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

KOOTENAI ELECTRIC COOPERATIVE, INC., an Idaho corporation d/b/a Cooperative marketing association,	)	**CASE NO. CV-02-08891**
Plaintiff,	)	**MEMORANDUM OPINION AND ORDER IN RE: SUMMARY JUDGMENT**
vs.	)	
THE LAMAR CORPORATION; THE LAMAR COMPANY, L.L.C., a limited Liability company d/b/a/ the successor in Interest to The Lamar Corporation,	)	
Defendant.	)	

Plaintiff KEC seeks indemnification of the amount it owes pursuant to a judgment in a personal injury case based upon the Idaho High Voltage Act. The parties filed cross-motions for Summary Judgment.

Andrew C. Bohrnsen, LAW OFFICE OF BOHRNSEN & STOWE, P.S., attorneys for Plaintiff.

Everett B. Coulter, Jr. and Patrick M. Risken, EVANS, CRAVEN & LACKIE, P.S., attorneys for Defendant.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Facts

The Lamar Company ("Lamar") is in the billboard business. Lamar is a Florida corporation that has offices and/or equipment locations in or near Spokane, Washington.

In May of 1998, Lamar purchased another billboard company. As part of the purchase, Lamar acquired a billboard located in Athol, Idaho. At the time of the incident involved herein, Lamar owned the Athol billboard and the necessary components for the billboard, including non-conductive rods to be used for replacing metal rods. Lamar contracted with the Coeur d'Alene Indian Tribe to put advertising on the Athol billboard, which was located on leased property.

Between February and June of 1998, Kootenai Electric Cooperative, Inc. ("KEC") redesigned and reconstructed the Bayview/Chilco power line. In doing so, KEC placed the new power line closer to the Athol billboard. The new power line was within ten (10) feet of the billboard.

James J. ("Jeff") Kuntz was a self-employed contractor from 1993 until November of 1998. On May 11, 1998, he signed an Independent Contractor Agreement with Lamar. This Agreement required Kuntz to comply with safety laws and adopt a safety program. Kuntz's job was to install advertising on the Athol billboard and to replace the metal rods with non-conductive rods.

On November 22, 1998, Kuntz went to work on the Athol billboard. Before going to the billboard, he went to the Lamar office in Spokane to get non-conductive

rods. The supply was inadequate so Kuntz re-used the metal rods on the Athol billboard. He ended up using a ten (10) foot steel rod.

KEC did not receive notice from either Kuntz or Lamar that work would be conducted on the Athol billboard near its conductor. If KEC had received notice, it had policies in place to put "cover-ups" on the high voltage lines.

Kuntz was severely injured while using the billboard's catwalk when the metal rod he was inserting into the vinyl sign came into contact with the high voltage power line that was approximately eight (8) feet away from the billboard.[1] Kuntz was not attached to the billboard and he fell forty (40) feet. He lost both arms and almost all of his right thigh muscle as a result of the electrocution and fall.

B. Lawsuit in the Federal Court

In 2000, Kuntz filed a lawsuit against Lamar and KEC in the United States District Court for the Eastern District of Washington. ***See James J. Kuntz, et al v. The Lamar Corporation and Kootenai Electric Cooperative, Inc.***, United States District Court for the Eastern District of Washington, Case No. CS-00-415-RHW.

In response to the Complaint, KEC filed its Answer. As both an affirmative defense and as a cross-claim, KEC asserted that Lamar and Kuntz had violated the terms of the High Voltage Act ("HVA") and that such violation was a proximate cause of Kuntz's injuries. In the Answer, KEC prayed for "an apportionment of fault between all parties to this litigation."

Before trial, KEC moved for Partial Summary Judgment. In a written opinion, the Honorable Robert H. Whaley, District Judge, held that Idaho law should apply to the

[1] It is unknown whether the metal rod actually came into physical contact with the high voltage line or whether an electrical arc was formed from the high voltage line to the metal rod.

facts of the case and that Idaho's High Voltage Act[2] would apply. Furthermore, the 1992 version of the Idaho HVA applied rather than the amended 2000 version.

Judge Whaley also ruled that Kuntz was a subcontractor, the Idaho HVA applied to subcontractors as being among the class of persons required to provide notice under the statute, Kuntz violated the statute by failing to give notice to KEC, and Kuntz was negligent because the lack of notice to KEC was the proximate cause of his injuries. Summary Judgment was granted to KEC as against both Kuntz and Lamar because they were negligent as a matter of law.

Kuntz moved for Partial Summary Judgment against Lamar on grounds that Lamar violated the Idaho HVA and such violation constituted negligence per se. Judge Whaley granted Summary Judgment to Kuntz on this issue.

