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IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 45105-2017

THE CITY OF MIDDLETON,
Plaintiff-Counterdefendant-Respondent,

v.

COLEMAN HOMES, LLC, an Idaho limited liability company; WEST HIGHLANDS, LLC, an Idaho limited liability company; WEST HIGHLANDS SUBDIVISION HOMEOWNERS ASSOCIATION, INC., an Idaho corporation; WEST HIGHLANDS LAND DEVELOPMENT, LLC, an Idaho limited liability company,
Defendants-Counterclaimants-Appellants.

APPELLANTS' AND CROSS-RESPONDENTS' REPLY BRIEF

Appeal from the District Court of the Third Judicial District in and for the County of Canyon
Case No. CV-2015-8119
The Honorable Christopher S. Nye, Judge

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I. STATEMENT OF THE CASE

This case is about a dispute between the City of Middleton ("Middleton") and the Appellants,[1] four different and unique entities, regarding their rights and duties under two contracts—the Impact Fee Agreement ("IFA") and the Parks Dedication Agreement ("PDA"). In Middleton's cross appeal, it asks this Court to consider on appeal two issues it failed to preserve—the district court's order amending the amended judgment, and the issue of whether the IFA allows Middleton to claim recovery for *all* attorney fees, not just reasonable ones. Because Middleton failed to adequately preserve these claimed errors, the Court may not review them on appeal. Even if reviewable, Middleton's position on these issues also fails on the merits. In reply to Middleton's opposition, the Appellants note that the district court's decision that Middleton was the prevailing party cannot be sustained in light of the fact that the Appellants' amended answer relates back to the date of the original pleading. As the answer agreed with Middleton's position that the IFA and PDA were enforceable, there was no alteration of legal rights between Middleton and the agreements' signatories. The only substantive decision that the district court made—that is, how much park acreage must be provided under the PDA to Middleton—was contrary to both side's positions. Thus, the district court's decision that Middleton was the prevailing party is unsound. And, even if the district

[1] As in its opening brief, the four entities comprising the Appellants will be referred to as such. While the Appellants recognize Idaho Appellate Rule 35(d) emphasizes using more straightforward references, this brief will use the term "Appellants" to refer to the four appellant entities collectively as a means of distinguishing from the entities as individuals.

court's decision was correct, there is insufficient evidence to support its finding that Middleton's fee petition was timely filed and served.

II. ADDITIONAL ISSUE ON CROSS-APPEAL

The Appellants / Cross-Respondents seek costs and attorney fees for defending the cross-appeal as authorized by I.A.R. 40 and 41. This claim for fees is based on I.C. § 12-120(3) or the IFA, as explained in Sections V and VI, *infra*.

III. CROSS APPEAL ARGUMENT

A. The District Court Did Not Err in Granting the Appellants' Motion to Alter or Amend the Judgment, But Middleton Has Failed to Completely Preserve this Assignment of Error.

1. Middleton has not preserved the claimed assignment of error that the district court failed to consider the language of the IFA in amending the judgment.

An issue cannot be raised for the first time on appeal. *McLean v. Cheyovich Family Trust*, 153 Idaho 425, 430, 283 P.3d 742, 747 (2012); *State v. Howard*, 150 Idaho 471, 476, 248 P.3d 722, 727 (2011) ("It is well settled that an issue not raised before the trial court cannot be raised for the first time on appeal."). Where no facts, theories, or argumentation have been presented below, the appellate court will not consider such issues for the first time. *Viveros v. State Dep't of Health & Welfare*, 126 Idaho 714, 716, 889 P.2d 1104, 1106 (1995).

