6-18-2008

Scott Beckstead Real Estate Co. v. City of Preston Respondent's Reply Brief Dckt. 34644

IN THE SUPREME COURT OF THE STATE OF IDAHO

SCOTT BECKSTEAD REAL ESTATE, COMPANY, an Idaho Corporation, and SCOTT BECKSTEAD, Individually,

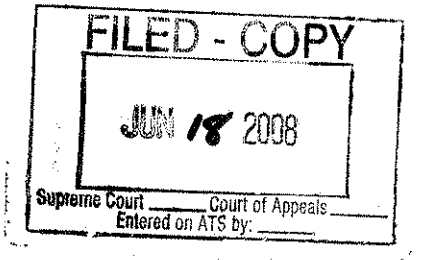
Plaintiffs/Appellants/Cross-Respondents

vs.

CITY OF PRESTON, a Municipal Corporation,

Defendant/Respondent/Cross-Appellant

SUPREME COURT NO. 34644



Reply Brief of Respondent / Cross-Appellant

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Franklin

The Honorable Don L. Harding, District Judge

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I.

THE DISTRICT COURT ERRED IN DENYING AN AWARD OF ATTORNEY FEES TO THE CITY

In its initial brief, the City addressed the fact that the City was the prevailing party in the case before the district court, and that the court erred in not awarding attorney fees to the City. In support of its position, the City cited *Eighteen Mile Ranch, L.L.C. v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 117 P.3d 130 (2005) as authority that the City was the prevailing party.

Beckstead does not dispute that the City was the prevailing party, but argues that the City is required to have claimed attorney fees and costs in its Motion for Summary Judgment in order for the court to have awarded the same. Beckstead cites the case of *Garner v. Bartschi*, 139 Idaho 430, 80 P.3d 1031 (2003) as authority for Beckstead's position that a party requesting attorney fees must assert the specific statute, rule or case authority for its claim within its pleadings. In *Garner*, Bartschi had requested attorney fees in her answer to the complaint, but had failed to cite a code section supporting her request for attorney fees either in her answer or in her memorandum of costs. While the court set forth language to the effect that the specific statute, rule, or case authority must be cited in the pleadings, it did not deny attorney fees on that basis. Instead, it found that Bartschi's supplemental petition for attorney fees had requested fees under I.C. §12-121, but that Garner had not pursued its case frivolously or unreasonably, and therefore the district court had not abused its

discretion in denying the award of attorney fees. It did not make its ruling on the basis asserted by Beckstead.

Beckstead continues to ignore or overlook the fact that the City did assert the specific statutes on which it relied for claiming attorney fees in its pleadings. The City filed an Answer to the First Amended Complaint (R. Vol.1, pp. 42-47), and an Answer to the Second Amended Complaint (R. Vol.1, pp. 81-87). In both answers, the City requested that it recover its attorney fees and costs from Beckstead pursuant to §§12-117, 12-120, and 12-121, Idaho Code.

In the City's Motion for Costs and Attorney Fees (R. Vol.2, p. 283), the City requested that it be awarded attorney fees and costs pursuant to Rule 54, I.R.C.P., Rule 68, I.R.C.P., and §§12-117, 12-120, and 12-121, Idaho Code. Thus, pursuant to the case authority cited by Beckstead, the City did adequately set forth the statutes upon which it relied. The district court specifically addressed the provisions of §§12-117 and 12-121, Idaho Code, but failed to address the request for attorney fees under §12-120. As the City was the prevailing party in the action, and as the claim filed by Beckstead was for less than $25,000.00 the court was required to award attorney fees to the City as the prevailing party.

