing, Univ. of Utah Hosp. and Med. Ctr. v. Bethke*, 101 Idaho 245, 611 P.2d 1030 (1980). In order to properly carry out that instruction, the District Court was obligated to make an award of costs and attorney's fees to the Contractors based on its finding that DPW's claim was "barred" and the resultant ruling that the Contractors were "prevailing in part." In numerous decisions, this Court had held that I.C. § 12-117 is not discretionary, and a finding that an agency covered by the statute acted "without reasonable basis in fact or law" requires the court to make an award under that statute. See, e.g., *Ralph Naylor Farms v. Latah County*, 144 Idaho 806, 809, 172 P.3d 1081 (2007), *citing*, *Fischer v. City of Ketchum, supra,* 141 Idaho at 356.

The District Court's failure to even mention I.C. § 12-117 in its Memorandum Decision and Order of September 14, 2010 (R. Vol. VIII, p. 1554-60) simply and impermissibly read I.C. § 12-117(2) out of existence, in a way that failed to give the statute (and that specific clause) the purpose for which this Court has held it was enacted. The District Court's failure to give meaning to I.C. § 12-117(2) violates a long-expressed requirement in Idaho that "courts give effect to the statute as written, without engaging in statutory construction." *See, e.g., Idaho Conservation League, Inc. v. Idaho Dep't of Agriculture,* 143 Idaho 366, 368, 146 P.2d 634 (2006), *citing State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685 (1999).

Only if I.C. § 12-117 was ambiguous would a court, including this one, inquire as to the reasonableness of a proffered interpretation or application of it. *See, e.g., Magic Valley Newspapers, Inc. v. Magic Valley Regional Med. Center*, 138 Idaho 143, 144, 59 P.3d 314 (2002). And, this Court has already held that I.C. § 12-117 is *not* ambiguous:

> In *clear, unambiguous and mandatory* language, I.C. § 12-117 requires an award of reasonable attorney fees merely upon a showing "that the agency acted without reasonable basis in fact or law."

Lockhart v. Dep't of Fish and Game, 121 Idaho 894, 898, 828 P.2d 1299 (1992) (emphasis added).

Both the purposes and mandatory nature of I.C. § 12-117 were impermissibly ignored by the District Court, when it failed to consider the statute in denying the Contractors' motions for costs and attorney's fees. As this Court has repeatedly held:

> Idaho Code Section 12-117 is not discretionary, but provides that the court must award attorney fees where a state agency did not act with a reasonable basis in fact or law in a proceeding involving a person who prevails in the action.

Eacret v. Bonner County, 139 Idaho 780, 789, 86 P.3d 494 (2004) *citing*, *Rincover v. State Dept. of Finance, Securities Bureau*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999). Here, as DPW had no reasonable basis to prosecute a "barred" claim against these Contractors for a period of years, and especially no reasonable basis to visit hundreds of thousands of dollars in costs and attorney's fees on the Contractors by so doing.

Once the District Court found as a matter of fact that DPW had failed to comply with the contractual prerequisites that would have allowed its counter-crosslaim, it properly determined as a matter of law that DPW's counter-crossclaim was therefore "barred." What the District Court then failed to do, however, was to properly apply the mandatory provisions of I.C. § 12-117 on the Contractors' Motions for Award of Costs and Attorney's Fees. In order to give meaning to that statute, and to have it act as the preventative measure it was enacted to be, this Court should correct the District Court's error.

C. NO "BARRED" ACTION IS BROUGHT OR MAINTAINED WITH A REASONABLE BASIS IN LAW OR FACT.

The concept of a "barred" claim is so axiomatic to lawyers and courts that little caselaw addresses it. Black's defines the noun "bar" as "a plea arresting a lawsuit or legal claim," and the verb "to bar" as "to prevent, esp. by legal objection." 143 BLACK'S LAW DICTIONARY (7th ed. 1999). In illustrating its definition of "to bar," Black's offers "the statute of limitations barred the filing of the legal claims." *Id.* Synonyms of the verb "to bar" are also instructive as to what that term means, since included among the synonyms is: "circumscribe," "delimit" and "prelimit," each of which refers to the establishment of a limit on some action or thing.[1]

A number of holdings demonstrate that when used in a legal sense, "to bar" or "barred" refers to a claim or cause of action that is precluded from being brought, because it is without efficacy *ab initio*. "[S]ummary disposition is available when an action is barred due to the disposition *of the claim before commencement of the action*. *Alcona Co. v. Wolverine Environ. Production, Inc.*, 233 Mich. App. 238, 246, 590 N.W.2d 586 (1986) (emphasis added) (referring to claims on which summary disposition may be sought under Michigan Court Rule 2-116(c)(7)[2]).

