

STATE OF IDAHO )  
County of «County» )<sup>ss</sup>

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AT \_\_\_\_\_ O'Clock \_\_\_\_\_ M  
CLERK OF DISTRICT COURT

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Deputy

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

**ROBERT L. WILHELM,**

*Plaintiff,*

vs.

**STEVEN R. FRAMPTON,**

*Defendant.*

Case No. **CV 2005 3870**

**MEMORANDUM DECISION AND  
ORDER ON ATTORNEY FEES AND  
COSTS**

**I. BACKGROUND.**

On May 20, 2005, plaintiff Robert L. Wilhelm (Wilhelm) filed a complaint against defendant Steven R. Frampton (Frampton), an attorney. According to the complaint, Wilhelm hired Frampton to represent him in pending criminal cases from May 1997 to July 1998. Complaint, p. 2, ¶ IV. For this representation, Wilhelm claims he paid Frampton \$29,000.00. Since Wilhelm felt he had been overcharged, and was unable to resolve that issue with Frampton, Wilhelm sought the assistance of the Idaho State Bar Association. In April 2004, the Idaho State Bar Association and the Idaho Supreme Court determined Wilhelm was entitled to non-binding fee arbitration under the rules of the Idaho State Bar. Complaint, p. 3, ¶¶ V, VI. On January 18, 2005, the three person Arbitration Panel issued a decision which concluded the value of Frampton's representation of Wilhelm was far less than what Wilhelm had paid, and determined that

Wilhelm was entitled to reimbursement from Frampton in the amount of \$24,609.00. Complaint, p. 4, ¶ VII. Wilhelm demanded payment of that amount from Frampton, and Frampton ignored the demand. *Id.* Wilhelm then alleged “Mr. Frampton breached his contract with Mr. Wilhelm and remains in possession of the monies that are owed to Mr. Wilhelm.” Complaint, p. 4, ¶ VIII. Wilhelm alleged the statute of limitations that would control the filing of the action for breach of contract has been tolled during the time that Mr. Wilhelm sought relief through the offices of the Idaho State Bar. Complaint, pp. 4-5, ¶ IX. In his prayer for relief, Wilhelm requested judgment “for monies owed on account of the breach of the contract.” Complaint, p. 5. On June 24, 2005, Frampton responded not with an Answer, but with a Motion to Dismiss, Motion for Attorney Fees and Costs, and Motion for Sanctions. In his Brief in Support of Motion to Dismiss, Motion for Attorney Fees and Costs, and Motion for Sanctions, Frampton argued that Wilhelm’s claims were barred by the applicable statute of limitations. Brief in Support of Motion to Dismiss, Motion for Attorney Fees and Costs, and Motion for Sanctions, pp. 7-11. On September 21, 2005, Wilhelm filed his response brief, arguing that the statute of limitations should be tolled. Brief in Response to Defendant’s Brief in Support of Motion to Dismiss, Motion for Attorney Fees and Costs, and Motion for Sanctions, pp. 5-11. Based on the case Wilhelm cited, *Antinoro v. Browner*, 478 S.E.2d 392 (Ga.App. 1996), on September 30, 2005, this Court denied Frampton’s Motion to Dismiss, Motion for Attorney’s Fees and Costs, and Motion for Sanctions. On November 18, 2005, this Court granted Frampton’s Motion for Permissive Appeal, and Frampton appealed. On April 27, 2007, the Idaho Supreme Court issued its decision in this case, reversing this Court, holding “Statutes of limitation in Idaho are not tolled by judicial construction but rather by the expressed language of the statute.” Slip Opinion, p. 4. The Supreme

Court stated in cases like this, the client must file a lawsuit, then ask the court to stay it pending the outcome of the fee arbitration. *Id.* The Remittitur was filed May 24, 2007, and on June 12, 2002, this Court entered an Order of Dismissal of this action. On June 21, 2007, Frampton timely filed his Motion for Award of Attorney Fees and Costs, and on July 3, 2007, Wilhelm timely filed his Objection to Motion for Award of Attorney Fees and Costs. Oral argument was held on August 17, 2007.