Nevertheless, the cases cited by Beckstead have been overruled or seriously compromised by the decision in *Eighteen Mile Ranch, L.L.C. v Nord Excavating & Paving, Inc.*, supra. This case was cited by the City in its initial brief as authority to establish that it was the prevailing party. That case also addressed the question of the necessity to assert specific code sections within pleadings

upon which a party must rely for an award of attorney fees. In *Eighteen Mile Ranch*, the defendant had not asserted its claim for attorney fees in its answer or counterclaim. It first asserted the same in its memorandum of costs and attorney fees. The court, quoting Rule 54(e)(4) I.R.C.P., ruled that it is not necessary for a party to list a specific attorney fee provision in its pleadings in order to obtain a fee award when it is the prevailing party. The court stated:

> Having concluded that the Nords and the Company were prevailing parties, we must now decide whether they adequately supported their request for fees. It is well established that "[a] party claiming attorney's fees must assert the specific statute, rule, or case authority for its claim." *MDS Invs., Inc. v. State*, 138 Idaho 456, 465, 65 P.3d 197, 206 (2003). *See also Bream v. Benscoter*, 139 Idaho 364, 79 P.3d 723 (2003). The Shelbys contend that the Nords failed to cite a rule, statute, or other authority in support of their request for fees. The Shelbys are wrong. In their initial and subsequent fee requests the Nords and the Company cited I.C. §§ 12-120, and requested fees "as a matter of costs because this was a commercial transaction as defined by Idaho Code §§ 12-120." We see nothing defective in this fee request. While it does not specifically refer to subsection (3) of I.C. §§ 12-120, it adequately identifies the ground under which fees are sought.
>
> The Shelbys contend that a prevailing party may not be awarded attorney fees unless it has stated in its pleadings the specific code section upon which it will rely for a fee award. Such a contention does find some support in the case law. For example, in *Jenkins v. Donaldson*, 91 Idaho 711, 715, 429 P.2d 841, 845 (1967), fees were denied for failure to request the same in a pleading. However, this result is at odds with Idaho R. Civ. P. 54(e)(4) which states, "It shall not be necessary for any party in a civil action to assert a claim for attorney fees in any pleading . . . ." The proviso following this language is worded somewhat awkwardly but it appears the proviso is intended to set out a different requirement for judgments by default - that the fee statute (other than section 12-121) or contract provision

> and amount of any fee award sought be specifically stated in the prayer of the complaint as a precondition to obtaining fees in a judgment by default. Rule 54(e)(4) did not exist at the time *Jenkins* was decided. It did not become effective until March 1, 1979. By virtue of the adoption of Rule 54(e)(4), the *Jenkins* holding has been superseded and has no further validity. Thus, a party need not have listed a specific attorney fee provision in its pleading in order to obtain a fee award under that provision upon prevailing in the litigation. While it is obviously the better practice to specify the fee request in the pleading, both to preserve a claim for fees in the event of a default and to put the opposing party on notice of the fee claim, failure to do so is not fatal to a fee claim in a contested matter. And, of course, a party must specify, in its Idaho R. Civ. P. 54(e)(5) fee request, the code section or contract provision pursuant to which it makes the fee request. Here, the Nords and Nord Excavating did so in their initial memorandum of costs and attorney fees, citing the commercial transaction ground, which is set forth in subsection (3) of I.C. §§ 12-120. They are not prevented from seeking an award just because their answer or counterclaim did not specifically designate this provision. 141 Idaho 720-721

Beckstead also ignores the case of *Fritts v. Liddle & Moeller Const., Inc.*, 144 Idaho 171, 158 P.3d 947 (2007). In their answer, the defendants had requested an award of attorney fees citing §12-120 I.C., Plaintiff argued that was insufficient. The court ruled:

> While our previous decisions have required prevailing parties to state in pleadings the specific code section on which they rely for their fee award, we have since found such a requirement "at odds with Idaho R. Civ. P. 54(e)(4) which states, 'It shall not be necessary for any party in a civil action to assert a claim for attorney fees in any pleading....' " 141 Idaho at 720, 117 P.3d at 134; I. R.C. P. 54(e)(4). *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 117 P.3d 130 (2005). In *Eighteen Mile Ranch,* the Court acknowledged that a party must claim attorney fees, but emphasized that "a party need not have listed a specific attorney fee provision in its pleading in order to obtain a fee award under that provision upon

> prevailing in the litigation." *Id.* at 721, 117 P.3d at 135. Here, both parties alleged the applicability of I.C. §§ 12-120, and the district court concluded this was a commercial transaction for which fees should be awarded. Further, the district court determined that Liddle & Moeller prevailed in the action. The parties adequately raised the issue of attorney fees awardable under I.C. §12-120. 144 Idaho 951 (emphasis added)

These cases were addressed before the district court in the City's Memorandum in Support Of Motion for Attorney fees (R. Vol.2, pp. 318-319). Beckstead raised the same arguments before the district court. However, Beckstead fails to direct the Court's attention to these cases or to distinguish the same.

