12-2-2016

H2O Environmental, Inc. v. Proimtu MMI, LLC Respondent's Brief Dckt. 44148

IN THE SUPREME COURT OF THE STATE OF IDAHO

H2O ENVIRONMENTAL, INC., an Idaho Company, Plaintiff/Appellant, vs. PROIMTU MMI, LLC, a Nevada company, Defendant/Respondent.	Supreme Court No. 44143 District Court No. CV-0C-1505838

CROSS-APPEAL AND ANSWERING BRIEF OF DEFENDANT/RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

HONORABLE TIMOTHY HANSEN, DISTRICT JUDGE PRESIDING

Brenoch R. Wirthlin (Idaho No. 8044)
FENNEMORE CRAIG, P.C.
Suite 1400 Bank of America Plaza
300 South Fourth Street
Las Vegas, NV 89101
Telephone: (702) 692-8000
Fax (702) 692-8099
Email: bwirthlin@fclaw.com

Attorneys for Defendant/Respondent

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STATEMENT OF THE CASE

Defendant Proimtu MMI, LLC ("Defendant") files this Response to Appellant's Brief and Cross-Brief and respectfully requests that the Court affirm the trial court's February 12, 2016 Memorandum Decision and Order and the Court's March 30, 2016 Order dismissing the lawsuit. Defendant further requests that the Court reverse the trial court's improper grant of Plaintiff's Motion to Disallow Defendant's Request for Costs as the Court abused its discretion in failing to award mandatory costs and fees pursuant to Idaho Code §12-120(1).

This lawsuit involves two Nevada companies (i.e., Appellant/Plaintiff H2O Environmental, Inc. ("Plaintiff") and Defendant) and the consequences of an alleged oral contract to pay all employment costs, including employment taxes, for construction labor to be performed in Nevada by Nevada employees. Similarly, Defendant is a "Nevada company licensed to do business in the State of Nevada." R. Vol. 1, P. 000004, L. 6-7; R. Vol. 1, P. 000005, L. 1-2. Defendant does not maintain an office or have agents in Idaho.

Plaintiff and Defendant are Nevada companies that provide construction labor. R. Vol. 1, P. 000004, L. 4-7; R. Vol. 1, P. 000005, L. 1-4. Plaintiff filed its original Articles of Incorporation in Nevada and is registered as a Nevada "domestic corporation." R. Vol. 1, P. 000120, L. 22-23. Plaintiff engages a registered agent also located in Nevada. R. Vol. 1, P. 000120, L. 22-23. Even Plaintiff's own website lists the entity as a Nevada company. R. Vol. 1, P. 000120, L. 24.

Defendant commissioned Plaintiff to hire and employ Nevada-based construction laborers for a solar project in Tonopah, Nevada. R. Vol. 1, P. 000120, L. 1-2. The project

required Nevada-based workers as the scope of Defendant's work was performed in Tonopah, Nevada. R. Vol. 1, P. 000120, L. 3-4.

At the time the Parties first engaged in communication, Defendant believed Plaintiff was an Arizona company as the first contact between the two took place in Arizona. R. Vol. 1, P. 000120, L. 5-7. Defendant was entirely unaware of Plaintiff's purported headquarters in Idaho. R. Vol. 1, P. 000120, L. 5-7. The main communication between Plaintiff and Defendant involved emails and phone calls and Defendant was unaware of the particular location of any of Plaintiff's employees with whom Defendant communicated and whom Plaintiff now alleges were in Idaho at the time. R. Vol. 1, P. 000120, L. 8-9. Defendant did not, and had no reason to, believe that it was availing itself of Idaho jurisdiction. R. Vol. 1, P. 000120, L. 10-11. Furthermore, in the Parties' contract, Plaintiff identified itself as a "Nevada corporation" and identified its place of business as 2364 S. Airport Blvd., Chandler, AZ 85286. R. Vol. 1, P. 000120, L. 12-15.

Aside from sending emails, making occasional phone calls and mailing paystubs to representatives of Plaintiff at an Idaho address, Defendant never knowingly had any direct contact with individuals in Idaho. R. Vol. 1, P. 000120, L. 16-18. Defendant never intentionally traveled to Idaho during the duration of time relevant to this lawsuit and never sought to do business of any nature whatsoever in Idaho. R. Vol. 1, P. 000120, L. 19-21.

Approximately two years after the Parties entered into a business arrangement, the Department of Labor launched an investigation against several entities employing construction workers at the Tonopah Solar Project. R. Vol. 1, P. 000006, L. 8-11. The results of the

investigation led to a dispute between the Parties. R. Vol. 1, P. 000006, L. 16-19. Plaintiff subsequently filed suit in Idaho. R. Vol. 1, P. 000004, L. 1-25.

On August 20, 2015, Defendant filed its Motion to Dismiss for Lack of Personal Jurisdiction and its Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. R. Vol. 1, P. 000009, L. 1-25; R. Vol. 1, P. 000012, L. 1-25. The trial court filed a Memorandum Decision on February 12, 2016 granting Defendant's Motion and an Order on March 30, 2016 dismissing the lawsuit. R. Vol. 1, P. 000150, L. 1-25; R. Vol. 1, P. 000158, L. 1-25. Defendant filed its Statement of Costs on April 13, 2016. R. Vol. 1, P. 000168, L. 2. Ultimately, the trial court determined in its Memorandum Decision and Order filed June 17, 2016 that Defendant did not waive its lack of personal jurisdiction defense by filing its Statement of Costs but granted Plaintiff's Motion to Disallow Defendant's Request for Costs. R. Vol. 1, P. 000224, L. 4-5.

ADDITIONAL ISSUE PRESENTED ON APPEAL

1. Whether the District Court erred in denying reasonable attorneys' fees and costs to Defendant pursuant to Idaho Code § 12-120(1), as the prevailing party in a dispute valued at less than $35,000.

ATTORNEY FEES ON APPEAL

Defendant is seeking attorney fees on appeal pursuant to Idaho Code §12-120(1).

ARGUMENT

I. Standard of Review.

The issue of whether a court has personal jurisdiction over an out-of-state defendant is a question of law. *Wilson v. King*, 160 Idaho 344, 346, 372 P.3d 399, 401 (2016). As such, the issue is subject to de novo review. *See id.*

II. The Federal Due Process Clause Controls in This Lawsuit.

To exercise personal jurisdiction over an out-of-state defendant, "two criteria must be met; the act giving rise to the cause of action must fall within the scope of [Idaho's] long-arm statute and the constitutional standards of due process must be met." *St. Alphonsus Reg'l Med. Ctr. v. State of Wash.*, 123 Idaho 739, 742, 852 P.2d 491, 494 (1993) (citations omitted). Plaintiff bears the burden of demonstrating that jurisdiction is proper, and Plaintiff was unable to do so at the trial court and has not met that burden in its appellate brief either. *See Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001); *Donaldson v. Donaldson*, 111 Idaho 951, 957, 729 P.2d 426, 432 (Idaho App. 1986).

