

1.5 CIVIL MISCELLANEOUS

**1.5.2 PRIMER ON ATTORNEY FEES -- LON DAVIS, ESQ.; HON. JESSE WALTERS;  
HON. JOHN LUSTER; THOMAS B. HIGH, ESQ., 2005**

**A PRIMER FOR IDAHO TRIAL JUDGES**

**IN**

**AWARDING ATTORNEY FEES**

**Written By**

**LON F. DAVIS**

**Idaho Supreme Court**

**Revised by**

**JUSTICE JESSE R. WALTERS**

**Idaho Supreme Court; and further**

**Revised by**

**JUDGE JOHN PATRICK LUSTER**

**District Judge**

**and**

**THOMAS B. HIGH**

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**A PRIMER FOR IDAHO TRIAL JUDGES**

**IN**

**AWARDING ATTORNEY FEES**

**I. INTRODUCTION**

This article is intended primarily as a research tool, rather than a treatise as to when and how to award attorney fees. An attempt has been made to include all Idaho decisions of any import on attorney fees. To the extent that opinions are expressed, they are solely those of the author

and not of the judiciary.

Nearly every civil complaint nowadays concludes with a prayer for costs and attorney fees. Likewise, many appellate opinions conclude with a ruling on whether the award or denial of attorney fees was an abuse of discretion of the trial court. This is quite a contrast to a time which most of us can remember when a prayer for attorney fees was unusual, except for actions on a promissory note or contract. The proliferation of attorney fees was caused largely by the enactment of Idaho Code s 12-120 in 1970 and Idaho Code s 12-121 in 1976.

A considerable amount of time and effort is expended by the trial judge in ruling upon these numerous requests for attorney fees. In many cases, the question of attorney fees has become one of the major parts of the litigation. I suggest that the trial judge should devise a systematic method for considering and ruling upon attorney fees. This would not only save the judge much time and effort, but should ultimately lead to a predictability that will allow attorneys to more often settle this question rather than litigate it. The determinations of whether attorney fees are permitted, whether they should be awarded in a particular case, and the amount of the attorney fees are complex. However, the Idaho Rules of Civil Procedure (the Civil Rules) give general principles to help the judge in making these determinations and appellate decisions give some specific guidelines and criteria.

## II. THE AMERICAN RULE

In approaching the question of attorney fees, the judge first should be aware that Idaho follows what is commonly known as the American Rule. Under this rule, "attorney fees are to be awarded only where they are authorized by statute or contract." *Hellar v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984). *See also Fournier v. Fournier*, 125 Idaho 789, 791, 874 P.2d 600, 602 (Ct. App. 1994); *Owner-Operator Indep. Drivers Ass'n v. Idaho Pub. Util. Comm'n*, 125 Idaho 401, 407, 871 P.2d 818, 824 (1994). Even where authorized under a statute or contract, if attorney fees are not requested at the trial court level they may be denied, and a denial on those grounds will be affirmed on appeal. *Lawrence v. Jones*, 124 Idaho 748, 752, 864 P.2d 194, 198 (Ct. App. 1993). The party asserting the claim for attorney fees has the burden of directing the court's attention to either a statute or a contract between the parties authorizing the award of attorney fees. If the party does not refer to a statute or contract they may be denied. *Fournier*, 125 Idaho at 791, 874 P.2d at 602. Fees cannot be awarded as an "equity" determination, *id.*, nor by the court sua sponte if not claimed under a pertinent statute. *Bingham v. Montane Resource Assoc.*, 133 Idaho 420, 423, 987 P.2d 1035, 1038 (1999).

There is no "inherent power" of a court to award attorney fees. In a case where the trial court referred to this inherent power, the Court of Appeals stated:

This assertion of a general inherent authority to award fees was incorrect. Idaho law does not recognize such an equitable power to grant attorney fees. Rather, our law adheres to the 'American Rule' which generally permits an attorney fee award only when authorized by contract or statute.

*Keevan v. Estate of Keevan*, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ct. App. 1994).

However, there are some exceptions to this Rule. The first exception was created by case law and is known as the "Private Attorney General Doctrine." If an individual incurs attorney fees in processing an action for the benefit of the general public, that party may be entitled to attorney fees. It has been stated that in considering an application for \*548 attorney fees under this doctrine, the court must consider three basic factors: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." *County of Ada v. Red Steer Drive-Ins of Nevada, Inc.*, 101 Idaho 94, 100, 609 P.2d 161, 167 (1980) (quoting *Serrano v. Priest*, 20 Cal. 3d 25, 569 P.2d 1303 (1977)).

An action to recover a refund of registration fees paid by interstate motor carriers does not qualify under the Private Attorney General Doctrine. *Owner-Operator Indep. Drivers Ass'n v. Idaho Pub. Util. Comm'n*, 125 Idaho 401, 408, 871 P.2d 818, 825 (1994). In *Owner-Operator Indep. Drivers Association*, the trial court denied attorney fees in an action challenging the procedure of assessment of registration fees for interstate carriers and the Supreme Court held that the trial court had not abused its discretion. The Supreme Court did award attorney fees under the Private Attorney General Doctrine in an action challenging the redistricting of legislative districts under a reapportionment statute. *Hellar v. Cenarrusa*, 106 Idaho 571, 577, 682 P.2d 524, 530 (1984). **[The trial judge often sees such a request for attorney fees, but i]** In *Taggart v. Highway Board*, 115 Idaho 816, 818, 771 P.2d 37, 39 (1988), the Supreme Court ruled that the trial court should have given attorney fees under this doctrine in an action by a property owner for a declaratory judgment that a public road had not been abandoned, where the highway district contended that it had been abandoned. In *Fox v. Board of County Commissioners*, 121 Idaho 684, 685, 827 P.2d 697, 698 (1992), the Supreme Court upheld attorney fees in an action challenging the issuance of beer licenses to taverns by the county, quoting the earlier opinion of the Court of Appeals:

In evaluating a claim for attorney fees under [the Private Attorney General Doctrine, we] recently suggested in *Hellar v. Cenarrusa*, 106 Idaho 571, 682 P.2d 524 (1984), that the district court must consider (1) the strength and societal importance of the public policy indicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, and (3) the number of people standing to benefit from the decision. Here, the record supports the district court's determination that all three of these criteria were met. In Fox's words, this action was pursued to ensure that Boundary County was governed by rule of law, not of man. Without Fox's efforts it was highly unlikely that the actions of the Boundary County Board of Commissioners would have been challenged. It is equally clear that this action imposed a substantial personal burden, both financial and emotional, on Mr. Fox. As a result of this litigation, all of the citizens of Boundary County benefited from Fox's perseverance.

121 Idaho at 685, 827 P.2d at 698.

Likewise, an action to declare void a county ordinance regarding the control of county lands did not fall within the doctrine because there was "no substantial and competent evidence to support a finding of necessity for this action, one of the prerequisites for the award of attorney

fees pursuant to the private attorney general doctrine." *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 378, 913 P.2d 1141, 1148 (1996). Also an action challenging an irrigation assessment did not qualify as it did not affect enough people and the "societal importance was 'negligible.'" *Dufur v. Nampa & Meridian Irrigation Dist.*, 128 Idaho 319, 327, 912 P.2d 687, 695 (Ct. App. 1996). In the same manner, an action challenging a fee on wholesale petroleum did not qualify for the doctrine where the plaintiff's only purpose in bringing suit was to obtain a refund on fees paid to a trust fund. *V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund*, 128 Idaho 890, 896, 920 P.2d 909, 915 (1996). **[The Supreme Court also held that the Private Attorney General Doctrine does not apply to a state agency (the Idaho Department of Health and Welfare) as fees must be sought under I.C. s 12-117. *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996).]**

In *Miller v. Echohawk*, 126 Idaho 47, 49, 878 P.2d 746, 748 (1994), the Supreme Court affirmed attorney fees under the Private Attorney General Doctrine even though a favorable decision was never obtained. The plaintiff brought action for reapportionment of the legislature in accordance with the 1990 census and, while the case was pending, the legislature reapportioned itself and the case was dismissed. The Supreme Court stated that the action of the legislature "reapportioning itself was in direct response to Miller's suit." *Id.* at 50, 878 P.2d at 749.

**The Private Attorney General Doctrine is not available as a basis for awarding fees in a case against a state agency; instead fees must be sought under I.C. s 12-117, which specifically addresses awards of attorney fees against state agencies. *Roe v. Harris*, 128 Idaho 569, 572, 917 P.2d 403, 406 (1996). In 1994, the Idaho legislature amended I.C. s 12-117 to include "a city, a county, or other taxing district." Therefore, the Private Attorney General Doctrine "is not available as the basis for an award of attorney fees in a case against a county." *Kootenai Medical Center v. Bonner County Commissioners*, 141 Idaho 7, 10, 105 P.3d 667, 670 (2004).**

Attorney fees in eminent domain cases is arguably another exception to the American Rule. They are fees by court decisions. The landmark case in this area is *Ada County Highway District v. Acarrequi*, 105 Idaho 873, 876, 673 P.2d 1067, 1070 (1983). In *Ada County*, the trial court had granted the condemnee attorney fees as a matter of right. The Supreme Court reversed, holding there was no such right, and established a new rule, vesting the trial court with discretion. The Court first stated, "[W]e adopt a new view and hold that, in condemnation \*548 actions, attorneys' fees may be awarded to the condemnee without a showing and finding that the action was brought and pursued 'frivolously, unreasonably or without foundation.'" *Id.* at 876-77, 673 P.2d 1070-71.

It then stated, "We now hold that an award of reasonable attorney's fees to the condemnee in an eminent domain proceeding is a matter for the trial court's guided discretion and, as in other areas of the law, such award will be overturned only upon a showing of abuse." *Id.* at 877, 673 P.2d at 1071. The Supreme Court then elaborated:

Except in the most extreme and unlikely situation, we cannot envision an award of attorneys' fees and costs to a condemnor. Given the vagaries of jury verdicts in condemnation

actions, the ultimate jury award is a far from perfect point of departure in attempting to gauge the reasonableness of the positions of the parties, relative to settlement, prior to trial. However, given the entire theory of eminent domain, *i.e.*, that a jury will determine the just compensation to be awarded the condemnee, we must, it seems, assume that a jury verdict at least approximates the fair market value of the property taken and the damages which will result to the remainder. We are convinced that such is at least a more reliable indicator than the wide and wild variations in value which will be testified to in any given case by the expert witnesses brought forward by each party. As a point of beginning, we postulate that a jury in a condemnation action, attempting to choose among highly divergent evidence as to value, can only be expected to arrive at the 'real' just compensation to which a condemnee is entitled within a margin of error of plus or minus ten per cent. Hence, we would deem that in considering the award of attorneys' fees to a condemnee, a condemnor should have reasonably made a timely offer of settlement at least 90 per cent of the ultimate jury verdict. We also deem that an offer would not be timely if made on the courthouse steps an hour prior to trial.

*Id.* at 878, 673 P.2d at 1072. Ultimately the case was remanded for reconsideration under the new standards.

However, in a later case the trial court denied attorney fees where the state made a tender of \$16,950.00 and the jury awarded \$39,361.00. *State v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 828, 820 P.2d 695, 695 (1991). The state's offer was only 43% of the verdict, but the Supreme Court affirmed and found that the trial court did not abuse its discretion by denying attorney fees because appellants were not prevailing parties. *Id.* [**In an inverse condemnation case, the court denied attorney fees without referring to *Ada County or Talbot. McCuskey v. Canyon County*, 128 Idaho 213, 912 P.2d 100 (1996).**]

There are other exceptions to the American Rule, resulting from case law decisions. In the case of quieting title to real property in conjunction with damages for breach of warranty of title, the Supreme Court granted fees without referring to any statute. *Koelker v. Turnbull*, 127 Idaho 262, 266, 899 P.2d 972, 976 (1995). Other exceptions exist with respect to modification of child custody decrees, *Poesy v. Bunney*, 98 Idaho 258, 263, 561 P.2d 400, 405 (1977), and for child support modifications, *Dykstra v. Dykstra*, 94 Idaho 797, 800, 498 P.2d 1270, 1273 (1972). The final exception to the American Rule is the award of attorney fees under rule of the court. These include I.R.C.P. 11(a)(1), I.R.C.P. 16(i), I.R.C.P. 30(g), I.R.C.P. 37, I.R.C.P. 56(g), and I.R.C.P. 65(c). These rules allow sanctions against a party or a party's attorney for improper conduct or for failure to comply with the procedure of the discovery process.

### III. THRESHOLD QUESTIONS

In ruling upon a claim for attorney fees, it may be helpful to the trial judge to systematically go through a series of threshold questions as to whether attorney fees can or should be considered. If any of the threshold questions, successively, are answered in the negative, it will terminate the inquiry. In this way, the judge will not spend time on questions which might ultimately be irrelevant.

I suggest the trial judge ask the following questions:

A. Are there proper parties for the award of attorney fees? (Can attorney fees be awarded for one party against the opposing party?)

B. Is there an underlying basis for the award of attorney fees?

C. Have all of the requirements for attorney fees been met?

1. Under a statute?

2. Under a rule?

3. Under a contract?

D. Is there a prevailing party?

E. What amount of attorney fees should be awarded? (The hard part.)

### **A. Are There Proper Parties For the Award of Attorney Fees?**

#### **(Can Attorney Fees Be Awarded For One Party Against the Opposing Party?)**

Even though there is an underlying basis for attorney fees, and even if the court thereafter finds the other requisites for making an award exist, attorney fees cannot be awarded unless the claimant is a proper party for such an award. For this reason, this determination should be made first.

