

ADDENDUM
TO
A PRIMER FOR IDAHO TRIAL JUDGES
IN
AWARDING ATTORNEY FEES

The body of the Primer has been updated through March 31, 2005. Since March 24, 2005, until April 30, 2006, the Idaho appellate courts have significantly addressed attorney fees in the following cases.

Freiburger v. J-U-B Engineers, Inc., 05.8 ISCR 327 (March 24, 2005)

After entering judgment in Freiburger's favor, the district court awarded attorney fees to him. J-U-B contended that, because this was a declaratory judgment action, the apportionment of expenses was governed solely by I.C. § 10-1210 and the district court erred in awarding attorney fees under I. C. § 12-120(3). The gravamen of both Freiburger's declaratory judgment action and J-U-B's counterclaim was the enforceability of a covenant contained in an employment agreement. **The fact that an action is brought as a declaratory judgment action does not preclude the application of I.C. § 12-120(3) where the gravamen is a commercial transaction.** Furthermore, I.C. § 10-1210, by its plain terms, applies only to "costs;" the general rule is that costs do not include attorney fees unless expressly included in the definition of the term costs. The judgment of the district court is affirmed.

Lettunich v. Lettunich, 05.8 ISCR 343 (March 29, 2005)

Rule 54 provides the criteria courts must consider in awarding attorney fees. Rule 54(e)(3) uses the word "shall" and is mandatory so that the court is required to consider all eleven factors plus any other factor the court deems appropriate. It is insufficient to consider some factors, declare the rest unknown, and award the full amount of fees requested.

With regard to criterion (D), the court is required to consider "the prevailing charges for like work." In *Lettunich*, the district court found that the hourly fees of the prevailing party's lawyers were consistent with those charged by the "largest of Idaho firms." In determining the reasonableness of an hourly rate, however, the district court should have considered "prevailing charges" in a geographic context and not in a strata context. **The district court must consider the fee rates generally prevailing in the pertinent geographic area rather than what any particular segment of the legal community may be charging.**

The time and labor expended is a fact to be considered under a standard of reasonableness. Consideration should be given to the necessity of the amount of "legal firepower" (number of lawyers and amount of time spent) employed in a case.

State of Idaho v. Estate of Joe Kaminsky, 05.8 ISCR 350 (March 30, 2005)

Idaho Code § 12-117 is not a discretionary statute. The court “shall” award attorney fees upon a finding that a state agency did not act with a reasonable basis in fact or law. The policy behind the statute is (1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne an unfair and unjustified financial burden in defending against groundless charges or attempting to correct mistakes agencies should not have made. Attorney fees were awarded to the Estate on appeal.

McCorkle v. The Northwestern Mutual Life Insurance Co., 05.11 ICAR 475 (May 12, 2005)

Attorney fees were awarded to Northwestern as a sanction against McCorkle’s lead counsel. After summary judgment was entered, Northwestern sought attorney fees pursuant to I.C. § 41-1839(4). McCorkle argued that its fraud based claims did not involve disputes arising under the terms of the policy. Under I.C. § 41-1839(4), attorney fees are not limited only to policy claims cases; the statute grants fees in all actions between insureds and insurers involving “disputes arising under policies of insurance.” In this case, the claim of fraud stemmed and originated directly from the purchase of an insurance policy; therefore, the statute applies. Idaho Code § 41-1839(4) and I.C. § 12-123 combine to provide the exclusive remedy for the award of attorney fees for either the insured or the insurer involving disputes arising under policies of insurance. However, based upon the facts of this particular case, it was an abuse of discretion for the trial court to award attorney fees as a sanction against lead counsel.

Long v. Alessi, 05.12 ICAR 496 (May 20, 2005)

In a personal injury action, attorney fees were awarded to Long under I.C. § 12-120(4). Alessi appealed on grounds that Long waived her right to an award of attorney fees under the statute by submitting evidence at trial of a significant new item of damage not set forth in the statement of claim she presented to Long before initiating the lawsuit. In her demand letter, Long failed to include a medical bill for \$208.50. Alessi contended that there was a significant change in the amount demanded while Long argued that she had substantially complied with I.C. § 12-120(4). The Idaho Court of Appeals distinguished *Johnson v. Sanchez*, 140 Idaho 667, 99 P.3d 620 (Ct.App. 2004), where Johnson provided evidence of an increased amount of damages but not new damages. Long presented evidence of a new item of damage. However, because Alessi already knew about the bill and because it was a “de minimis” amount, the “new” item of damage was not “significant.” Because Long substantially complied with the statute, attorney fees were properly awarded.