Idaho's long-arm statute, Idaho Code §5-514, allows a broader reach of personal jurisdiction than the federal Due Process Clause. *See Smalley v. Kaiser*, 130 Idaho 909, 913, 950 P.2d 1248, 1252 (1997) (finding that a defendant's conduct did fall within Idaho's long-arm statute, but that jurisdiction could not be exercised over the defendant under the Due Process Clause); *St. Alphonsus*, 123 Idaho at 744, 852 P.2d at 496 (same). However, as Idaho's long arm-statute is broader than the Due Process Clause, the Court need only look to the Due Process

Clause to determine whether the trial court may exert personal jurisdiction over Defendant. *See Wells Cargo Inc. v. Transport Ins. Co.*, 676 F. Supp. 2d 1114, 1119 n. 2 (D. Idaho 2009) (holding that *Smalley* and *St. Alphonsus* imply that Idaho's long-arm statutes "reaches beyond the limits of due process, and that the Idaho Supreme Court must use the Due Process Clause to rein in the statute's grasp").[1]

III. The Trial Court Correctly Determined That the Contacts Were Insufficient and Defendant Did Not Purposefully Avail Itself of the Privilege of Conducting Business in Idaho to Invoke Specific Personal Jurisdiction in Idaho.

To determine whether Idaho can exercise personal jurisdiction over the Defendant, the trial court must determine: (1) whether Defendant purposefully availed itself of the privilege of conducting activities in Idaho and thereby invoking the benefits and protections of its laws; and (2) whether Defendant had certain minimum contacts with Idaho such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Schneider v. Sverdsten Logging Co.*, 104 Idaho 210, 212 657 P.2d 1078, 1080 (1983) (quoting *Hansen v. Denckla*, 357 U.S. 235, 253 (1958), and *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)). Neither of these two requirements is met in this lawsuit.

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[1] Even if the Idaho long-arm statute somehow applied to the analysis of whether the trial court may exert personal jurisdiction over the Defendant, the analysis under the Idaho statute is still insufficient to subject Defendant to personal jurisdiction. Assuming arguendo that Defendant engaged in a telephone call as alleged by Plaintiff, minor communications to negotiate a contract is insufficient to qualify as "transacting business" for purposes of Idaho's long-arm statute. *See Telford v. Smith Cnty. Tex.*, 155 Idaho 497, 314 P.3d 179 (2013) (finding nine telephone calls, two faxes, and six emails sent to Idaho by the defendants during the negotiation to be insufficient to confer Idaho jurisdiction).

A. **Defendant did not purposefully avail itself of the privilege of conducting activities in Idaho.**

Plaintiff cites to three separate arguments in an attempt to establish specific personal jurisdiction in Idaho, including: (1) that the email signature of Plaintiff's Chief Financial Officer ("CFO") was sufficient indication of the location of the recipient upon receiving an email; (2) that the payroll work for the Nevada-based Tonopah project was performed in Idaho; and (3) that the location to which payroll was mailed as required by Plaintiff were somehow not the result of H2O's unilateral activity. *See* Appellant's Brief, at 6-9. However, these issues were analyzed by the trial court and that court correctly determined that the alleged contacts were insufficient to invoke specific personal jurisdiction in Idaho.

Plaintiff ignores the case law and analysis which the trial court should and did apply to the issue of specific personal jurisdiction. For the trial court to have personal jurisdiction over Defendant, Defendant must have purposefully availed itself of doing business in the forum. *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008). This means that Defendant "must have 'performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state.'" *Boschetto*, 539 F.3d at 1016 (quoting *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990)).

First, the U.S. Supreme Court explicitly, and very recently, held that the relevant jurisdictional question asks "whether the defendant's conduct connects him to the forum in a meaningful way." *Walden v. Fiore*, 134 S.Ct. 1115, 1125 (2014). To answer this question, *Walden* extensively analyzed the issue of whether knowledge of a plaintiff's residence or the

location in which the plaintiff experienced a particular effect is sufficient to constitute purposeful availment and to exert specific personal jurisdiction. *Id.* at 1124-25. The Supreme Court determined that the mere knowledge of such information is insufficient to constitute purposeful availment. *Id.*; *see also Phillips v. Prairie Eye Ctr.*, 530 F.3d 22, 28 (1st Cir. 2008) (noting that courts have held "in a variety of contexts, that the defendant's awareness of the location of the plaintiff is not, on its own, enough to create personal jurisdiction over a defendant"); *accord Harlow v. Children's Hosp.*, 432 F.3d 50 (1st Cir. 2005) (rejecting argument that because defendant knew plaintiff resided in Maine, jurisdiction was proper because "[j]urisdiction cannot be created by and does not travel with the plaintiff patient wherever she goes"). Thus, regardless of whether the email signature of Plaintiff's CFO or the W-9 included an Idaho address, the mere knowledge of the CFO's residence or location is not sufficient to argue that purposeful availment, and by extension personal jurisdiction, exists in this case.

Second, Plaintiff's statements regarding the location of Plaintiff's provision of services to Defendant misconstrues the law. The unilateral activities of the plaintiff are irrelevant under a personal jurisdiction analysis. *Phillips*, 530 F.2d at 28 (requiring that a defendant's contacts "must be deliberate, and 'not based on the unilateral actions of another party") (quoting *Adelson v. Hananel*, 510 F.3d 43, 50 (1st Cir. 2007)). Plaintiff cannot project its own Idaho efforts and activities onto Defendant. If Plaintiff's activities could be imputed to Defendant, every Plaintiff would have the ability to unilaterally confer personal jurisdiction on behalf of any defendant.

Plaintiff's repeated references to its own activities in Idaho are an unpersuasive attempt to claim that Plaintiff was headquartered in Idaho at the time the Parties contracted for

construction employment services. However, Plaintiff's argument notably lacks any explanation for why Defendant would have divined Plaintiff's Idaho connection rather than relying on the representation of Plaintiff as a Nevada entity and the location in which the initial contract between the Parties took place. Plaintiff's corporate entry on the Nevada Secretary of State website identifies Plaintiff as a domestic entity. Plaintiff's own website portrays Plaintiff as a Nevada entity in both its description of genesis of the entity and two of its five locations. In the Parties' contract, Plaintiff identified itself as a "Nevada corporation" and identified its place of business as 2364 S. Airport Blvd., Chandler, AZ 85286. With all of this information, Defendant understandably believed that when it entered into the contract with Plaintiff for the Tonopah project, it was contracting with a Nevada entity which performed work in Arizona and Nevada.

Third, minor emails and phone calls are insufficient to subject a defendant to a foreign forum. *See Rupert v. Bond*, 68 F. Supp. 3d 1142, 1168 (N.D. Cal. 2014) ("Courts have been clear that the sending of a single email, or even a series of emails, by itself, does not amount to purposeful availment."); *see e.g., Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 729 (E.D. Pa. 1999) (finding that two emails sent from a defendant to a plaintiff resident in the forum "[d]id not show purposeful availment"); *Machulsky v. Hall*, 210 F. Supp. 2d 531, 542 (D.N.J. 2002) (holding that "minimal correspondence" via email "does not constitute sufficient minimum contacts" for purposes of personal jurisdiction); *Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.*, 558 F.2d 450, 455 (8th Cir. 1977) ("The letters and telephone calls in this purely commercial setting did not supply the necessary minimal contact"); *see also Adv. Tactical Ordinance Sys., LLC*, 751 F.3d 796, 802-03 (2014) (holding that "[t]he connection between the

place where an email is opened and a lawsuit is entirely fortuitous," and that "as a practical matter, email does not exist in any location at all").