#### ***1. Pro Se Parties***

The Supreme Court has ruled that a pro se party can never be awarded attorney fees. *Curtis v. Campbell*, 105 Idaho 705, 707, 672 P.2d 1035, 1037 (1983); *O'Neil v. Schuckardt*, 112 Idaho 472, 480, 733 P.2d 693, 701 (1986). The prohibition against an award of attorney fees to a pro se litigant applies also to attorneys who represent themselves in litigation. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 973 P.2d 142 (1999), citing *Swanson & Setzke v. Henning*, 116 Idaho 199, 774 P.2d 909 (Ct. App. 1989). **The prohibition further applies to a pro se litigant who prevails on appeal. *Cobbley v. City of Challis*, 138 Idaho 154, 160, 59 P.3d 959, 965 (2002).** In *Swanson*, the Court of Appeals explained:

In our view, the public perception of fairness in the legal system is of greater moment than a \*548 lawyer litigant's claim to an attorney fee award if he elects to represent himself. For this reason, and because the other rationales for the general rule against fee awards are applicable to lawyer and nonlawyer litigants alike, we decline to carve out a special exception for lawyers *pro se*.

116 Idaho at 203, 774 P.2d at 913. **Attorney fees, however, can be awarded to a pro se litigant for attorney fees incurred by counsel on appeal, even though for a majority of the**

case the litigant appeared pro se. *Erickson v. Flynn*, 138 Idaho 430, 438, 64 P.3d 959, 967 (Ct. App. 2002).

Attorney fees can be awarded against a pro se litigant who brings or pursues an appeal frivolously, unreasonably, or without foundation. In *Twin Falls County v. Coates*, 139 Idaho 442, 80 P.3d 1043 (2003), the Supreme Court said:

**Pro se litigants are held to the same standards and rules as those represented by an attorney.**

139 Idaho at 445, 80 P.3d at 1046.

### *2. Where No Attorney Fees Are Paid*

From these rulings, one might suspect that the principle has been stated that attorney fees will be awarded only to a party who has incurred attorney fees. This is not entirely true. The Supreme Court ruled in *Futrell v. Martin* that attorney fees can be awarded to a party who is represented at no cost by an attorney provided by an insurance company:

Appellants also assert that respondents should not be awarded attorney fees at the trial level because respondents did not incur any attorney fees inasmuch as they were represented by their insurance company. We find no merit in this position. The purpose of I.C. s 12-121 was in proper cases to impose the actual costs of litigation on the unsuccessful parties, in the court's discretion.

100 Idaho 473, 479, 600 P.2d 777, 783 (1979). Although the court did not discuss just who gets the attorney fees, presumably the insured would get the attorney fees as a windfall. *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 841, 801 P.2d 37, 48 (1990) (holding that even if defendants' insurance companies paid defendants' attorney fees, defendants would not be precluded from receiving fees as the prevailing party under I.C. s 12-121).

### *3. Governmental or Public Agencies*

A somewhat similar situation arises where a party is represented by an attorney who is a salaried employee of a governmental agency or a public entity. The Supreme Court ruled that a public entity is entitled to receive attorney fees when authorized by statute and that this award is not precluded by the fact that its attorney is a salaried employee. *In the Interest of Dunmire*, 100 Idaho 697, 700, 604 P.2d 711, 714 (1979).

Likewise, the Supreme Court has held that a Legal Aid attorney is entitled to recover attorney fees while representing the mother of a juvenile under a Juvenile Correction action even though the attorney is paid by Idaho Legal Aid Services, Inc. *See Dunmire*, 100 Idaho at 699, 604 P.2d 713. This claim for attorney fees was not submitted by the mother of the juvenile personally, but was prosecuted by the Legal Aid attorney who represented the mother. Therefore the court was not concerned with giving a windfall to the party for attorney fees **[which] that** the party had not paid. It is unclear whether Legal Aid or the attorney received the attorney fees awarded by the

court.

#### ***4. Parties to the Action***

It seems clear that attorney fees can be awarded to a party other than the plaintiff in an action. For example, a counter claimant may, in the proper case, be awarded attorney fees on his counterclaim. *Torix v. Allred*, 100 Idaho 905, 910-11, 606 P.2d 1334, 1339-40 (1980).

If a statute provides for attorney fees in an action, there is a right to attorney fees to the defendant who successfully defends in that action. *Boise Truck & Equip., Inc. v. Hafer Logging*, 107 Idaho 824, 825, 693 P.2d 470, 471 (Ct. App. 1984). Therefore, if the court determines that the plaintiff would have been entitled to attorney fees under a statute if he prevailed, the defendant or third-party defendant would likewise be entitled to attorney fees if he successfully defends the action. *Griggs v. Nash*, 116 Idaho 228, 234-35, 775 P.2d 120, 126-27 (1989); *Spidell v. Jenkins*, 111 Idaho 857, 860, 727 P.2d 1285, 1288 (Ct. App. 1986).

This reciprocal principle does not apply to attorney fees under a contract. If a contract provides for attorney fees only to one party, the other party does not have a similar right to attorney fees. *Barnes v. Hinton*, 103 Idaho 619, 621, 651 P.2d 555, 558 (Ct. App. 1982). Therefore, under a common promissory note there may not be a contractual right to attorney fees for a successful defense. Despite the contract terms, attorney fees still may be awarded under I.C. s 12-120(3) as discussed below. The trial court cannot enter a judgment awarding fees in favor of the plaintiff's attorney and against the defendant's attorney directly because the attorneys are not "parties" in the action. *Valentine v. Perry*, 118 Idaho 653, 655-56, 798 P.2d 935, 937-38 (1990).

A party to an appeal from the magistrate's division to the district court is entitled to attorney fees in that appeal generally in the same manner as he would be entitled to attorney fees at trial before the magistrate. *Nicholls v. Blaser*, 102 Idaho 559, 562, 633 P.2d 1137 (1981).

#### ***5. Can Attorney Fees Be Awarded Against a Party?***

Just as the court should determine whether the party seeking attorney fees is one who properly may receive them, there is also a corresponding question of whether the opposing party is a proper party against whom attorney fees can be awarded. This can be a substantial question when a governmental agency is involved. Our Supreme Court held in 1952 that costs and attorney fees **[can] could** be awarded against the state, or other governmental unit, only when authorized by statute. *Chastain's, \*548 Inc. v. State Tax Comm'n*, 72 Idaho 344, 351, 241 P.2d 167, 174 (1952). With the advent of **[Idaho Code] I.C. s 12-121**, the question arose as to whether attorney fees could be awarded against a governmental unit under this statute, which makes no reference to the liability of the state or any other governmental agency. The Supreme Court has ruled that attorney fees can be awarded under I.C. s 12-121 against the state of Idaho, a county, or municipality. *Rickel v. Bd. of Barber Examiners*, 102 Idaho 260, 629 P.2d 656 (1981) (awarding costs and attorney fees to plaintiff against State Board of Barber Examiners); *Averitt v. City of Coeur d'Alene*, 100 Idaho 751, 752, 605 P.2d 515, 576 (1980) (**attorney fees included in the costs awarded to plaintiff against the city**); *Merris v. Ada County*, 100 Idaho

59, 67, 593 P.2d 394, 402 (1979) (ordering county to pay plaintiff's attorney fees and costs).

In 1984 the Idaho legislature enacted I.C. s 12-117, which specifically allows the award of attorney fees against a "state agency." This statute will be discussed in detail in section III.C.1.(h).

In a rather unusual case, the Supreme Court ruled that the attorneys for an insured could not collect attorney fees from the insurance company for collecting its subrogated share of the settlement recovery. This was because the insured never notified the insurer of his intent to collect on the insurer's subrogated interest from the other motorist, as required. *Miner v. Farmers Ins. Co. of Idaho*, 116 Idaho 656, 658, 778 P.2d 778, 780 (1989). *See also Boll v. State Farm Mut. Auto. Ins. Co.*, 140 Idaho 334, 342, 92 P.3d 1081, 1089 (2004).

Therefore, in each case the trial court must determine if the party against whom attorney fees are claimed can legally be held liable for the fees.

## **B. Is There An Underlying Basis For the Award of Attorney Fees?**

In determining whether there is an underlying basis for the award of attorney fees, the trial judge must apply the American Rule, one of its exceptions, a statute, or a contract. It is important to make this determination at the outset, because the subsequent inquiry will be altered, depending upon whether the claim is made under a contract provision or a particular statute or rule. The specifics of the inquiry under a particular statute, rule, or contract provision are discussed in detail below. It is possible to have more than one statute or rule applicable to the case which potentially could be grounds for the award of attorney fees.

This determination is a question of law. If the court finds that there is an applicable statute, rule, or contract provision, it does not mean that attorney fees automatically will be awarded. It merely means that the court has determined that there is an underlying basis on which attorney fees could be awarded in an appropriate case. The trial judge must then exercise a great deal of discretion in determining whether the requirements of the statute, rule, or contract have been met so as to award attorney fees.

### ***1. Is There An Applicable Statute?***

The Supreme Court has held that an award of post-judgment attorney fees incurred in enforcing a judgment is not authorized under statute or rules. *Allison v. John M. Biggs, Inc.*, 121 Idaho 567, 826 P.2d 916 (1992). However, in 1994 a new provision was added to I.C. s 12-120 which allows for such attorney fees. Subsection (5) provides:

In all instances where a party is entitled to reasonable attorney's fees and costs under subsection (1), (2), (3) or (4) of this section, such party shall also be entitled to reasonable postjudgment attorney's fees and costs incurred in attempting to collect on the judgment. Such attorney's fees and costs shall be set by the court following the filing of a memorandum of attorney fees and costs with notice to all parties and hearing.

Note that this applies only to I.C. s 12-120 attorney fees. A similar section, I.C. s 12-120(6), was added in 2001 to allow recovery of fees to collect on small claims judgments.

In most cases the attorneys will identify the basis for the claim for attorney fees in the pleadings. However, under modern pleading practice it appears that a party need only pray for attorney fees in his pleading and is not required to introduce evidence regarding attorney fees at trial. *Devine v. Cluff*, 110 Idaho 1, 4, 713 P.2d 437, 440 (Ct. App. 1985), *aff'd*, 111 Idaho 476, 725 P.2d 181 (Ct. App. 1986).

If a statute authorizes the award of attorney fees, the court must first decide whether the statute applies to the case before the court. The Supreme Court has applied I.C. s 12-121 retroactively. Although the statute was enacted in 1976, the court applied it to an action which arose in 1975, stating:

It is our view that the district court did not err in awarding the Shanks attorney fees pursuant to I.C. s 12-121 and that the district court properly included the attorney fees as costs. *See Idah-Best, Inc. v. First Security Bank of Idaho*, 99 Idaho 517, 584 P.2d 1242 (1978). The application of I.C. s 12-121 to a claim for relief which arose prior to the enactment of that section but tried after the section became law is not an improper retroactive application of that section since we view its provision as remedial and procedural and not as affecting the substantive claim for relief.

*Jensen v. Shank*, 99 Idaho 565, 566-567, 585 P.2d 1276, 1277-78 (1978).

*Jensen v. Shank* does not indicate the date the action was filed, but because of the remedial nature of I.C. s 12-121, the court seems to conclude that trial courts must apply any existing attorney fee statute to all pending cases, regardless of when the cause of action arose. *Id.* However, in the case of *Myers v. Vermaas*, 114 Idaho 85, 87, 753 P.2d 296, 298 (Ct. App. 1988), the Court of Appeals was faced \*548 with a question of whether the 1986 amendment to I.C. s 12-120 should be applied to a case filed in 1985 but tried after July 1, 1986. The court in a per curiam opinion held that the 1986 amendment did not apply to the action filed in 1985. Citing to *Jensen*, the court commented, "Presumably, any amendment to such statutes also would receive retrospective effect." *Id.* at 87, 753 P.2d at 298. The court then reasoned:

However, we think a different analysis is required for I.C. s 12-120. Unlike I.C. ss 12-121 and 61-617A, I.C. s 12-120 provides for a *mandatory*, not discretionary, award of attorney fees to the prevailing party in commercial litigation. The automatic nature of an award under I.C. s 12-120 makes it, in effect, an adjunct to the underlying commercial agreement between the parties. It establishes an entitlement. In this respect, an award under the statute is closely akin to other 'contractual or vested' rights contained in the agreement itself. Although the award right is 'remedial' in the semantic sense that it relates to a remedy, the same could be said of contract provisions relating to damages or other relief in the event of default.

Accordingly, we think that the 1986 amendment to I.C. s 12-120, which enlarged the scope of entitlement to mandatory attorney awards, is more accurately classified as substantive than as merely remedial or procedural. Consequently, the 1986 amendment should not be given retroactive effect.

Accordingly, we think that the 1986 amendment to I.C. s 12-120, which enlarged the scope of entitlement to mandatory attorney fee awards, is more.

114 Idaho at 87, 753 P.2d at 298.

Later, in May 1989, the Supreme Court ruled that the same 1986 amendment to I.C. s 12-120 applied to an action that accrued in 1985, but was filed in 1987. *Griggs v. Nash*, 116 Idaho 228, 234-35, 775 P.2d 120, 126-27 (1989). In making this ruling, the Supreme Court approved of the Court of Appeals' decision in *Myers v. Vermaas*. *Id.* at 235, 775 P.2d at 127. Therefore, it seems that a statute or amendment on attorney fees is applied retroactively to actions which arose prior to the effective date of the statute, but only if the action is filed after the effective date. The Supreme Court has stated that in determining the application of I.C. s 12-120(3), "[T]he proper focus is upon the time of filing, not the time the cause of action arose." *Ramco v. H-K Contractors, Inc.*, 118 Idaho 108, 113, 794 P.2d 1381, 1386 (1990); *see also Bott v. Idaho State Bldg. Auth.*, 122 Idaho 471, 481, 835 P.2d 1282, 1292 (1992).

Until the determination is made by the court that a statute, rule, or contract provision is applicable, there is no reason to further consider attorney fees. If the court determines that there is no underlying basis for attorney fees, it may summarily deny the claim for attorney fees. There is no statute or case law requiring any specific findings when attorney fees are denied on this basis, but it may be helpful to appellate courts if a short statement is included in the order denying attorney fees to the effect that there is no applicable statute, rule, or contract provision which would permit the award of attorney fees.

