

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

POTTS CONSTRUCTION CO. et al.,)

Plaintiffs,)

vs.)

NORTH KOOTENAI WATER DISTRICT,)

Defendants.)

Case No. **CV 2002 1750**

**MEMORANDUM DECISION AND
ORDER ON DEFENDANT'S
MEMORANDUM OF COSTS AND
FEES**

At issue is Defendant's Request for Award for attorney fees. Defendant requests attorney fees in the amount of \$6,610.00. Defendant bases its request on two theories.

First, defendant claims in its memorandum it is entitled to attorney fees under I.C. § 12-120(3). At oral argument, defendant claimed that since it is the prevailing party after the Idaho Supreme Court decision, and since the district court awarded plaintiffs attorney fees as the prevailing party under I.C. § 12-120(3) at summary judgment (which was reversed by the Idaho Supreme Court), the district court should now award defendant its attorney fees simply because the Idaho Supreme Court has changed the prevailing party.

Defendant's argument ignores that fact the Idaho Supreme Court specifically found "There was no contract between the parties that precluded enforcement of the capitalization fee ordinance." *Potts Const. Co. v. North Kootenai Water District*, 141 Idaho 678, 680-81, 116 P.3d 8, 10-11 (2005). Additionally, the Idaho Supreme Court held the adoption of ordinance 99-4 was a valid exercise of the water district's police power. 141 Idaho at 681,

116 P.3d at 11. Since the Idaho Supreme Court held there was no contract, I.C. § 12-120(3) is simply unavailable to defendant. Defendant has provided no authority to the district court to indicate that police power enforcement of its ordinance is somehow a commercial transaction under I.C. § 12-120(3).

Second, defendant claimed at oral argument that it is entitled to attorney fees under I.C. § 12-120(1) since the amount in controversy is less than \$25,000.00. Defendant did not raise this basis in its Memorandum of Costs and Fees and has never raised this basis in any written pleading prior to oral argument. Accordingly, plaintiff objected. Defendant has failed to cite any case law supporting its claim of entitlement for attorney fees under I.C. § 12-120(1). Attorney fees can be awarded to a defendant under this statute. *Loftus v. Snake River School District*, 130 Idaho 426, 429, 942 P.2d 550, 553 (1997). However, plaintiffs' pleadings are determinative in this case. Plaintiffs' Complaint requests in their prayer for relief: "1. For an award of damages in an amount in excess of \$10,000.00 to be proven in trial on Plaintiffs' Claim 2 (breach of contract)." Complaint, p. 8. Defendant's answer provided no further clarification to the amount pleaded by plaintiff. Since plaintiffs phrased its request for attorney fees this way, had plaintiff prevailed, plaintiff could not have been awarded attorney fees. *Pancoast v. Indian Cove Irrigation Dist.*, 121 Idaho 984, 985, 829 P.2d 1333, 1334 (1992); *Czerwinsky v. Lieske*, 122 Idaho 96, 99, 831 P.2d 564, 567 (Ct.App. 1992). Due to the language used by plaintiff in their Complaint, defendants cannot be awarded attorney fees under I.C. § 12-120(1).

As prevailing party, defendant is awarded its costs as a matter of right in the amount of \$47.00 for the filing for its Answer. The remaining costs requested by defendant are related to its appeal. While the Idaho Supreme Court in their opinion awarded costs to defendant as the prevailing party on appeal, Idaho Appellate Rule 40(c) is clear and

mandatory. Within 14 days of the filing and announcement of the opinion on appeal, any party claiming costs *shall* file with the Court and serve upon all adverse parties a memorandum of costs, and failure to file a memorandum of costs within the 14 days “*shall* be a waiver of the right to costs.” Defendant filed its request for these costs is fifteen and one half months too late in filed before the wrong court.

II. ORDER.

IT IS HEREBY ORDERED defendant is awarded costs in the amount of \$47.00 against plaintiffs. All other costs and attorney fees requested by defendant are **DENIED**.

Entered this 12th day of January, 2007.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2007, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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