

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE VERIFIED)
PETITION FOR WRIT OF MANDAMUS.)

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COEUR D'ALENE TRIBE,)

Petitioner,)

v.)

LAWRENCE DENNEY, Secretary of State of)
the State of Idaho, in his official capacity,)

Respondent.)

ORDER ON ATTORNEYS FEES
AND COSTS

Supreme Court Docket No. 43169-
2015

Ref. No. 15-431

On September 28, 2015, the Coeur d'Alene Tribe (Tribe) filed documents seeking an award of \$94,736.00 in attorney fees. On October 7, 2015, the Secretary of State filed an objection, stating that the Tribe's filing was untimely under Idaho Appellate Rule 40 and that the amount of fees should be reduced to \$57,173.85. In response to the assertion that the filing was untimely, the Tribe argues that Rule 40 by its terms does not apply because that rule only applies to appeals and this is an original action not an appeal. It also argues that Idaho Appellate Rule 5, which addresses special writs and proceedings, does not refer to Rule 40, nor does it specify any time frame for filing a memorandum of costs.

Idaho Appellate Rule 41 states, "If the Court determines that a party is entitled to attorney fees *on appeal*, the party claiming attorney fees shall file a claim concurrently with, or as part of, the memorandum of costs provided for by Rule 40." (Emphasis added.) Idaho Appellate Rule 40(c) states that the memorandum of costs must be filed "[w]ithin 14 days of the filing and announcement of the opinion *on appeal*" (Emphasis added.) The Tribe correctly points out that the Court's decision issued in this case was not a decision *on appeal*. A mandamus action filed in this Court is based upon this Court's original jurisdiction, not its appellate jurisdiction. Idaho Const. art. V. § 9. As a result, Rules 40 and 41 do not expressly apply with respect to the time frame for filing a memorandum of costs.

The Secretary of State contends that the fourteen-day time limit should apply pursuant to Idaho Appellate Rule 48, which states, "In cases where no provision is made by statute or by these rules, proceedings in the Supreme Court shall be in accordance with the practice usually followed in such or similar cases, or as may be prescribed by the Court or a Justice thereof." The Secretary of State argues that the practice usually followed in similar cases is a fourteen-day time limit for filing a memorandum of costs.

Because the Tribe's request for a writ of mandamus was a civil action based upon this Court's original jurisdiction, *Chastain's, Inc. v. State Tax Commission*, 72 Idaho 344, 350, 241 P.2d 167, 170 (1952), the most similar type of case would be a civil action pursuant to the Idaho Rules of Civil Procedure. In such actions, the memorandum of costs "may not be filed later than fourteen (14) days after entry of judgment." I.R.C.P. 54(d)(5). However, a judgment as that term is used in Rule 54(d)(5) must be a document that is separate from any written decision upon which it was based. I.R.C.P. 54(a). This Court issued its opinion regarding the Tribe's request for a writ of mandate, but this Court did not ultimately issue a separate document constituting a peremptory writ of mandate, which would be necessary for there to be a judgment as that term is used in Rule 54(d)(5). Thus, if we applied Rule 54(d)(5), the time for filing a memorandum of costs would not yet have begun to run.

This Court has never previously ruled when a memorandum of costs must be filed after the issuance of a peremptory writ, nor have we previously held that Rule 40 applies to a peremptory writ. Because of the ambiguity in the appellate rules regarding that issue, it would not comport with substantial justice to hold that Rule 40 applies and that the Tribe's memorandum of costs is untimely for failing to anticipate that we would so hold. Therefore, we will not do so. The Tribe should not be procedurally denied relief because of the ambiguity of our appellate rules.

The next issue is the amount of attorney fees to award. After considering the arguments of the parties, we are persuaded that a reasonable attorney fee is \$57,173.85 as argued by the Secretary of State. The costs awardable are \$232.95.

Therefore, it is hereby ordered that the Tribe is awarded attorney fees in the sum of \$57,173.85 and costs in the sum of \$232.95, for a total of \$57,406.80.

Justice W. JONES, concurring in the Order and dissenting as to the amount, only:

I agree that the Coeur d'Alene Tribe is entitled to attorney fees in this case for the reasons decided by the majority in the Order on Attorney Fees and Costs because there are no specific time limits for filing a claim for attorney fees in original jurisdictional matters before this Court. I dissent, however, from the amount of \$57,173.85 awarded by the majority for attorney fees. The rule of this Court regarding the award of attorney fees specifies that only "reasonable" attorney fees may be awarded. Rule 54(e)(3) of Idaho Rules of Civil Procedure lists the particular factors the Court should consider in determining the amount of reasonable fees:

- (A) The time and labor required.
- (B) The novelty and difficulty of the questions.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- (D) The prevailing charges for like work.
- (E) Whether a fee is fixed or contingent.
- (F) The time limitations imposed by the client or the circumstances of the case.
- (G) The amount involved and the results obtained.
- (H) The undesirability of the case.
- (I) The nature and length of the professional relationship with the client.
- (J) Awards in similar cases.
- (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- (L) Any other factor which the court deems appropriate in the particular case.

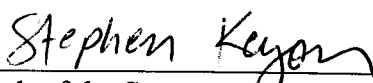
Having considered these factors, this Court need not blindly accept the amount claimed by the attorney, but rather must consider the reasonableness of the claim. *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct. App. 1985). The question of what constitute "reasonable" attorney fees involves the discretionary determination of the Court, and this Court should disallow fees that are unnecessary or unreasonably incurred. *Daisy Mfg. Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 260, 999 P.2d 914, 915 (Ct. App. 2000); *Hoopes v. Hoopes*, 124 Idaho 518, 524, 861 P.2d 88, 94 (Ct. App. 1993).

In the present case, the Tribe claimed attorney fees in the amount of \$94,736. Although the majority only allowed \$57,173.85, I nevertheless consider that amount grossly

unreasonable. This case did not involve a trial but rather only briefing and an hour of oral argument before this Court. More importantly, this case involved only one issue: whether SB 1011 was timely vetoed by Governor Otter. The Idaho Constitution specifically provides that a legislative bill must be returned to the legislature as vetoed within five days (not counting holidays and Sundays) while the legislature is in session. Perhaps I understate the issue when I assert that anybody with five fingers and a calendar can determine whether a veto is timely returned; it is not, however, understated by much. It is inconceivable to me how anybody could expend almost \$100,000 briefing and arguing that issue. I would extend my limits of "reasonableness" to a maximum of attorney fees of \$25,000.

DATED this 2nd day of December, 2015.

By Order of the Supreme Court



Clerk of the Supreme Court
STATE OF IDAHO

cc: Counsel of Record