The City was the prevailing party. The City specifically listed the statutes and rules upon which it was relying for award of attorney fees and costs, not only in its answer, but in its Motion for such fees. Rule 54(e)(4) I.R.C.P. specifically states that it is not necessary for a party in a civil action to assert a claim for attorney fees in any pleading. The City should be awarded its attorney fees in this action.

II.

BECKSTEAD'S STATEMENT OF ADDITIONAL FACTS IS ERRONEOUS

1. Beckstead argues that the Franklin County Fire District did not require the installation of the waterline. As set forth in the Statement of Facts of the City's initial brief, the requirement to construct a six-inch line was imposed by the Franklin County Fire District as

Beckstead would not have had sufficient fire flow for his subdivision had a new waterline not been constructed. Thus, he would not have been permitted by the fire district or the City to construct his subdivision. The same is fully explained in Paragraphs 2 and 3 of the Second Affidavit of Darrell Wilburn, City Engineer, (R. Vol. 2, p. 233) as follows:

> 2. As represented in Paragraph 2 of Mr. Beckstead's Affidavit, I did meet with him prior to his development of the proposed subdivision. It is true that I advised him that he would need to connect to a 6-inch waterline. The same is required by the Subdivision Ordinance of the City. At the time the fire flow test was conducted, I was unaware that the 6-inch line to which Mr. Beckstead would have connected was in turn connected to a 4-inch line. The restriction in the 4-inch line would have created inadequate fire flow to the interior of Mr. Beckstead's subdivision.
>
> 3. Scott Marshall, who is Fire Marshall for Franklin County Fire District, and was at the time in question, advised me that even if Mr. Beckstead could obtain a fire flow at the beginning of the subdivision, that he was of the opinion that it would be an inadequate fire flow for the interior of the subdivision and that he would not approve the connection unless the line were 6-inch for the entire distance. For that reason, Mr. Beckstead was required to put in a 6-inch waterline.

While Mr. Wilburn may have been of the opinion that there was sufficient fire flow at the initial planning stage of the subdivision, the fire district disapproved the same, and required Mr. Beckstead to construct the waterline if he wished to build his subdivision.

2. Beckstead argues the pipeline was constructed on 800 East Street as it would enhance the City's ability to "loop" its pipeline system. Looping of the system was not a consideration given by the City as to the location of the line, and the line was not placed at that location for that reason.

Instead, Beckstead was given the option to place the line on two different streets. He could have installed the line on Oneida Street or 800 East Street. He chose 800 East Street although that involved an additional 700 feet of line to be constructed. Beckstead chose this route, as it is believed he thought that the construction of the line would be easier along that street although it required more pipe. (¶4, Affidavit of Darrell Wilburn, R. Vol. 2, pp. 201-202; ¶4-5, Second Affidavit of Darrell Wilburn, R. Vol. 2, p. 234)

3. Beckstead represents that the City had all information concerning the cost of the pipe by November 12, 2003. That statement is misleading and incorrect. Beckstead further claims that the exhibit to Beckstead's Third Affidavit, which is the same as Exhibit A to the Affidavit of Darrell Wilburn (R. Vol. 2, p. 204) was signed by Beckstead. That too is incorrect. From a review of that exhibit, it can easily be seen that the calculations were prepared by Mr. Wilburn with the assistance of Scott Martin. The summary of figures compiled by Darrell Wilburn showed the quantity of the subdivider's pipe and the City's supplied pipe totaling 1,700 feet. The engineer then computed the six-inch unit costs, the twelve-inch unit costs, the total of the six-inch costs, and the total of the twelve-inch costs. The difference between the two costs was $7,461.00, which was the additional amount required to be reimbursed to Beckstead for enlargement of the waterline from six-inch to twelve-inch. Following computation of that figure, Mr. Wilburn circled the sum of $7,461.00, drew an arrow, and printed the words "To Scott Beckstead". Thereafter, Darrell Wilburn and Scott Martin signed the same and dated the document. The waterline costs were estimated by Wilburn based upon