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[1] *See, respectively*, 410, 597 and 1789 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981).

[2] "The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of

In regard to a plaintiff's appeal of the dismissal of its Complaint on a demurrer, and its assertion that the trial court should have allowed amendment to correct "defects" in the Complaint, the California Court of Appeals observed: "amendment could not correct a deficiency in the complaint or where the action is barred as a matter of law, the demurrer is properly sustained without leave to amend." *State of California Auto. Dismantlers Assn. v. Interinsurance Exchange*, 180 Cal.App.3d 735, 742, 225 Cal.Rptr. 676 (1986), *citing, Saltier v. Pierce Bros. Mortuaries*, 81 Cal.App.3d 292, 146 Cal.Rptr. 271 (1978). Further illustrating that "barred" claims cannot be prosecuted, the *Auto Dismantlers* court held that, "[l]eave to amend is appropriately withheld where it is clear the plaintiff is seeking a legally impossible result." 180 Cal.App.3d at 735, *citing, Robinson v. Robinson*, 198 Cal.App.2d 193, 197, 17 Cal.Rptr. 786 (1961). It is inherent in the District Court's finding that DPW's claim was "barred" that the claim could not have been brought from the outset, and that DPW's having done so was wrongful. As such, the District Court erred when it failed to properly consider its own findings when applying the law germane to the Contractors' Motion for Award of Costs and Attorney's Fees.

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the moving party, or assignment or other disposition of the claim before commencement of the action."

D. DPW'S MISREPRESENTATIONS OF THE "PLAIN AND UNAMBIGUOUS" LANGUAGE OF THE CONTRACT ALLOWED IT TO CONTINUE TO PROSECUTE ITS WRONGFUL CLAIM AGAINST THE CONTRACTORS, AT HUGE EXPENSE TO THEM.

The District Court repeatedly found that the contract between DPW and SE/Z was "clear and unambiguous." See, e.g., R., Vol. II, p.258; R., Vol. IV, p. 628; *Id.* at 735. As such, interpretations of that contract were for the District Court to make as a matter of law. *See, e.g., Dunlap v. State*, 141 Idaho 50, 63, 106 P.3d 376 (citation omitted).

The District Court ultimately dismissed DPW's counter-crossclaim on March 26, 2010, affirming that decision when it denied reconsideration on April 2, 2010. However, for nearly four years before then, the Contractors made several attempts on summary judgment to demonstrate to the District Court that DPW was precluded from bringing its counter-crossclaim, based on DPW's failure to provide the requisite notices and opportunity to cure required under several provisions of the contract.

In its Memorandum Decision and Order on Plaintiff's Motion in Limine, the District Court recounted DPW's positions on motions brought by the Contractors, all of which ignored or obfuscated DPW's obligations to provide written notice and an opportunity to cure under before it could assert any claims against the Contractors:

> The State has previously urged the Court that the law should allow the State the opportunity to show, in order to be relieved of the

> contractual obligation to provide notice and an opportunity to cure, that the contracts had actual knowledge of the alleged defects and that the contractors suffered no prejudice by the State's failure to provide notice and an opportunity to cure.

R., Vol. IV, p. 625.

> On April 14, 2006, Defendant SE/Z filed a motion for summary judgment seeking a ruling that the State had no ability to maintain the cross-claims to recover for damages for the repair and replacement of allegedly defective work found after the contractor filed suit against the State. At that time the Court was persuaded that Article 13.4.2 of the contract preserved the State's right to pursue the cross-claims...While that provision on its fact allows the State to pursue its own independent claims against the contractors, the Court finds that its ability to pursue those actions is otherwise foreclosed by its failure to provide notice and opportunity to cure.

R., Vol. IV, p. 626.