The case proceeded to trial before a nine (9) person jury. On a Special Verdict Form,[3] the jury apportioned the negligence as follows:

Kuntz	12%
Lamar	38%
KEC	50%

The jury awarded total damages to Jeff Kuntz in the amount of $18,306,504, to Jennifer Kuntz, Jeff's wife, in the amount of $1,000,000, and to each of Jeff's five (5) children in the amount of $125,000. Thus, the amount assessed against KEC was $9,965,752.

On a post-judgment motion, Judge Whaley refused to decide whether KEC was entitled to indemnification by Lamar under the Idaho HVA. On or about October 29,

[2] Idaho's Act is titled as "ACTIVITIES IN PROXIMITY TO HIGH VOLTAGE OVERHEAD LINES" and is found in Chapter 55 of Title 24 of the Idaho Code. It is referred to here as the "Idaho HVA."

[3] The Special Verdict Form contained several questions. Question No. 4 was "Did the Defendant Kootenai Electric fail to exercise the highest degree of care and diligence?" to which the Jury answered "Yes." Question No. 5 was "Was Defendant Kootenai Electric's failure to exercise the highest degree of care and diligence a proximate cause of the accident?" to which the Jury answered "Yes." Question No. 6 was "Did Kootenai Electric engage in reckless misconduct?" to which the Answer was "Yes."

2002, the Judgment was filed. That case has now been appealed to the Court of Appeals for the Ninth Circuit.

C. This Lawsuit

On January 13, 2001, KEC filed the instant case. KEC alleges that it is entitled to indemnification under the Idaho HVA statutes because judgment has been entered against it for injuries to a "third person." KEC also seeks judgment for its costs and expenses, which are in the amount of $300,672.78, plus costs and expenses incurred during the trial in the underlying federal case.

Lamar filed an Answer and Affirmative Defenses. The Affirmative Defenses include, but are not limited to, the following: failure to join an indispensable party; judicial and collateral estoppel; res judicata; and lack of ripeness because of the appeal.

On May 6, 2003, KEC filed a Motion for Summary Judgment. The Motion is supported by an Affidavit of Andrew C. Bohrnsen, to which is attached a number of exhibits from the underlying action, and memorandums of law.

Lamar filed its Motion for Summary Judgment on August 12, 2003. Lamar's Motion is supported by an Affidavit of Patrick M. Risken, to which is attached various exhibits from the underlying action, and a memorandum of law.

Counsel for the parties presented oral arguments at a Hearing on the Cross-Motions for Summary Judgment.

II

STANDARDS FOR SUMMARY JUDGMENT

Summary judgment should be granted if there is no genuine issue of material fact and, as a matter of law, the moving party is entitled to judgment. In order to make that

determination, the court must look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . . ." ***Rule 56(c), Idaho Rules of Civil Procedure***.

On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion. ***Roell v. City of Boise***, 130 Idaho 197, 938 P.2d 1237 (1997). Where the evidentiary facts are not disputed and the court will be the trier of fact, the trial judge is free to arrive at the most probable inferences to be drawn from the uncontroverted evidentiary facts. ***Loomis v. City of Hailey***, 119 Idaho 434, 807 P.2d 1272 (1991).

When the opposing parties have moved for summary judgment based upon the same evidentiary facts and the same theories and issues, they effectively have stipulated that there are no genuine issues of material fact. ***Bob Daniels & Sons v. Weaver***, 106 Idaho 535, 681 P.2d 1010 (Ct.App. 1984). Summary judgment may then be granted to the party who is entitled to it under the law. ***Anderson v. Farm Bureau Mut. Ins. Co.***, 112 Idaho 461, 732 P.2d 699 (Ct.App. 1987). The mere fact that both parties have moved for summary judgment does not, however, absolutely demonstrate that there is no material issue of fact. Even though there are cross-motions for summary judgment, the court is not transformed into a trier of fact and, if issues of fact remain, summary judgment cannot be granted. ***Moss v. Mid-America Fire and Marine Ins.***, 103 Idaho 298, 647 P.2d 754 (1982).

III

QUESTIONS PRESENTED

1. Pursuant to ***Idaho Code § 55-2404(b)***, should Lamar be required to indemnify KEC for all costs and expenses arising from Kuntz's physical and/or electrical contact with KEC's high voltage overhead line if Kuntz's injuries were proximately caused by Lamar's violation of Idaho's HVA?

2. Under ***I.R.C.P. 8(c)***, did KEC waive its right to assert indemnification by failing to plead and try it in the underlying case?

3. Does the doctrine of laches apply so that the instant case is barred?

IV

THE IDAHO HIGH VOLTAGE ACT

A. The Idaho High Voltage Act

The Idaho State Legislature added Chapter 24 to Title 55 of the Idaho Code in 1992. In the Idaho Code, the Act is described as "ACTIVITIES IN PROXIMITY TO HIGH VOLTAGE OVERHEAD LINES" ("Idaho HVA"). When the Idaho HVA was added to the Idaho Code, the Legislature stated its purpose, in part, as

> ***to prohibit activities in proximity to high voltage overhead lines except within specified clearances; to provide for arrangements with public utilities for the performance of activities in closer proximity than the specified clearance; [and] to provide penalties and payment of damages for violations of the provisions of the chapter.*** (Emphasis added.)