his knowledge of the costs for pipeline in the Preston area. Beckstead submitted no information to the City for the pipeline or additional costs or invoices for materials or labor he furnished for the pipeline. (¶8, Affidavit of Darrell Wilburn, R. Vol. 2, p. 202; ¶6, 7, 8, 9 Affidavit of Jerry Larsen, R. Vol. 1, p.175)

It was not until July 31, 2006, when Beckstead submitted a Notice of Claim with the City that he made the City aware of his labor and material costs of $10,603.00. This is the same amount that Beckstead included in his First Amended Complaint, which figure was changed to $13,153.64 in his Second Amended Complaint.

Beckstead was fully aware of all of the amounts he had expended for installation, materials and labor by November, 2003. Yet, he did not submit any of this information to the City until he responded to the City's discovery request in 2007 after suit had been filed. (¶5 and Ex. C, Affidavit of Clyde G. Nelson, R. Vol. 2, pp. 207-215)

III.

APPLICATION OF ORDINANCE NO 16.28.030B

1. Beckstead argues that the City contends that Ordinance No. 16.28.030B does not apply to off-site improvements made by Beckstead. The City also argues that if Beckstead's improvements are subject to this ordinance, Beckstead failed to take the preliminary steps required to invoke the same. Logically, Beckstead must exercise his discretion to invoke the ordinance and

alert the City to the fact the he wanted reimbursement for the pipeline prior to his construction of the line. The City could then call for bids to obtain the lowest responsible bid for construction of these improvements. If Beckstead followed the requirements of the ordinance, and the City called for bids, it is possible that the City could have obtained construction of this waterline at a cost less than what Beckstead is requesting. After the engineer had verified the costs for this line, Beckstead would have paid the bid price to the City, and the City would have had the line constructed by the successful bidder. Beckstead's money paid to the City would have been used to pay the contractor. Of course, Beckstead had the discretion not to invoke the ordinance, and could instead construct the line himself, which he did in fact do. Beckstead was fully aware of the ordinance prior to construction. Yet, he chose not to notify the City that he wanted reimbursement to invoke the ordinance, or to allow the City the opportunity to take steps to insure that the procedural requirements could be followed.

2. Beckstead argues that there is no language within the ordinance which requires the engineer to determine which intervening properties will be benefitted. The ordinance specifically states "Engineering drawings showing benefitted property shall be prepared by the city engineer....". As the ordinance requires the engineer to prepare drawings showing the benefited properties, it is only logical that he would also determine the extent to which the property is benefitted, and the amount that that property would be required to reimburse Beckstead in the event that it connected to the waterline.

3. Beckstead further argues that there is no requirement of an agreement under the ordinance. The ordinance specifically states there will be an agreement for reimbursement, and that reimbursement will extend for a period of five years from the initial date of the agreement. There was no agreement between the City and Beckstead as Beckstead, oral or written. If Beckstead had invoked the ordinance, compelling the City to call for bids, and paid his money to the City, an agreement would have been prepared. The agreement would establish the commencement and termination dates of the contract, the amount of construction costs, the amount to be reimbursed, the properties liable for reimbursement and the amount each benefitted property would pay. The initial date of the agreement referred to in the ordinance, may have been the date that construction was completed, or it could have been a later date as agreed to between the parties. Beckstead further asserts that "there should be no necessity for the parties to agree as to what was already in the ordinance." The amount of the construction costs, the properties benefitted, the amount they would be benefitted, the prorata share to be paid by each of the benefitted properties, and the term are not set forth in the ordinance. It had to be determined by an agreement between the parties. As there was no agreement, the City cannot be held responsible for Beckstead's costs.