Intermittent correspondence, i.e., an occasional email, phone call, and mailing of a reimbursement check, is the only act by Defendant that Plaintiff alleges alters the nature of Plaintiff's unilateral activity. Plaintiff's arguments conflate Plaintiff's and Defendant's acts to erroneously assert that Defendant availed itself of the opportunity of doing business in Idaho. Defendant never travelled to Idaho at any point during the project or time at issue in the lawsuit. The sole use of email, which is indisputedly the only Idaho-based attenuated contact is the quintessential example of a contact so miniscule and attenuated that the vast majority of courts describe it as so random, fortuitous, or attenuated that it cannot constitute purposeful availment. *See e.g., LAK, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1300 (6th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988); *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 151 (6th Cir. 1987) ("It is immaterial that Paragon placed telephone calls and sent faxes to Kerry Steel in Michigan."); *Scullin Steel Co. v. Nat'l Ry. Utilization Corp.*, 676 F.2d 309, 314 (8th Cir. 1982) ("The use of interstate facilities (telephone, the mail), the making of payments in the forum state, and the provision for delivery within the forum state are secondary or ancillary factors and cannot alone provide the 'minimum contacts' required by due process"); *Aaron Ferer & Sons. Co.*, 558 F.2d at 455 ("The letters and telephone calls in this purely commercial setting did not supply the necessary minimal contact."). Plaintiff tried to bolster its argument by citing to *Southern Idaho Piper & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 567 P.2d 1246 (1977), to suggest that the contacts with Idaho

were not the unilateral activity of Plaintiff. However, *Southern Idaho Pipe & Steel Co.* involves a multitude of communications including contacts with more than one business in the state and affirmative solicitation via advertising circulars. 98 Idaho at 497, 567 P.2d at 1248. Thus, the case is vastly different from the minimal interactions and communications Plaintiff alleges in this lawsuit and cannot support Plaintiff's argument.

Defendant never intentionally conducted any business in Idaho and any minor emails or phone calls, especially given Defendant's belief that Plaintiff was a Nevada entity based on Plaintiff's own assertions, cannot create an impression of purposeful availment. If a plaintiff can subject a defendant to personal jurisdiction in any location by requiring the defendant to mail a check to a particular jurisdiction after a contract was formed, the entire concept of *voluntary* purposeful availment would become futile. Plaintiff forced Defendant to send mail and email to Plaintiff in Idaho by their request; Defendant did not intend to subject itself to suit in Idaho or to purposefully avail itself of doing business in Idaho.

The trial court correctly determined that the minor contacts were not sufficient to establish personal jurisdiction and that Defendant did not purposefully avail itself of doing business in Idaho. On appeal Plaintiff does not provide a legal basis to support a finding that Defendant purposefully availed itself of doing business in Idaho.

B. **Subjecting Defendant to Idaho jurisdiction would not comport with traditional notions of fair play and substantial justice.**

Even assuming Defendant had purposefully availed itself of Idaho jurisdiction, exercising personal jurisdiction over Defendant must comport with "traditional notions of fair play and substantial justice." *Smalley*, 130 Idaho at 913, 950 P.2d at 1252. This determination analyzes: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining the most convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Id.*; *see also CE Distrib., LLC v. New Sensor Corp.*, 380 F.4d 1107, 1112 (9th Cir. 2004) (additionally considering "the extent of the defendants' purposeful interjection into the forum state's affairs" and "the existence of an alternative forum").

However, a comprehensive and calculated analysis of those factors is unnecessary in this matter as it distracts from the simple fact that this lawsuit involves a dispute between two Nevada companies involving the salaries of Nevada construction workers who worked on a solar plant in Nevada. *See Aaron Ferer & Sons Co.*, 558 F.2d at 455 (holding that exercising personal jurisdiction over the defendant would offend traditional notions of fair play and substantial justice in part because the "contracts at issue here were not to be performed in any part" within the forum state and thus have "no substantial connection" to the forum state). Although Plaintiff's Complaint attempts to minimize the common "Nevada" thread that binds the domicile of the parties, the alleged substance of the contract (i.e., to obtain Nevada workers) and

the place of contractual performance (i.e., Nevada) resonates with a Nevada theme throughout the entire dispute and cannot be overstated. Although Plaintiff may prefer the convenience of litigating the matter in Idaho because its officers reside in Idaho, such "convenience...is not determinative." *Id.* The notions of fair play and substantial justice warrant litigating the dispute in Nevada where the parties and the center of the dispute are located, not Idaho.

IV. The Trial Court Correctly Determined That Defendant Did Not Submit to the Jurisdiction of Idaho By Filing Its Statement of Costs and Fees.

Plaintiff makes an equally flawed and nonsensical argument that by filing its statement of costs and fees after its successful Motion to Dismiss, Defendant somehow submitted to Idaho jurisdiction. However, such an outcome, under Plaintiff's argument and draconian reading of Idaho Rule of Civil Procedure 4.1 ("Rule 4.1") would allow even the simple filing of a proposed judgment to subject a defendant to Idaho jurisdiction – an outcome that is surely not the intended purpose of the Rule.

First, Defendant's Statement of Costs is not a "pleading" within the meaning of Rule 4.1 that would support a finding of voluntary submission to personal jurisdiction. Idaho Rule of Civil Procedure 7(a) defines a pleading as a complaint and answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, a third-party answer, and a reply to an answer or a third-party answer. *See Rhino Metals, Inc. v. Craft*, 146 Idaho 319, 321, 193 P.3d 866, 868 (2008). Thus a "pleading" is "[a] formal document in which a party to a legal proceeding

([especially] a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses," not a statement of costs. *See* Black's Law Dictionary 573 (4th pocket ed. 2011).

Second, Rule 4.1 does not define "appearance," and as a result Idaho courts have determined that an appearance is conduct by a defendant that "evidenced an intent to defend the action." *See Donaldson*, 111 Idaho at 954, 729 P.2d at 429. Similar to the letter sent by the husband to the court in *Donaldson*, Defendant's Statement of Costs does not evidence an intent to defend against Plaintiff's claims in Idaho. The Statement of Costs is rather a filing meant to comply with Idaho Rule of Civil Procedure 54 and Idaho Code §12-120(1).

Third, Defendant did not seek affirmative relief. Plaintiff's only support for its argument otherwise is a citation to the Idaho Rules of Civil Procedure. Plaintiff ignores that Idaho Code §12-120(1) provides:

> In any action where the amount pleaded is thirty-five thousand dollars ($35,000) or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees.

Idaho Code §12-120(1) (emphasis added). Plaintiff also ignores that Idaho Rule of Civil Procedure 54 further provides for an award of attorneys' fees and costs. The rule states:

> Parties entitled to Costs. Except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.

> Attorney Fees as Costs. Attorney fees, when allowable by statutes or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs; provided, however, the claim for attorney fees as costs shall be supported by an affidavit of the attorney stating the basis and method of computation of the attorney fees claimed.