Here, Middleton did not object to, or provide argument against, the Appellants' motion to alter or amend the judgment on one of the bases that it raises on appeal—that is, the argument that the district court misread the language of the IFA. The record shows that on February 21, 2017, the Appellants filed their Motion to Alter or Amend Re: Amended Judgment. (R. at 972-75.) The Appellants moved to amend the judgment in part because it purported to require all four

of the Appellants to provide a financial guaranty, regardless of whether they were a party to the IFA. (R. at 974.) Middleton did file an opposition to that motion on February 27, 2017—but that opposition contained no mention of the language of the IFA and no argument regarding which parties were bound by the IFA's financial guaranty requirement. (*See* R. at 990-94.) The only arguments Middleton made in that opposition were that the Appellants' motion was untimely, and that the amended proposed judgment that Middleton sent to the court without the Appellants' review was substantially the same as the original judgment. *See id.* At oral argument, counsel for Middleton presented these same two arguments, and no others. (*See* Tr. Vol. I (March 16, 2017), p. 53, L. 15 – p. 54, L. 24.) Middleton simply did not raise the argument that the financial guaranty obligation belonged to Coleman Homes, LLC based on the language of the IFA. Therefore, this Court should not consider this claimed assignment of error on appeal.

2. The Appellants' motion to alter or amend the judgment was within the timelines required by I.R.C.P. 59 and 60.

The district court granted the Appellants' motion to alter or amend the judgment on April 10, 2017, "to more accurately reflect the relief granted as it relates to the particular Defendants." (R. at 996) (citing *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 707, 979 P.2d 107, 109 (1999) ("[I.R.C.P.] 59(e) provides a trial court a mechanism to correct legal and factual errors occurring in proceedings before it."). Contrary to Middleton's assertion, I.R.C.P. 54(a)(1) does not contain any time limits on the amendment of a judgment. *Id.* The district court granted the Appellants' motion under I.R.C.P. 59(e) and 60, which contain the relevant timelines for altering or amending a judgment. *Id.* This Court will review an order granting a motion to alter or amend

judgment for an abuse of discretion. *Slaathaug*, 132 Idaho at 707, 979 P.2d at 109. Similarly, the district court's decision on a motion under I.R.C.P. 60 is also reviewed for an abuse of discretion. *E.g.*, *Eby v. State*, 148 Idaho 731, 734, 228 P.3d 998, 1001 (2010).

I.R.C.P. 59(e) states that "A motion to alter or amend the judgment must be filed and served no later than 14 days after entry of the judgment." *Id.* The district court signed the amended judgment on February 15, 2017 and the clerk accepted it for filing the next day. (R. at 966-67.) The Appellants filed a motion to alter or amend the amended judgment on February 21, 2017, only five days after the clerk accepted the amended judgment for filing. (R. at 972.) Thus, the motion was timely under I.R.C.P. 59(e), and the district court did not abuse its discretion in amending the amended judgment.

Further, the motion was well within the time requirements of I.R.C.P. 60. "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." I.R.C.P. 60(a) (emphasis added). A motion under I.R.C.P. 60(b)(1) for "mistake" must be made no more than sixth months after entry of judgment. I.R.C.P. 60(c)(1). A motion for "any other reason that justifies relief" under I.R.C.P. 60(b)(6) "must be made within a reasonable time." I.R.C.P. 60(b)(6). The Appellants' motion was well within the time limits under any of these provisions of I.R.C.P. 60, and the district court did not abuse its discretion in amending the amended judgment.[2]

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[2] Even if the original judgment starts the clock running for the purposes of I.R.C.P. 60, the Appellants' motion would still be timely. *See* R. at 831 (original judgment signed on November 2, 2016).

B. The District Court Did Not Err in Reducing Middleton's Requested Attorney Fees.

1. Middleton did not properly preserve the alleged assignment of error that the district court failed to consider the IFA's attorney fee provision.

Middleton argues on appeal that under the IFA, it is entitled to "all costs and expense." (Resp. Reply Br., p. 19.) Middleton claims that the district court erred because it assessed the reasonability of Middleton's requested attorney fees under I.R.C.P. 54, when the court should have just granted its fee petition in totality. *See id.* Middleton, however, did not make this argument to the district court.