## **2. Objections**

I.R.C.P. 54(e)(6) provides that a party may make an objection to the award of attorney fees in the same manner as an objection to costs under I.R.C.P. 54(d)(6). That rule requires the objection to be filed within fourteen (14) days after service of the memorandum of costs and further provides that failure to timely object "shall constitute a waiver of all objections to costs claimed." Pursuant to that rule it has been held that failure to object is a waiver of the right to contest the amount of the attorney fee requested. "Failure to timely object to a memorandum of costs and attorney fees constitutes a waiver of the right to contest the requesting party's entitlement to the fees sought." *Fearless Farris Wholesale, Inc. v. Howell*, 105 Idaho 699, 704, 672 P.2d 577, 582 (Ct. App. 1983); *see also Conner v. Dake*, 103 Idaho 761, 653 P.2d 1173 (1982); *Farber v. Howell*, 111 Idaho 132, 136, 721 P.2d 731, 735 (Ct. App. 1986). If a party does not specifically state the grounds for an objection to a request for attorney fees, the court may strike the objection and award attorney fees. *Nanney v. Linella, Inc.*, 130 Idaho 477, 482, 943 P.2d 67, 72 (Ct. App. 1997). However, the Supreme Court has held that failure to object to attorney fees when they are not authorized by statute or rule does not result in a waiver of the party's right to object to the improper award of attorney fees. *Allison v. John M. Biggs, Inc.*, 121

Idaho 567, 826 P.2d 916 (1992).

### **C. Have All of the Requirements For Attorney Fees Been Met?**

If the court decides that (1) an attorney fee statute, (2) rule, or (3) contract provision is applicable, it must then determine if all of the requirements for the award of attorney fees have been met. This involves the discretion and judgment of the trial court which will be reversed only for an abuse of discretion.

#### ***1. Attorney Fees Under Statutes***

Most often the basis for attorney fees is a statutory provision. Each statute must be examined closely to determine whether all requirements have been met. Statutes are both independent and overlapping, so that in a particular case there might potentially be several statutes involved. However, if there is a specific statute in an area of the law, such as anti-trust or insurance, that statute controls over the statutes discussed below. *Empire Fire and Marine Ins. Co. v. North Pacific Ins. Co.*, 127 Idaho 716, 719-20, 905 P.2d 1025, 1028-29 (1995).

The following are some of the statutes commonly raised in support of a claim for attorney fees.

#### ***(a) Idaho Code s 12-121***

This statute has become the paramount \*548 statute in the award of attorney fees because it potentially applies to every single civil action. Section 12-121 provides in pertinent part: "In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees."

There is no written legislative history for Idaho statutes. Consequently, when I.C. s 12-121 was enacted in 1976, each trial judge in Idaho was suddenly required to interpret this seemingly broad authority to award attorney fees to the prevailing party in any civil action. Obviously, the statute was permissive by the use of the words "may award" attorney fees so that most judges did not feel compelled to award attorney fees to the prevailing party in every case. However, it soon became apparent that the interpretation of this broad authority varied greatly from judge to judge. In some cases, judges were awarding attorney fees in the amount of a contingency fee claim in every personal injury action. Other judges seemed to feel that attorney fees should be awarded only in unusual circumstances. The amount of attorney fees varied greatly as some judges felt that the attorney fees should make the prevailing party "whole," while other judges felt that they could make an independent determination of what reasonable attorney fees were justified in the situation. It is no surprise then that this unfettered and unguided discretion, and the inconsistent results it produced, led to judge shopping.

The Supreme Court recognized this problem and appointed a blue ribbon committee of judges and attorneys in the summer of 1978 to study this problem and make recommendations to the Court. As a result of the report and recommendations of this committee, the Supreme Court

adopted Rules 54(e)(1) through (9) to the Idaho Rules of Civil Procedure on January 2, 1979.

The most obvious and most important restriction placed on attorney fees under I.C. s 12-121 by I.R.C.P. 54(e)(1) is the limitation of attorney fees to those situations in which the court finds that the action was "brought, pursued or defended frivolously, unreasonably or without foundation." The statute and rule apply to both plaintiff and defendant. The corollary is also stated in I.R.C.P. 54(e)(4) that attorney fees can never be awarded under I.C. s 12-121 in a default judgment, in that the action was obviously not defended frivolously, unreasonably or without foundation.

There is no further explanation in I.R.C.P. 54(e)(1) as to the meaning of whether a case is "brought, pursued or defended frivolously, unreasonably or without foundation." These words are allegedly self-explanatory. Even though an action might be proper at its commencement, facts might thereafter develop which indicate that it was thereafter "pursued" frivolously, unreasonably or without foundation. The distinction has been made that attorney fees can be available if the action was either "brought" or "pursued" frivolously, unreasonably or without foundation. *Ortiz v. Reamy*, 115 Idaho 1099, 1101, 772 P.2d 737, 739 (Ct. App. 1989); *see also Win of Michigan, Inc. v. Yreka United, Inc.*, **137 Idaho 747, 754, 53 P.3d 330, 337 (2002)**; *Anson v. Les Bois Race Track, Inc.*, 130 Idaho 303, 305, 939 P.2d 1382, 1384 (1997).

How does a trial judge decide if an action was brought, pursued or defended frivolously, unreasonably or without foundation? It is not easy. The Supreme Court has repeatedly stated that this is a matter within the broad and sound discretion of the trial court. *Anderson v. Goodliffe*, **140 Idaho 446, 450, 95 P.3d 64, 68 (2004)**; *Win of Michigan, Inc. v. Yreka United, Inc.*, **137 Idaho 747, 754, 53 P.3d 330, 337 (2002)**; *Etcheverry Sheep Co. v. J.R. Simplot Co.*, 113 Idaho 15, 19, 740 P.2d 57, 61 (1987); *O'Boskey v. First Fed. Sav. & Loan Ass'n*, 112 Idaho 1002, 1008, 739 P.2d 301, 307 (1987); *Everett v. Trunnell*, 105 Idaho 787, 790-91, 673 P.2d 387, 390-91 (1983). The failure of the opposing party to object to the attorney fees under I.R.C.P. 54(e)(6) is not a waiver of the requirements of I.C. s 12-121 and the trial judge still must exercise discretion in making this determination. *Long v. Hendricks*, 109 Idaho 73, 80, 705 P.2d 78, 85 (Ct. App. 1985).

This broad grant of discretionary authority does not give the trial judge much direction, but a few appellate court decisions provide guidance. The Supreme Court has stated that this determination must be more than a mere conclusionary opinion of the trial judge. *Davis v. Professional Bus. Serv., Inc.*, 109 Idaho 810, 815-816, 712 P.2d 511, 516-17 (1985). The appellate courts have warned trial judges that this finding must be based upon more than just "the judge's subjective impression of the [plaintiff's] motive for litigating this case." *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 911, 684 P.2d 307, 313 (Ct. App. 1984), *overruled on other grounds by NBC Leasing Co. v. R & T Farms, Inc.*, 112 Idaho 500, 733 P.2d 721 (1987).

The Supreme Court has also made it very clear that I.C. s 12-121 attorney fees cannot be awarded upon the basis that a party has failed to negotiate in good faith:

Just last year this Court reasserted our earlier holding in *Payne v. Foley*, 102 Idaho 760, 639 P.2d 1126 (1982), that in determining whether or not to award attorney

fees under I.C. s 12-121 the trial courts may not consider the extent of any settlement negotiations which the parties may or may not have engaged in. In *Ross v. Coleman*, 114 Idaho 817, at 836, 761 P.2d 1169, at 1188 (1988), this Court stated, quoting from *Payne*, "There is no authority in a trial court to insist upon, oversee, or second guess settlement negotiations, if any, and certainly no authority to impose sanctions for 'bad faith' bargaining." *Ross v. Coleman* overruled *Sigdestad v. Gold sub silentio*. We again affirm our holdings in *Payne v. Foley*, and *Ross v. Coleman*, i.e., "that the failure to enter into or conduct settlement negotiations is \*548 not a basis for awarding attorney fees under I.C. s 12-121 and I.R.C.P. 54(e)(1)." *Id.* The language in *Sigdestad v. Gold*, 106 Idaho 693, 682 P.2d 646 (Ct. App. 1984), to the contrary is in error and is expressly disapproved.

*Anderson v. Anderson, Kaufman, Ringert and Clark, Chtd.*, 116 Idaho 359, 365-66, 775 P.2d 1201, 1207-08 (1989). See also *Bailey v. Sanford*, 139 Idaho 744, 754, 86 P.3d 458, 468 (2004); *Smith v. Angell*, 122 Idaho 25, 29, 830 P.2d 1163, 1164 (1992).

Likewise, the Supreme Court has stated, "A finding that the nonprevailing party failed to negotiate in good faith cannot be considered." *Edwards v. Donart*, 116 Idaho 687, 688, 778 P.2d 809, 810 (1989). [**"Attorney fees may be awarded to an insured under I.C. s 41-1839 only when the insured had no other option other than to file suit against his or her insurer in order to recover his or her loss."** *Anderson v. Farmers Ins. Co.*, 130 Idaho 755, 759, 947 P.2d 1003, 1007 (1997).

However, the Supreme Court later stated in reviewing a I.C. s 12-121 award, "We hold that the district court did not err in giving due consideration to defendants' refusal to make any advances on plaintiff's sum-certain medical bills, especially given defendants' belated admission of liability." *Turner v. Willis*, 116 Idaho 682, 685, 778 P.2d 804, 807 (1989).]

In one case, the Supreme Court stated that "[a]ttorney fees may be awarded to an insured under I.C. s 41-1839 only when the insured had no other option other than to file suit against his or her insurer in order to recover his or her loss." *Anderson v. Farmers Ins. Co.*, 130 Idaho 755, 759, 947 P.2d 1003, 1007 (1997). However, that condition placed on an award of attorney fees pursuant to I.C. s 41-1839 has since been withdrawn. *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 247, 61 P.3d 601, 604 (2002).

Although a lack of good faith negotiations is not a proper concern in considering a claim to an award of attorney fees in a personal injury action, a trial court can consider the entire course of the litigation when determining whether a defendant acted frivolously or unreasonably. A district court "did not err in giving due consideration to defendants' refusal to make any advances on plaintiff's sum-certain bills, especially given defendants' belated admission of liability." *Turner v. Willis*, 116 Idaho 682, 685, 778 P.2d 804, 807 (1989), *rev'd on other grounds*, 119 Idaho 1023, 812 P.2d 737 (1990).

The conduct of the parties, as opposed to the bringing, pursuing or defending of the action, cannot be a basis for the award under I.C. s 12-121, *Verway v. Blincoe Packing Co., Inc.*, 108 Idaho 315, 319, 698 P.2d 377, 381 (Ct. App. 1985), unless it is followed by an unreasonable

prosecution or defense of the action. *O'Boskey v. First Fed. Sav. & Loan Ass'n*, 112 Idaho 1002, 1009-10, 739 P.2d 301, 308-09 (1987).

Misconduct by a party's attorney during the trial which causes a mistrial is not grounds for attorney fees because it is not covered by the rules or statute. *Valentine v. Perry*, 118 Idaho 653, 655-56, 798 P.2d 935, 937-38 (1990). This is partially true because the prevailing party has not yet been determined. *Robertson v. Richards*, 118 Idaho 791, 793, 800 P.2d 678, 680 (Ct. App. 1990). It is improper to award attorney fees on any fact not in the record, and attorney fees cannot be awarded for personal misconduct, such as the use of drugs. *Severson v. Hermann*, 116 Idaho 497, 499, 777 P.2d 269, 271 (1989).

In a fire damage case there was no abuse of discretion in denying attorney fees when the action was not frivolous or without foundation. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 499, 943 P.2d 912, 925 (1997).

The dismissal of a case before trial is not automatic grounds for section 12-121 attorney fees:

Mere dismissal of a claim without a trial does not necessarily mean that the party against whom the claim was made is a prevailing party for the purpose of awarding costs and fees. Dismissal of a claim may be but one of many factors to consider. When the claim was dismissed may be another.

*Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 692, 682 P.2d 640, 645 (Ct. App. 1984). While not dispositive, dismissal is one of the factors to be considered. *Platt v. Brown*, 120 Idaho 41, 44, 813 P.2d 380, 383 (Ct. App. 1991); *P.N. Cedar, Inc. v. D & G Shake Co.*, 110 Idaho 561, 569, 716 P.2d 1333, 1340 (Ct. App. 1986). [**"Mere dismissal of a claim without a trial does not necessarily mean that the party against whom the claim was made is a prevailing party for the purpose of awarding costs and fees."**] Additionally, the Court of Appeals has ruled that an involuntary dismissal of a complaint at the conclusion of plaintiff's case under I.R.C.P. 41(b) is not by itself grounds for attorney fees under I.C. s 12-121. *Bonaparte v. Neff*, 116 Idaho 60, 64, 773 P.2d 1147, 1151 (Ct. App. 1989). Nevertheless, the dismissal of the action determines the defendant's position as the prevailing party. *Sanders v. Lankford*, 134 Idaho 322, 325-26, 1 P.3d 823, 826-27 (Ct.App. 2000); *Daisy Mfg. Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 262, 999 P.2d 914, 917 (Ct. App. 2000).

It has also been stated that it is "simply inconsistent and arbitrary" to deny a motion to dismiss or for summary judgment and thereafter award attorney fees under I.C. s 12-121. *J.M.F. Trucking, Inc. v. Carburetor & Elec. of Lewiston, Inc.*, 113 Idaho 797, 799, 748 P.2d 381, 383 (1987). However, the Supreme Court has also held that the denial of a motion to dismiss and the denial of a motion for directed verdict in a jury case does not preclude the award of attorney fees under I.C. s 12-121. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 92, 803 P.2d \*548 993, 998 (1991). Additionally, dismissal of a count of a complaint because of the lack of service of process on a defendant, alone, is not grounds for attorney fees under I.C. s 12-121. *Webster v. Hoopes*, 126 Idaho 96, 100-01, 878 P.2d 795, 799-800 (Ct. App. 1994).