DPW repeatedly misrepresented to the District Court what the contract required of it before it could bring any claim against SE/Z or Hobson, including particularly the counter-crossclaim, which was specifically conditioned on DPW's adherence to the prerequisite conditions of written notice and opportunity to cure included in Article 2.4.1 of the contract. See, R. Vol. II, p. 365; R. Vol. IV, p. 625. DPW was the drafter of the SE/Z contract, and under Idaho law is charged with having that agreement construed against it. *See, e.g., Big Butte Ranch, Inc. v. Grasnick*, 91 Idaho 6, 9, 415 P.2d 48 (1966).

Still, rather than withdraw its cross-counterclaim, DPW forged ahead, misrepresenting the contract and the law to the District Court:

> We are not precluded by ***any*** language in this contract from asserting claims under this contract. We are not precluded by ***any***

> language in this contract from properly asserting warranty claims, or express warranty claims, or straight breach claims, *when we discover them.*

Tr., October 15, 2008, 109:14-20 (emphasis added). That representation by DPW was simply false, just as were the misrepresentations made in 2006 and 2007 that "persuaded" the District Court not to dismiss DPW's claims. Ignoring both the effect of its termination of the Contractors for convenience under Article 14.4 of the SE/Z contract (*see*, R., Vol. II., p. 397). and its failure to have provided any notice and opportunity to cure as required by Article 2.4.1, DPW told the District Court that nothing in the agreement precluded its counter-crossclaim when plainly, nothing could have been further from the truth.

And, based on DPW's misrepresentations, the District Court allowed DPW's counter-crossclaim to survive in 2006, 2007 and 2008, and did not ultimately dismiss it until March 2010. And, during that time, the counter-crossclaim--by far the largest claim in the action below (see, R. Vol. V., pp. 938-39)--caused the Contractors to incur hundreds of thousands of dollars in costs and attorney's fees (see, Id., 939-40; 947-59) in defending against it. In giving meaning and purpose to I.C. § 12-117, as the parties "prevailing (at least) in part" against DPW's wrongful cross-counterclaim, the Contractors were entitled to an award under I.C. § 12-117(2) below, because they have "borne [the] unfair and unjustified financial burdens [incurred in] defending against groundless charges" brought in this matter by DPW.

E. DPW ASSIGNED NO ERROR TO THE DISTRICT COURT'S FINDINGS, AND THEREFORE IS PRECLUDED FROM ASSERTING THAT THE "FACTS" ALLEGED BY IT IN THE OVERTURNED SUMMARY JUDGMENT MOTIONS IS A PROPER BASIS FOR FINDING ITS PURSUIT OF A "BARRED" CLAIM TO HAVE BEEN "REASONABLE."

Since long before Statehood, this Court has held that matters--including a trial court's findings of fact--to which no assignment of error is made, are not reviewable on appeal. *See, e.g., Martineau v. Walker*, 97 Idaho 246, 247, 542 P.2d 1165 (1975); *Bicandi v. Boise Payette Lumber Co.*, 55 Idaho 543, 44 P.2d 1103, 1107 (1935) (citations omitted) ("This court will not review acts of a district court which has not been assigned as error.") *Coeur D'Alenes Lead Co. v. Kingsbury*, 56 Idaho 475, 55 P.2d 1307, 1310 (1936); *Purdy v. Steel*, 1 Idaho 216 (Terr. Rptr. 1868) (citation omitted) ("we would treat all exceptions taken in the court below as waived unless they were assigned as errors in this court."). DPW did not cross-appeal the District Court's ruling on any finding of fact,[3] and therefore assigned no error to either of the District Court's findings that: a) DPW's claim was "barred"[4]; or b) the Contractors "prevailed in part"[5] by defeating the counter-crossclaim. With those two facts considered to be "conclusive" on this appeal, and no appeal made as to the District Court's decision to overturn its previous interlocutory orders on the various motions for partial summary

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[3] The Settlement Agreement between these parties called for a resolution of all causes of action, reserving only the issues of the determination of prevailing party status and the entitlement to costs and attorney's fees for the District Court. *See*, R., Vol. IV, p. 748; R. Vol. V, p. 875.

[4] *See, e.g.*, R. Vol. IV, p. 738.

[5] R. Vol. VIII, p. 1559.

judgment,[6] no factual assertion made in those motions is able to be tested here, even on a "free review."