Idaho Session Laws, Chapter 177, p. 559.

The safety restrictions for the performance by contractors of work or other activities around high voltage lines are set forth in ***Idaho Code § 55-2402***. There must be at least ten (10) feet of clearance. ***Idaho Code § 55-2402(1)***.

If any contractor desires to temporarily carry on any work in closer proximity to any high voltage overhead line than permitted under the Act, the

> ***contractor responsible for performing the work shall promptly notify the public utility owning or operating the high voltage overhead line***. The contractor may perform the work only after making mutually agreeable arrangements with the public utility owning or operating the line . . . . (Emphasis added.)

Idaho Code § 55-2403(1). The public utility must then make arrangements to accommodate the activity in accordance with the agreement of the parties. ***Idaho Code § 55-2403(3)***.

The penalties for violations of the Act are set forth in ***Idaho Code § 55-2404***. That statute states as follows:

> **Violations. –** (1) Any contractor or agent thereof violating the provisions of this chapter shall be subject to a civil penalty of not more than five hundred ($500) to be imposed by the court in favor of the state and deposited in the state general account.
>
> (2) ***If a violation of the provisions of this chapter results in physical or electrical contact with any high voltage overhead line, the contractor committing the violation shall be liable to the public utility owning or operating the high voltage overhead line for*** all damages to the facilities and ***all costs and expenses, including damages to third persons, incurred by the public utility as a result of the contact***.
>
> (3) County prosecuting attorneys and the attorney general are authorized to prosecute violations of the provisions of this chapter. (Emphasis added.)

Definitions are found in ***Idaho Code § 55-2401***. In the underlying case, Judge Whaley interpreted the term "contractor" to include "subcontractors." "Person" is also defined, but the statute does not define "third person."

In the instant case, the work to be performed by Kuntz for Lamar was within the restricted space; *i.e.*, the clearance between the billboard and the high voltage overhead line was less than ten (10) feet. Lamar, as the contractor, and Kuntz, as the sub-contractor, were required to notify the public utility company, which was KEC, and could not commence their work until Lamar and Kuntz had made mutually agreeable arrangements with KEC. It is undisputed that KEC was never notified by either Lamar or Kuntz.

Therefore, the provisions for violations of the Act as found in ***Idaho Code § 55-2404*** must be applied. Specifically, KEC seeks indemnification from Lamar. The indemnification provision of Idaho's HVA is found in ***Idaho Code § 55-2404(2)***.

B. <u>The Rules For Statutory Interpretation</u>

This case presents a question of statutory interpretation. "The determination of the meaning of a statute and its application is a matter of law . . . ." ***Woodburn v. Manco Products, Inc.***, 137 Idaho 502, 504, 50 P.3d 997 (2002).

The primary function of the court in interpreting a statute is to determine legislative intent and give effect to it. ***George W. Watkins Family v. Messenger***, 118 Idaho 537, 797 P.2d 1385 (1990). The court may examine the language used, the reasonableness of the proposed interpretations, and the policy behind the statute. ***Kelso & Irwin, P.A. v. State Insurance Fund***, 134 Idaho 130, 997 P.2d 591 (2000); ***Kootenai Electric Co-op, Inc. v. Washington Water Power Co.***, 127 Idaho 432, 901 P.2d 1333 (1995). The interpretation begins with the literal words of the statute. Those words must be given their plain, obvious, and rational meaning. ***Adamson v. Blanchard***, 133 Idaho 602, 990 P.2d 1213 (1999). Where the statute is unambiguous, it speaks for itself; it must be given the interpretation that the language clearly implies and without employing rules of statutory construction. The court is confined to that meaning and cannot add or take away by judicial construction. ***State v. Hagerman Water Right Owners, Inc.***, 130 Idaho 727, 947 P.2d 400 (1997); ***Cameron v. Minidoka County Highway District***, 125 Idaho 801, 874 P.2d 1108 (1994); ***Credit Bureau of Lewiston-Clarkston, Inc. v. Idaho First National Bank***, 117 Idaho 29, 784 P.2d 885 (1989).

A statute is ambiguous where the language is capable of more than one interpretation or where reasonable minds might differ or be uncertain as to its meaning. ***Struhs v. Protection Technologies, Inc.***, 133 Idaho 715, 992 P.2d 164 (1999); ***State v. Browning***, 123 Idaho 748, 852 P.2d 500 (Ct.App. 1993). Ambiguity is not established, however, merely because the parties present differing interpretations to the court. ***Payette River Property Owners Association v. Board of Commissioners of Valley County***, 132 Idaho 551, 976 P.2d 477 (1999). If the statute is ambiguous, the court goes outside the language of the statute to ascertain and effectuate the legislative intent and applies rules of construction. ***Frazier v. Neilsen & Co.***, 118 Idaho 104, 794 P.2d 1160 (Ct.App. 1990).