In examining the defensive measures taken by a defendant, the Supreme Court stated, "The

frivolity and unreasonableness of a defense is not to be examined only in the context of trial proceedings." *Turner v. Willis*, 116 Idaho 682, 685, 778 P.2d 804, 807 (1989), *rev'd on other grounds*, 119 Idaho 1023, 812 P.2d 737 (1990). In addition, the "total conduct" of the defendant must be examined. The Supreme Court has stated:

The trial court cites I.R.C.P. 54(e)(1) as one basis for the award of attorney fees. Where as in this case there are multiple claims and multiple defenses, it is not appropriate to segregate those claims and defenses to determine which were or were not frivolously defended or pursued. The total defense of a party's proceedings must be unreasonable or frivolous.

*Magic Valley Radiology Assocs., P.A., v. Professional Business Services, Inc*, 119 Idaho 558, 563, 808 P.2d 1303, 1308 (1991).

**Thus, 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 to the prevailing party even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings*, 135 Idaho 518, 524-25, 20 P.3d 702, 708-09 (2001). See also *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003).**

Accordingly, an award to the plaintiff for attorney fees in a personal injury case where the defendant denied liability until the date of the trial was reversed by the Supreme Court:

In this case the trial court, in both its initial opinion and its opinion on remand, recognized that there was a legitimate triable issue over the amount of damages caused by plaintiff's "soft tissue injury," and "that plaintiff's counsel bore the risk of an unfavorable jury verdict," suggesting that the final result was legitimately debatable. Therefore, the "total defense" of this case was not unreasonable or frivolous, and, accordingly, pursuant to our holding in *Magic Valley Radiology*, the trial court erred in awarding attorney fees pursuant to I.C. s 12-121 and I.R.C.P. 54(e)(1).

*Turner v. Willis*, 119 Idaho at 1025, 812 P.2d at 739.

**I.C. s 12-121 applies to cases as a whole and not to individual motions. It was error for the district court to cite this section as a basis for an award of attorney fees when a single motion was denied. *Walker v. Boozer*, 140 Idaho 451, 456, 95 P.3d 69, 74 (2004).**

The fact that a party loses is not grounds to award attorney fees under I.C. s 12-121 unless, "the position advocated by the non-prevailing party is plainly fallacious and, therefore, not fairly debatable." *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987); *Clements Farms, Inc. v. Ben Fish & Son*, 120 Idaho 209, 814 P.2d 941 (Ct. App. 1990), *rev'd on other grounds*, 120 Idaho 185, 814 P.2d 917 (1991) (holding that attorney fee awards under I.C. s 12-121 are "improper where the non-prevailing party has presented a 'genuine and fairly debatable' issue"). This is probably a good summary of the test.

The scope of I.C. s 12-121 is very broad. Attorney fees can be awarded under the statute against the State of Idaho, *Needs v. State*, 118 Idaho 207, 208, 795 P.2d 912, 913 (Ct. App. 1990) (fees awarded against the Department of Corrections), [or] against a municipality, *Averitt v. City of Coeur d'Alene*, 100 Idaho 751, 752, 605 P.2d 515, 516 (1980), **or** against a highway district, *Ada County Highway Dist. v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983). However, in *Hentges v. Hentges*, 115 Idaho 192, 197, 765 P.2d 1094, 1099 (Ct. App. 1988), attorney fees were denied in a divorce action where the court found that the spouse's appeal from magistrate's order was not frivolous, unreasonable or without foundation; and in *Klassert v. Wadley*, 117 Idaho 424, 426, 788 P.2d 239, 241 (Ct. App. 1990), attorney fees were denied in the husband's appeal of a child support order where the appeal was found not to be frivolous. Attorney fees against the state tax commission in a district court action to recover a tax payment were affirmed under I.C. s 12-121 even though I.C. s 63-3049, dealing with judicial review of the tax commission decisions, did not then provide for attorney fees. *Bogner v. State Dep't of Revenue and Taxation*, 107 Idaho 854, 858, 693 P.2d 1056, 1060 (1984). Moreover, the Supreme Court has held that attorney fees under I.C. s 12-121 cannot be awarded in an administrative appeal to the district court because it is not a civil action commenced by the filing of a complaint. *Horne v. Idaho State University*, 138 Idaho 700, 706, 69 P.3d 120, 126 (2003); *Staff of the Idaho Real Estate Commission v. Nordling*, 135 Idaho 630, 637, 22 P.3d 105, 112 (2001); *Lowery v. Bd. of County Comm'rs*, 117 Idaho 1079, 793 P.2d 1251 (1990).

If the trial judge determines that attorney fees should be awarded under I.C. s 12-121, I.R.C.P. 54(e)(2) requires the court to make written findings "as to the basis and reasons for awarding such attorney fees." These findings can be stated in the award or in a separate document. The Court of Appeals has stated that, "[t]he absence of such a finding requires us to reverse the award of attorney fees." *Bosshardt v. Taylor*, 104 Idaho 660, 661, 662 P.2d 241, 242 (Ct. App. 1983). *See also Henderson v. Smith*, 128 Idaho 444, 452, 915 P.2d 6, 14 (1996); *Snipes v. Schalo*, 130 Idaho 890, 893, 950 P.2d 262, 265 (Ct. App. 1997).

The Supreme Court has held that a lower court's reasons for denying **\*548** attorney fees must be expressed in more detail than a one-sentence conclusion that the case was brought or defended frivolously, unreasonably or without foundation. *Davis v. Professional Bus. Serv., Inc.*, 109 Idaho 810, 815-16, 712 P.2d 511, 516-17 (1985). The findings must be specific findings of fact and must be supported by the evidence. "An award of attorney fees under I.C. s 12-121 is discretionary; but it must be supported by findings and those findings, in turn, must be supported by the record." *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 910-11, 684 P.2d 307, 312-13 (Ct. App. 1984), *citing Bosshardt v. Taylor*, 104 Idaho 660, 662 P.2d 241 (Ct. App. 1983). ***See also McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003).** Because "the court's findings contain a mixture of a legal conclusion and the judge's subjective impression of the landowner's motive for litigating this case," *id.*, they will not be reversed unless the trial court has abused its discretion. *Foster v. Shore Club Lodge, Inc.*, 127 Idaho 921, 927, 908 P.2d 1228, 1234 (1995).

Although the Rule does not require the court to state its reasons for denying attorney fees, the Court of Appeals has suggested that the trial court make such findings as an aid to appellate review. *First Sec. Bank of Idaho v. Absco Warehouse, Inc.*, 104 Idaho 853, 857, 664 P.2d 281, 285 (Ct. App. 1983).

*(b) Idaho Code s 12-120*

Section 12-120 was enacted in 1970 and is sometimes referred to as the open account attorney fee statute. However, as will be seen, the scope of the statute is now much broader than that. The first and most important aspect of the statute is that the concept of the action being "pursued or defended frivolously, unreasonably or without foundation" has no application. Secondly, if the statute is applicable, attorney fees are mandatory for the prevailing party. A prevailing party is "entitled to attorney fees as a matter of statutory right under I.C. s 12-120(2) and not merely in the court's discretion." *Torix v. Allred*, 100 Idaho 905, 911, 606 P.2d 1334, 1340 (1980). *See also Spidell v. Jenkins*, 111 Idaho 857, 860, 727 P.2d 1285, 1288 (Ct. App. 1986) ("I.C. s 12-120(2) mandates an award of reasonable attorney fees, set by the court, to the prevailing party in a civil action brought to recover on a note; because Jenkins successfully defended against the action for recovery on the note, he is entitled to reasonable attorney fees."). Accordingly, if I.C. s 12-120 is found to be applicable, the trial court has no discretion in determining whether to award attorney fees to the prevailing party. *DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 678 P.2d 80 (Ct. App. 1984).

Section 12-120 has several **[subparts] subsections** which have entirely different coverages and criteria for their application. These will be discussed separately and must always be considered independently by the trial judge.

*(c) Idaho Code s 12-120(1)*

The dollar limit of I.C. s 12-120(1) was originally \$2,500, but in 1986 the statute was amended to read as follows:

**12-120. [Attorney] Attorney's Fees in Civil Actions.--** (1) Except as provided in subsections (3) and (4) of this section, in any action where the amount pleaded is twenty-five thousand dollars (\$25,000) or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as **[attorney] attorney's fees**. For the plaintiff to be awarded **[attorney] attorney's fees**, for the prosecution of the action, written demand for the payment of such claim must have been made on the defendant not less than ten (10) days before the commencement of the action; provided, that no **[attorney] attorney's fees** shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety-five per cent (95%) of the amount awarded to the plaintiff.

The scope of this statute is substantial. First of all it applies to "any action," without limitation, where the amount pleaded is \$25,000 or less. Attorney fees can be awarded to a defendant under this statute. *Loftus v. Snake River Sch. Dist.*, 130 Idaho 426, 429, 942 P.2d 550, 553 (1997). Because the award of attorney fees under this statute is mandatory, this obviously means that in any action where the amount "pleaded" is \$25,000 or less, the award of attorney fees are mandatory for the prevailing party if the procedural requirements are met. In order for the plaintiff to get attorney fees **under this section: first**, the statute requires that the plaintiff

must have made written demand on the defendant at least 10 days before the commencement of the action, **and second, the plaintiff must have pled under \$25,000.** *Anderson v. Goodliffe*, **140 Idaho 446, 449, 95 P.3d 64, 67 (2004).** [Additionally,] If the defendant tenders an amount equal to 95% of the ultimate judgment, then attorney fees cannot be awarded to the plaintiff. **Section 12-120(1) must be narrowly construed. *Id.***

**The purpose of I.C. s 12-120(1) is to discourage litigation by requiring the defendant to be notified of the plaintiff's claim at least 10 days before a complaint is filed. If a complaint is filed, the section encourages early settlement by requiring that the pleadings warn the parties that the statute will be invoked for mandatory fees. *Id.*; *Cox v. Mueller*, 126 Idaho 734, 737, 874 P.2d 545, 548 (1994).**

Despite the broad scope of this statute, [until recently there were] there have been **relatively** few appellate cases interpreting it. One case merely stated that because the amount prayed for in the complaint exceeded the dollar amount of the statute, it obviously did not apply. *T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 836, 642 P.2d 70, 73 (Ct. App. 1982). In another case, the Supreme Court affirmed the judgment of a magistrate and summarily awarded attorney fees under this statute. \***548** *Robinson v. Joint Sch. Dist. No. 331*, 105 Idaho 487, 492, 670 P.2d 894, 899 (1983). Presumably the amount prayed for in the magistrate court case was less than the dollar limit of the statute. Attorney fees were awarded to a chiropractor who sued the worker's compensation surety for intentional interference with a prospective economic relationship where the amount pleaded was less than \$25,000. *Downey Chiropractic Clinic v. Nampa Restaurant Corp.*, 127 Idaho 283, 286-87, 900 P.2d 191, 194-95 (1995).

The Supreme Court reviewed this question where the plaintiff sued for crop damage "in excess of \$10,000" and testified at trial that his damage was \$16,000. The plaintiff won and was awarded attorney fees under I.C. s 12-120(1) as a case involving not more than \$25,000. The Supreme Court reversed the attorney fees stating:

This statute does not authorize a trial court to award attorney fees unless the amount 'pleaded' is \$25,000 or less. Pancoast pleaded damages in 'an amount in excess of \$10,000.' Although the proof submitted by Pancoast at trial was for damages of less than \$25,000, I.C. s 12-120(1) does not authorize the substitution of 'the amount proved' for 'the amount pleaded.'

*Pancoast v. Indian Cove Irrigation Dist.*, 121 Idaho 984, 985, 829 P.2d 1333, 1334 (1992).

Two [recent] decisions of the Court of Appeals reached the same result. In *Latham Motors, Inc. v. Phillips*, 123 Idaho 689, 697, 851 P.2d 985, 993 (Ct. App. 1992), the amount "pleaded" was less than \$25,000 so attorney fees were awarded at the trial court level and on appeal. However, in *Czerwinsky v. Lieske*, 122 Idaho 96, 831 P.2d 564 (Ct. App. 1992), the plaintiff obtained an award of \$4,468 from an auto accident but was denied attorney fees under I.C. s 12-120(1). The Court of Appeals followed *Pancoast*, but also answered the question of how to allege damages under \$25,000 when I.C. s 5-335 prevents the allegation of general damages:

The Rule and I.C. s 5-335 suggest a way to do this. According to the Rule, 'no

dollar amount or figure shall be included in the complaint beyond a statement reciting that the jurisdictional amount established for filing the action is satisfied.' A similar general pleading should suffice to support a claim for attorney fees under I.C. s 12-120(1). For example, the complaint could contain an appropriate general allegation that the plaintiff's claim is within the jurisdictional limits of the district court, or magistrate division thereof. The complaint could separately allege that 'plaintiff's claim for damages does not exceed the limit set by I.C. s 12-120(1) and plaintiff is entitled to an award of attorney fees under this statute.' We believe that such allegations would satisfy the jurisdictional pleading requirement and also afford a plaintiff -- or defendant -- an opportunity to recover attorney fees under I.C. s 12-120(1) without contravening I.C. s 5-335 or I.R.C.P. 9(g).

122 Idaho at 99, 831 P.2d at 567.

The "Czerwinsky Rule" was affirmed by the Supreme Court in *Cox v. Mueller*, 125 Idaho 734, 737, 874 P.2d 545, 548 (1994). **[in which]** Attorney fees were denied because no amount was alleged for pain and suffering, although in final argument the plaintiff asked only for \$25,000 and the verdict was less than \$25,000. The plaintiff complained that the statute prohibits alleging the amount of general damages, but the Supreme Court held that the plaintiff could allege that the damages do not exceed the statutory limit (\$25,000) so as to come within I.C. s 12-120(1).