With regard to the amount of attorney fees awarded, Long’s attorney sought an award of attorney fees on a “time and hour” basis rather than on the contingency basis upon which he agreed to pursue the case. The trial court awarded fees on the hourly basis but found that the attorney’s request for \$135 per hour was unreasonable and reduced the

amount to \$110 per hour. The trial court took into consideration all of the factors set forth in I.R.C.P. 54(e)(3). While I.R.C.P. 54(e)(3)(E) allows a court to consider whether a fee is contingent or fixed, it is only one factor to be considered. The amount of an attorney fee award is not necessarily limited by the party-attorney agreement. The district court did not abuse its discretion in awarding attorney fees to Long.

Campbell v. Kildew and Daltoso, 05.14 ISCR 583 (June 17, 2005)

Sanctions were awarded to Daltoso against Campbell and Kildew pursuant to I.R.C.P. 11(a)(1). The rule does not extend to conduct during trial. It is "a management tool to be used by the district court to weed out, punish, and deter specific frivolous and other misguided filings" and should be narrowly exercised. Reasons for granting attorney fees under I.C. § 12-121 are not the same as and will not support an award of sanctions under Rule 11. The district court did not err in finding that, although it was without authority to award attorney fees under I.C. §§ 12-121 or 12-123, it could award sanctions under Rule 11. The amount of the sanctions was reasonable. The amount of the sanctions was originally \$15,000 but it was later increased to \$60,000. The amount of attorney fees and computer-aided research costs incurred by the aggrieved party may serve as a guide for determining the amount of the sanctions to be awarded. The determination to issue sanctions and the amount of the sanctions are in the sound discretion of the trial court.

Eighteen Mile Ranch v. Nord Excavating & Paving, 05.15 ISCR 637 (July 1, 2005)

This case involves the following issues: (1) whether defendants were the prevailing parties, and (2) whether defendants adequately supported their request for attorney fees. The prevailing party issue must be examined and determined from an overall view, not on a claim-by-claim analysis. In rendering a decision, the trial court may not use the award or denial of attorney fees to vindicate a sense of justice beyond the judgment rendered on the underlying dispute between the parties.

A party claiming attorney's fees must assert the specific statute, rule, or case authority for its claim. It was adequate for a party to cite I.C. § 12-120 and request fees as a matter of costs "because this was a commercial transaction as defined by Idaho Code § 12-120." It was not necessary to cite subsection (3). The holding in *Jenkins v. Donaldson*, 91 Idaho 711, 429 P.2d 841 (1967), regarding attorney fees is superseded by Rule 54(e)(4) and is no longer valid. The Idaho Supreme Court stated as follows:

Thus, a party need not have listed a specific attorney fee provision in its pleading in order to obtain a fee award under [Rule 54(e)(4)] 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.

From *Eighteen Mile Ranch*, it would appear that, under Rule 54(e)(4), it is not necessary for a party in a civil action to assert a claim for attorney fees in any pleading except for cases in which a default judgment is requested. With judgments by default, the requirement is 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. The better practice, however, is to always specify the fee request in the pleading. In any event, a party must specify the code section or contract provision upon which it relies when making its Rule 54(e)(5) fee request.

David Moore and Mednat, Inc. v. Omnicare, Inc., 05.16 ISCR 685 (July 22, 2005)

This case involved an appeal from a judgment entered by the district court vacating in part and confirming in part an arbitration panel's award. The district court properly vacated the arbitration panel's award of attorney fees on one of the claims on the basis that the award exceeded the arbitration panel's scope of authority. The district court also properly affirmed the arbitration panel's refusal to award attorney fees on another claim. Among other authority, Idaho Code § 7-910 is cited. Idaho Code § 7-910 prohibits an award of attorney fees in arbitration absent an express agreement by the parties; the statute applies only to fees incurred in the conduct of the arbitration and not to those incurred in proceedings to confirm an arbitration award.

