



argument on that motion was held on November 5, 2008. That motion was taken under advisement.

On July 9, 2008, defendants filed a Motion to Dismiss pursuant to I.R.C.P. 12(b)(1) and 12(b)(6). Oral argument on defendants' motion to dismiss was held on December 4, 2008. At the beginning of that hearing the Court announced its ruling granting Allied's Motion to Amend Complaint, and the Court ordered the Second Amended Complaint, dated October 22, 2008, be filed, and that defendants had twenty days from December 4, 2008, to answer such.

At that December 4, 2008, hearing, the Court noted that at the conclusion of an earlier hearing on June 3, 2008, Judge Luster (previously assigned to this case) granted Allied's Motion to Amend the Complaint and ordered the Amended Complaint and Request for Jury Trial, dated May 20, 2008, be filed. On June 15, 2007, Judge Luster signed an order allowing Allied to amend its complaint. However, the Amended Complaint was never actually filed with the Court. This Court ordered that Amended Complaint be filed *nunc pro tunc* back to May 20, 2008, the date the Motion to Amend the Complaint was granted. The Second Amended Complaint dated October 22, 2008, differs very little from the Amended Complaint.

On December 12, 2008, this Court entered its "Order Granting Motion to Dismiss in Part and Denying Motion to Dismiss in Part." In that Order, this Court: 1) granted defendants' motion to dismiss all tort claims in Allied's complaints; 2) granted defendants' motion to dismiss all claims brought by Allied under Idaho Code § 9-343; 3) granted defendants' motion to dismiss on the ground that Allied has failed to state a claim against Sheriff Watson upon which relief may be granted due to Allied's failure to follow Judge Luster's order and Idaho Code § 6-610, and due to the mandatory

language in that statute and the Court of Appeals decision in *Beehler* and *Greenwade* and the Idaho Supreme Court decision in *Monson*; 4) denied defendants' Motion to Dismiss on the ground that the agreement is a covenant not to compete; 5) granted defendants' Motion to Dismiss on the ground that Allied has no property right to the bail bond business and denied defendants' motion to dismiss on the ground that Allied has no contractual right as there may be contractual rights which attach to the April 2001 agreement; 6) denied defendants' Motion to Dismiss on the ground that Allied has standing to challenge the use of credit cards, operation of Adult Misdemeanor Probation (AMP) and pre-trial services; 7) granted defendants' Motion to Dismiss on the ground that Allied's claim challenging the acceptance of a credit card to post bail fails to state a claim upon which relief can be granted; and 8) granted defendants' Motion to Dismiss on Allied's claims that the county's operation of AMP and Pre-Trial Services (PTS) is without statutory authority and in violation of Article 10, § 5 of the Idaho Constitution.

On February 3, 2009, defendants filed a "Memorandum in Support of Renewed Motion to Dismiss", moving to dismiss the breach of contract claim against defendants arising out of the 2001 Release and Settlement Agreement. Memorandum in Support of Renewed Motion to Dismiss, p. 2. On February 11, 2009, Allied filed its "Response to Defendants' Renewed Motion to Dismiss. On February 13, 2009, defendants filed their "Reply to Plaintiff's Response to Defendants' Renewed Motion to Dismiss." Oral argument was held on February 17, 2009. At the conclusion of that hearing, this Court announced its decision and on February 26, 2009, entered an "Order Granting Renewed Motion to Dismiss in Part and Denying Renewed Motion to Dismiss in Part" in which this Court: 1) granted defendants' Renewed Motion to Dismiss Allied's claim for injunctive relief on the ground that Kootenai County Sheriff Rocky Watson was

previously dismissed from this lawsuit; 2) granted defendants' Renewed Motion to Dismiss Allied's claims on the ground that the Kootenai County Board of County Commissioners does not have the authority to perform or direct the statutory duties of the Sheriff; 3) granted defendants' Renewed Motion to Dismiss Allied's claims on the ground that defendants are not directly liable for the alleged non-performance or mal-performance of the Sheriff; and 4) denied defendants' Renewed Motion to Dismiss Allied's claims on the ground of public policy, finding there to be genuine issues of material fact on that claim. On March 9, 2009, this Court entered a Judgment consistent with the above decisions.