The assertions of fact made in the original motions for partial summary judgment, and repeated in DPW's Response are but surplusage. No fact asserted at any time in a lawsuit has the ability to make a "barred" cause of action efficacious. If a party is precluded from bringing a cause of action because of whatever reason, *i.e.,* due to a statutory bar, the action being time-barred, or as in this matter, the cause of action is barred for failure to have satisfied the contractual prerequisites that would (presumably) have allowed it, no "fact" alleged by any witness, whether lay or expert, and no offer of "what would be proven" at trial can lift the "bar" to that cause of action. *See, e.g,, Hays v. State*, 132 Idaho 516, 520, 975 P.2d 1181 (Ct. App. 1999) (claim of actual innocence not able to be considered when procedurally barred); *Hoglan v. First Security Bank of Idaho, N.A.*, 120 Idaho 682, 685, 819 P.2d 100 (1991) (claim for libel barred by statute of limitations improperly submitted to the jury); *Myers v. City of Pocatello*, 98 Idaho 168, 169-70, 559 P.2d 1136 (1977) (malicious prosecution action not timely commenced was barred by applicable statute of limitations, and therefore properly dismissed by the trial court).

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[6] Idaho considers orders granted on summary judgment to be interlocutory, and subject to revision by a trial court at any time through the time of entry of final judgment. *See, e.g., Tiegs v. Robertson*, 149 Idaho 482, 485, 236 P.3d 474 (Ct. App. 2010); *see also*, I.R.C.P. 54(b).

Reliance on what evidence *might* have been provided at trial does not excuse DPW's wrongful multi-year pursuit of a barred counter-crossclaim, or render that pursuit "reasonable." DPW was able to defeat the Contractors' motions for partial summary judgment and maintain its counter-crossclaim only because it purposefully obfuscated and misinterpreted the SE/Z contract to the District Court. This included DPW's assertions—in contravention to the plain language of a contract the District Court found to be "clear and unambiguous"—that it was somehow not bound by the notice and opportunity to cure provisions of that agreement. *See, supra*, Tr., October 15, 2008, 109:14-20, 177:10-13. This despite the fact that DPW prepared that agreement, *even if* the notice and opportunity to cure provisions of it were ambiguous (something DPW never contended and the District Court did not find), those provisions would still have to be construed against DPW. *See, e.g., Freeman & Co. v. Bolt,* 132 Idaho 152, 156, 968 P.2d 247 (Ct. App. 1998), *citing, Haener v. Ada Cty. Highway Dist.,* 108 Idaho 170, 173, 697 P.2d 1184 (1985).

Not surprisingly, DPW cites no authority that holds it to be "reasonable" (or even excusable) for a party to purposefully or recklessly misinterpret a "clear and ambiguous" contract created before the court, so long as the aim is to avoid dismissal of that party's claims. And though it may seem ludicrous that such authority could exist, that is essentially what DPW is asking this Court to hold. This despite DPW having not cross-appealed on any issue, including any

challenge to the District Court's findings regarding the efficacy of the counter-crossclaim or the determination that the Contractors prevailed "in part" below.

DPW's Response does not straightforwardly address the issues on appeal, because the District Court's findings are conclusive here, and the correct application of I.C. § 12-117 warrants for a reversal of the District Court's denial of costs and attorney's fees to the Contractors. Instead, DPW has opted for an flanking attack on the Contractors' position, asking this Court to ignore the established facts, including notably that DPW's barred claim visited hundreds of thousands of dollars in needless and wasteful expense on these Contractors.

In its Response, DPW carefully steers clear of even addressing the purpose for which this Court has held that I.C. § 12-117 was enacted. Instead, DPW reargues a set of wholly unproven allegations regarding allegedly deficient work, in the apparent hope that the Court will ignore the conclusively established facts, and will opt not to give meaning to that statute. The District Court's failure to have enforced I.C. § 12-117 in this matter was error, which these Contractors now respectfully contend should be corrected by this Court.

F. THIS MATTER IS NOT PROPERLY DEEMED A "MATTER OF FIRST IMPRESSION" IN REGARD TO THE APPROPRIATENESS OF AN AWARD OF COSTS AND ATTORNEY'S FEES FOLLOWING MISINTERPRETATIONS MADE BY ONE PARTY TO A COURT.