Idaho R. Civ. P. 54(d)(1)(A), (e)(5) (emphasis added); *see also id.* 54(d)(5) (requiring that a memorandum of costs be filed no later than 14 days after judgment).

The Idaho Supreme Court categorizes a post-judgment request for fees and costs as a collateral issue. *Inland Group of Companies, Inc. v. Obendorff*, 131 Idaho 473, 475, 959 P.2d 454, 456 (1998) (citation omitted). A collateral issue does not "go to the merits of the action." *Id.* (citation omitted).

Defendant's Statement of Costs did not seek affirmative relief. Defendant was not only able to, but also required to file a memorandum of costs for the trial court to tax. *See* I.C. §12-120(1); Idaho R. Civ. P. 54; *Cf. Profits Plus Capital Mgmt., LLC v. Podesta*, 156 Idaho 873, 881, 332 P.3d 785, 793 (2014), *reh'g denied* (sept. 15, 2014) (holding a compulsory counterclaim filing was not a voluntary appearance to waive the defendant's personal jurisdiction).

Fourth, courts across the country have overwhelmingly established that a defendant's statement of costs or request for fees pursuant to a successful motion to dismiss a claim does not constitute a general appearance for purposes of personal jurisdiction. *See Two Worlds United v.*

Zylstra, 46 So. 3d 1175, 1177 (Fla. App. 2010); *Gognat v. Ellsworth*, 224 P.3d 1039, 1055 (Colo. App. 2009) ("This conclusion [i.e., seeking fees as part of a motion to dismiss for lack of jurisdiction does not constitute a general appearance] is consistent with the holdings of most courts that have addressed this question."); *Heineken v. Heineken*, 683 So. 2d 194, 197-98 (Fl. App. 1996) (holding that a motion for attorneys' fees and costs incurred in the motion to dismiss for lack of personal jurisdiction is not an attempt to seek affirmative relief and waiver of a personal jurisdiction defense); *Grange Ins. Ass'n v. State*, 757 P.2d 933 (Wash. 1988) (rejecting argument that the State of Idaho waived its right to object to jurisdiction when it asked the trial court to award attorneys' fees as part of its motion to dismiss for lack of jurisdiction). Most of these decisions involve an attorney fee motion or application far more comprehensive than the simple statement of costs at issue here. *See Two Worlds United v. Zylstra*, 46 So. 3d at 1177; *Gognat*, 224 P.3d at 1055; *Heineken*, 683 So. 2d at 197-98; *Grange Ins. Ass'n*, 757 P.2d at 940.

Indeed, a finding that a motion for fees or statement of costs would constitute a general appearance would be inconsistent with the purpose of the statute allowing attorney fees for a successful motion to dismiss. *See Gognat*, 224 P.3d at 1054-55 (analyzing the issue under a similar statutory scheme); *Two Worlds United*, 46 So. 3d at 1177 (noting that the purpose of the statute awarding fees for defense against frivolous litigation "is to dissuade litigants and attorneys from pursuing 'baseless claims, stonewall defenses, and sham appeals in civil litigation by placing a price tag...on losing parties who engage in these activities.'") (quoting *Vehicles v. Salter*, 710 So.2d 1039, 1041 (Fla. App. 1998)). As the Supreme Court of Wyoming stated in *Meyer v. Hatto*, 198 P.3d 552, 557 (Wyo. 2008):

> [T]he better approach is to conclude that a motion for attorneys' fees is not an affirmative action that invokes personal jurisdiction. Holding otherwise would allow one contracting party to force the other party to subject itself to a foreign jurisdiction or forgo its contractual right to attorneys' fees.

In *Grange Ins. Ass'n*, the court first defined affirmative relief as that "'for which defendant might maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it.'" 757 P.2d at 940 (quoting Black's Law Dictionary 56 (5th ed. 1979)). A statement of costs or motion for attorneys' fees is dependent on the plaintiff's claim and would not exist absent Plaintiff's affirmative act in bringing its claim. *Id.* at 940.

In *Heineken*, the court based its analysis on *Grange* and found that merely bringing a motion for attorneys' fees and costs in prosecuting a motion to dismiss does not waive personal jurisdiction defense by seeking affirmative relief. 683 So.2d at 197-98. The court highlighted the absurdity in assuming any waiver in stating that "by the recovery of fees incurred in asserting the jurisdictional defense[,] a defendant...would only be placed back in the status existing before the plaintiff sought to assert personal jurisdiction." *Id.* at 198.

The court in *Two World United* utilized *Heineken* to affirm that an attorneys' fee motion does not seek affirmative-type relief and does not warrant a waiver determination. 46 So. 3d at 1177. The court found that an attorneys' fee motion is "substantively defensive in nature" and

does not support a determination that defendant waived the personal jurisdiction requirement. *Id.* at 1177. The statement of costs here was a defensive action and filed pursuant to the statutory requirement to do so.

Defendant would not have a right to attorneys' fees and costs had Plaintiff not brought its lawsuit in Idaho despite the lack of personal jurisdiction. Defendant should not be forced to choose between the statutory recovery of its incurred costs and fees and maintaining its successful objection to the lack of personal jurisdiction.

Finally, Plaintiff improperly sought review of its alleged waiver argument via a motion under Idaho Rule of Civil Procedure 60(b). R. Vol. 1, p. 000183, L. 1-5. Plaintiff provides no authority to support its assumption that a party may seek Rule 60 relief from a dismissal based on a personal jurisdiction defense for an alleged waiver of such defense by filing a statement of costs. Indeed, Plaintiff could not do so and the attempt to appeal an inappropriate and unfounded motion is merely another attempt to force Defendant into a court in which specific personal jurisdiction does not exist.

V. The District Court Erred in Denying Reasonable Attorneys' Fees and Costs to Defendant/Appellee Pursuant to Idaho Code §12-120(1)

Idaho Code § 12-120 requires that a court award attorneys' fees as a part of the costs of an action when a party prevails in relation to a claim pleading an amount of thirty-five thousand dollars ($35,000) or less. I.C. §12-120(A) ("In any action where the amount pleaded is thirty-five thousand dollars ($35,000) or less, there shall be taxed and allowed to the prevailing party,

as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees."); *see also Action Collection Servs., Inc. v. Bigham*, 146 Idaho 286, 290, 192 P.3d 1110, 1114 (App. 2008) ("Idaho Code Section 12-120(1) provides for a mandatory award of attorney fees to the prevailing party where the amount pleaded is $25,000 or less."); *Clement v. Franklin Inv. Grp., Ltd.*, 689 F. Supp. 1575, 1577 (D. Idaho 1988) ("the Idaho Supreme Court has made it clear that Idaho Code §12-120 is mandatory in its nature and has rejected an attempt by a trial judge to impose his own sense of justice in denying the mandatory award.") (citing *Evans v. Sawtooth Partners*, 111 Idaho 381, 723 P.2d 925 (App. 1986)). Plaintiff's Complaint requested that judgment be entered against [Defendant] for damages for breach of contract in the amount of $23,805.77." R. Vol. 1, P. 000008, L. 8-9. Because Plaintiff's claim as pled was less than $35,000, Defendant is entitled to its attorneys' fees, taxed as costs, as a matter of right.