J. Craig Lester v. Michael R. Salvino, 05.20 ICAR 806 (September 8, 2005)

Defendant's attorney appealed from the order of the district court imposing I.R.C.P. 11 sanctions. The district court had awarded, *sua sponte*, sanctions against the attorney under Rule 11 after finding that the attorney's answers to interrogatories were insufficient. The imposition of attorney fee sanctions for litigative misconduct is governed by Rule 11(a)(1). The court is authorized to impose sanctions, including attorney fees, on its own initiative, upon an attorney who signs discovery documents which violate the requirements of Rule 11. The intent of the rule is to grant the courts the power to impose sanctions for discrete pleading abuses or other types of litigative misconduct. The district court properly imposed sanctions against the attorney because Rule 11 is specifically designed to be a management tool to be used by the district court to weed out, punish and deter specific frivolous and other misguided filings. In a footnote, the Court of Appeals notes that sanctions could also have been awarded in this case under I.R.C.P. 26(f).

Lloyd B. Cox v. Valorie L. Mulligan and Charles Cates, 05.25 ISCR 954
(November 22, 2005)

The amount of plaintiff's claim in this personal injury action did not exceed \$25,000. The district court refused to award attorney fees pursuant to I.C. § 12-120(4) to the prevailing plaintiff. Subsection (4) does not require that plaintiff plead damages of \$25,000 or less. **This case distinguishes subsection (1), which applies where "the amount pleaded" is \$25,000 or less, from subsection (4), which applies where "the amount of the claim" for damages does not exceed \$25,000.** The requirements for a statement of claim are set forth in Idaho Code § 12-120(4). Plaintiff had complied with the requirements and was entitled to attorney fees. The order of the district court was reversed.

Oldcastle Precast, Inc. v. Parktowne Construction, Inc. and Developers Surety and Indemnity Company, 06.1 ISCR 33 (December 22, 2005)

Under I.C. § 54-1926, a performance bond or a payment bond is required on public construction projects. The district court denied a request by Oldcastle for an award of attorney fees under I.C. § 54-1929, which provides for the payment of attorney fees to the prevailing party in actions brought upon the performance bond or the payment bond. Oldcastle, a subcontractor, had filed a lawsuit against both the general contractor and the bonding company. The bonding company paid all sums owing under the subcontract, but a counterclaim remained between Parktowne and Oldcastle. **The district court awarded attorney fees to Oldcastle up to the date it was paid all sums due under the bond, but refused to award attorney fees after Oldcastle had been paid even though Oldcastle prevailed on the counterclaim on grounds that the attorney fees incurred after the date of payment by the bonding company were not incurred in an action under the performance bond.** The district court's decision was affirmed. Two justices dissent, arguing that the attorney fees should have been allowed because the counterclaim was related directly to the subcontract work that Oldcastle was seeking to recover for when the lawsuit was initiated.

Theresa Jo Lieurance-Ross v. Randy Ross, 06.4 ICAR 203 (February 7, 2006)

Theresa filed a motion for attorney fees. The magistrate found that Randy, who was incapacitated and subject to a guardianship, had frivolously sought custody of his children and that Randy's position regarding items of personal property had been frivolous and unreasonable. Finding that Randy had defended the entire divorce action in an unreasonable and frivolous manner, the magistrate awarded attorney fees to Theresa pursuant to I.C. § 12-121. The district court affirmed the magistrate's order. **In deciding whether a case is brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. If there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation.** The Court of Appeals concluded that a parent with a guardian is not precluded from seeking child custody; therefore, it was

error for the magistrate to find that Randy's custody argument was frivolous based on the premise that Randy was precluded from seeking custody. The magistrate abused its discretion in awarding attorney fees to Theresa.