This Court has ruled that a party can be denied costs and attorney's fees under I.C. § 12-117 if the action was a "matter of first impression." However, this

matter is readily and completely distinguishable from the cases in which this Court denied fees on that basis. Those denials have uniformly involved a new or initial interpretation of a statute, while this matter turns on DPW's unreasonable actions under a contract of its own creation. Consequently, while there is no analog to the cases denying fees based on "first impression" statutory interpretations, this matter analogizes favorably with those cases in which this Court sustained or ordered an award of fees under I.C. § 12-117 due to an agency's misinterpretation of a "clear and unambiguous" statute or administrative rule.

In *State Dep't of Finance v. Resource Service Co., Inc.*, 134 Idaho 282, 1 P.3d 783 (2000), this Court discussed at length the basis for denying fees under I.C. § 12-117 because the matter was of "first impression." That case (*"RSC II"*) involved but two issues, whether the appellant was entitled to an award of costs and fees under I.C. § 12-117, both for the trial court action and on appeal. In *Resource Service Co., Inc. v. State Dep't of Finance* (dubbed "*RSC I*" by this Court), 130 Idaho 877, 950 P.2d 249 (1997), this Court reversed an order on summary judgment that Resource Service Co. ("RSC") had violated the Idaho Securities Act, I.C. 30-14, *et.seq*. This Court remanded to the District Court, which dismissed the Department's action and denied RSC's application for costs and fees under I.C. § 12-117. 134 Idaho at 283. RSC appealed that denial.

In affirming the District Court's denial to RSC, this Court determined that *RSC II* was like its findings in *Rincover v. State Dep't of Finance*, *supra,* and *Treasure Valley Concrete, Inc. v. State*, 132 Idaho 673, 978 P.2d 233 (1999), two actions in which it determined that the State's actions were not "unreasonable" because its actions involved "first impression" interpretations of statutes (I.C. §§ 30-1413 and 47-701, respectively). This matter, however, is nothing like *RSC II*, *Rincover* or *Treasure Valley Concrete*, and therefore warrants a completely different result.

This matter is like the line of cases in which this Court has upheld an award, or has made an award itself under I.C. § 12-117, because of an agency's failure to properly interpret a "clear and unambiguous" regulation or statute. Here, DPW brought its counter-crossclaim against the Contractors, despite the fact that its failure to follow the "clear and unambiguous" contract it provided precluded it from doing so. A significant line of cases provides that an award under I.C. § 12-117 is appropriate when an agency misinterprets or misapplies something "clear and unambiguous," the clear understanding of which it is charged with knowing. *See, e.g., In re Elliott,* 141 Idaho 177, 108 P.3d 324 (2005) ("erroneous interpretation" of a "clear and unambiguous' statute); *Lane Ranch P'ship v. City of Sun Valley,* 145 Idaho 87, 175 P.3d 776 (2007) (municipality abused its discretion interpreting an ordinance); *Fischer v. City of Ketchum*, *supra,* 141 Idaho at 352, (municipality's failure to act with reasonable

basis interpreting conditional use permit process); *Gardiner v. Boundary County Bd. of Commissioners,* 148 Idaho 764, 229 P.3d 369, 374 (2010) (acts contrary to an unambiguous state statute and local ordinance).

DPW issued the SE/Z contract, and therefore knew that its termination of SE/Z for convenience, coupled with its failure to have provided the Contractors with notice and opportunity to cure absolutely prohibited it from bringing its counter-crossclaim. DPW then misinterpreted the contract to the District Court, and asserted in a manner wholly contrary to the "plain and unambiguous" language in the agreement that it was excepted from having to comply with the contract's requirements. "We are not precluded by *any language* in this contract from asserting claims under this contract." Tr., October 15, 2008, 109:14-15 (emphasis added).

That affirmative statement made by DPW to the District Court was untrue, and was a bald-faced misstatement of the contract's meaning, made by the entity that provided the contract, and against which it must be construed. Ultimately, the District Court understood that statement to have been false, when it held DPW's counter-crossclaim to be "barred" for its failure to follow the contract.