C. Guidance from Other Jurisdictions

The Idaho appellate courts have not addressed this issue. In fact, the Idaho HVA has yet to be the subject of an appellate decision in Idaho. Therefore, the decisions in other jurisdictions provide guidance here.

Approximately thirty-two of the fifty states have HVAs. To support its position, KEC relies upon the law from Arizona, Texas, and Wyoming. Lamar, on the other hand, argues that there are four types of HVAs. First, approximately one-third of the states with HVAs have statutes that do not even mention "indemnity" or provide for reimbursement. Second, additional states do not create relief beyond what is available at common law for indemnification. Third, some states impose strict liability. Finally, other states have statutes that mention damages to "third persons."

The Arizona HVA indemnification clause is very similar to the one found in the Idaho statute.[4] In ***Tucson Electric Power Company v. Swengel-Robbins Construction***

[4] The Arizona statute provided as follows: "If a violation of this article results in physical or electrical contact with any high voltage line, the person or business entity violating the article is liable to the public

Co., 153 Ariz. 486, 737 P.2d 1385 (Ariz.App. 1987), an electric company brought a third party action seeking indemnification from a construction company with respect to a claim against it by the widow of an electrocuted worker. Summary judgment was entered in favor of the electric company on the indemnity claim. According to ***Tucson Electric Power Company v. Swengel-Robbins Construction Co.***,

> The statute represents a determination by the legislature that where work is being performed near power lines, the person or entity performing the work is in the best position to prevent injury – whether caused by its negligence or that of the utility – by giving notice so that appropriate protective measures may be taken. ***The imposition of liability for what is in effect Swengel-Robbins' own negligence in failing to give notice and thereby enabling TEP to take action to prevent injury is a reasonable legislative choice*** . . . . Had [Swengel-Robbins] given the required notice and had TEP failed to take appropriate protective measures, no liability would have ensued and no obligation to indemnify would have arisen. Conversely, had notice been given and protective measures been taken, no injury would have occurred. Swengel-Robbins was not prevented by the statute from protecting itself. Given the unexcused violation of the statutes, ***we hold that the statutory language permitting recovery for 'all damages . . . to third persons, incurred by the utility' allows indemnification for the utility's own negligence***. (Emphasis added; citations omitted.)

Tucson Electric Power Company v. Swengel-Robbins Construction Co., 153 Ariz. at 488, 737 P.2d at 1387.[5]

In ***Citizens Utilities Company v. New West Homes, Inc.***, 174 Ariz. 223, 848 P.2d 308 (Ariz.App. 1992), an electric utility company brought suit against a general contractor and a roofing subcontractor for statutory indemnity. The Arizona Court of

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utility operating the high voltage overhead line ***for all damage*** to the facilities and all costs and expenses, ***including damages to third parties***, incurred by the public utility as a result of contact." (Emphasis added.)

[5] In ***Gunnell v. Arizona Public Service Company***, 202 Ariz. 388, 46 P.3d 399 (2002), the Supreme Court of Arizona distinguished ***Tucson Electric Power Company v. Swengel-Robbins Construction Co.*** when it addressed a claim for indemnification against an injured worker who was also an excavator required to give notice under the Underground Facilities Act; in that factual situation, the effect of the excavator's negligence in violating the act and the effect of the utility owner's negligence were for the jury to determine under principles of comparative negligence.

Appeals affirmed a grant of summary judgment for indemnification to the utility. Furthermore, an award of attorney fees was authorized by the section of the Arizona HVA providing for reimbursement of "all other costs and expenses" incurred by the utility.

The indemnification clause in the Texas HVA is also similar to the Idaho statute.[6] In ***Olsen v. Central Power & Light Co.***, 803 S.W.2d 808 (Texas 1991), the Texas Court of Appeals ruled that the statutory indemnification found in the Public Utilities Act controlled and that the utility would be indemnified even for its own negligence. The reference to "all liability incurred" by the utility included attorney's fees, costs, and interest. The purpose of indemnity is to make a party whole and, if the indemnitee has to bear the expense of defending a lawsuit, then he is not made whole by the indemnification unless attorney's fees, costs, and interest are included.

When the HVA was enacted in Wyoming, the legislature specifically stated that the Wyoming HVA was modeled upon the Arizona HVA and that Arizona case law interpreting the statutes should be used in interpreting the Wyoming statutes.

See also Santana v. Georgia Power Co., 269 Ga. 127, 498 S.E.2d 521 (1998).