## **II. COSTS.**

Following the appeal and dismissal of this case, Frampton is now the prevailing party. Frampton has requested costs as a matter of right in the amount of \$156.00 for filing fees (Affidavit in Support of Award of Attorney Fees and Costs, p. 2), but at oral argument Frampton's counsel this should be reduced to \$61.00 as the remaining costs requested related to the appeal, which costs had already been addressed by the Idaho Supreme Court. Frampton has requested discretionary charges in the amount of \$1,206.62 (*Id.*), but similarly, his counsel at oral argument noted that the \$345.60 requested as "Record and Transcript on Appeal" had already been addressed by the Idaho Supreme Court. The remaining discretionary costs are \$810.00 for paralegal fees, \$2.00 for copy charges and \$49.02 for postage. Discretionary costs are allowed under I.R.C.P. 54(d)(1)(D), upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. The rule itself, and Idaho case law requires the Court to use its discretion and set forth its reasons granting or denying discretionary costs. As to the copy charges and postage, while those amounts were likely "necessary", neither amounts are "exceptional" in that they would be incurred in virtually any litigation. The Idaho Supreme Court has held that if such costs are "common" (*Fish v. Smith*, 131

Idaho 492, 960 P.2d 175 (1998)), or “ordinary” (*Hayden Lake Fire Prot. Dist. V. Alcorn*, 141 Idaho 307, 109 P.3d 161 (2005)), that it is proper for the district judge to deny them. This Court finds copy and postage to be items that would be “common” in this type of litigation, “ordinary” expenses in this type of litigation, and not “exceptional” under I.R.C.P. 54(d)(1)(D). As to the paralegal expenses, such expenses are similarly “common” in this type of litigation, “ordinary” expenses in this type of litigation, and not “exceptional” under I.R.C.P. 54(d)(1)(D). At oral argument, counsel for Frampton urged that any time spent by his paralegal would reduce the time spent by the attorney, thus reducing the amount of attorney fees requested on behalf of Frampton. However, that really does nothing to convince the Court that the paralegal costs are anything other than “common” or “ordinary” expenses incurred in litigation such as this.

Accordingly, costs as a matter of right in the amount of \$61.00 are awarded, and all discretionary costs requested are denied.

### **III. ATTORNEY FEES.**

Frampton requests fees based on three grounds, Idaho Code § 12-121, 12-120(1) and 12-120(3).

#### **A. IDAHO CODE § 12-121.**

In order for attorney fees to be awarded under Idaho Code § 12-121, the Court must find that the action was brought and pursued “frivolously, unreasonably or without foundation.” Frampton’s argument seems to be that since the Idaho Supreme Court only spent one paragraph discussing this Court’s reliance on *Antinoro v. Browner*, 223 Ga.App. 664, 478 S.E.2d 392 (Ga.App. 1996), when it denied Frampton’s Motion to Dismiss, Motion for Attorney’s Fees and Costs, and Motion for Sanctions, the Supreme Court must have felt Wilhelm’s citing that case to this Court was “frivolous”, and this

Court's adopting the reasoning in that case, was equally frivolous.

The facts in *Antinoro* are very similar to the facts in this case. In *Antinoro*, the Georgia Court of Appeals held:

A basic purpose of the AFD [Arbitration of Fee Disputes] program is to provide a means to encourage the resolution of fee disputes between lawyers and clients without resort to traditional litigation. In order to give effect to this purpose and encourage use of the program, we conclude that Browner's timely filing of a petition to arbitrate under the AFD program prior to the expiration of the four-year statute of limitation applicable to the civil action sought to be arbitrated tolled the statute of limitation during the pendency of the AFD proceedings. The AFD program provides for notice to respondents of the complaint and notice of and the right to attend all arbitration hearings. Thus, tolling the applicable statute of limitation during the AFD proceedings does not frustrate the fundamental purpose of the limitation period which is to ensure that an adverse party has timely notice of a claim so he can investigate the claim and prepare a defense while the facts are still fresh. See *Butler v. Glen Oak's Turf*, 196 Ga.App. 98, 99, 395 S.E.2d 277 (1990); compare *Mitcham v. Blalock*, 214 Ga.App. 29, 31, 447 S.E.2d 83 (1994).

Applying this rule, *we have no difficulty concluding that the statute of limitation was tolled* from the date the petition was filed until the award was rendered by the arbitrators in favor of Browner on September 27, 1985.