On February 23, 2009 [after this Court announced its decision on February 17, 2009, but before this Court entered its Order Granting Renewed Motion to Dismiss in Part and Denying Renewed Motion to Dismiss in Part on February 26, 2009], Allied filed its "Supplemental Memorandum in Support of Motion to Reconsider", asking this Court to reverse its ruling that the filing of the bond the day after the complaint was filed requires dismissal. Supplemental Memorandum in Support of Motion to Reconsider, p. 1. On March 23, 2009, Allied filed its "Memorandum in Support of Motion to Reconsider", claiming: 1) Allied's claim for public records must be reinstated because Allied fulfilled the pleading requirements of I.R.C.P. 8 and is entitled to relief under the Public Records Act; 2) because the court, not the defendants, excepted to the sufficiency of the sureties, dismissal of the Sheriff is error; 3) because Allied submitted a bond supported by "two (2) sufficient sureties" as required by I.C. § 6-610, and 4) because Article 10, Section 5 of the Idaho Constitution is clear and unambiguous, this Court may not engage in interpreting its plain language. Also on March 23, 2009, Allied filed a Notice of Hearing scheduling its Motion to Reconsider for April 29, 2009.

On April 15, 2009, Allied filed its “Supplemental Argument in Support of Motions to Reconsider”, claiming 1) the Sheriff and the County’s conduct is in violation of the Idaho Constitution, and 2) the County can be held liable for the Sheriff’s actions under *respondeat superior*.

On April 22, 2009, defendants filed “Defendants’ Objection to Motion to Reconsider”, arguing: 1) the Court properly dismissed Allied’s Public Record’s request; 2) the Court properly dismissed Allied’s claims against Sheriff Watson for failure to comply with I.C. § 6-610; the Court properly dismissed Allied’s claim challenging the defendants’ operation of Adult Misdemeanor Probation; 4) Allied’s Supplemental Request to Reconsider is untimely under I.R.C.P. 11(b)(2); 5) the Court properly dismissed Allied’s Tort Claims; and 6) the Court properly dismissed Allied’s contract claims against defendants.

In the midst of all the briefing filed regarding Allied’s Motion to Reconsider, defendants filed a “Memorandum of Costs”, a “Motion for Attorney Fees” and an “Affidavit [of Darrin L. Murphey] in Support of Motion for Attorney Fees” on March 20, 2009. On March 24, 2009, defendants filed a Notice of Hearing, scheduling the Motion for Attorney Fees and Memorandum of Costs for oral argument on April 29, 2009. On April 3, 2009, Allied filed its “Motion to Disallow Items of Costs.” On April 22, 2009, defendants filed their “Response to Plaintiff’s Motion to Disallow Costs.”

On April 28, 2009, the day before oral argument, Allied filed its “Reply to Response to Motion to Disallow Costs and to Reconsider”. The caption of that pleading is misleading, as Allied references Allied’s Motion to Disallow Costs, but the pleading itself pertains only to Allied’s Motion to Reconsider.

Oral argument was held on April 29, 2009. At the conclusion of the hearing, the Court took under advisement the issue of attorney's fees, but because oral argument on the attorney fees issue took so long, the Court announced that it would hear oral argument on Allied's Motion to Reconsider at a later point in time. While Allied has reserved hearing time for July 22, 2009, Allied has failed to file a Notice of Hearing on Allied's Motion to Reconsider. Allied, on July 8, 2009, filed a Notice of Hearing for July 21, 2009, for its "Motion to Amend Complaint", "Motion to Join Clerk of the Court" and "Motion for Preliminary Injunction."

Because it would make sense to decide Allied's Motion to Reconsider before addressing defendants' Motion for Attorney Fees and Memorandum of Costs, this Court deferred issuing a decision on defendants' Motion for Attorney Fees and Memorandum of Costs, hoping Allied would schedule oral argument on its Motion to Reconsider. However, doing so has left defendants' Motion for Attorney Fees and Memorandum of Costs under advisement for two and one-half months.

## **II. ANALYSIS.**

### **A. Defendants are Entitled to Attorney Fees Against Allied.**

Defendants move this Court for an Order determining defendants the prevailing party pursuant to I.R.C.P. 54(e)(1) and for fees pursuant to I.C. §§ 9-344, 6-918A, 6-610, 12-117, 12-120, and 12-121. Allied argues defendants have not set forth a "reasoned argument" for the statutory basis of the fees request. Motion to Disallow Costs, pp. 1-3. Allied argues I.C. § 9-344, allowing fees if a public records request is frivolously requested or denied, is inapplicable because "the request was not frivolous, it was merely dismissed for failure to make the proper requests as required under the statute." *Id.*, p. 2. Allied also argues I.C. § 6-610 makes no provision for fees based on

the statute itself, that I.C. § 6-918A only allows fees if an action is brought in bad faith, and that I.C. §§ 12-117 and 12-121 only allow for fees where no reasonable basis in law or fact exists for a claim against the governmental agency. It appears Allied makes no argument with respect to I.C. § 12-120 specifically.