4. Beckstead further argues that the City had no right to impose a "surcharge" against intervening properties for repayment of Beckstead had Beckstead chosen to invoke the ordinance. Pursuant to §50-301, Idaho Code, cities may "...exercise all powers and perform all functions of local self government in city affairs as are not specifically prohibited by or in conflict with the general

laws or the constitution of the state of Idaho." If Beckstead had invoked the ordinance, the City would have prepared an ordinance which would have charged intervening benefitted property owners who connected to this line an additional sum as determined by the city engineer for reimbursement. These fees would be in addition to the fees charged by the City for connections made by the City to its waterlines. As Beckstead failed to invoke the ordinance, and as Beckstead failed to make the City aware of his request for any reimbursement until after all of the intervening property owners had paid and connected to the line, the City was unable to enact an ordinance which would have increased the rates for those intervening property owners in order to reimburse Beckstead. It cannot now go back in time and try to assess these property owners for those fees.

IV.

UNJUST ENRICHMENT OF BECKSTEAD

Beckstead argues that the City has been unjustly enriched as a waterline was constructed for which it did not have to pay, and that payment of City connection fees to the City by intervening property owners constitutes a windfall to the City. The City addressed this question in Section II of its initial brief including Beckstead's failure to raise the issue of unjust enrichment in his letter of October 22, 2004, or his Notice of Claim on July 31, 2006. As previously noted, Beckstead could not have constructed his subdivision without adequate fire flow. He could not receive approval of his subdivision without approval by the Franklin County Fire District. Thus, no subdivision could have been constructed. The line was constructed by Beckstead for his benefit, not the City's.

The fees paid by the five intervening property owners reimburse the City for its costs. The cost of a connection in 2004 was $2,618.07. By City ordinance, the City could only charge $2,500.00. (¶9, Affidavit of Darrell Wilburn, R. Vol. 2, p. 202) There is no "windfall" to the City, as the fees paid by the five connections were to reimburse the City for its costs and did not exceed those costs.

What Beckstead has continually chosen to ignore is the benefit he received through construction of the pipeline. Beckstead had 22 lots within his subdivision. Beckstead sold all of the lots within the subdivision. He made a profit from the sale of the lots after taking into account all expenses and costs associated with the development of the subdivision, including the cost of installing the pipeline on 800 East Street. (¶3, 4, and Exhibits A and B, Affidavit of Clyde G. Nelson, R. Vol. 2, p. 207-215). In addition to making a profit on the sale of his lots, Beckstead now wishes to be reimbursed the full amount for construction of the pipeline although he received most of the benefit of that construction. There have been twenty-seven lots connected to the waterline including the twenty-two owned by Beckstead. There has been $12,500.00 (5 x $2,500) received by the City in fees from property owners connecting to the line for City connection fees. The number of Beckstead's lots benefitted constitutes 81.5% of the total lots so benefitted. The five year period is nearly at an end, and it is unlikely that there will be any other connections to the line. The total amount that Beckstead could possibly recover is the $12,500.00 paid by the intervening connections. However, this would result in unjust enrichment for Beckstead and a windfall to him. Using

Beckstead's argument that the ordinance calls for "benefitted properties" to pay reimbursement, the maximum amount that he could recover is the remaining 18.5% of costs not attributable to his own lots. 18.5% of the amount paid by the intervening property owners is $2,312.50. Beckstead's argument that he is entitled to all of the connection fees paid would result in a windfall to him of a sum in excess of $10,000.00.