As noted above, an issue cannot be raised for the first time on appeal. *McLean*, 153 Idaho at 430, 283 P.3d at 747. And, "[i]t is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." *State v. Fisher*, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993); *see also Simono v. House*, 160 Idaho 788, 793, 379 P.3d 1058, 1063 (2016) (declining to review argument on appeal regarding motion to disallow attorney fees that was raised before trial court but not decided upon). Further, under the invited error doctrine, a party may not present an issue on appeal if it is due to an error that party caused. *State v. Carlson*, 134 Idaho 389, 402, 3 P.3d 67, 80 (Ct. App. 2000). With regard to requests for attorney fees in particular, the basis for attorney fees must be specifically and clearly identified in the memorandum of fees and costs. *E.g., Van Velson Corp. v. Westwood Mall Assocs.*, 126 Idaho 401, 406, 884 P.2d 414, 419 (1994) (Stating with regard to a party's request for fees and costs, that "[i]t is the litigant's duty to not only clearly state its contentions to the trial judge, but to make such contentions, and the rulings thereon, of record so they may be reviewed on appeal.").

While Middleton did *mention* the contractual provision in its memorandum of fees and costs, it made no argument and gave no indication that it believed that the attorney fee provision in the IFA allowed for Middleton to recover *all* costs and fees incurred. (R. at 893.) Further, Middleton filed an affidavit of counsel arguing that its fees were reasonable under I.R.C.P. 54. (R. at 897-901.) Indeed, the affidavit of counsel offers a detailed analysis of why the requested fees are reasonable under each factor of I.R.C.P. 54(e)(3). *Id.* It makes sense that the district court then analyzed Middleton's requested fees under the reasonability factors of I.R.C.P. 54(e)(3) when awarding fees and costs. (R. at 958-65.)

Middleton cannot raise this issue on appeal because it was not properly argued at the district court. Middleton made only a passing reference to the contractual provision and did not clearly identify the argument under the IFA, and the only analysis it provided was under I.R.C.P. 54. The district court then made a ruling based on that I.R.C.P. 54 analysis, and did not make a ruling on whether the IFA entitled Middleton to *all* fees and costs. Middleton cannot now complain that the claimed error it caused, and that the district court did not pass upon, is reviewable on appeal.

Further, the IFA only applies to its signatories. Not all of the Appellants are signatories to that agreement. (R. at 448-51) Thus, even if this Court accepted Middleton's argument, it cannot apply to all four Appellants.

2. The Appellants' objection to Middleton's fee petition focused on duplicative entries and a mediation fee that was intended to be split between the parties.

Even if Middleton were entitled to all fees and costs incurred, Middleton's memorandum of fees and costs included a number of duplicative entries and a request for reimbursement of a mediation fee that the parties had agreed to split. (R. at 897-916.) The duplicative entries were caused when Middleton listed the items of costs as fees on their invoices, and then also separately enumerated those items of cost. (R. at 941.) The Appellants objected to Middleton's memorandum of fees and costs due to these issues, in addition to arguing that Middleton was not the prevailing party. (R. at 937-45.) Middleton cannot seek duplicate fees and costs or a mediation fee it agreed to split under the IFA provision or the provisions of I.R.C.P. 54, and thus the district court did not abuse its discretion in declining to award those expenses.

IV. REPLY ARGUMENT

A. The District Court Erred in Holding that Middleton was the Prevailing Party.

Middleton argues that it should be declared the prevailing party because "the City was successful in its request for declaratory relief by obtaining an Order that the IFA and PDA were valid and enforceable." (Resp. Reply Br., p. 27.) In determining that Middleton was the prevailing party, the district court agreed with this position, and relied upon the notion that "the Court granted Middleton's request for declaratory relief by ordering that the IFA and PDA are valid and enforceable." (R. at 961.)

But, Middleton and the district court failed to acknowledge that the Appellants agreed that the IFA and PDA were enforceable, and the district court simply rubber-stamped that finding it in its Order Re: Amended Answer to Petition for Declaratory Ruling and

Counterclaim, entered May 3, 2016. (R. at 87.) Specifically, the district court held that the IFA and PDA were "valid and enforceable; however a dispute exists between the parties to this lawsuit regarding the interpretation of those agreements and the respective rights and obligations as between the parties to those agreements." *Id.* This order, achieved by the parties' agreement, is not enough to convey prevailing party status to Middleton.