The Supreme Court of Alaska addressed the indemnity provision in Alaska's HVA in ***Atwater v. Matanuska Electric Association, Inc.***, 727 P.2d 774 (Alaska 1986). In ***Atwater***, an electrocuted motel partner's estate brought a wrongful death action against an electric association. Reversing the trial court's grant of summary judgment to the utility, the ***Atwater*** court held that the utility was not entitled to indemnification for

[6] The Texas statute provides as follows: "If a violation of this Act results in physical or electrical contact with any voltage overhead line, the person, firm, corporation or association violating the provisions of this Act shall be liable to the owner or operator of such high voltage line for all damage to such facilities and ***all liability incurred by such owner or operator as a result of any such contact***." (Emphasis added.)

damage caused by its own negligence. The Alaska statute provided for penalties as follows:

> If a violation of ***AS 18.60.670 – 18.60.695*** results in physical or electrical contact with an overhead high voltage line or conductor, the violator is liable to the owner or operator of the high voltage line or conductor for all damage to the facilities and for ***all liability incurred by the owner or operator as a result of the unlawful activities***. (Emphasis added.)

In reaching a decision, the ***Atwater*** court stated that

> [w]e believe the comparative causation approach comports more closely with the common meaning of the statutory language and with the policy of promoting public safety which underlies the statute. We first note that the legislature did not simply require indemnification "for all liability incurred." Neither did it require indemnification "for all liability incurred as a result of the contact with the high voltage lines." The "as a result of the unlawful activities" language qualifies "all liability incurred"; it suggests, although it does not command, that liability should be apportioned to the violator in proportion to the extent to which his violation caused the accident.
>
> More importantly, we believe that a comparative causation approach is more consistent with the policy of promoting public safety which underlies the high voltage statutes. This policy would not be served by interpreting the statute as requiring indemnification for the utility's own negligence. As the facts of this case graphically illustrate, if the utility shirks its duty of due care there may be tragic consequences. Placing a strong incentive on the utility, as well as on would-be violators, to exercise due care will maximize public safety. This incentive is best provided by an interpretation of the statute which requires indemnification of the utility only for that portion of the total liability caused by the violator's unlawful activities and not for that portion caused by the utility's negligence.

Atwater v. Manatuska Electric Association, Inc., 727 P.2d at 777-78.

D. <u>Applying the Law to the Facts of This Case</u>

Initially, it must be noted that this is a case involving interpretation of a statute. Therefore, any determination here must commence with a review of the plain language of the statute. Furthermore, it must be noted that, while the statutes and case law from other

jurisdictions may be instructive, it is the Idaho statute which must be interpreted here. Additionally, it must be noted that this is a question of first impression in Idaho. Finally, it must be noted that certain decisions, including a decision regarding the status of the parties, have already been reached in the underlying federal case.

Certain facts are undisputed. Although the Idaho HVA required notice to KEC of the impending work on a billboard in Athol, neither Lamar nor Kuntz did so. Kuntz was injured during the work. Eventually, Kuntz filed a lawsuit against both Lamar and KEC. The trial judge found that Lamar was a contractor, that Kuntz was a subcontractor, and that both were bound by the Idaho HVA to give notification to KEC. At trial, the jury apportioned the negligence between the parties, with KEC being 50% negligent. In the instant lawsuit, KEC alleges that it is entitled to indemnification from Lamar for the damages that KEC would have to pay to Kuntz.

The statutory language must now be examined as it applies between the Plaintiff and the Defendant in this case – *i.e.*, between KEC and Lamar. The statute must be interpreted according to its clear and plain language.

Idaho Code § 55-2404(2) first addresses "a violation of the provisions of this chapter." It is undisputed that there was a violation of the provisions of the Idaho HVA by Lamar, who is the Defendant in this case. Lamar failed to notify KEC as required by the Idaho HVA.

The statute goes on to state that such violation is one that "results in physical or electrical contact with any high voltage overhead line." In this case, the violation resulted in physical or electrical contact by Kuntz with KEC's high voltage overhead line.

The statute then refers to the "contractor committing the violation." A contractor is defined in ***Idaho Code § 55-2401(2)***. In this case, Lamar was a contractor who committed a violation.

According to the statute, the contractor "shall be liable to the public utility owning or operating the high voltage overhead line." KEC is the public utility that owned or operated the high voltage overhead line near the bulletin board at Athol. Thus, Lamar is liable to KEC.

The statute provides that the contractor is liable for "all costs and expenses . . . incurred by the public utility as a result of the contact." This language is very similar to the language found in the Arizona statute, which was discussed in ***Tucson Electric Power Company v. Swengel-Robbins Construction Co.***, 153 Ariz. 486, 737 P.2d 1385 (Ariz.App. 1987). The language states that Lamar is liable for *all costs and expenses* which would be incurred by KEC *as a result of the contact*.