Therefore, the trial judge should award mandatory attorney fees to the prevailing party in all actions in which the amount "pleaded" is less than \$25,000 and the demand requirement is met. *Pitzer v. Swenson*, 128 Idaho 423, 425, 913 P.2d 1193, 1195 (Ct. App. 1996); *Bettinger v. Idaho Auto Auction Inc.*, 128 Idaho 327, 333, 912 P.2d 695, 701 (Ct. App. 1996); *Downey Chiropractic Clinic*, 127 Idaho at 287-88, 900 P.2d at 195-96. This is a two way street so that attorney fees can be awarded to a prevailing plaintiff or defendant, as the statute allows attorney fees to the "prevailing party." *Spidell v. Jenkins*, 111 Idaho 857, 860, 727 P.2d 1285, 1288 (Ct. App. 1986). Section 12-120(1) prohibits the award of attorney fees to the "plaintiff" if a 10 day demand is not made. As there is no such restriction on the defendant, it appears that attorney fees should be awarded to the prevailing defendant when the amount prayed for is less than \$25,000.

**In 1996, the legislature amended I.C. s 12-120 by adding subsection (4), which pertains to personal injury actions. The Supreme Court interpreted subsection (4) and addressed its relationship to subsection (1) in *Gillihan v. Gump*, 140 Idaho 264, 267, 92 P.3d 514, 517 (2004). The question was whether or not a defendant can recover attorney fees in personal injury actions under \$25,000. The Supreme Court held that subsection (1) applies to a personal injury action where the amount alleged is under \$25,000 to the extent it is not inconsistent with the specific provisions of subsection (4). Subsection (4) sets forth a "unique protocol" for the plaintiff to obtain attorney fees in small personal injury actions.**

**Subsection (4) changes two parts of subsection (1) when the case is a personal injury action: first, it requires that the plaintiff must serve its statement of claim not less than sixty days to the defendant's insurer rather than the ten**

**days as required under subsection (1); and second, it only requires that the defendant tender to the plaintiff, prior to the commencement of the action, an amount equal to 90% of the amount awarded to the plaintiff for attorney fees to be disallowed rather than the 95% requirement found in subsection (1).**

**140 Idaho at 267, 92 P.3d at 517. The legislature used the term "plaintiff" in subsection (4) when modifying subsection (1) only as to the requirements the plaintiff must meet in order to recover fees, but when it addressed the right to an award of fees it used \*548 the term "claimant" which may be either a plaintiff or a defendant. This interpretation is supported by public policy as otherwise there would be no real incentive for an unreasonable plaintiff to accept a reasonable settlement offer, because there would be no risk that attorney fees would be imposed. Thus, both plaintiffs and defendants may recover attorney fees in personal injury actions under \$25,000. *Id.***

If the complaint does not pray for a dollar amount because of the nature of the action, e.g., paternity action, actions for quiet title, for an injunction, unlawful detainer, a probate contest, for declaratory judgment, or to mandate a public official, attorney fees cannot be awarded under I.C. s 12-120(1). *Henderson v. Smith*, 128 Idaho 444, 452, 915 P.2d 6, 14 (1996).

Additionally, the Court of Appeals held that attorney fees cannot be awarded under I.C. s 12-120 in an action for treble damages for a wage claim. Attorney fees for wages must be claimed under I.C. s 45-614, I.C. s 45-615, and I.C. s 45-617. *Hutchison v. Anderson*, 130 Idaho 936, 943, 950 P.2d 1275, 1282 (Ct. App. 1997).

Subsection (2) of I.C. s 12-120 additionally provides that these concepts apply equally to counterclaims, cross-claims or third party claims.

***(d) Idaho Code s 12-120(3)***

The second part of I.C. s 12-120 is contained in subsection (3) and provides an entirely different basis for the award of attorney fees. It states:

In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable **[attorney] attorney's** fee to be set by the court, to be taxed and collected as costs.

The term 'commercial transaction' is defined to mean all transactions except transactions for personal or household purposes. The term 'party' is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

By the express wording of I.C. s 12-120, the dollar limitation and demand requirements of subsection (1) do not apply to claims for attorney fees under subsection (3). Therefore, *any* action covered by subsection (3), regardless of the dollar amount, carries with it the mandatory award of attorney fees to the prevailing party. *Torix v. Allred*, 100 Idaho 905, 911, 606 P.2d

1334, 1340 (1980) (referring to the former I.C. s 12-120(2) which is now subsection (3)); *see also Merrill v. Gibson*, 139 Idaho 840, 845 87 P.3d 949, 954 (2004); *Inland Title Co. v. Comstock*, 116 Idaho 701, 705, 779 P.2d 15, 19 (1989); *Steiner v. Amalgamated Sugar Co.*, 106 Idaho 111, 115, 675 P.2d 826, 830 (Ct. App. 1984).

**The prevailing party is entitled to attorney fees in actions brought to recover on the following: (1) open account; (2) account stated; (3) note; (4) bill; (5) negotiable instrument; (6) guaranty; (7) contract relating to the purchase or sale of goods, wares, merchandise; (8) contract for services; and (9) commercial transaction. *Rahas v. Vermett*, 05.6 ISCR 290 (2005).**

**Thus, subsection (3) covers a number of areas, including a contract relating to the purchase or sale of goods, wares, merchandise, or services. "[I]t is not enough that the relationship between the parties relates to the purchase of goods or services; the action itself must be one to recover on the contract." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 715, 99 P.3d 1092, 1105 (2004).**

A rather broad interpretation has been given to the meaning of "sale." For example, it has been applied to an action filed by a farm equipment dealer against a manufacturer for the repurchase of implement parts upon the termination of the dealership. *MH & H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 883, 702 P.2d 917, 921 (Ct. App. 1985). However, an action to recover damages for a defective product does not come within I.C. s 12-120(3) as an action on a contract of sale where there is no contract between the parties because the suit is not one "to recover on a contract." *Management Catalysts v. Turbo West Corpac, Inc.*, 119 Idaho 626, 630-31, 809 P.2d 487, 491-92 (1991); *Day v. CIBA Geigy Corp.*, 115 Idaho 1015, 1018, 772 P.2d 222, 225 (1989) (holding that manufacturer could not recover attorney fees under I.C. s 12-120(3) in absence of a contract). If a contract does not qualify as a sales contract under I.C. s 12-120(3), attorney fees can still be granted if provided for by the terms of an agreement. *Callenders, Inc. v. Beckman*, 120 Idaho 169, 176, 814 P.2d 429, 436 (Ct. App. 1991).

Where an action on a contract is successfully defended upon the basis there was no contract, attorney fees may be awarded to the defendant. *Property Mgmt. West, Inc. v. Hunt*, 126 Idaho 897, 900-01, 894 P.2d 130, 133-34 (1995). "Where a party alleges the existence of a contractual relationship of a type embraced by I.C. s 12-120(3) ... that claim triggers the application of [I.C. s 12-120(3)] and a prevailing party may recover fees even though no liability under a contract was established." *Farmers Nat'l. Bank v. Shirey*, 126 Idaho 63, 73, 878 P.2d 762, 772 (1994), **citing *Twin Falls Livestock Comm'n v. Mid-Century Ins. Co.*, 117 Idaho 176, 184, 786 P.2d 567, 575 (Ct. App. 1989). See also *Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 238, 31 P.3d 921, 926 (2001).**

Attorney fees under I.C. s 12-120(3) have been granted in an action to establish an easement because it was not disputed that the prevailing party was entitled to attorney fees. *Phillips Industries, Inc. v. Firkins*, 121 Idaho 693, 700, 827 P.2d 706, 713 (Ct. App. 1992). **Attorney fees were awarded under subsection (3) in a successful action on a medical services contract as this was a contract for the sale of services. *Ericksen v. Blue Cross of Idaho Health Serv., Inc.*, 116 Idaho 693, 778 \*548 P.2d 815 (Ct. App. 1989). "[A]ctions on**

employment contracts are subject to the attorney fee provisions of I.C. s 12-120(3)" as contracts for the purchase or sale of services. *Atwood v. Western Constr., Inc.*, 129 Idaho 234, 241, 923 P.2d 479, 486 (Ct. App. 1996). In a buyer's action to revoke acceptance of a sale contract for a used vehicle, the used car dealership and its owners were entitled to attorney fees after prevailing at trial. *Haight v. Dales Used Cars, Inc.*, 139 Idaho 853, 858, 87 P.3d 962, 967 (Ct. App. 2003). Attorney fees were granted on a \$74,000 claim for pouring concrete under I.C. s 12-120(3) as a sale of goods and services. *Cuddy Mountain Concrete, Inc. v. Citadel Constr., Inc.*, 121 Idaho 220, 232, 824 P.2d 151, 163 (Ct. App. 1992). Likewise, fees have been granted for breach of a covenant under a deed of trust which provided for attorney fees in such an action. *Nationsbank Mortgage Corp. of New York v. Cazier*, 127 Idaho 879, 884, 908 P.2d 572, 577 (Ct. App. 1995). Attorney fees were awarded on a promissory note under I.C. s 12-120 as an action on a "negotiable instrument." *Western World, Inc. v. Prator*, 121 Idaho 870, 871, 873, 828 P.2d 899 (Ct. App. 1992).

However, it appears that most litigation will continue **[to be with regard to] to arise under** the 1986 amendment to I.C. s 12-120(3) which enlarged coverage to include an action filed with regard to "any commercial transaction." However, it should be noted that the "commercial transaction" clause comes into play only if the transaction does not fall within the other described transactions such as a "contract relating to the purchase or sale of goods, wares, or merchandise." The commercial transaction clause was independently added in 1986 and does not modify the other categories. The term commercial transaction is defined by the statute to mean "all transactions" except those for "personal or household purposes." Occasionally, an action on a contract regarding the sale of goods has been declared covered by I.C. s 12-120(3) as a "commercial transaction." *Freiberger v. Am. Triticale, Inc.*, 120 Idaho 239, 243, 815 P.2d 437, 441 (1991). An action for an employee's breach of fiduciary duty is not a commercial transaction. *Property Mgmt. West, Inc. v. Hunt*, 126 Idaho 897, 899, 894 P.2d 130, 132 (1995). Likewise, in a very complicated case involving an agreement to acquire property and build a Christian retreat, attorney fees were not allowed under the "commercial transaction" clause because "the gravamen of this case was fraud." *Spence v. Howell*, 126 Idaho 763, 775-76, 890 P.2d 714, 726-27 (1995).

An action for breach of a contract and conversion on the sale of a tractor for repairs was held to be a tort action and not a commercial transaction. *Jahnke v. Mesa Equip., Inc.*, 128 Idaho 562, 567, 916 P.2d 1287, 1292 (Ct. App. 1996). Likewise, fees were denied in an action for breach of fiduciary capacity and conversion with regard to a corporation because they were tort claims and fell outside of the scope of I.C. s 12-120(3). *Property Management West*, 126 Idaho at 900, 894 P.2d at 133. **[However, in a somewhat similar case involving an agreement to build a theater, the Supreme Court held that "commercial transaction" attorney fees were proper. *Magic Lantern Prod., Inc. v. Dolsot*, 126 Idaho 805, 808, 892 P.2d 480, 483 (1995). The district court determined that the focus of Magic Lantern's claims, as well as the fraud claim, was the proposed venture to build a cinema complex. Although the trial court dismissed the action because the proposed venture never materialized, the Supreme Court found that the basic commercial nature of the alleged transaction was not changed by the dismissal and, therefore, the prevailing party qualified for attorney fees under I.C. s 12-120(3). *Id.***

The Court of Appeals has held that attorney fees must be awarded under I.C. s 12-120(3) in a successful action on a medical services contract, as this is a contract for the sale of services. *Eriksen v. Blue Cross of Idaho Health Serv., Inc.*, 116 Idaho 693, 778 P.2d 815 (Ct. App. 1989). It]

There must be a commercial transaction between the parties before attorney fees can be awarded under the section governing attorney fee awards in a civil action to recover on a commercial transaction. A commercial transaction can exist in the absence of a contract. *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001). In *Erickson v. Flynn*, 138 Idaho 430, 64 P.3d 959 (Ct. App. 2002), a quasi-contract claim was presented as an alternative to a claim for breach of contract, which could not be established. Since the quasi-contract claim was based on the same facts and circumstances as the breach of contract claim and the alleged transaction was commercial in nature, the prevailing party was entitled to attorney fees under I.C. s 12-120(3).

The Court of Appeals also awarded attorney fees in an action to enforce a land sale contract when there was no contract:

It is well settled in Idaho that one who successfully defends against the enforcement of a contract, when the gravamen of the transaction is a commercial transaction, nevertheless may be entitled to attorney fees even though the court ruled that no contract exists or it is unenforceable.

*Lawrence v. Jones*, 124 Idaho 748, 752, 864 P.2d 194, 198 (Ct. App. 1993); see also [*Magic Lantern Prod.*, 126 Idaho at 808, 892 P.2d at 483;] *Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 238, 31 P.3d 921, 926 (2001); *Continental Casualty Co. v. Brady*, 127 Idaho 830, 835, 907 P.2d 807 (1995). [However, in]

In 1996, I.C. s 41-1839 was amended to provide that attorney fees on insurance policies can be awarded only under that chapter. Accordingly, the Supreme Court subsequently held that attorney fees cannot be awarded any longer in an insurance claim under I.C. s 12-120(3). *Union Warehouse and Supply \*548 Co., Inc. v. Illinois R.B. Jones, Inc.*, 128 Idaho 660, 669, 917 P.2d 1300, 1309 (1996). Likewise, where there is a specific statute on attorney fees in anti-trust cases, I.C. s 12-120(3) does not apply. *K. Hefner, Inc. v. Caremark, Inc.*, 128 Idaho 726, 732, 918 P.2d 595, 601 (1996).