In *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 121 S.Ct. 1835 (2001) the United States Supreme Court addressed the meaning of "prevailing party," a term used in many federal fee-shifting statutes. 532 U.S. 598, 603, 121 S.Ct. 1835, 1839 (2001). Under *Buckhannon*, a prevailing or substantially prevailing party "is one who has been awarded some relief by the court." *Id.* A litigant must meet two criteria under this standard. First, he must achieve a "material alteration of the legal relationship of the parties." *Id.* at 604, 121 S.Ct. at 1840. Second, that alteration must be judicially sanctioned. *Id.* *Buckhannon* rejected the "catalyst theory" for the recovery of attorney's fees: "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties." 532 U.S. at 605, 121 S. Ct. at 1840 (emphasis in original). While *Buckhannon* may have been decided in the context of fee shifting statutes, it is persuasive authority in the instant case, where the applicable statute and rule contains the "prevailing party" term of art. *See, e.g.* *Trenching Servs., Inc. v. Depatco, Inc.*, No. CV08-451-E-BLW, 2010 WL 1816186, at *1

(D. Idaho May 5, 2010) (citing *Buckhannon* with approval in the context of an award of attorney fees under I.C. § 12-120(3)); *Saint Alphonsus Med. Ctr.--Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, No. 1:12-CV-00560-BLW, 2015 WL 2033088, at *1 (D. Idaho Apr. 29, 2015) (same).

Here, the Appellants voluntarily agreed with Middleton that the IFA and PDA were enforceable. While the Appellants denied the enforceability of the IFA and PDA in their original answer (R. at 36-39), their amended answer admits that the IFA and PDA are enforceable (R. at 89-103). That amended answer relates back to the original answer under I.R.C.P. 15(c)(1)(B). The fact that Appellants changed their position cannot be held against them as I.R.C.P. 15 treats the amended answer as if it is the original and only pleading from the Appellants. *Id.* Since the Appellants agreed in the amended answer that the IFA and PDA were valid and enforceable agreements, the parties' relationship was not materially altered. Middleton advances a catalyst theory—it sued for a declaration that the agreements were enforceable and the Appellants agreed. However, this is not enough under the sound reasoning of *Buckhannon*, which requires more than the defendant's agreement with the plaintiff's position or the defendant's voluntary change for prevailing party status. Further, the only tangible result achieved related to that finding was favorable to Appellants—Middleton was required to return the illegally-collected impact fees upon the entry of the district court's order declaring the IFA and PDA were valid and enforceable, as discussed in Middleton's opening brief. (App. Br. at 9-10.)

The majority of the litigation focused on the interpretation of the IFA and the PDA and the acreage that the West Highlands Subdivision Homeowners' Association, Inc. was required to hold open as park space for Middleton's benefit. Middleton sought to increase that number to

15.1 utilizing an incorrect reading of the applicable agreements. (*E.g.*, R. at 743.) Where the single position taken by the plaintiff in the lawsuit—that is, seeking 15.1 acres of open space—is denied by the district court, there is no basis to conclude that Middleton is the prevailing party. Middleton prosecuted a lawsuit seeking to obtain more open space than it was entitled to, and the district court denied that undertaking. Where the district court ruled against Middleton regarding the parties' true dispute, it cannot be declared the prevailing party.

Lastly, Middleton avers that *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 105 P.3d 676 (2005), stands only for the proposition that business owners cannot be held individually liable for judgments against their businesses. (Resp. Reply Br., p. 30.) However, *Gunter* also stands for the rule that the losing party must have engaged in the commercial transaction with the prevailing party under I.C. § 12-120(3) in order for the court to award fees against the losing party. 141 Idaho at 32, 105 P.3d at 692 ("Only Mountain West and Murphy's Lounge engaged in the commercial transaction with Gunter, however. Therefore the award of attorney fees should only be against those two Defendants.") The district court abused its discretion by lumping the Appellants together and failing to consider their individual contractual relationships with Middleton, as explained in the Appellants' opening brief. (App. Br. 11-15.)