An award of attorneys' fees to be taxed as costs under Idaho Code §12-120 does not require the party to prevail on the merits but may be awarded to a party that was successful on a Rule 12(b)(6) motion. *See, e.g., Idaho Transp. Dept. v. Ascorp, Inc.*, 159 Idaho 138, 357 P.3d 863, 866 (2015) (affirming attorneys' fee award to defendant who prevailed on Rule 12(b)(6) motion); *Taylor v. McNichols*, 149 Idaho 826, 848-49, 243 P.3d 642, 664-65 (2010) (same). Courts in other jurisdictions have similarly awarded attorneys' fees for parties who successfully argue a motion to dismiss for lack of personal jurisdiction. *E.g., Atl. Propeller Serv., Inc. v. Hoffman GMBH & Co. KG*, 382 S.E.2d 109, 110 (Ga. App. 1989) (affirming attorneys' fees award to defendants who had prevailed on a motion to dismiss for lack of personal jurisdiction). Some state statutes also identify the availability of fees for defendants who prevail on motions to

dismiss for lack of personal jurisdiction. *See* Wash. Rev. Code. 4.28.185(5) ("In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.").

A party that opposes a motion to dismiss based on a lack of personal jurisdiction and succeeds is able to recover attorneys' fees and costs on appeal under Idaho Code §12-120(3). *See Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 729, 152 P.3d 594, 600 (2007). To allow a plaintiff to be awarded fees if it succeeds in opposition to a motion to dismiss for lack of personal jurisdiction but to disallow a defendant to be awarded fees for succeeding on its motion to dismiss for lack of personal jurisdiction would provide an inconsistent and biased result.

Although the court has discretion to determine the amount of fees, the award of attorneys' fees is mandatory. *See In re Haun*, 396 B.R. 522, 531 (Bankr. D. Idaho 2008). Idaho Code § 12-120 includes a "shall" mandate requiring Defendant to file a Statement of Costs to allow the court to fix a reasonable amount of attorneys' fees to be taxed as costs. The statute and case law do not point to any specific information that must be provided to the court in order to calculate a reasonable amount of attorneys' fees.

Furthermore, Defendants' costs and attorneys' fees which are to be taxed as costs were reasonable as provided in Defendants' Statement of Costs. Plaintiff chose to bring a lawsuit in Idaho in a court which lacked personal jurisdiction over the Defendant. Plaintiff also requested an in-person hearing in Idaho on the jurisdictional issue. Although a Statement of Costs listing the individuals who performed work on the matter, the date the work was performed, the task

performed, the amount of time expended on the task, and the amount billed to the client for that particular entry (from which the court can extrapolate the hourly billable rate for each individual was provided to the Court), the Court incorrectly determined that a statement of costs, i.e., the only requirement for an award of attorneys' fees under the statute and rules, was insufficient to determine a reasonable award of attorneys' fees. The court had sufficient information to review to determine the reasonable attorneys' fees which should be awarded and abused its discretion by failing to award attorneys' fees and costs.

Plaintiff's opposition provided no valid reason to dismiss any of the fees and costs specified in the Statement of Costs. The fees, however, are mandatory, and the appropriate statement of costs was filed; thus, the Court erred in not determining the reasonable amount of fees to be awarded.

CONCLUSION

For the foregoing reasons Defendant respectfully requests that the Court affirm the trial court's findings that Defendant has not purposefully availed itself of the jurisdiction of Idaho and lacks sufficient minimum contacts to authorize the application of personal jurisdiction to its in Idaho. Defendant further requests that the court affirm the trial court's Judgment dismissing the lawsuit for lack of personal jurisdiction. Finally, Defendant requests that the Court grant Defendant's appeal and reverse the trial court's determination to disallow attorneys' fees and costs to Defendant as such fees and costs are mandatory under Idaho Code §12-120.

RESPECTFULLY SUBMITTED this 1st day of December, 2016.

FENNEMORE CRAIG, P.C.

By _____
Brenoch R. Wirthlin

Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of December, 2016, I caused to be served a copy of the foregoing **ANSWERING BRIEF AND CROSS-BRIEF OF DEFENDANT/RESPONDENT** on the following, in the manner indicated below:

Vaughn Fisher
Fisher Rainey Hudson
950 W. Bannock Street, Suite 630
Boise, ID 83702
Email: vaughn@frhtriallawyers.com

Attorneys for Plaintiffs/Appellant

Adrena Harris

12291399.1/034514.0013

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Validity Called into Doubt by Wells Cargo, Inc. v. Transport Ins. Co., D.Idaho, Dec. 13, 2009

West's Idaho Code Annotated
Title 5. Proceedings in Civil Actions in Courts of Record
Chapter 5. Commencement of Actions

I.C. § 5-514

§ 5-514. Acts subjecting persons to jurisdiction of courts of state

Currentness

Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation;

(b) The commission of a tortious act within this state;

(c) The ownership, use or possession of any real property situate within this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting;

(e) The maintenance within this state of matrimonial domicile at the time of the commission of any act giving rise to a cause of action for divorce or separate maintenance;

(f) The engaging in an act of sexual intercourse within the state, giving rise to a cause of action for paternity under chapter 11, title 7, Idaho Code. The provisions of this subsection shall apply retroactively, and for the benefit of any dependent child, whether born before or after the effective date of this act, and regardless of the past or current marital status of the parents of the child.

Credits
S.L. 1961, ch. 153, § 1; S.L. 1969, ch. 236, § 1; S.L. 1988, ch. 106, § 1.

Notes of Decisions (122)

I.C. § 5-514, ID ST § 5-514
Current through the 2016 Second Regular Session of the 63rd Idaho Legislature.

End of Document

West's Idaho Code Annotated
Title 12. Costs and Miscellaneous Matters in Civil Actions
Chapter 1. Costs

I.C. § 12-120

§ 12-120. Attorney's fees in civil actions

Currentness

(1) Except as provided in subsections (3) and (4) of this section, in any action where the amount pleaded is thirty-five thousand dollars ($35,000) or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees. For the plaintiff to be awarded attorney's fees, for the prosecution of the action, written demand for the payment of such claim must have been made on the defendant not less than ten (10) days before the commencement of the action; provided, that no attorney's fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety-five percent (95%) of the amount awarded to the plaintiff.

(2) The provisions of subsection (1) of this section shall also apply to any counterclaims, cross-claims or third party claims which may be filed after the initiation of the original action. Except that a ten (10) day written demand letter shall not be required in the case of a counterclaim.

(3) In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

(4) In actions for personal injury, where the amount of plaintiff's claim for damages does not exceed twenty-five thousand dollars ($25,000), there shall be taxed and allowed to the claimant, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees. For the plaintiff to be awarded attorney's fees for the prosecution of the action, written demand for payment of the claim and a statement of claim must have been served on the defendant's insurer, if known, or if there is no known insurer, then on the defendant, not less than sixty (60) days before the commencement of the action; provided that no attorney's fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety percent (90%) of the amount awarded to the plaintiff.