The language found in the Idaho statute can be distinguished from the language in the Alaska statute, which was discussed in ***Atwater v. Matanuska Electric Association, Inc.***, 727 P.2d 774 (Alaska 1986). The Alaska statute qualifies the indemnification for all liability by restricting it to liability incurred as a result of the unlawful activities. Under the Alaska statutory language, the concept of comparative fault applies – *i.e.*, how much of the cost incurred by the utility was the result of the contractor's unlawful activities and how much was the result of the owner's negligence. Under that statutory scheme, the contractor is liable only for that portion of the cost that was the result of the contractor's unlawful activities.

Under the Idaho statute, the costs and expenses are not limited. Instead, KEC is entitled to all costs and expenses incurred as a result of the contact with the high voltage overhead line.

At this point, the language becomes more troubling as it applies to the facts in this case. ***Idaho Code § 55-2404(2)*** provides for all costs and expenses, "including damages to third persons." A "person" is defined in ***Idaho Code § 55-2401***, but a "third person" is not defined. A "third party" has been defined in BLACK'S LAW DICTIONARY, p. 1489, as "[o]ne who is not a party to a lawsuit, agreement, or other transaction but who is somehow involved in the transaction; someone other than the principal parties." Although "third person" is defined in the dictionary, the definition there has to do with linguistics and does not apply here.[7] ***See*** WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, p. 1227.

The term "third person" as it is used in the Idaho statute, ***Idaho Code § 55-2404(2)***, is the same in meaning as "third party" in BLACK'S LAW DICTIONARY. According to that plain meaning, a "third person" would be one who is not a party in this lawsuit, although somehow involved. Kuntz is not a party in this lawsuit, although he is involved. The lawsuit is between KEC and Lamar, but Kuntz is involved because he was injured. Therefore, Kuntz is a "third person" under the language of the statute and damages to Kuntz would be included among the costs and expenses for which Lamar is liable to KEC.

[7] "Third person" is defined as "**1 a :** a set of linguistic forms (as verb forms, pronouns, and inflectional affixes) referring to one that is neither the speaker or writer of the utterance in which they occur nor the one to whom that utterance is addressed **b :** a linguistic form belonging to such a set **2 :** reference of a linguistic form to one that is neither the speaker or writer of the utterance in which it occurs nor the one to whom that utterance is addressed

Lamar complains that Kuntz, as a "subcontractor," is a "contractor" and, therefore, cannot be a "third person." While Kuntz may have been a "contractor" in terms of the underlying action and in terms of the statute requiring notification to KEC, he is a "third person" in the instant action and in terms of the statute requiring indemnification. Otherwise stated, Kuntz is a third person to KEC and Lamar in this case.[8]

The result here is in accord with the purpose of the Idaho HVA. The purpose was to provide for the safety of people who work in the vicinity of high voltage electric power lines and to establish penalties for those who do not make the required safety arrangements by notifying the utility companies. Therefore, the determination regarding the interpretation of ***Idaho Code § 55-2404(2)*** complies with the policy of the Idaho legislature when it enacted the Idaho HVA.

There is a further issue that must be addressed here. That is whether the term "all costs and expenses" includes attorney fees and costs. The term itself would appear to include "all costs and expense" of whatever kind. The Arizona and Texas cases, where the statutes are similar to the Idaho statute, provide guidance here. In those states, attorney fees and costs are included in "all costs and expenses." Under the Idaho statute, attorney fees and costs must be included.

The facts in the instant case are difficult ones. Both Lamar and Kuntz, as "contractors," had an obligation to notify KEC. Under the language of the statute, however, Lamar must indemnify KEC for the injuries of Kuntz plus all costs and

[8] The determination here is limited to the relationship between KEC and Lamar in the instant case. No opinion is ventured as to the outcome of any other relationship, including the relationship between Lamar and Kuntz, in any other situation. Furthermore, this case can be distinguished from ***Gunnell v. Arizona Public Service Company***, 378 Ariz. 388, 46 P.3d 399 (2002), in that Lamar is not both the contractor and the third person for purposes of determining indemnification.

expenses. The Idaho legislature could not have foreseen all of the possible fact patterns. Furthermore, this is a case in which the jury found significant negligence on the part of the utility, KEC. Finally, the injury was serious and a large amount of money is at stake. Nonetheless, this Court is constrained to follow the provisions of the statute.

In conclusion, Lamar, as the contractor who had violated provisions of the Idaho HVA regarding notification, is liable to KEC, as a public utility, for all costs and expenses, including damages to Kuntz, incurred by KEC as a result of Kuntz's contact with the high voltage overhead line. KEC's Motion for Summary Judgment is granted.