B. The District Court Abused its Discretion in Finding that the Middleton's Memorandum of Fees and Costs was Timely Served.

"This Court limits its review of a trial court's decision to determining 'whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law.'" *City of Meridian v. Petra Inc.*, 154 Idaho 425, 434–35, 299 P.3d 232, 241–42 (2013)

(quoting *Shore v. Peterson*, 146 Idaho 903, 907, 204 P.3d 1114, 1118 (2009)). The evidence regarding the service of Middleton's memorandum of fees and costs does not support the district court's finding that it was timely served.

Middleton did not present a single bit of corroborating evidence to support the alleged November 17, 2016 service date in the certificate of service and was careful in its representations to the Court. (Tr. Vol. I, p. 44, L. 11-19.) The only actual evidence regarding service is the Appellants' supplemental affidavit proving that it did not receive a copy of the fee memorandum. (R. at 954-56.) It is noteworthy that Middleton never responded to that affidavit. Nothing in the record creates a factual dispute. Given the lack of evidence from Middleton that service was timely, the district court abused its discretion in finding that Middleton's memorandum of fees and costs was timely served.

V. RESPONSE TO REQUEST FOR ATTORNEY FEES

The Appellants object to Middleton's request for fees and costs on appeal. Certainly, the Court's resolution of the appeal and cross appeal issues will determine which, if any, party is entitled to fees and costs on appeal. However, Middleton requests fees and costs under the language of the IFA, which states that "[i]n the event a suit or action is filed by either party against the other to interpret or enforce this Agreement, the unsuccessful party to such litigation agrees to pay to the prevailing party all costs and expense, including attorney's fees incurred therein, including the same with respect to an appeal." (R. at 450.) However, that language is contained only in the IFA, not the PDA. *Compare id.*, *with* R. at 461-65. Two of the Appellants

are not signatories to the IFA (*See* R. at 451), and therefore the contractual fee provision of the IFA cannot be applied to them.

VI. REQUEST FOR ATTORNEY FEES

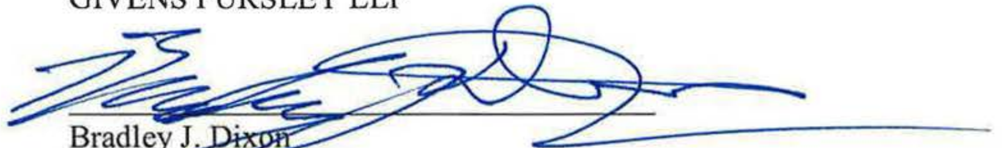
The Appellants request and are entitled to attorney fees and costs for defending the cross appeal pursuant to I.A.R. 40 and 41 and under Idaho Code § 12-120(3) as a commercial transaction, and the IFA (applied to two of the Appellants as discussed in the Section V, *supra*) as the prevailing parties on appeal.

VII. CONCLUSION

For the foregoing reasons, the Appellants respectfully request this Court affirm the judgment of the district court related to the issues on cross appeal, vacate and remand (or reverse as appropriate) the judgment of the district court for the issues in the appeal-in-chief, and award the Appellants their attorney fees and costs in bringing this appeal and defending the cross-appeal.

DATED: December 14, 2017.

GIVENS PURSLEY LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of December, 2017, I served a true and correct copy of the foregoing **APPELLANTS' AND CROSS-RESPONDENTS' REPLY BRIEF** in the above-entitled matter as follows:

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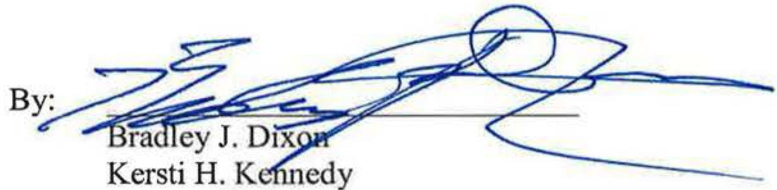
By: 
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