Defendants claim they seek an award of attorney fees “primarily” pursuant to the attorney’s fee provision of paragraph 12 of the Settlement Agreement attached to Allied’s Second Amended Complaint. Response to Plaintiff’s Motion to Disallow Costs, p. 4. Indeed, paragraph 12 of the Settlement Agreement provides: “In the event any action is instituted to enforce the provisions of this Agreement, the prevailing party will be entitled to recover reasonable attorneys’ fees, and expenses, and court costs.” Complaint, Exhibit A. Allied’s Complaint revolves around the alleged breach of that Settlement Agreement. Complaint, pp. 2-3, ¶8.

An award of attorney fees under I.C. § 12-121 may only be granted by the Court when it finds that the case was brought, pursued or defended frivolously, unreasonably, or without foundation. *Hossner v. Idaho Forest Indus., Inc.*, 122 Idaho 413, 835 P.2d 648 (1992). Similarly, attorney fees under I.C. § 12-117 are not awarded where it cannot be shown that the parties acted without a reasonable basis in fact or law. *Stacey v. Idaho Dep’t of Labor*, 134 Idaho 727, 9 P.3d 530 (2000).

Idaho Code § 12-120(3) grants the prevailing party the right to an award of reasonable attorney’s fees in “any civil action to recover... in any commercial transaction.” The statute applies to declaratory judgment actions if the gravamen of the action is a commercial transaction. *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 423, 111 P.3d 100, 108 (2005). “The term ‘commercial transaction’ is defined to mean all transactions except transactions for personal and household purposes.’ I.C. § 12-

120(3). And, I.C. § 12-120(3) does not require that there be a contract between the parties before that statute is applied; “the statute requires only that there be a commercial transaction.” *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 472, 36 P.3d 218, 224 (2001).

In its Judgment, this Court ordered that a determination of the prevailing party would be subsequently made by the Court. Judgment, p. 3. Such a determination is necessary to a grant of fees under I.C. §§ 6-610, 9-344, 12-117, 12-120, and 12-121. I.C. § 6-918A does not use the language “prevailing party,” but provides for fees “in the manner provided for fixing costs in civil actions.” I.C. § 6-918A. Thus, the requirement for a prevailing party analysis is implicit in this Code section as well.

Allied argues the County and Sheriff are both not prevailing parties because the dismissals in this matter were not an adjudication of the claims on their merits. Motion to Disallow Costs, p. 3. Allied makes the argument that: “Finally, most of the claims were dismissed without prejudice, so it is unreasonable for Defendants to state that they were the prevailing parties when such claims can be re-filed.” Motion to Disallow Costs, p. 4. No case law is cited by Allied to support this argument. Such argument is not supported by *Sanders v. Lankford*, 134 Idaho 322, 1 P.3d 823 (Ct. App. 2000), where the complaint in that case was dismissed without prejudice for failure to name a property party and failure to properly serve. 134 Idaho 322, 325, 1 P.3d 823, 826. Defendants reply that Idaho Courts have recognized a party to be the prevailing party where obtaining a dismissal of an action, even without prejudice, amounts to a favorable outcome. Response to Plaintiff’s Motion to Disallow Costs, p. 3. Defendants have cited authority from other jurisdictions that show a dismissal without prejudice may still result in a prevailing party for attorney fee purposes. Motion to Disallow Costs, p. 4, citing:

*First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1015 (7<sup>th</sup> Cir. 1985), quoting 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 54.70[4] (2d ed. 1985); *Arango v. United Automobile Ins. Co.*, 901 So.2d 320, 321-22 (Fla.3d DCA 2005). The fact that some of the dismissals of Allied's various claims have been without prejudice is of no help to Allied in avoiding responsibility for defendants' attorney fees.

I.R.C.P. 54(d)(1)(B) states a trial court:

...shall 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 in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon 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 resultant judgment or judgments obtained.