478 S.E.2d 392 at 395.223 Ga.App. 664 at 667. Simply because the Idaho Supreme Court disagreed with an on point, well reasoned decision from another state, does not make Wilhelm's claim "frivolous". Such a finding would also be contrary to this Court's earlier decision when it granted Frampton's motion for a permissive appeal, in which this Court wrote:

This Court finds there is a controlling question of law as to which there are substantial grounds for difference of opinion, and appeal from the order or decree may materially advance the orderly resolution of the litigation. This Court has considered the factors of *Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1983), and determines the balance tips in favor of defendant on the motion for permissive appeal.

Order Granting Permissive Appeal, pp. 1-2. This Court would be inconsistent in finding there was "substantial grounds for difference of opinion" in 2005, and now find at all

times Wilhelm has been “frivolous” in the prosecution of this case.

Accordingly, attorney fees under I.C. § 12-121 are denied.

**B. IDAHO CODE § 12-120(1).**

The concept that the action must have been pursued frivolously has no application to Idaho Code § 12-120(1). If I.C. § 12-120(1) applies, attorney fees are mandatory for the prevailing party. Idaho Code § 12-120(1) requires that “...in any action where the amount pleaded is twenty-five thousand dollars (\$25,000) 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.” The analysis turns then on what was “pleaded” by Wilhelm in his complaint.

Wilhelm claims “In addition, the amount of money in dispute in this case exceeds \$10,000.00.” Complaint, p. 2, ¶ III. Wilhelm references the arbitration panel issued a decision which concluded the value of Frampton’s representation of Wilhelm was far less than what Wilhelm had paid, and determined that Wilhelm was entitled to reimbursement from Frampton in the amount of \$24,609.00. Complaint, p. 4, ¶ VII. In his prayer for relief, Wilhelm prays: “for judgment in favor of the Plaintiff for monies owed on account of the breach of the contract;” and “for costs, attorney fees, and pre- and post-judgment interest as provide for by law”. Complaint, p. 5. Thus, Wilhelm did not limit himself to an amount less than \$25,000.00. In addition to the \$24,609.00 mentioned in the complaint, Wilhelm obviously seeks pre-judgment interest, which, if he were entitled to that amount, could easily exceed the \$25,000.00 limit. A fair reading of the complaint might be that he was not even limiting himself to the \$24,609.00 amount found by the arbitration panel, since that was non-binding. The Idaho Court of Appeals answered how Wilhelm could have pleaded this case in order to satisfy the

requirements of I.C. § 12-120(1), in *Czerwinsky v. Lieske*, 122 Idaho 96, 831 P.2d 564 (Ct.App. 1992), and the Idaho Supreme Court affirmed the “Czerwinsky Rule” in *Cox v. Mueller*, 125 Idaho 734, 737, 874 P.2d 545, 548 (1994). Since Idaho Code § 5-335 requires no dollar amount be pled in the complaint beyond a statement that the jurisdictional amount established for filing the action is satisfied (the claim that this case exceeded \$10,000), a claimant could separately allege that “plaintiff’s claim for damages does not exceed the limit set by I.C. § 12-120(1) and plaintiff is entitled to an award of attorney fees.” 122 Idaho at 99, 831 P.2d at 567. “We believe that such allegations would satisfy the jurisdictional pleading requirement and also afford a plaintiff—or defendant—an opportunity to recover attorney fees under I.C. § 12-120(1) without contravening I.C. § 5-335 or I.R.C.P. 9(g).” *Id.*

Since Wilhelm did not do this, this Court cannot find that Wilhelm had “pleaded an amount of twenty-five thousand (\$25,000.00) dollars or less”. Wilhelm did not make a prayer for relief for only the amount awarded in arbitration. Even if he had, he also prayed for pre-judgment interest which would have taken that amount pled to over \$25,000.00. Thus, Frampton cannot avail himself of I.C. § 12-120(1) for attorney fees.

### **C. IDAHO CODE § 12-120(3).**

Idaho Code § 12-120(3) reads:

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.

The concept that the action must have been pursued frivolously also has no application to Idaho Code § 12-120(3). Additionally, the dollar limitation of I.C. § 12-120(1) do not apply to claims for attorney fees under subsection (3). As it pertains to the present litigation, I.C. § 12-120(3) reads: “In any civil action to recover on [a]...contract relating to the purchase or sale of ...services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.”