The term "statement of claim" shall mean a written statement signed by the plaintiff's attorney, or if no attorney, by the plaintiff which includes:

(a) An itemized statement of each and every item of damage claimed by the plaintiff including the amount claimed for general damages and the following items of special damages: (i) medical bills incurred up to the date of the plaintiff's

demand; (ii) a good faith estimate of future medical bills; (iii) lost income incurred up to the date of the plaintiff's demand; (iv) a good faith estimate of future loss of income; and (v) property damage for which the plaintiff has not been paid.

(b) Legible copies of all medical records, bills and other documentation pertinent to the plaintiff's alleged damages.

If the plaintiff includes in the complaint filed to commence the action, or in evidence offered at trial, a different alleged injury or a significant new item of damage not set forth in the statement of claim, the plaintiff shall be deemed to have waived any entitlement to attorney's fees under this section.

(5) In all instances where a party is entitled to reasonable attorney's fees and costs under subsection (1), (2), (3) or (4) of this section, such party shall also be entitled to reasonable postjudgment attorney's fees and costs incurred in attempting to collect on the judgment. Such attorney's fees and costs shall be set by the court following the filing of a memorandum of attorney's fees and costs with notice to all parties and hearing.

(6) In any small claims case resulting in entry of a money judgment or judgment for recovery of specific property, the party in whose favor the judgment is entered shall be entitled to reasonable postjudgment attorney's fees and costs incurred in attempting to collect on the judgment. Such attorney's fees and costs shall be set by the court following the filing of a memorandum of attorney's fees and costs with notice to all parties and an opportunity for hearing. The amount of such attorney's fees shall be determined by the court after consideration of the factors set out in rule 54(e)(3) of the Idaho rules of civil procedure, or any future rule that the supreme court of the state of Idaho may promulgate, but the court shall not base its determination of such fees upon any contingent fees arrangement between attorney and client, or any arrangement setting such fees as a percentage of the judgment or the amount recovered. In no event shall postjudgment attorney's fees exceed the principal amount of the judgment or value of property recovered.

Credits

Added by S.L. 1970, ch. 44, § 1. Amended by S.L. 1975, ch. 65, § 1; S.L. 1986, ch. 205, § 1; S.L. 1987, ch. 204, § 1; S.L. 1988, ch. 343, § 1; S.L. 1994, ch. 353, § 1; S.L. 1996, ch. 383, § 1; S.L. 2001, ch. 161, § 1; S.L. 2012, ch. 94, § 1, eff. July 1, 2012.

Notes of Decisions (785)

I.C. § 12-120, ID ST § 12-120

Current through the 2016 Second Regular Session of the 63rd Idaho Legislature.

End of Document

West's Idaho Code Annotated
Idaho Court Rules
IdahoRules of CivilProcedure(Refs & Annos)
Title II. Commencement of Action; Service

Idaho Rules of Civil Procedure (I.R.C.P.), **Rule** 4.1
Formerly cited as ID R RCP Rule 4(i)

Rule 4.1. General or special appearance

Currentness

(a) **General Appearance.** The voluntary appearance of a party or service of any pleading by the party, except as provided in subsection (b) of this **Rule**, constitutes voluntary submission to the personal jurisdiction of the court.

(b) **Motion or Special Appearance to Contest Personal Jurisdiction.** The following do not constitute a voluntary appearance by a party under this **Rule**:

(1) a motion under **Rule** 12(b)(2), (4) or (5), whether raised before or after judgment;

(2) a motion under **Rule** 40(a) or (b);

(3) a motion for an extension of time to answer or otherwise appear;

(4) the joinder of other defenses in a motion under **Rule** 12(b)(2), (4) or (5);

(5) a response to discovery or to a motion filed by another party after a party files a motion under **Rule** 12(b)(2), (4) or (5), action taken by that party in responding to discovery or to a motion filed by another party;

(6) pleading further and defending an action by a party whose motion under **Rule** 12(b)(2), (4), or (5) is denied; or

(7) filing a document entitled "special appearance," which does not seek relief but merely provides notice that the party is entering a special appearance to contest personal jurisdiction, if a motion under **Rule** 12(b)(2), (4), or (5) is filed within fourteen (14) days after filing the special appearance, or within such later time as the court permits.

Credits
[Adopted March 1, 2016, effective July 1, 2016. Amended effective September 9, 2016.]

Rules Civ. Proc., **Rule** 4.1, ID R RCP **Rule** 4.1
Current with amendments received through 11/15/16.

End of Document

West's Idaho Code Annotated
Idaho Court Rules
Idaho Rules of Civil Procedure (Refs & Annos)
Title III. Pleadings; Motions; Scheduling

Idaho Rules of Civil Procedure (I.R.C.P.), Rule 7

Rule 7. Pleadings allowed; Form of motions and other papers

Currentness

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a cross claim;

(5) a third party complaint;

(6) an answer to a third party complaint; and

(7) if the court orders one, a reply to an answer.

(b) Motions and Other Papers.

(1) *In General.* A request for a court order must be made by motion. That motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for the relief sought including the number of the applicable civil rule, if any;

(C) state the relief sought; and

(2) *Proposed Order.* A proposed form of order, if included, must be a separate document.

(3) *Filing and Serving Motions, Affidavits and Briefs; Time Limits.*

(A) A written motion, affidavit(s) supporting the motion, memoranda or briefs supporting the motion, if any, and, if a hearing is requested, the notice of hearing for the motion, must be filed with the court and served so as to be received by the parties at least 14 days prior to the day designated for hearing.

(B) Affidavit(s) opposing the motion and opposing memoranda or briefs, if any, must be filed with the court and served so as to be received by the parties at least 7 days before the hearing.

(C) The moving party may file a reply brief or memorandum, which must be filed with the court and served so as to be received by the parties at least 2 days prior to the hearing.

(D) The moving party must indicate on the face of the motion whether oral argument is desired. If a brief or memorandum is not filed with the motion, the motion must indicate on the face of the motion whether the party intends to file a brief or memorandum supporting the motion.

(E) If the moving party does not request oral argument or does not timely file a supporting memorandum or brief, the court may deny the motion without further notice if it determines the motion does not have merit.

(F) If oral argument has been requested on any motion, the court may deny oral argument by written or oral notice from the court at least 1 day prior to the hearing. The court may limit oral argument at any time.

(G) If the office of the presiding judge is outside of the county in which the action is pending, the parties must simultaneously provide a copy of any notice, motion, affidavit, brief, or other document relating to a motion to the presiding judge in addition to filing the materials with the court of record.

(H) Any exception to the time limits in this rule may be granted by the court for good cause shown. If time does not permit a hearing or response on a motion to extend or shorten time, the court may rule without opportunity for response or hearing.

(I) The time limits in this rule do not apply to motions and other matters if a different time limit is provided by statute or by another rule of civil procedure.

Credits

[Adopted March 1, 2016, effective July 1, 2016.]

Rules Civ. Proc., Rule 7, ID R RCP Rule 7
Current with amendments received through 11/15/16.

End of Document

West's Idaho Code Annotated
Idaho Court Rules
Idaho Rules of Civil Procedure (Refs & Annos)
Title III. Pleadings; Motions; Scheduling

Idaho Rules of Civil Procedure (I.R.C.P.), Rule 12

Rule 12. Defenses and objections: When and how presented; Motion for judgment on the pleadings; Consolidating motions; Waiving defenses; Hearings before trial

Currentness

(a) Time to Serve a Responsive Pleading.