Defendants are the prevailing party, having sought dismissal of all claims and having received the favorable outcome of the Judgment with respect to:

- 1) Allied's second amended complaint was dismissed;
- 2) all of Allied's tort claims were dismissed without prejudice;
- 3) all of Allied's public record claims were dismissed with prejudice;
- 4) all of Allied's claims against Sheriff Watson were dismissed without prejudice;
- 5) all of Allied's claims related to an alleged property right in bail bond business were dismissed with prejudice;
- 6) all of Allied's credit card bond-posting claims were dismissed with prejudice;
- 7) all of Allied's claims relating to AMP and PTS violating the Idaho Constitution were dismissed with prejudice;
- 8) all of Allied's claims for injunctive relief against Sheriff Watson were dismissed without prejudice;

9) all of Allied's claims that the BOCC have the authority to direct the statutory duties of the Sheriff were dismissed with prejudice; and

10) all claims that the County is directly liable for alleged non or mal-performance of the Sheriff were dismissed with prejudice.

Only Allied's contract claims remain. Even if Allied were to prevail on its breach of contract claim, Allied has failed to prevail on *all* other claims it has brought. Based upon the above, defendants are the prevailing party. Determination of the prevailing party is committed to the discretion of the trial court. I.R.C.P. 54(d)(1)(B); *Sanders v. Lankford*, 134 Idaho 322, 325, 1 P.3d 823, 826 (Ct.App. 2000).

Allied makes the argument that: "Most importantly, no authority is cited for the proposition that a governmental lawyer is entitled to hour rate of a private attorney, or any hourly rate for that matter." Motion to Disallow Costs, p. 2. In defendants' Response to Plaintiff's Motion to Disallow Costs, defendants cited a plethora of cases from a variety of jurisdictions which allow an award of attorney fees to in-house counsel. Response to Plaintiff's Motion to Disallow Costs, pp. 6-8, n. 1.

Allied makes the argument that the Settlement Agreement is void because the County Commissioners were not a party to the Settlement Agreement and because that Agreement lacks consideration. Motion to Disallow Costs, pp. 4-5. As pointed out by the defendants, Allied's argument is misplaced as "A party may be entitled to attorney's fees under a contract even if it is established that no contract between the parties ever existed." *O'Connor v. Harger Constr. Inc.*, 145 Idaho 904, 912, 188 P.3d 846, 854 (2008); *citing Garner v. Barschi*, 139 Idaho 430, 439, 80 P.3d 1031, 1040 (2003); *Ayotte v. Redmon*, 110 Idaho 726, 728, 718 P.2d 1164, 1166 (1986). The Settlement Agreement in the present case does not contain a severability agreement. The Idaho

Supreme Court in *O'Connor* noted that the agreement in question in that case had a severability clause, and attached significance to that fact by stating: “Even though the contract was unenforceable, it was a contract and had a severability clause, so the attorney fee provision is capable of enforcement.” 145 Idaho 904, 912, 188 P.3d 846, 854. However, in *Garner*, there either was no severability clause or at least that issue was never discussed. The Idaho Supreme Court in *Garner* held:

It is of no consequence that the underlying contractual obligation is unenforceable. A prevailing party may recover attorney fees even though no liability under a contract was established or where no contract was, in fact, ever formed.

139 Idaho 430, 439, 80 P.3d 1031, 1040, quoting from *Hilbert v. Hough*, 132 Idaho 203, 207, 969 P.2d. 836, 840 (Ct.App. 1998). In *Hilbert*, there was either no severability clause or at least that issue was not discussed in the appeal. The Idaho Supreme Court in *Hilbert* cited *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 73, 878 P.2d 762, 772 (1994) and *Konic International Corporation v. Spokane Computer Services, Inc.*, 109 Idaho 527, 708 P.2d 932 (Ct.App. 1985), for the proposition that: “A prevailing party may recover attorney fees even though no liability under a contract was established or where no contract was, in fact, ever formed.” *Shirey* in turn cited *Twin Falls Livestock Comm'n Co. v. Mid-Century Ins. Co.*, 117 Idaho 176, 184, 786 P.2d 567, 575 (Ct.App. 1989). *Twin Falls Livestock* in turn cited *Boise Truck & Equipment, Inc. v. Hafer Logging, Inc.*, 107 Idaho 824, 693 P.2d 470 (Ct.App. 1984). This Court has reviewed all those cases and either there was no severability clause or at least that issue was not discussed in the appeal.