This Court finds that attorney fees are “services”. By analogy, if medical services are covered (they are covered according to *Erickson v. Blue Cross of Idaho Health Services, Inc.*, 116 Idaho 693, 778 P.2d 815 (Ct.App. 1992)), attorney services should be covered as well. However, “[I]t is not enough that the relationship between the parties relates to the purchase of the goods or services; the action itself must be one to recover on the contract.” *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 715, 99 P.3d 1092 1105 (2004).

The tougher question is whether this is an action on the “contract”. As discussed above, Wilhelm’s complaint alleges: “Mr. Frampton breached his contract with Mr. Wilhelm and remains in possession of the monies that are owed to Mr. Wilhelm.” Complaint, p. 4, ¶ VIII. Wilhelm alleged the statute of limitations that would control the filing of the action for breach of contract has been tolled during the time that Mr. Wilhelm sought relief through the offices of the Idaho State Bar. Complaint, pp. 4-5, ¶ IX. In his prayer for relief, Wilhelm requested judgment “for monies owed on account of the breach of the contract.” Complaint, p. 5. At oral argument, counsel for Frampton argued that the Idaho Supreme Court characterized Wilhelm’s suit as a breach of contract action. The Idaho Supreme Court wrote: “On May 20, 2005, Wilhelm filed this

action seeking excessive fees allegedly charged by Frampton under a breach of contract theory.” Slip Opinion, p. 3. That is an accurate description of Wilhelm’s Complaint in this action, but this Court finds it is not a finding by the Idaho Supreme Court that Wilhelm’s complaint is an action on a “contract”, at least as defined by Idaho case law interpreting I.C. § 12-120(3).

The fact that no recovery ever occurred under Wilhelm’s alleged breach of contract is of no import. “Where a party alleges the existence of a contractual relationship of a type embraced by I.C. § 12-120(3)...that claim triggers the application of [I.C. § 12-120(3)] and a prevailing party may recover fees even though no liability under a contract was established.” *Farmers National Bank v. Mid-Century Ins. Co.*, 117 Idaho 176, 184, 786 P.2d 567, 575 (Ct.App. 1989). See also *Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 238, 31 P.3d 921, 926 (2001). The question becomes “Did Wilhelm “allege the existence of a contractual relationship of a type embraced by I.C. § 12-120(3).

Just because Wilhelm referred to his claim as a breach of contract, and the Idaho Supreme Court reiterated that claim, does not necessarily make it an action on the contract that Wilhelm had with attorney Frampton. *Yenger v. Dunnavan*, 26 Wash.2d 559, 174 P.2d 755, 757 (1946). A fair reading of Wilhelm’s complaint is that he paid Frampton \$29,000.00 to represent him in a criminal case, (Complaint, pp. 2-3 ¶ IV), Frampton performed legal work for Wilhelm, and after Wilhelm’s criminal case was completed, Wilhelm felt, as apparently did the arbitration panel, that Frampton had overcharged Wilhelm \$24,609.00, all but \$4,391.00 of the \$29,000.00 originally charged by Frampton and paid by Wilhelm. The contract was complete. Wilhelm paid the \$29,000.00, and Frampton performed the legal work, and the legal work was completed

and Wilhelm was convicted and sent to prison on June 15, 1998. Supreme Court Slip Opinion, p. 1. It was only after all these things took place, that Wilhelm in February 1999, wrote to Frampton and first requested an itemization of services Frampton rendered. Slip Opinion, p. 2. It was nearly **seven** years after his conviction and prison sentence that Wilhelm brought this action by filing his complaint on May 20, 2005. Any contract between Wilhelm and Frampton had been fully performed nearly seven years earlier. Essentially, this case is a claim for conversion or fraud by Frampton against Wilhelm for overcharging him \$24,609.00 on that contract. It is not a claim for breach of contract, as the contract was completed. An action for breach of a contract and conversion on the sale of a tractor for repairs was held to be a tort action and not a commercial transaction. *Jahnke v. Mesa Equip., Inc.*, 128 Idaho 562, 567-58, 916 P.2d 1287, 1292-93 (Ct.App. 1996). Fees were denied in an action for breach of fiduciary capacity and conversion with regard to a corporation because they were tort claims and fell outside the scope of I.C. § 12-120(3). *Property Management West, Inc. v. Hunt*, 126 Idaho 897, 900, 894 P.2d 130, 133 (1995). The action itself must be one to recover on the contract. *T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 836, 642 P.2d 70, 73 (Ct.App. 1982). In that case, while a breach of a bailment contract was alleged and the bailment proven, the underlying cause of action was grounded in negligence. *Id.* *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 682 P.2d 640 (Ct.App. 1984) is probably the most instructive to the facts of the present case. In *Chenery*, the plaintiff Chenery alleged a breach of contract against Agri-Lines for the purchase of new pump bowls, and secondarily for services. Agri-Lines argued Chenery's suit was an action to recover in tort based on the claim that Agri-Lines was negligent in repairing the pump and installing the pump bowls. The Idaho Court of Appeals adopted Agri-Lines argument.