The potentially broad coverage of this commercial transaction provision is indicated by an opinion of the Supreme Court in which the provision was used to award attorney fees to a defendant attorney in a professional malpractice action. *Griggs v. Nash*, 116 Idaho 228, 234, 775 P.2d 120, 126 (1989). In that case, the Supreme Court seemed to assume, without specific discussion, that the professional malpractice action would be covered as a commercial transaction because the claim arose out of representation of the plaintiff in a commercial transaction involving a loan on real property. However, the Supreme Court specifically addressed the question in a subsequent malpractice case, stating:

We were not asked in *Griggs* to decide whether a malpractice action involving a commercial transaction falls within the parameters of I.C. s 12-120(3). We now hold that an action for legal malpractice is a tort action, and even though the underlying transaction which resulted in the malpractice was a 'commercial transaction,' attorney fees under 12-120(3) are not authorized.

*Fuller v. Wolters*, 119 Idaho 415, 425, 807 P.2d 633, 643 (1991).

Similarly, the Court of Appeals has held that a malpractice action against an architect does not involve a commercial transaction. *Smith v. David S. Shurtleff & Assoc.*, 124 Idaho 239, 242, 858 P.2d 778, 781 (Ct. App. 1993). However, attorney fees were allowed to architects against the Idaho State Building Authority in a contract action where the court concluded that "the gravamen of the lawsuit was a commercial transaction." *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 592, 917 P.2d 737, 749 (1996).

In another case, the trial court awarded attorney fees in a product liability action brought by a farmer against the manufacturer of a herbicide for damage to his farm from the herbicide. *Brower v. E.I. DuPont DeNemours and Co.*, 117 Idaho 780, 792 P.2d 345 (1990). The action was dismissed on summary judgment because the claim was barred by the statute of limitations and the trial court granted attorney fees to the defendant manufacturer under the commercial transaction provision of I.C. s 12-120(3). The Supreme Court reversed holding that "the award of attorney's fees is not warranted every time a commercial transaction is remotely connected with the case." *Id.* at 784, 792 P.2d at 349. Instead, the test is whether a commercial transaction is the "gravamen of the lawsuit." *Id.* However, in **[a recent] another** case, the Court declared, "This is a product liability case," and awarded fees for defective spray put on potatoes under the commercial transaction provision. *Walker v. American Cyanamid Co.*, 130 Idaho 824, 826, 948 P.2d 1123, 1125 (1997). Quoting *Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72, 78, 910 P.2d 744, 750 (1996), the Court restated the two elements of the *Brower* test: "*Brower* establishes that there are two stages to the analysis. First, there must be a commercial transaction that is integral to the claim. Second, the commercial transaction must be the basis upon which recovery is sought." *Id.* at 834, 948 P.2d at 1133.

**Thus, the standards to be applied can be summarized as follows. In order for the "commercial transaction" clause of Idaho Code s 12-120(3) to apply, there must be a commercial transaction between the parties. The statute cannot be invoked if the commercial transaction is between parties only indirectly related. *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 471-72, 36 P.3d 218, 222-223 (2001). Once it is determined that a commercial transaction exists between the parties, the critical test is whether the commercial transaction comprises the gravamen of the lawsuit. The analysis consists of two steps: (1) the commercial transaction must be integral to the claim, and (2) the commercial transaction must constitute a basis on which the party is attempting to recover. "The commercial transaction must be an actual basis of the complaint, that is, the lawsuit and the causes of action must be based on a commercial transaction, not simply a situation that can be characterized as a commercial transaction." *Id.*, 136 Idaho at 471, 36 P.3d at 222. See also *Iron Eagle Development v. Quality Design Systems, Inc.*, 138 Idaho 487, 493, 65 P.3d 509, 515 (2003).**

In an action for breach of a contract to build a log home, the Supreme Court held that the gravamen of the lawsuit was a commercial transaction. *Ervin Constr. Co. v. Van Orden*, 125 Idaho 695, 704, 874 P.2d 506, 515 (1993). **In a case where plaintiffs were seeking to recover money held in escrow in a real estate transaction, they were entitled to attorney fees under the commercial transaction clause.** *Bowen v. Heth*, 120 Idaho 452, 454, 816 P.2d 1009, 1011 (Ct. App. 1991). Where leases were properly characterized as commercial transactions and where the commercial transactions constituted the gravamen of the lawsuit, plaintiff was entitled to attorney fees, but only as to defendants who engaged in the commercial transaction with plaintiff. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 32, 105 P.3d 676, 692 (2005). Attorney fees were granted in an action to collect for pouring concrete as a commercial action because it involved an agreement between two construction companies "in a business context." *Cuddy Mountain Concrete, Inc. v. Citadel Const., Inc.*, 121 Idaho 220, 232, 824 P.2d 151, 163 (Ct. App. 1992). On a claim brought by a discharged schoolteacher, the Supreme Court held that actions brought for breach of an employment contract are considered to be commercial transactions so the prevailing party is entitled to attorney fees under I.C. s 12-120(3). *Willie v. Board of Trustees*, 138 Idaho 131, 136, 59 P.3d 302, 307 (2002).

On the other hand, the Supreme Court held that attorney fees were not appropriate under the commercial \*548 transaction clause in I.C. s 12-120(3) when the issue was one of quiet title. *C & G, Inc. v. Rule*, 135 Idaho 763, 769, 25 P.3d 76, 82 (2001). Similarly, the Court of Appeals reversed an award of attorney fees under the commercial transaction clause in a mandamus action to compel a city to publish its notices in a particular newspaper. *Idaho Newspaper Foundation v. City of Cascade*, 117 Idaho 422, 788 P.2d 237 (Ct. App. 1990). The Court held that the commercial transaction clause did not apply to mandamus actions, holding that the action "must seek resolution of a dispute arising from a commercial *transaction* between the parties" in order to come within the statute. *Id.* at 424, 788 P.2d at 239. (Emphasis in original.) The Court stated that at most this case would have only "future commercial ramifications." *Id.*

[In an action to recover money held in escrow in a real estate transaction, attorney fees were affirmed under the commercial transaction clause. *Bowen v. Heth*, 120 Idaho 452, 454, 816 P.2d 1009, 1011 (Ct. App. 1991). Attorney fees were granted in an action to collect for pouring concrete as a commercial action because it involved an agreement between two construction companies "in a business context." *Cuddy Mountain Concrete, Inc. v. Citadel Const., Inc.*, 121 Idaho 220, 232, 824 P.2d 151, 163 (Ct. App. 1992).]

[However, f] Fees were denied under I.C. s 12-120(3) in a declaratory judgment action brought to determine whether a contract existed between the parties under two agreements. The appellate court held that the action did not arise from a commercial transaction, stating:

In this case, we conclude that neither party was attempting to recover against the other on the basis of any 'integral' commercial transaction -- such a transaction simply was not the 'gravamen of the lawsuit.' Instead, the purpose of the declaratory judgment action was to ascertain whether there existed a binding,

contractual *relationship* between the parties under each of the two disputed agreements, focusing on the parties' actions as they affected each of those relationships. Admittedly, the outcome of the lawsuit bore upon the parties' rights and obligations under the agreements as to any *future* transactions involving the property. However, as stated in *Idaho Newspaper*, 'there is a clear distinction between litigation arising from a commercial transaction and litigation on noncommercial issues that might have future commercial ramifications.' [*Idaho Newspaper Foundation v. City of Cascade*,] 117 Idaho at 424, 788 P.2d at 239. For reasons different from those given by the district judge, we conclude that an award of attorney fees in this case was not authorized under I.C. s 12-120(3).

*Edwards v. Edwards*, 122 Idaho 971, 972-73, 842 P.2d 307, 308-09 (Ct. App. 1992). ***But see Freiburg v. J-U-B Engineers, Inc.*, 05. \_\_ ISCR \_\_\_\_ (2005) (if the gravamen of the case is a commercial transaction, the mere fact that the action was brought as a declaratory judgment does not preclude an award of attorney fees under I.C. s 120(3)).**

It appears that the action must involve a dispute over an actual commercial transaction in order to be covered by the commercial transaction clause. Collection of registration fees for the Interstate Commerce Commission by the Public Utilities Commission is not such a commercial transaction. *Owner-Operator Indep. Drivers Ass'n, Inc. v. Idaho Pub. Util. Comm'n*, 125 Idaho 401, 408, 871 P.2d 818, 825 (1994). **Likewise, a party who prevailed in a lawsuit to recover on a judgment was not entitled to attorney fees based upon the commercial transaction clause of I.C. s 12-120(3). *Rahas v. Vermett*, 05.6 ISCR 290 (2005).**

[Section 12-120(3) also allows for an award of attorney fees in contract claims relating to the purchase or sale of services. "[A]ctions on employment contracts are subject to the attorney fee provisions of I.C. s 12-120(3)" as contracts for the purchase or sale of services. *Atwood v. Western Constr., Inc.*, 129 Idaho 234, 241, 923 P.2d 479, 486 (Ct. App. 1996).]

If more than one claim is pled, there can be more than one "gravamen." Attorney fees can still be awarded, however, for a specific claim of the type covered by Idaho Code s 12-120(3). *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 472, 36 P.3d 218, 223 (2001).

Attorney fees under I. C. s 12-120(3) are unavailable when the claim is based upon a statutory provision, but only when that statute contains its own provision for attorney fees. "When various statutory and common law claims are separable, the court should bifurcate the claims and award fees pursuant to s 12-120(3) only on the commercial transaction." *Willie v. Board of Trustees*, 138 Idaho 131, 136, 59 P.3d 302, 307 (2002).

In *Rockefeller v. Grabow*, 139 Idaho 538, 546, 82 P.3d 450, 458 (2003), the trial court denied a party's request for attorney fees under I.C. s 12-120(3) because the fees spent on a contract defense could not be separated from the fees spent on a tort counterclaim. A party can seek attorney fees under I.C. s 12-120(3) when the claim is for a breach of a contract for services, but the party is not entitled to attorney fees under the statute for a tort counterclaim for a breach of fiduciary duty. The Supreme Court affirmed and held

that, where a party did not adequately apportion fees incurred between the contract and tort action, all fees could be denied.

A prevailing party may rely on I.C. s 12-120(3) pled by another party for recovery of attorney fees if such an award is warranted under the statute. An award to the prevailing party when the other party has claimed fees pursuant to the statute is not mandated, however. *Great Plains Equipment*, 136 Idaho at 471, 36 P.3d at 222. "A court is not required to award reasonable attorney fees every time a commercial transaction is connected with a case." *Id.* "[I]f a party asserts a claim that is based upon the existence of an alleged commercial transaction, attorney fees are awardable to a prevailing party \*548 who defends against such claim even if the alleged commercial transaction is found not to have existed." *Miller v. St. Alphonsus Medical Center*, 139 Idaho 825, 839, 87 P.3d 934, 948 (2004).

An exception to the award of attorney fees under I.C. s 12-120(3) exists when the commercial transaction is illegal. Even if both parties' claims are based upon a commercial relationship between them and a commercial transaction comprises the gravamen of the lawsuit, neither party should be permitted to claim the benefit of I.C. s 12-120(3) if the basis of the commercial transaction was illegal. *Kunz v. Lobo Lodge, Inc.*, 133 Idaho 608, 612, 990 P.2d 1219, 1223 (Ct. App. 1999). *See also Barry v. Pacific West Construction, Inc.*, 140 Idaho 827, 835, 103 P.3d 440, 448 (2004); *Trees v. Kersey*, 138 Idaho 3, 12, 56 P.3d 765, 774 (2002).

As can be seen from these cases, I.C. s 12-120(3) applies in a host of different situations and trial courts can anticipate many claims for attorney fees under this provision. It must be remembered that if this provision applies, the trial court has the duty to award attorney fees to any prevailing party. The trial judge should always watch for new appellate decisions interpreting the scope of this statute.

*(e) Idaho Code s 12-120(4)*

Section 12-120(4) provides:

In actions for personal injury, where the amount of plaintiff's claim for damages does not exceed twenty-five thousand dollars (\$25,000), there shall be taxed and allowed to the claimant, as part of the costs of the action, a reasonable amount to be fixed by the court as [attorney] attorney's fees. For the plaintiff to be awarded [attorney] attorney's fees for the prosecution of the action, written demand for payment of the claim and a statement of claim must have been served on the defendant's insurer, if known, or if there is no known insurer, then on the defendant, not less than sixty (60) days before the commencement of the action; provided that no [attorney] attorney's fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety percent (90%) of the amount awarded to the plaintiff.

The term "statement of claim" shall mean a written statement signed by the plaintiff's attorney, or if no attorney, by the plaintiff which includes:

(a) An itemized statement of each and every item of damage claimed by the plaintiff including the amount claimed for general damages and the following items of special damages: (i) medical bills incurred up to the date of the plaintiff's demand; (ii) a good faith estimate of future medical bills; (iii) lost income incurred up to the date of the plaintiff's demand; (iv) a good faith estimate of future loss of income; and (v) property damage for which the plaintiff has not been paid.

(b) Legible copies of all medical records, bills and other documentation pertinent to the plaintiff's alleged damages.

If the plaintiff includes in the complaint filed to commence the action, or in evidence offered at trial, a different alleged injury or a significant new item of damage not set forth in the statement of claim, the plaintiff shall be deemed to have waived any entitlement to attorney fees under this section.