V

FAILURE TO PLEAD INDEMNITY IN THE UNDERLYING LAWSUIT

It is undisputed that KEC did not specifically plead indemnity in the underlying lawsuit. In its Cross-Claim against Lamar, KEC alleged that

> defendant Lamar was negligent and in violation of the applicable rules, regulations and statutes governing outdoor advertising signs within specified distances of high powered transmission lines. That the plaintiff's injuries were caused and/or contributed to by the negligence of Lamar; that liability should be apportioned between the respective parties and that judgment be apportioned between the respective parties and that judgment be entered in accordance with the findings of the trier of fact.

In its prayer for relief in the underlying action, KEC prayed for "an apportionment of fault between all parties to this litigation." The question of indemnification was not tried before the jury. The specific issue of indemnification under ***Idaho Code § 55-2404(2)*** did not arise until KEC raised the issue on a post-judgment motion. Judge Whaley denied the motion on grounds that, while it might have been pled, it had not been and the pleadings could not be amended in a post-trial context.

Affirmative defenses are addressed in ***Rule 8(c), Idaho Rules of Civil Procedure***. That rule provides that,

> [i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense.

The purpose of this rule requiring affirmative defenses to be pled is to alert the parties concerning the issues of fact to be tried and to afford them an opportunity to present evidence to meet those defenses. ***Williams v. Paxton***, 98 Idaho 155, 559 P.2d 1123 (1976). Failure to raise an affirmative defense ordinarily results in a waiver of the defense. ***Hartwell Corp. v. Smith***, 107 Idaho 134, 686 P.2d 79 (Ct.App. 1984).

Lamar argues that indemnity falls within the category of "any other matter constituting an avoidance or affirmative defense" because it would allow KEC to completely avoid any liability to Kuntz. Lamar argues further that, as such, it had to be affirmatively pled in KEC's Answer. Lamar contends that, when KEC waited until after the trial in the underlying lawsuit to bring this claim for indemnity, KEC waived the affirmative defense.

The instant lawsuit involves an indemnification of KEC by Lamar. KEC does not seek indemnification from Kuntz. Under ***I.R.C.P. 8(c)***, KEC did not have to affirmatively plead indemnification in its Answer in response to Kuntz's Complaint. While failure to do so might have waived any affirmative defense that KEC had against Kuntz, it did not waive a claim for indemnification against Lamar, who was a co-defendant in the underlying action.

KEC filed a Cross-Claim against Lamar. That was not, however, an answer to a claim – it was itself a claim. Therefore, ***I.R.C.P. 8(c)*** does not apply.

To the extent that Lamar relies upon ***I.R.C.P. 8(c)*** as a basis for its contention that failure to plead and try indemnity in the underlying case results in an inability to bring such a claim in the instant case, KEC's claim against Lamar is not barred.[9] ***I.R.C.P. 8(c)*** does not prohibit KEC from bringing this case. Under ***I.R.C.P. 8(c)***, KEC did not waive its claim by failure to plead and try indemnity in the underlying case. KEC's Motion for Summary Judgment is granted.

VI

LACHES

According to Lamar, KEC's complaint in the instant action is barred by laches. Lamar points out that KEC defended in the underlying case using its own strategy; now, KEC seeks to "stick" its co-defendant for the entirety of the damages awarded against it for the injuries of a third person plus the attorney fees and costs. According to Lamar, this is extremely unfair.

A defendant in an action can assert the affirmative defense of laches, which is an equitable doctrine. The party asserting laches has the burden of proof. Whether a party is guilty of laches is a question of fact. The elements of "laches" are: (1) defendant's invasion of plaintiff's rights; (2) delay by plaintiff in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his or her rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred. In determining whether the doctrine of laches applies, consideration must be given to all

[9] For purposes of this discussion, it is presumed, but without so deciding, that indemnity was not pled or tried. Furthermore, based on the decision here, it is unnecessary to determine whether KEC could have asserted its claim for indemnity in the underlying case. Finally, no opinion is offered as to whether, based upon the express terms of the indemnity statute in the Idaho HVA and its interpretation as a matter of law, there would have been any evidence to present to and be considered by a jury.

surrounding circumstances and acts of the parties. ***Thomas v. Arkoosh Produce, Inc.***, 137 Idaho 352, 48 P.2d 1241 (2002).

The facts in this case must be viewed most favorably to the non-moving party at the time when each party's motion for summary judgment is considered. Inferences can, however, be drawn from the undisputed facts since the court would be the finder of fact in this case.

As to the first element, the question is whether Lamar invaded KEC's rights in some manner. Based on the holding that Lamar is liable to KEC under ***Idaho Code § 55-2404(2)***, it can be found that Lamar invaded KEC's rights.