106 Idaho at p. 689-90. The Idaho Court of Appeals then explained:

The test for determining whether the claim sounds in tort or contract was articulated by the Supreme Court of the State of Washington in *Yeager v. Dunnavan*, 26 Wash.2d 559, 174 P.2d 755, 757 (1946) as follows:

“Whether an action is in contract or in tort should be determined in the first place from the pleadings, and by an examination and consideration of the essential allegations of the complaint rather than the form adopted by the pleader, what the pleader calls it, the understanding of counsel or of the trial court, and the question must be determined by reference to the complaint as a whole, and not by particular words or allegations considered apart from the context. 1 C.J.S. 1100, Actions, § 46. We think a good test to be used in determining whether a pleading sets up a case in contract or in tort may be stated as follows. When an act complained of is a breach of specific terms of the contract, without any reference to the legal duties imposed by law upon the relationship created thereby, the action is in contract, *but where there is a contract for services which places the parties in such a relation to each other that, in attempting to perform the promised service, a duty imposed by law as a result of the contractual relationship between the parties is violated through an act which incidentally prevents the performance of the contract, then the gravamen of the action is a breach of the legal duty, and not of the contract itself, and in such case allegations of the latter are considered mere inducement, showing the relationship which furnishes the right of action for the tort, but not the basis of recovery for it, and in such cases the remedy is an action ex delicto.’*”  
*Compton v. Evans*, 200 Wash. 125, 93 P.2d 341, 344 [1939].  
[Emphasis original.]

Similar statements of the test have been announced in Idaho in *Taylor v. Herbold*, 94 Idaho 133, 483 P.2d 664 (1971) and in *Galbraith v. Vangas, Inc.*, 103 Idaho 912, 655 P.2d 119 (Ct.App.1982). See also *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433 (Utah 1983); *Tate v. Mountain States Tel. & Tel. Co.*, 647 P.2d 58 (Wyo.1982).

The Idaho Court of Appeals held Chenery’s was essentially a tort action, not an action to recover on a contract for the purchase or sale of goods, and thus, the district court erred in awarding attorney fees under I.C. § 12-120(2). 106 Idaho at 691, 682 P.2d at 644.

In this case, keeping in mind the language of *Yeager* as adopted by the Idaho

Court of Appeals in *Chenery*, this lawsuit does not arise from "a breach of specific terms of the contract" between Wilhelm and Frampton. Instead, it arises from the "legal duties imposed by law upon the relationship created thereby", ie., the duty not to overcharge a client for services, the duty to account for time spent on an hourly case, or the duty not to convert a client's funds. The "gravamen of the action is a breach of the legal duty" not to overcharge, to account for time and to not convert a client's funds, and not a breach of any specific term of the contract. Accordingly, this Court finds that attorney fees under I.C. § 12-120(3) are not appropriate in this case, as the matter does not arise out of the contract.

#### **IV. ORDER.**

**IT IS HEREBY ORDERED** that costs as a matter of right in the amount of \$61.00 is **GRANTED**, and all discretionary costs requested are **DENIED**.

**IT IS FURTHER ORDERED** that attorney fees are **DENIED**.

**DATED** this 17<sup>TH</sup> day of August, 2007.

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John T. Mitchell, District Judge

#### **CERTIFICATE OF MAILING**

I hereby certify that on the 17th day of August, 2007a true and correct copy of the foregoing has been mailed, postage prepaid, or sent by interoffice mail to:

Gary Amendola  
702 N. Fourth Street, Ste. 200  
Coeur d'Alene, ID 83814  
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Ian Smith  
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**DANIEL J. ENGLISH,**  
Clerk of the District Court

By: \_\_\_\_\_, Deputy  
Clerk