Ramiro G. Contreras and Omar Baeza Martinez v. Clare B. Rubley, 06.6 ISCR 265 (February 23, 2006)

In a personal injury action, a jury found plaintiffs were entitled to a portion of their damages resulting from a three-car accident. Contreras claimed less than \$25,000 in damages and was awarded attorney fees under I.C. § 12-120(4). The issue was whether evidence of damage to his car constituted a "significant new item of damage" such that he forfeited his right to recover attorney fees under subsection (4). **The property damage claimed by Contreras was new because it was not expressly included in his Statement of Claim to Rubley's insurer, but it was not significant enough to constitute a waiver of his right to attorney fees because of the amount of the new item compared with the total claim and because of the fact that Rubley's insurer had disclaimed any liability so that a lack of awareness of damage to the car did not play any part in the insurer's refusal to settle prior to commencement of the lawsuit.**

Martinez's claim was more than \$25,000 and he was awarded attorney fees under I.R.C.P. 37(c). The issue was whether Rubley's blanket denial of a request for admission was unreasonable and therefore justified an award of attorney fees to Martinez under Rule 37(c). Rubley had denied a request to admit negligence. **The district court found that, in order to avoid an award of attorney fees against her pursuant to Rule 37(c), Rubley should have admitted at least some measure of negligence under the facts of this case. Rubley's denial of any negligence under the circumstances was unreasonable. The award of attorney fees was upheld.**

Rubley also sought attorney fees under Rule 37(c). Rubley failed to satisfy the prerequisite that the party requesting admissions "thereafter proves the . . . truth of the matter" before applying to the court for an award of attorney fees. The district court did not err in denying attorney fees to Rubley.

City of McCall v. J.P. Seubert and Cherie Seubert, et al, 06.6 ISCR 279 (February 24, 2006)

Defendants Seubert and certain intervening parties filed a combined motion for attorney fees, which was granted. First, the City contended that the attorney fees award was unreasonable. The calculation of reasonable attorney fees lies in the discretion of the trial court; the burden is on the person disputing the award to show the abuse of discretion. The City claimed that the rates were excessive for the area and that the trial court should not have based the amount of fees on the "reputation of the law firm and the amount of the verdict." I.R.C.P. 54(e)(3) lists factors that the court should consider when determining the amount of attorney fees. Those factors include: (C) the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law; and (G) the amount involved and the results obtained. The trial court appropriately took those factors into consideration and did not abuse its discretion in determining the amount of fees. Second, the City argued that an

1

Craig Johnson Construction, LLC v. West American Insurance Company v. Floyd Town Architects, P.A., and Floyd Town, 2006 Opinion No. 43 (April 24, 2006)

The issue in this case is whether a contract between Town, the architect, and Dean, the developer, could be the basis of an attorney fee award in litigation between Johnson, the contractor, and Town. **Because Johnson was not a party to the contract between Town and Dean, that contract could not be the basis for an attorney fee award against Johnson for fees incurred in the Town/Johnson litigation.** The district court's award of attorney fees based upon a provision in a contract between Town and Dean was reversed.

Schwan's Sales Enterprises, Inc. v. Idaho Transportation Department, 2006 Opinion No. 48 (April 25, 2006)

In this action for contribution, subrogation, and indemnification for wrongful deaths, the district court awarded attorney fees to Schwan's under I.R.C.P. 37(c). **A trial court's decision to award fees under Rule 37(c) is discretionary.** I.R.C.P. 36(a) provides that a party may not give lack of knowledge as a reason for failure to admit or deny unless the party states that it has made reasonable inquiry and been unable to obtain sufficient information to admit or deny. I.R.C.P. 37(a) requires a party to qualify a response to a request for admission or deny only a part of the matter requested. The Department could have qualified its response; also, the Department did not show that its claim of insufficient information was made after reasonable inquiry. The award of attorney fees was affirmed.

ERRATA

In the most recent cases involving the "private attorney general doctrine," the three factors to be considered are stated as follows:

- (1) the litigation vindicated an important or strong public policy;
- (2) private enforcement was necessary in order to vindicate the policy and was pursued at significant burden to the plaintiff; and
- (3) a significant number of people stand to benefit from the decision.

See Thomson v. City of Lewiston, 137 Idaho 473, 50 P.3d 488 (2002); *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 46 P.3d 9 (2002); *Smith v. Idaho Commission on Redistricting*, 136 Idaho 542, 38 P.3d 121 (2001); *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129 (2000).