This Court has reviewed *Mihalka v. Shepherd*, 145 Idaho 547, 181 P.3d 473 (2008). Neither party cited *Mihalka*, but it is very instructive. In *Mihalka*, the Idaho Supreme Court affirmed District Judge Renae Hoff's decision to award attorney fees to

the prevailing party where the settlement agreement provided attorney fees for the prevailing party when a party was required to enforce the settlement agreement. That is the situation in the present case. As mentioned above, Allied's Complaint revolves around the alleged breach of that Settlement Agreement. Complaint, pp. 2-3, ¶8.

Because this Court finds defendants are the prevailing party and are entitled to attorney fees under the Settlement Agreement, this Court need not determine whether Allied's prosecution of its claims were frivolous.

Although defendants are entitled to their attorney fees, this Court cannot make the determination at this point as to the *amount* of those fees. Defendants have stated how much time has been involved (202 hours) in this litigation, and defendants have claimed that \$200 per hour is "...a reasonable hourly rate for the services that have been provided." Affidavit in Support of Motion for Attorney Fees, p. 3. That addresses criteria (A), (D) and (G) under I.R.C.P. 54(e)(3). Neither party has expressly addressed the remaining criteria under I.R.C.P. 54(e)(3)(A)-(L). This Court can determine that (C) Darren Murphey has adequate skills requisite to perform the legal service properly, and this Court is aware that (I), Darren Murphey has worked for defendants as one of its counsel for quite some time. However, neither of those criteria would justify an upward or downward departure from the amount of fees sought by defendants' counsel. This Court determines that (B), (E), (F), (H), (J), and (K) are either not applicable, or if applicable, would not justify an upward or downward departure from the amount of fees sought by defendants' counsel. This Court is not bound by Darren Murphey's claim that \$200 per hour is "...a reasonable hourly rate for the services that have been provided." Affidavit in Support of Motion for Attorney Fees, p. 3. This Court finds a reasonable hourly rate for similar work in this area to be \$150 per hour. This Court also finds the

fact that Darren Murphey is a salaried Deputy Prosecuting Attorney is a relevant factor under (L) (“Any other factor which the court deems appropriate in the particular case”), and he does not have some of the operating costs and some of the overhead that an individual attorney or a member of a private law firm would have. This results in a downward departure of \$50 per hour from the reasonable hourly rate for similar work in this area of \$150 per hour. Accordingly, this Court finds a reasonable hourly rate for Darren Murphy to be \$100 per hour. At 202 hours spent on the case, defendants are entitled to reasonable attorney fees against Allied in the total amount of \$20,200.00.

**B. Allied’s Motion to Reconsider is Denied.**

Allied’s Motion to Reconsider filed February 11, 2009, did not state the applicable civil rule under which it was filed (in contravention of I.R.C.P. 7(b)(1)), and did not state on the “face of the motion” whether Allied desired to present oral argument on their motion. Thus, under I.R.C.P. 7(b)(3)(C) and (D), Allied is not entitled to oral argument.

This Court has read Allied’s Memorandum in Support of Motion to Reconsider filed February 11, 2009, read pages 3-5 of defendants’ Objection to Plaintiff’s Motion to Set Bond, Motion to Reconsider, and Motion to Continue Trial, read Allied’s Supplemental Memorandum in Support of Motion to Reconsider filed February 23, 2009, read Memorandum in Support of Motion to Reconsider filed March 23, 2009, and read Allied’s Supplemental Argument in Support of Motions to Reconsider filed April 15, 2009, and read Defendant’s Objection to Motion to Reconsider. Most importantly, this Court has re-read its “Order Granting Motion to Dismiss in Part and Denying Motion to Dismiss in Part” filed December 12, 2008. The decision to grant or deny a motion for reconsideration is committed to the Court’s discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). After considering all of Allied’s submissions, in light of

the "Order Granting Motion to Dismiss in Part and Denying Motion to Dismiss in Part", Allied's Motion to Reconsider is Denied.

**III. ORDER.**

**IT IS HEREBY ORDERED** defendants are the prevailing party and are awarded reasonable attorney fees against Allied, in the total amount of \$20,200.00. Defendant's Motion for Attorney Fees and Memorandum of Costs is GRANTED to that extent, and Allied's Motion to Disallow Costs is DENIED to that extent.

**IT IS FURTHER ORDERED** Allied's Motion to Reconsider is DENIED.

Entered this 13<sup>th</sup> day of July, 2009.

---

John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of July, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

**Lawyer**  
Arthur Bistline

**Fax #**  
676-8680

|  
**Lawyer**  
Darrin Murphey

**Fax #**  
446-1621

---

Secretary