**[There are no reported cases discussing this section, which was added in 1996.]**

**Subsection (4) was added to I.C. s 12-120 in 1996. It applies to small personal injury actions. As used in the statute, "claimant" refers to a prevailing party, whether it is a plaintiff or a defendant, who is claiming attorney fees. Either a prevailing plaintiff or a prevailing defendant is entitled to attorney fees in personal injury actions under \$25,000. *Gillihan v. Gump*, 140 Idaho 264, 267, 92 P.3d 514, 517 (2004).**

**The paragraph in subsection (4) pertaining to a waiver of attorney fees was addressed in a recent case. After the jury returned a verdict favorable to the plaintiff, the defendant argued that the plaintiff waived her right to seek attorney fees by submitting significant new items of damage during the trial that had not been set forth in the statement of claim. The trial court awarded attorney fees to the plaintiff, which was affirmed on appeal. The Court of Appeals construed the phrase "significant new item of damage not set forth in the statement of claim." At trial the plaintiff had presented evidence of increased amounts of the same damage items listed in the statement of claim. Because subsection (4) presumes that the amount of damages may change over time, evidence of an increased amount of damages at trial does not in itself constitute a waiver of attorney fees. The statement of claim must, however, contain a good faith estimate or the trial court may still deny an award of attorney fees. *Johnson v. Sanchez*, 140 Idaho 667, 670, 99 P.3d 620, 623 (2004).**

*(f) Idaho Code s 12-120(5) and (6)*

Section 12-120(5) provides:

In all instances where a party is entitled to reasonable [attorney] attorney's fees and costs under subsections (1), (2), (3) or (4) of this section, such party shall also be entitled to reasonable post-judgment [attorney] attorney's fees and costs incurred in attempting to collect on the judgment. Such [attorney] attorney's fees and costs shall be set by the court following the filing of a memorandum of [attorney] attorney's fees and costs with notice to

all parties and hearing.

Note that this provision allows an award of judgment collection related fees and costs only when the judgment includes fees allowed under I.C. s 12-120. It would appear that this statutory allowance would therefore not apply to a judgment with fees obtained under I.C. s 12-121, as these fees are otherwise disallowed under *Allison v. John M. Biggs, Inc.*, 121 Idaho 567, 826 P.2d 916 (1992). *See also Post v. Idaho Farmway, Inc.*, 135 Idaho 475, 479, 20 P.3d 11, 15 (2001).

Section 12-120(6) provides:

In any small claims case resulting \*548 in entry of a money judgment or judgment for recovery of specific property, the party in whose favor the judgment is entered shall be entitled to reasonable postjudgment attorney's fees and costs incurred in attempting to collect on the judgment. Such attorney's fees and costs shall be set by the court following the filing of a memorandum of attorney's fees and costs with notice to all parties and an opportunity for hearing. The amount of such attorney's fees shall be determined by the court after consideration of the factors set out in rule 54(e)(3) of the Idaho rules of civil procedure, or any future rule that the supreme court of the state of Idaho may promulgate, but the court shall not base its determination of such fees upon any contingent fees arrangement between attorney and client, or any arrangement setting such fees as a percentage of the judgment or the amount recovered. In no event shall postjudgment attorney's fees exceed the principal amount of the judgment or value of property recovered.

This subsection was enacted by the legislature in 2001 as Session Law ch. 161. It applies to the two types of judgments permitted in the jurisdiction of the small claims department. *See* I.C. s 1-2301. It differs from I.C. s 12-120(5) because it is not tied to or limited by the other provisions of I.C. s 12-120 as the basis for the underlying claim, since the recovery of a money judgment in a small claims proceeding could result from a tort, property damage, or in contract action. The determination of the reasonableness of the fee award cannot be controlled by a contingency fee agreement entered into between the judgment creditor and the attorney hired to collect the judgment, and the award cannot exceed the principal amount of the judgment on the underlying claim.

***(g) Idaho Code s 12-123. Sanctions for frivolous conduct in a civil case.***

Section 12-123 was enacted in 1987. Apparently this statute was part of the "Tort Reform" law to provide for sanctions against over-zealous plaintiff attorneys. Its use has been very limited, or almost non-existent. The statute provides:

**12-123. Sanctions for frivolous conduct in a civil case.--** (1) As used in this section:

(a) "Conduct" means filing a civil action, asserting a claim, defense, or other position in connection with a civil action, or taking any other action in connection with a civil action.

(b) "Frivolous conduct" means conduct of a party to a civil action or of his counsel of

record that satisfies either of the following:

(i) It obviously serves merely to harass or maliciously injure another party to the civil action;

(ii) It is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

(2)(a) In accordance with the provisions of this section, at any time prior to the commencement of the trial in a civil action or within twenty-one (21) days after the entry of judgment in a civil action, the court may award reasonable attorney's fees to any party to that action adversely affected by frivolous conduct.

(b) An award of reasonable attorney's fees may be made by the court upon the motion of a party to a civil action, but only after the court does the following:

(i) Sets a date for a hearing to determine whether particular conduct was frivolous; and

(ii) Gives notice of the date of the hearing to each party or counsel of record who allegedly engaged in frivolous conduct; and

(iii) Conducts the hearing to determine if the conduct was frivolous, whether any party was adversely affected by the conduct if it is found to be frivolous, and to determine if an award is to be made, the amount of that award. In connection with the hearing, the court may order each party who may be awarded reasonable attorney's fees and his counsel of record to submit to the court, for consideration in determining the amount of any such award, an itemized list of the legal services necessitated by the alleged frivolous conduct, the time expended in rendering the services, and the attorney's fees associated with those services. Additionally, the court shall allow the parties and counsel of record involved to present any other relevant evidence at the hearing.

(c) The amount of an award that is made pursuant to this section shall not exceed the attorney's fees that were both reasonably incurred by a party and necessitated by the frivolous conduct.

(d) An award of reasonable attorney's fees pursuant to this section may be made against a party, his counsel of record, or both.

(3) An award of reasonable attorney's fees pursuant to this section does not affect or determine the amount of or the manner of computation of attorney's fees as between an attorney and the attorney's client.

(4) The provisions of this section do not affect or limit the application of any civil rule or another section of the Idaho Code to the extent that such a rule or section prohibits an award of attorney's fees or authorizes an award of attorney's fees in a specified manner, generally, or

subject to limitations.

This statute seems to be a cross between I.C. s 12-121 and I.R.C.P. 11. It seems to allow the award of attorney fees against an attorney personally, as does I.R.C.P. 11, and it seems to prohibit frivolous actions like I.C. s 12-121. The criteria for awarding attorney fees under I.C. s 12-123 is more restrictive than I.C. s 12-121, but not quite the same as I.R.C.P. 11. The courts appear to treat sections 12-121 and 12-123 similarly if not identically. *See Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 369, 816 P.2d 320 325 (1991); *Webster v. Hoopes*, 126 Idaho 96, 99-100, 878 P.2d 795, 799-800 (Ct. App. 1994). [***Dufur v. Nampa & Meridian Irr. Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996).**] **However, a specific procedure is set forth in \*548 the statute and, if the procedures do not take place, an award of attorney fees is improper. *Roe Family Services v. Doe*, 139 Idaho 930, 938, 88 P.3d 749, 757 (2004).**

*(h) Idaho Code s 12-117. Attorney's fees, witness fees and expenses awarded in certain circumstances.*

In 1984 the legislature adopted I.C. s 12-117 which specifically allows the award of attorney fees against a state agency if it "acted without a reasonable basis in fact or law." The statute was amended in 1994 to include cities, counties and taxing districts. Then, in 2000 the legislature again amended the statute to permit the award in favor of any "prevailing party." The statute now reads:

**12-117. Attorney's Fees, witness fees and expenses awarded in certain instances. (1)**

Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

(2) If the prevailing party is awarded a partial judgment and the court finds the party against whom partial judgment is rendered acted without a reasonable basis in fact or law, the court shall allow the prevailing party's attorney's fees, witness fees and expenses in an amount which reflects the person's partial recovery.

(3) Expenses awarded against a state agency, city, county or other taxing district pursuant to this section shall be paid from funds in the regular operating budget of the state agency, the city, the county or the taxing district. If sufficient funds are not available in the budget of the state agency, the expenses shall be considered a claim governed by the provisions of section 67-2018, Idaho Code. If sufficient funds are not available in the budget of the city, county or taxing district, the expenses shall be considered a claim pursuant to chapter 9, title 6, Idaho Code. Every state agency, city, county or taxing district against which litigation expenses have been awarded under this act shall, at the time of submission of its proposed budget, submit a report to the governmental body which appropriates its funds in which the amount of expenses awarded and paid under this act during the fiscal year is stated.

(4) For the purposes of this section:

(a) "Person" shall mean any individual, partnership, corporation, association or any other private organization;

(b) "State agency" shall mean any agency as defined in section 67-5201, Idaho Code.

(5) If the amount pleaded in an action by a person is two thousand five hundred dollars (\$2,500) or less, the person must satisfy the requirements of section 12-120, Idaho Code, as well as the requirements of this section before he or she may recover attorney's fees, witness fees or expenses pursuant to this section.

The Supreme Court has described the purpose of I.C. s 12-117 as follows:

We believe the purpose of that statute is two-fold: (1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never ha[ve] made.

*Bogner v. State Dep't. of Rev. and Taxation*, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984). The Court has emphasized that the statute is one which states that attorney fees "shall" be granted if the action of the agency was groundless or arbitrary. *Rincover v. State Dep't of Finance*, 129 Idaho 442, 444, 926 P.2d 626, 628 (1996).

The Court later reversed an award of attorney fees under I.C. s 12-117 where the Insurance Department improperly filed a complaint against an insurance agent, stating:

If an error in a case involved a reasonable, but erroneous, interpretation of an ambiguous statute, then attorney fees generally would not be awarded. [*Id.*] However, if the error involved either an unreasonable interpretation of an unambiguous statute or an erroneous interpretation of an ambiguous statute, then the court stated that a fee award may well be warranted. [*Id.*]

Utilizing [that] analysis in the application of I.C. s 12-117 to the facts of this case, we hold that the district court's award of costs and attorney fees was in error. We think the department's actions fall into the first category outlined above, namely, a reasonable, yet erroneous interpretation of an ambiguous, or at least confusingly-worded, statute. **(Citations omitted.)**

*Cox v. Dep't of Ins.*, 121 Idaho 143, 148, 823 P.2d 177, 182 (Ct. App. 1991).

The statute does not apply to all state agencies, but rather only to the state agencies defined by I.C. s 67-5201(2), which in turn exempts the legislative and judicial branches, the state militia, and the state board of correction. *Needs v. Idaho State Dep't of Corr.*, 115 Idaho 399, 766 P.2d 1280 (Ct. App. 1988). The Idaho State Building Authority is not a "state agency." *Bott v. Idaho State Bldg. Auth.*, 122 Idaho 471, 479-80, 835 P.2d 1282, 1290-91 (1992). Likewise, the Idaho Public Utilities Commission is a "legislative agency" and not a "state agency" under I.C. s

12-117. *Owner-Operator Indep. Drivers Ass'n v. Idaho Pub. Util. Comm'n*, 125 Idaho 401, 407-08, 871 P.2d 818, 824-25 (1994). **Idaho State University also was not a "state agency" for purposes of this statute. *Horne v. Idaho State University*, 138 Idaho 700, 706, 69 P.3d 120, 126 (2003).** However, attorney fees under I.C. s 12-117 were allowed against the Department of Water Resources in *Musser v. Higginson*, 125 Idaho 392, 396-97, 871 P.2d 809, 813-14 (1994), **overruled on other grounds by *Rincover v. State Dep't of Finance*, 132 Idaho 547, 976 P.2d 473 (1999).**

Attorney fees will be awarded if there is a valid finding that the state agency, city, or county acted "without a reasonable basis in fact or law." *Idaho Dep't of Law Enforcement v. Kluss*, \*548 125 Idaho 682, 685, 873 P.2d 1336, 1339 (1994), **overruled on other grounds by *Rincover v. State Dep't of Finance*, 132 Idaho 547, 976 P.2d 473 (1999).** Fees were awarded in an action challenging a state statute regulating when Medicare Funds are available for abortions. *Roe v. Harris*, 128 Idaho 569, 573-74, 917 P.2d 403, 407-08 (1996), **overruled on other grounds by *Rincover v. State, Dep't of Finance*, 132 Idaho 547, 976 P.2d 473 (1999).**

The Supreme Court has specifically ruled that I.C. s 12-117 grants authority to an administrative agency, such as the Idaho Personnel Commission, to award attorney fees for an internal administrative appeal if it finds that the state agency "acted without a reasonable basis in fact or law." *Stewart v. Dep't of Health and Welfare*, 115 Idaho 820, 822-23, 771 P.2d 41, 43-44 (1989). However, the Supreme Court has also held that attorney fees on an administrative appeal to the district court cannot be awarded under I.C. s 12-121 because it does not involve a civil action commenced by the filing of a complaint. *Horne v. Idaho State University*, 138 Idaho 700, 706, 69 P.3d 120, 126 (2003); *Lowery v. Board of County Comm'rs*, 117 Idaho 1079, 793 P.2d 1251 (1990). Attorney fees, in a proper case, can be awarded in an administrative appeal against the state agency under I.C. s 12-117. *Moosman v. Idaho Horse Racing Comm'n*, 117 Idaho 949, 954, 793 P.2d 181, 186 (1990).

**(i) Idaho Code s 32-704. Attorney fees in divorce cases.**

Attorney fees in divorce actions are granted under I.C. s 32-704 and I.C. s 32-705. The appellate courts have indicated that trial courts have broad discretion in awarding attorney fees in divorce cases under I.C. s 32-704. The denial of attorney fees where there is a finding that the wife has sufficient funds to pay her own attorney fees is generally upheld. *Golder v. Golder*, 110 Idaho 57, 61-62, 714 P.2d 26, 30-31 (1986); *Sherry v. Sherry*, 108 Idaho 645, 650-51, 701 P.2d 265, 270-71 (Ct. App. 1985). The court can require the husband to pay attorney fees out of his property rather than the community property. *Bell v. Bell*, 122 Idaho 520, 527, 835 P.2d 1331, 1338 (Ct. App. 1992). The court should consider the financial resources of both parties and not award attorney fees if both parties have the financial resources necessary to prosecute and defend the action. *Ireland v. Ireland*, 123 Idaho 955, 960, 855 P.2d 40, 45 (1993). However, it has been held that it is not an abuse of discretion to require the husband to pay the wife attorney fees out of his assets even though the wife received substantial assets from the divorce proceedings. *Desfosses v. Desfosses*, 120 Idaho 354, 362, 815 P.2d 1094 (Ct. App. 1991). **See also *Stephens v. Stephens*, 138 Idaho 195, 61 P.3d 63 (Ct. App. 2002).** Likewise, it was not error to deny attorney fees under this section where the applicant had violated a Court Order. ***Roberts v. Roberts*, 138 Idaho 401, 406, 64 P.3d 327, 332 (2003).**

Attorney fees are no longer considered to be a community debt. *Jensen v. Jensen*, 124 Idaho 162, 170, 857 P.2d 641, 649 (Ct. App. 1993). Attorney fees can also be awarded on appeal under I.C. s 12-121 in a divorce case. *McPherson v. McPherson*, 112 Idaho 402, 407, 732 P.2d 371, 376 (Ct. App. 1987). Attorney fees in a divorce are not automatic and the party claiming an award for fees must state the specific grounds relied upon, or the claim will be denied. *Fournier v. Fournier*, 125 Idaho 789, 792, 874 P.2d 600, 603 (Ct. App. 1994). The award of attorney fees cannot be offset against child support. *Ireland*, 123 Idaho at 961, 855 P.2d at 46. The award of attorney fees under I.C. s 32-704 will be reversed unless the trial court's decision "cites the legislative factors and demonstrates that such factors were considered" in awarding attorney fees. *Noble v. Fisher*, 126 Idaho 885, 891, 894 P.2d 118, 124 (1995).