DPW's misstatements about the contract's meaning and requirements undoubtedly contributed to the District Court's reticence to dismiss the counter-crossclaim, and wrongfully preserved DPW's claims against the Contractors. The effect of that preservation was many scores of thousands of dollars in

needless expenses borne by the Contractors to defend against DPW's "barred" claim.

The consideration of whether an award of attorney's fees is appropriate after a litigant's purposeful or reckless misrepresentations or misinterpretations to a court is hardly a "matter of first impression" in Idaho. In this Court's recent decision in *Allied Bail Bonds, Inc. v. County of Kootenai*, 151 Idaho 405, 258 P.3d 340 (2011), it granted attorney's fees on appeal under I.C. § 12-117(1) in a matter in which the appellant "misrepresented controlling precedent in its briefing" and "unreasonably pursued this appeal even though it failed to comply with the notice requirement of...I.C. § 6-610." Id.[7] *See also*, *J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford,* 146 Idaho 311, 193 P.3d 858 (2008) (attorney's fees under I.C. § 12-121 awarded in part because appellant "misrepresented legal authority"); *Bogner v. State Dep't of Revenue and Taxation*, *supra,* 107 Idaho at 859 (attorney's fees under I.C. § 12-121 awarded in part for commission's "misinterpretation" of statutes).

DPW cannot properly seek to avoid the consequences of its wrongful representations to the District Court on the basis that this matter is one of "first impression." While no decision of this Court may have pointedly addressed a factual scenario in which a state agency wrongfully pursued a "barred" claim, more than adequate authority exists to allow this Court to determine that DPW's

[7] This opinion was released on July 8, 2011, and no pinpoint citations for it are yet available.

actions in seeking to bring, pursue and prolong a wrongfully brought claim warranted an award of costs and attorney's fees under I.C. § 12-117 below. Much in keeping with the old saw, "if it looks like a duck and quacks like a duck," here, there is no question but that DPW's actions in pursuing these Contractors was wrongful, and met the standard of having been pursued without the requisite "reasonable bases" in law and fact.

III. CONCLUSION

On its consideration of the Contractors' joint motion for award of costs and fees, the District Court was required to have reconciled both I.R.C.P. 54(d)(1)(B) and the mandatory requirements of I.C. § 12-117 in a manner that gave meaning to both the rule and statute. When it failed to do so after finding DPW's counter-crossclaim to be "barred," and also finding that by defeating DPW's claim, the Contractors "prevailed in part," the District Court erred.

While the Contractors contend that the District Court further erred by not finding them to be the substantially prevailing party, and therefore entitled to an award of costs and attorney's fees under I.C. § 12-117(1), there can be no question on this appeal that given the District Court's findings (not challenged on this appeal) it was unquestionably error to deny the Contractors costs and attorney's fees under I.C. § 12-117(2).

The deterrent purpose of I.C. § 12-117 is fulfilled when wrongdoing by a state agency requires it to bear the costs of litigation in which it never should

have been involved. In this instance, the District Court's denial of the Contractors' request for award of costs and attorney's fees not only failed to repay the Contractors for DPW's wrongful action, it also read the statute out of existence, which this Court simply does not allow.

With the District Court's findings conclusive on this appeal, Hobson, on behalf of both Contractors respectfully requests that this Court do what the District Court failed to do, and fulfill the purposes for which I.C. § 12-117 was enacted. Hobson requests that the Court reverse the District Court's determination that the Contractors were not the substantially prevailing parties and remand this matter with instructions that the District Court make an award to them under I.C. § 12-117(1).

Alternately, Hobson respectfully requests that the Court, based on the District Court's finding that the Contractors "prevailed in part," remand this matter to the District Court with instructions that it make an award to the Contractors under I.C. § 12-117(2).

Third, Hobson respectfully requests that this Court reverse the District Court's award of expenses to the Individual Defendants, due to its failure to have properly considered that award from the "overall" perspective required in multi-party, multi-claim actions.

Finally, based on DPW's misrepresentations below, Hobson respectfully requests that the Court make an award of the Contractors' costs and attorney's fees on this appeal pursuant to I.C. § 12-117.

DATED this 18th day of November, 2011.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of November, 2011, I served two true and correct copies of the above and foregoing document upon the following, by Overnight Federal Express, with the necessary postage affixed thereto:

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