As to the second element, the question is whether there is any genuine issue as to a delay by KEC in asserting its rights. KEC clearly had notice of the claim by Kuntz against KEC and Lamar under the Idaho HVA. KEC also should have been aware that Kuntz's claim might lead to an award against it and that such an award could be indemnified under certain provisions in the Idaho HVA. KEC had an opportunity to institute a Cross-Claim against Lamar and, in fact, a Cross-Claim was filed. The Cross-Claim did not specifically mention indemnification, however. Therefore, it can be inferred from the undisputed facts that KEC had notice of its potential liability and an opportunity to make a claim for indemnity against Lamar.

The issue on this element, however, is whether there was a delay. The Cross-Claim did not specifically plead indemnification and indemnification was not tried in the underlying case. KEC did not tender defense of the claim to Lamar. KEC contends that there was no delay because the claim for indemnification did not exist until the jury rendered its verdict and judgment was entered. According to KEC, the cause of action

for indemnification did not accrue until damages were awarded against the party seeking indemnification.

The Idaho Supreme Court has concluded that, "unless liability of the claimed indemnitee to the third party is established, the right to indemnification does not arise." ***Beitzel v. Orton***, 121 Idaho 709, 717, 827 P.2d 1160, ___ (1992), quoting from ***Williams v. Johnston***, 92 Idaho 292, 298, 442 P.2d 178, 184 (1968). ***See also*** 41 Am.Jur.2d ***Indemnity***, §§ 43-44. Thus, KEC's right to indemnification under ***Idaho Code § 55-2404(2)*** did not arise until its liability to Kuntz was established in the underlying case.[10] That does not, however, mean that KEC could not have alleged a right to indemnification as a cross-claim in that case. ***See, e.g., Beitzel v. Orton***, 121 Idaho 709, 827 P.2d 1160 (1992) (two of the defendants cross-claimed against two other defendants seeking indemnification under contract and common law principles).

The jury returned its Special Verdict on October 18, 2002. Judgment was entered on or about October 29, 2002. KEC moved for indemnification from Lamar. On December 6, 2002, Judge Whaley denied the motion. The instant case seeking indemnification from Lamar was filed by KEC on December 30, 2002.

When viewed from KEC's position as a non-moving party, it cannot be found that there is no genuine issue of material fact as to a definite delay. On the other hand, when viewed from Lamar's position as a non-moving party, it cannot be found that there is no genuine issue of material fact regarding a lack of delay. Thus, there is a genuine issue of material fact concerning whether or not KEC delayed in asserting its rights.

[10] It appears that, at the present time, the underlying case is on appeal to the Court of Appeals for the Ninth Circuit. Therefore, the liability may not yet be established. There is no evidence to indicate that KEC has made payment to Kuntz on the judgment entered in the underlying case.

The third element is whether there was lack of knowledge by the defendant that plaintiff would assert his or her rights. In this case, KEC did not specifically plead indemnification. KEC did, however, allege in its Cross-Claim that Lamar was negligent and "in violation of the applicable rules, regulations and statutes governing outdoor advertising signs within specified distances of high powered transmission lines." The issue of indemnification was not raised at the jury trial. It was only after the trial that the issue of indemnification was raised. When viewed from KEC's position as a non-moving party, it cannot be found that there is no genuine issue as to the fact that Lamar lacked knowledge. On the other hand, when viewed from Lamar's position as a non-moving party, it cannot be found that there is no genuine issue as to the fact that Lamar had knowledge. Thus, there is a genuine issue of material fact regarding Lamar's knowledge that KEC would assert its rights.

The fourth element is whether there will be injury or prejudice to the defendant in the event relief is accorded to the plaintiff or the suit is held not to be barred. There was a large verdict against KEC for which KEC now seeks indemnification. KEC went to trial on its own strategy and with its own witnesses. The underlying case is presently on appeal to the Court of Appeals for the Ninth Circuit. Lamar contends that it will be prejudiced if relief in the form of indemnification is granted to KEC. When viewed from the position of either KEC or Lamar as a non-moving party, there is a genuine issue of material fact which precludes summary judgment on the issue of laches. Therefore, the Motions for Summary Judgment of both KEC and Lamar must be denied.

VII

CONCLUSION AND ORDER

Based on the foregoing discussion, it is ORDERED that the Motion for Summary Judgment by Plaintiff KEC shall be and hereby is granted in part and denied in part as set forth herein. Also, based on the foregoing discussion, it is further ORDERED that the Motion for Summary Judgment by Plaintiff Lamar shall be and hereby is denied as set forth herein.

DATED this _____ day of October, 2003.

_____
John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER IN RE: SUMMARY JUDGMENT was mailed, postage prepaid, sent by interoffice mail, or sent by facsimile transmission, on the _____ day of October, 2003, to the following:

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ALL FIRST DISTRICT COURT JUDGES

The Honorable Don L. Swanstrom
Trial Court Administrator
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DANIEL J. ENGLISH
Clerk of the District Court

By: _____
Deputy Clerk