Beckstead cites the case of *Stephens v. City of Notus*, 101 Idaho 101, 609 P.2d 168 (1980) as authority for his position. However, in that case, the Supreme Court held there was sufficient evidence that the city and the subdivision developer entered into an oral agreement whereby the city would waive sewer and water hookup charges if the developer would install water and sewer systems at his own expense, and that the city had benefitted from such an agreement thereby entitling the developer to recover the fees charged by the city on the grounds of unjust enrichment. The Court also indicated that the City of Notus would have had a duty to construct these improvements itself. There is no similarity between the *Stephens* case and this case. Here, there was no agreement between Beckstead and the City. Furthermore, there was no duty for the City to construct the line on behalf of Beckstead had he not constructed the same. Where the Court found in the *Stephens* case that the City of Notus had a duty to construct the line for the subdivider, and had agreed with him to waive all fees, it would be unjust enrichment for that city to have not been required to waive those fees.

V.

NOTICE OF CLAIM WAS NOT TIMELY FILED

Beckstead argues that the construction project was not completed "until all water connections were in place and the entire five years had elapsed.", and that damages could not be ascertained until the connections had been made and the five year period under the ordinance had expired. (Reply Brief of Appellant, pp. 11, 12), He then contradicts these statements by arguing that his "claim did not become "ripe" for purposes of the notice statute until his claim was denied" and that "his claim arose when connections were made to the pipeline and the City denied his right to reimbursement." (Reply Brief of Appellant, pp.13-14) This matter was addressed in Section III of the City's initial brief.

The City agrees that Beckstead's claim arose either upon completion of construction or when the City denied his request for a meeting to discuss reimbursement. He failed to timely file a Notice of Claim following each of these incidents.

Regardless of Beckstead's attempts to sidestep the cases of *Farber v. State of Idaho*, 102 Idaho 398 630 P. 2d 685 (1981) and *C&G, Inc. v. Canyon Highway District No. 4*, 139 Idaho 140, 75 P.3rd 194 (2003), the fact is that the Court ruled that the date of completion of construction was the date which triggered the notice requirement of §6-906, Beckstead completed the construction of his waterline in October, 2003, was aware of all of his costs, and was required to file a notice of claim within 180 days. This would have alerted the City that Beckstead expected reimbursement

which would have been acted upon by the City either denying Beckstead his reimbursement for theses expenses, or advising him that it would cause the expenses to be repaid when connections were made. Instead, Beckstead waited until he became aware that the connections were made to file a letter with the City requesting a meeting with the City to discuss reimbursement. That letter followed the dates of payment of the connection fees and construction of the connections by the City. If the City had been notified of Beckstead's desire to be reimbursed for the improvements in 2003, and if it had not taken exception to reimbursement, it would have had the opportunity to collect fees from intervening property owners in addition to the City's connection fee which could have been used to reimburse Beckstead. By waiting until connections had been made, Beckstead denied the City the right to collect additional fees from intervening property owners. All connections which have been made to Beckstead's line, were made prior to his letter to the City of October 22, 2004. If the request for reimbursement had been made in 2003, and the City had rejected the same, Beckstead would have had the right to file an action for declaratory judgment (which he finally did in his Second Amended Complaint filed on May 15, 2007. (R. Vol 1. p. 64) asking the court to determine if he was entitled to such fees pursuant to the ordinance. If the court had ruled in Beckstead's favor, the City would have had the opportunity to enact an ordinance requiring intervening property owners to pay additional sums. It should not be the obligation of the City to pay Beckstead's bill. The obligation should be that of the intervening property owners, and the same could have been collected if Beckstead had timely notified the City.

VI.

LETTER OF OCTOBER 22, 2004 WAS INSUFFICIENT TO CONSTITUTE A NOTICE OF CLAIM

Beckstead argues that the letter of October 22, 2004, was adequate to give the City notice of his claim. This argument has been addressed in Section IV of the City's initial brief. §6-907, Idaho Code, sets forth the requirements of a claim, and what the claim must contain. The claim must describe the project which brought about the "injury or damage". In other words, it must describe the project with some detail. It must state the time and place that Beckstead's claim for labor and material costs occurred. It must provide the name of all persons involved, which would include his subcontractors for which he requested reimbursement. Last, but not least, it must contain the amount which he is claiming and make demand on the City for payment. Beckstead's letter of October 22, 2004, was merely a request to meet with the City to discuss reimbursement for the 8th Street project. It did not describe the work performed by Beckstead or his subcontractors which brought about his request for reimbursement, it did not describe what the reimbursement would be for, did not state the time or place that these damages allegedly occurred, did not state the amount that Beckstead was claiming, and did not make demand on the City for payment. It does not constitute a claim under that section.