(1) *In General.* Unless another time is specified by rule or statute, the time for serving a responsive pleading is as follows:

(A) a defendant must serve an answer within 21 days after being served with the summons and complaint;

(B) a party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim;

(C) a party must serve a reply to an answer 21 days after being served with an order to reply, unless the court specifies a different time.

(2) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted;

(7) failure to join a party under Rule 19; and

(8) another action pending between the same parties for the same cause.

If a pleading states a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed, but early enough not to delay trial, a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule or by filing a special appearance under Rule 4.1.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) *When Some are Waived.* A party waives any defense listed in subsections (b)(2),(4) and (5) by failing to make it by motion before filing a responsive pleading or filing any other motion, except a motion for an extension of time to answer or otherwise appear or a motion to disqualify a judge under Rule 40(a) or (b).

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19 or 19.1, a defense of another action pending between the same parties for the same cause, or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(4) *Improper Venue.* An objection to improper venue is waived unless a timely motion for proper venue is made as provided in Rule 40.1.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7), whether made in a pleading or by motion, and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Credits

[Adopted March 1, 2016, effective July 1, 2016. Amended effective September 9, 2016.]

Rules Civ. Proc., Rule 12, ID R RCP Rule 12
Current with amendments received through 11/15/16.

End of Document

West's Idaho Code Annotated
Idaho Court Rules
Idaho Rules of Civil Procedure (Refs & Annos)
Title VII. Judgment

Idaho Rules of Civil Procedure (I.R.C.P.), Rule 54

Rule 54. Judgments; Costs

Currentness

(a) Definition--Form--Amendments.

(1) *Definition and Form of Judgment.* "Judgment" as used in these rules means a separate document entitled "Judgment" or "Decree". A judgment must state the relief to which a party is entitled on one or more claims for relief in the action, which may include dismissal with or without prejudice. A judgment must not contain a recital of pleadings, the report of a master, the record of prior proceedings, the court's legal reasoning, findings of fact, or conclusions of law. A judgment is final if either it is a partial judgment that has been certified as final pursuant to subsection (b)(1) of this rule or judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties in the action. A judgment or partial judgment must begin with the words "JUDGMENT IS ENTERED AS FOLLOWS: .." and it must not contain any other wording between those words and the caption. A judgment may include any findings of fact or conclusions of law expressly required by statute, rule, or regulation.

(2) *Amended Judgments.* If the court orders an amendment to a judgment, the amendment will be effective only after the court enters an amended judgment setting forth all of the terms of the new judgment, including those terms of the prior judgment that remain in effect.

(b) Partial Judgment Upon Multiple Claims or Involving Multiple Parties.

(1) *Certificate of Partial Judgment as Final.* When an action presents more than one claim for relief, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any judgment, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities. In the event the trial court determines that a partial judgment should be certified as final under this Rule 54(b), the court must execute a certificate which must immediately follow the court's signature on the partial judgment and be in substantially the form found in Appendix B.

(2) *Jurisdiction if Appealed After Rule 54(b) Certificate.* If a Rule 54(b) Certificate is issued on a partial judgment and an appeal is filed, the trial court loses all jurisdiction over the entire action, except as provided in Rule 13 of the Idaho Appellate Rules.

(3) *Offsetting Judgments.* If any parties to an action are entitled to judgments against each other such as on a claim and counterclaim, or upon cross-claims, the judgments must be offset against each other and a single judgment for the difference between the entitlements must be entered in favor of the party entitled to the larger judgment.

(c) Demand for Judgment; Relief to be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs.

(1) *In General; Items Allowed.*

(A) Parties Entitled to Costs. Except when otherwise limited by these rules, costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.

(B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

(C) Costs as a Matter of Right. When costs are awarded to a party, that party is entitled to the following costs, actually paid, as a matter of right:

(i) court filing fees;

(ii) actual fees for service of any pleading or document in the action, whether served by a public officer or other person;

(iii) witness fees of $20.00 per day for each day that a witness, other than a party or expert, testifies at a deposition or in the trial of an action;

(iv) travel expenses of witnesses who travel by private transportation, other than a party, who testify in the trial of an action, computed at the rate of $.30 per mile, one way, from the place of residence, whether it is in or outside the state of Idaho;

(v) travel expenses of witnesses who travel other than by private transportation, other than a party, computed as the actual travel expenses of the witness, but not more than $.30 per mile, one way, from the place of residence of the witness, whether it is in or outside the state of Idaho;

(vi) expenses or charges of certified copies of documents admitted as evidence in a hearing or the trial of an action;

(vii) reasonable costs of the preparation of models, maps, pictures, photographs, or other exhibits admitted in evidence as exhibits in a hearing or trial of an action, but not more than $500 for all of such exhibits of each party;

(viii) cost of all bond premiums;

(ix) reasonable expert witness fees for an expert who testifies at a deposition or at a trial of an action, but not more than $2,000 for each expert witness for all appearances;

(x) charges for reporting and transcribing of a deposition taken in preparation for trial of an action, whether or not read into evidence in the trial of an action; and

(xi) charges for one (1) copy of any deposition taken by any of the parties to the action in preparation for trial of the action;

The trial court may, on objection, disallow any of the above-described costs on a finding that the costs were not reasonably incurred; were incurred for the purpose of harassment; were incurred in bad faith; or were incurred for the purpose of increasing the costs to any other party. The mere fact that a deposition is not used in the trial of an action, either as evidence read into the record or for the purposes of impeachment, does not indicate that the taking of the deposition was not reasonable, or that a copy of a deposition was not reasonably obtained, or that the cost of the deposition should otherwise be disallowed, so long as its taking was reasonable for trial preparation.

(D) Discretionary Costs. Additional items of cost not enumerated in, or in an amount in excess of that listed in subpart (C), may be allowed on a showing that the costs were necessary and exceptional costs, reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling on objections to discretionary costs, must make express findings as to why the item of discretionary cost should or should not be allowed. In the absence of any objection to an item of discretionary costs, the court may disallow on its own motion any items and must make express findings supporting such disallowance.

(E) Costs Incurred by the Court. The Court may assess and apportion as costs, between and among the parties to the action, all fees and expenses of masters, receivers or expert witnesses appointed by the court in the action.

(F) Costs and Attorney Fees--Fees on Execution of Judgment--Added to Judgment. All costs and attorney fees approved by the court and fees for the service of the writ of execution upon a judgment are automatically added to the judgment as costs and collected by the sheriff in addition to the amount of the judgment and other allowed costs. In the event the return of the sheriff on a writ of execution indicates that the service costs were not obtained through the service of the writ, the clerk of the court must automatically add the uncollected service fees to the judgment as additional costs.

(2) *Multiple Parties.* In the event judgment is entered in favor of multiple parties or coparties, costs must be allowed as a matter of course to each of the prevailing parties unless the court otherwise directs.

(3) *Costs on Extension of Time.* In the event any party to an action applies for an enlargement of time or postponement of a hearing or trial, the court may impose and tax costs and expenses caused by the delay against the moving party as a condition to granting the enlargement or postponement.