Beckstead takes issue with the cases cited by the City in support of its position. These cases were cited to show that the court has ruled on numerous occasions that the omission of one or more of the elements of a claim as required by §6-907 renders the claim insufficient. The cases stand for

the proposition that the omission of the amount of damages, the omission of the names and addresses of parties to the claim, the omission of a formal claim, the omission of the conduct and circumstances which brought about the injury or damages, all rendered the claims invalid under §6-907, and the claims were subsequently barred as not being timely filed.

Beckstead claims that he learned of additional connections being made to the pipeline he installed in 2006, and thus filed the "second Notice of Claim" with the City to avoid the argument that no notice of claim had been made for additional connections. (Appellant's Reply Brief, p.16) That allegation and claim is patently incorrect. As repeatedly pointed out by the City in its initial brief, and in this reply brief, there have been only five connections made to the line since Beckstead constructed the same, other than Beckstead's own lots. All of these connections were paid for and the connections made in 2004. Beckstead could not have learned of additional connections being made to the pipeline in 2006 as no such connections were made after his letter of October 22, 2004. The notice of claim filed by Mr. Fuller on behalf of his client on July 31, 2006, was not intended to cover additional connections being made in that year. Instead, it was intended to rectify what Beckstead's counsel realized was a lack of claim being filed or a defective notice of claim being filed on October 22, 2004. Beckstead attempted to request a second meeting with the City to discuss reimbursement, through Mr. Fuller's letter of April 11, 2006. (R. Vol. 1 pp. 71-74) When that request was denied on May 24, 2006, (R. Vol. 1, p. 190), Beckstead's counsel then filed his Notice of Claim on July 31, 2006 (R. Vol. 1, pp. 191-192)

If the wrongful act of failure to pay Beckstead did not occur in 2003 when the construction project was completed, then most assuredly it was in November 2004, when the City refused to meet with Beckstead to discuss reimbursement. This necessitated a formal notice of claim being filed with the City meeting the requirements of §6-907, Idaho Code. That notice of claim was not filed for a period of approximately 21 months thereafter.

CONCLUSION

The City is entitled to an award of its attorney fees. While the Court has held that parties to an action are not required to assert the authority on which they rely in their pleadings for such an award, the City did so in its Answer and again in its Motion for Costs and Attorney Fees. The City was the prevailing party, and pursuant to §12-120, 12-117, and 12-121, Idaho Code, should be awarded its attorney fees.

Beckstead was aware of the ordinance prior to his construction. Nevertheless, he failed to exercise his discretion to invoke the ordinance thereby denying the City the opportunity to obtain the lowest costs through competitive bidding, denying it the opportunity to determine the properties that could be benefitted and the amount of the benefit for each property, and denying it the opportunity to enact an ordinance requiring intervening property owners to pay an additional sum upon connection for reimbursement to Beckstead. His failure to exercise this discretion, prevented the City from preparing an agreement, as required by the ordinance, to include the terms and conditions

for reimbursement. Instead, Beckstead waited one year, and after the only connections to the line had been made, to request a meeting with the City to discuss reimbursement. No claim, as envisioned by Chapter 9, Title 6, Idaho Code was filed until July, 2006.

Beckstead wishes to be paid all of the money derived by the City from its connection fees as reimbursement but fails to account for the benefit he realized from the construction for his twenty-two lots. Payment of the entire sum to Beckstead would constitute a windfall to him and result in his unjust enrichment. The district court's decision should be affirmed.

Respectfully submitted this 17 day of June, 2008.

Clyde G. Nelson
Attorney for Respondent / Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF RESPONDENT / CROSS-APPELLANT was served on the 17 day of June, 2008.

On:	By:
Steven R. Fuller Attorney at Law P.O. Box 191 Preston, Idaho 83263	U.S. Mail, Postage Prepaid