(4) *Memorandum of Costs.* At any time after the verdict of a jury or a decision of the court, but not later than 14 days after entry of judgment, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense. The memorandum must state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule. Failure to timely file a memorandum of costs is a waiver of the right to costs. A memorandum of costs prematurely filed is considered as timely.

(5) *Objections to Costs.* Within 14 days of service of a memorandum of costs, any party may object by filing and serving a motion to disallow part or all of the costs. The motion does not stay execution on the judgment, exclusive of costs, and must be heard and determined by the court as other motions under these rules. Failure to timely object to the items in the memorandum of costs constitutes a waiver of all objections to the costs claimed.

(6) *Settlement of Costs by Order of Court.* After a hearing on a motion to disallow costs, or after the time for filing the motion has passed, the court must enter an order settling the dollar amount of costs, if any, awarded to any party to the action.

<Text of subrule (e) effective until March 1, 2017.>

(e) Attorney Fees.

(1) *Pursuant to Contract or Statute.* In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract.

(2) *Pursuant to Idaho Code Section 12-121.* Attorney fees under Idaho Code Section 12-121 may be awarded by the court only when it finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation, which finding must be in writing and include the basis and reasons for the award. No attorney fees may be awarded pursuant to Idaho Code Section 12-121 on a default judgment.

(3) *Amount of Attorney Fees.* If the court grants attorney fees to a party or parties in a civil action it must consider the following in determining the amount of such fees:

(A) the time and labor required;

(B) the novelty and difficulty of the questions;

(C) the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law;

(D) the prevailing charges for like work;

(E) whether the fee is fixed or contingent;

(F) the time limitations imposed by the client or the circumstances of the case;

(G) the amount involved and the results obtained;

(H) the undesirability of the case;

(I) the nature and length of the professional relationship with the client;

(J) awards in similar cases;

(K) the reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case;

(L) any other factor which the court deems appropriate in the particular case.

(4) *Pleading; Default Judgments.*

(A) In General. It is not necessary for any party in a civil action to assert a claim for attorney fees in any pleading.

(B) In Default Judgment. When attorney fees are requested pursuant to contract or a statute other than Idaho Code section 12-121 in a judgment by default, the amount of attorney fees in the event of default must be included in the prayer for relief in the complaint and the award must not exceed the amount in the prayer. An award of attorney fees under Idaho Code section 12-120 in default judgments where the defendant has not appeared must not exceed the amount of the judgment for the claim, exclusive of costs.

(5) *Attorney Fees as Costs.* Attorney fees, when allowable by statute or contract, are costs in an action and processed in the same manner as other costs and included in the memorandum of costs. A claim for attorney fees as costs must be supported by an affidavit of the attorney stating the basis and method of computation.

(6) *Objection to Attorney Fees.* Any objection to a claim for attorney fees must be made in the same manner as an objection to costs as provided by Rule 54(d)(5). The court may conduct an evidentiary hearing, if it deems it necessary, regarding the award of attorney fees.

(7) *Settlement of Attorney Fees by Order of Court; Determination Not Binding on Attorney and Client.* After a hearing on an objection to attorney fees, or after the time for filing an objection has passed, the court must enter an order settling the dollar amount of attorney fees, if any, awarded to any party to the action. If there was a timely objection to the amount of attorney fees, the court must include in the order its reasoning and the factors it relied on in determining the amount of the award. The allowance of attorney fees by the court under this rule is not to be construed as fixing the fees between attorney and client.

(8) *Claims to Which Rule Applies.* Any claim for attorney fees, including claims pursuant to Idaho Code section 12-121, must be made pursuant to Rule 54(e) unless an applicable statute or contract provides otherwise.

<Text of subrule (e) effective March 1, 2017.>

(e) Attorney Fees.

(1) *Pursuant to Contract or Statute.* In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract.

(2) *Amount of attorney fees.* If the court grants attorney fees to a party or parties in a civil action it must consider the following in determining the amount of such fees:

(A) the time and labor required;

(B) the novelty and difficulty of the questions;

(C) the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law;

(D) the prevailing charges for like work;

(E) whether the fee is fixed or contingent;

(F) the time limitations imposed by the client or the circumstances of the case;

(G) the amount involved and the results obtained;

(H) the undesirability of the case;

(I) the nature and length of the professional relationship with the client;

(J) awards in similar cases;

(K) the reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case;

(L) any other factor which the court deems appropriate in the particular case.

(3) *Pleading; Default Judgments.*

(A) In General. It is not necessary for any party in a civil action to assert a claim for attorney fees in any pleading.

(B) In Default Judgment. When attorney fees are requested pursuant to contract or a statute in a judgment by default, the amount of attorney fees in the event of default must be included in the prayer for relief in the complaint and the award must not exceed the amount in the prayer. An award of attorney fees under Idaho Code section 12-120 in default judgments where the defendant has not appeared must not exceed the amount of the judgment for the claim, exclusive of costs.

(4) *Attorney Fees as Costs.* Attorney fees, when allowable by statute or contract, are costs in an action and processed in the same manner as other costs and included in the memorandum of costs. A claim for attorney fees as costs must be supported by an affidavit of the attorney stating the basis and method of computation.

(5) *Objection to Attorney Fees.* Any objection to a claim for attorney fees must be made in the same manner as an objection to costs as provided by Rule 54(d)(5). The court may conduct an evidentiary hearing, if it deems it necessary, regarding the award of attorney fees.

(6) *Settlement of Attorney Fees by Order of Court; Determination Not Binding on Attorney and Client.* After a hearing on an objection to attorney fees, or after the time for filing an objection has passed, the court must enter an order settling the dollar amount of attorney fees, if any, awarded to any party to the action. If there was a timely objection to the amount of attorney fees, the court must include in the order its reasoning and the factors it relied on in determining the amount of the award. The allowance of attorney fees by the court under this rule is not to be construed as fixing the fees between attorney and client.

(7) *Claims to Which Rule Applies.* Any claim for attorney fees, including claims pursuant to Idaho Code section 12-121, must be made pursuant to Rule 54(e) unless an applicable statute or contract provides otherwise.

Credits

[Adopted March 1, 2016, effective July 1, 2016. Amended April 27, 2016, effective July 1, 2016; October 6, 2016, effective March 1, 2017.]

Rules Civ. Proc., Rule 54, ID R RCP Rule 54
Current with amendments received through 11/15/16.

End of Document

West's Idaho Code Annotated
Idaho Court Rules
Idaho Rules of Civil Procedure (Refs & Annos)
Title VIII. Post-Judgment Procedure

Idaho Rules of Civil Procedure (I.R.C.P.), Rule 60

Rule 60. Relief from a judgment or order

Currentness

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time, and for reasons (1), (2), and (3) no more than 6 months after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) to set aside, as provided by law, within one year after judgment was entered, a judgment obtained against a party who was not personally served with summons and complaint either in the state of Idaho or in any other jurisdiction, and who has failed to appear in the action; or

(3) set aside a judgment for fraud on the court.

Credits
[Adopted March 1, 2016, effective July 1, 2016.]

Rules Civ. Proc., Rule 60, ID R RCP Rule 60
Current with amendments received through 11/15/16.

End of Document