**Idaho Code s 32-704(3) directs the trial court to consider the financial resources of both parties and the factors set forth in Idaho Code s 32-705 before awarding attorney fees.** Many cases state that in awarding fees under I.C. s 32-704, the trial court must consider the factors listed in I.C. s 32-705. *Ireland*, 123 Idaho at 960, 855 P.2d at 45; *Stephens*, 138 Idaho at 197-98, 61 P.3d at 65-66. However, the Court of Appeals, in addressing fees awarded under I.C. s 32-704 stated, "[T]he factors articulated in I.C. s 32-705 are the minimum factors to be considered in determining whether attorney fees should be provided under I.C. s 32-704. Therefore, we reject [the plaintiff's] assertion that relevant factors other than those listed in I.C. s 32-705 may not be considered when deciding whether attorney fees should be awarded." *Antill v. Antill*, 127 Idaho 954, 958, 908 P.2d 1261, 1265 (Ct. App. 1996). The Supreme Court affirmed the lower court's denial of attorney fees where it found that "each party ha[d] sufficient property and employment to provide for his or her reasonable needs." *Jensen v. Jensen*, [128 Idaho at 606, 917 P.2d at 763] 128 Idaho 600, 606, 917 P.2d 757, 763 (1996). **Absent a request for attorney fees to either the magistrate or district judge to pursue an appeal, and absent any information to support such a request, the prevailing husband was not entitled to fees on appeal, nor was the wife entitled to fees based solely on her allegation in her brief that she was "without sufficient funds."** *Gustaves v. Gustaves*, 138 Idaho 64, 57 P.3d 775 (2002). Likewise, the Court reversed a fee award when it found that the magistrate did not consider the elements in I.C. s 32-705. *Rohr v. Rohr*, 128 Idaho 137, 143-44, 911 P.2d 133, 139-40 (1996). If the court denies a motion for attorney fees, one appellate court decision suggests that the judge should make findings as to \*548 why fees were not granted. *Antill*, 127 Idaho at 959, 908 P.2d at 1265.

**(j) Idaho Code s 41-1839. Attorney fees in arbitration of insurance.**

Attorney fees with regard to binding arbitration are rather complicated. First of all, attorney fees for the arbitration itself cannot be awarded by an arbitrator. *Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, 42-43, 665 P.2d 1046, 1052-53 (1983); *Storrer v. Kier Constr. Corp.*, 129 Idaho 745, 746, 932 P.2d 373, 374 (Ct. App. 1997). However, if the plaintiff sues to collect under an insurance policy pursuant to the arbitration, attorney fees may be granted by the court, including attorney fees for the arbitration under I.C. s 41-1839. *Emery v. United Pac. Ins. Co.*, 120 Idaho 244, 246, 815 P.2d 442, 444 (1991). This is true despite the fact that attorney fees in arbitration may not be awarded by the trial court or the arbitrator. *Wolfe v. Farm Bureau Ins. Serv. Co.*, 128 Idaho 398, 403, 913 P.2d 1168, 1173 (1996); *Storrer v. Kier Constr.*

*Corp.*, [129 Idaho 745, 932 P.2d 373 (Ct. App. 1997)] 129 Idaho at 747, 932 P.2d at 375.

Upon receipt of an arbitration award, I.C. s 41-1839 provides that a party may file suit to confirm the arbitration and obtain a judgment. In such a case, the plaintiff cannot seek attorney fees under I.C. s 41-1839 because an action confirming an [arbitral] arbitration award is not a civil action for which attorney fees are recoverable. *Wolfe*, 128 Idaho at 404-05, 913 P.2d at 1174-75.

If I.C. s 41-1839 applies as an action on an insurance policy, as distinguished from an application to confirm an arbitration award, attorney fees can be granted for any arbitration under the policy even though the Arbitration Rules provide that all expenses of arbitration shall be shared equally by the parties. The Supreme Court has held:

Pursuant to this implied term in the insurance contract [I.C. s 41-1839], the parties agree that the insurer is obligated to pay attorney fees if the insured is compelled to file suit to recover under the insurance policy. As an implied term in the insurance contract, the statutory language of I.C. s 41-1839 modifies the general American Arbitration Association rule that the parties must bear equally all expenses of arbitration, except those associated with the presentation of witnesses. Where the insured is required and compelled to file a lawsuit by reason of an insurer's refusal to pay in order to recover under her insurance contract, we hold it is implicit in I.C. s 41-1839 that the court shall adjudge a reasonable award of attorney fees against the insurer. This Court has further held that the attorney fee authorized by I.C. s 41-1839 is not a penalty, but an additional sum rendered as just compensation. *Halliday v. Farmers Ins. Exch.*, 89 Idaho 293, 404 P.2d 634 (1965). We affirm the trial court's award of attorney fees.

*Emery v. United Pacific Ins. Co.*, [120 Idaho 244, 247, 815 P.2d 442, 445 (1991)] 120 Idaho at 247, 815 P.2d at 445.

**An insured may recover attorney fees against an insurer under I.C. s 41-1839 if the insured can show that (1) the insured provided proof of loss as required by the insurance policy, and (2) the insurance company failed to pay an amount justly due under the policy within thirty days of proof of such loss. *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 61 P.3d 601 (2002). In *Martin*, the Supreme Court withdrew a third condition previously stated in *Anderson v. Farmers Ins. Co.*, 130 Idaho 755, 947 P.2d 1003 (1997). The third condition, which was not included in the statute, was that the insurer's failure to pay had to compel the insured to bring suit against the insurer in order to recover for the loss. Thus, the third condition is no longer required.**

#### *(k) Other Statutes*

There are obviously many other statutes providing for the award of attorney fees. These include such areas as actions on insurance contracts (I.C. s 41-1839), attorney fees for a product seller against a manufacturer in products liability (I.C. s 6-1307(2)), wage claims, with fees awardable only to the employee, not to the employer (I.C. s 45-615), foreclosure of mechanics' liens (I.C. s 45-513), trespass (I.C. s 6-202), habeas corpus actions (I.C. s 12-122), interpleader (I.C. s 5-321), abortion consent (I.C. s 18-609A), forcible entry and unlawful detainer (I.C. s 6-324), and contempt of court judgments (I.C. s 7-610). See Christine Wyatt, *Reasonable*

*Attorney's Fees in Idaho*, 11 IDAHO L. REV. 279 (1974), and Mark D. Perison, *A Guide to Attorney Fee Awards in Idaho*, 32 IDAHO L. REV. 29 (1995). Each statute must be examined separately to determine its specific requirements.

Where an insurance company pays the claim of an insured, it may then claim attorney fees as a subrogee. *Empire Fire and Marine Ins. Co. v. North Pacific Ins. Co.*, 127 Idaho 716, 719, 905 P.2d 1025, 1028 (1995). [Section] Idaho Code s 45-615 allows for an award of attorney fees in a wage claim where the plaintiff makes a demand "for a sum not to exceed the amount so found due;" a statement that demand was made for \$1.00 does not satisfy this requirement. *GME, Inc. v. Carter*, 128 Idaho 597, 917 P.2d 754 (1996). [Section] Idaho Code s 41-1839 is liberally construed to give attorney fees to **an** uninsured. *Northland Ins. Co. v. Boise's Best Autos & Repairs*, 131 Idaho 432, 958 P.2d 589 (1998). In order to prevail on an I.C. s 41-1839(1) request for attorney fees, the insured must present evidence establishing that the insurer "failed to pay a specific amount 'justly due' under the ... policy." *Id.* at 434, 958 P.2d 589, quoting *Union Warehouse and Supply Co., Inc. v. Illinois R.B. Jones, Inc.*, 128 Idaho 660, 669, 917 P.2d 1300, 1309 (1996).

All provisions of I.R.C.P. 54(e) apply equally to any of these statutes, except that the frivolous, unreasonable or without foundation test in I.R.C.P. \*548 54(e)(1) applies only to I.C. s 12-121. Accordingly, the determination of a prevailing party should be made in the same manner under I.R.C.P. 54(d)(1) as in claims under I.C. s 12-120 or I.C. s 12-121. The amount of the attorney fee award under any of these statutes should be determined under I.R.C.P. 54(e)(3).

Attorney fees were granted to the state under a provision of the Consumer Protection Act, Idaho Code s 48-614(2), when the defendant retailer failed to respond to the state's investigative demand within the requisite time period. *State v. Hobby Horse Ranch Tractor and Equip. Co.*, 129 Idaho 565, 929 P.2d 741 (1996).

## 2. Attorney Fees Under Civil Rules

The determination of attorney fees under a Civil Rule can be at least as complicated as attorney fees under a statute or contract. The trial court must make the same threshold determinations, except that if it finds the sanction rule should be invoked, there is no need to determine the prevailing party on the merits in the underlying case.

The criteria for awarding attorney fees is different under the various rules.

### (a) I.R.C.P. 11(a)(1)

In 1985 the Supreme Court adopted I.R.C.P. 11(a)(1), identical to the Federal Rule which had been adopted in 1983. The Idaho Rule provides:

#### **Rule 11(a)(1). Signing of pleadings, motions, and other papers; sanctions.**

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney's individual name, whose address shall be stated before the same may be

filed. A party who is not represented by an attorney shall sign the pleading, motion or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. *The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.* If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. *If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

(Emphasis added.)

There have been only a few Idaho appellate decisions mentioning this rule during its existence[, **in contrast to the corresponding Federal Rule which**]. **In contrast, the corresponding Federal Rule has** been used in thousands of Federal appellate court determinations during the last two decades. Critics of I.R.C.P. 11(a)(1) point out that the rule was allegedly adopted to prohibit frivolous lawsuits, thereby reducing court caseloads, when in fact it has spawned a great amount of new litigation and appeals.

The most unusual thing about I.R.C.P. 11 is that it allows the imposition of attorney fees against either a party or the party's attorney. The rule rather simply provides that the signature of an attorney on a pleading or motion certifies that "after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." Additionally, by signing, the party or attorney certifies that the pleading is "not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation." In many ways these words sound similar to I.R.C.P. 54(e)(1) which interprets I.C. s 12-121 as allowing the award of attorney fees for any action "pursued or defended frivolously, unreasonably or with foundation." However, as will be seen below, it appears that I.R.C.P. 11(a)(1) has more stringent requirements than I.C. s 12-121.

The Supreme Court stated, "The reasons for which attorney fees may be awarded pursuant to I.C. s 12-121 and I.R.C.P. 54(e)(1) are not reasons that will support an award of sanctions pursuant to I.R.C.P. 11(a)(1)." *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 96, 803 P.2d 993, 1002 (1991); *see also Tolley v. Thi Co.*, 140 Idaho 253, 263, 92 P.3d 503, 513 (2004); *Landvik by Landvik v. Herbert*, 130 Idaho 54, 61, 936 P.2d 697, 704 (Ct. App. 1997); *Gubler v. Brydon*, 125 Idaho 112, 867 P.2d 986 (1994).

However, the Supreme Court affirmed I.R.C.P. 11(a)(1) sanctions against an attorney in a

personal injury case stating, "The record supports the conclusion that Smith acted unreasonably under the circumstances in that he failed to conduct a proper investigation upon reasonable inquiry into the facts and legal theories of [plaintiff's] personal injury case." *Koehn v. Riggins*, 126 Idaho 1017, 1018, 895 P.2d 1210, 1211 (1995). In another case, attorney fees and costs were awarded where the plaintiff's attorney "did not make a reasonable inquiry into the facts before filing the complaint." *Landvik*, 130 Idaho at 62, 936 P.2d at 705.

The Court of Appeals has had occasion to comment upon I.R.C.P. 11 on several occasions. In one case it merely stated summarily that it found nothing in the record which would indicate a violation of the rule. *Murr v. Odmak*, 112 Idaho 606, 608, 733 P.2d 827, 829 (Ct. App. 1987). In a later case, the Court of Appeals commented:

Finally, the county officers urge us to consider I.R.C.P. 11(a)(1). \*548 This rule authorizes sanctions (including attorney fees) for pleadings which are not 'well grounded in fact,' which are not 'warranted by existing law or a good faith argument for the extension, modification or reversal of existing law,' or which are 'interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.' In our view, Rule 11(a)(1) is not a broad compensatory law. It is a court management tool. The power to impose sanctions under this rule is exercised narrowly, focusing on discrete pleading abuses or other types of litigative misconduct within the overall course of a lawsuit. So understood, it is not the type of 'rule of court' the Legislature intended to displace with I.C. s 6-918A.

In the case before us, no management use of the rule has been urged. Rather, the county officers would have us hold that the rule provides authority for making a lump-sum compensatory attorney fee award after the case has been decided. If the rule were so applied, there would be little difference between the rule and I.C. s 12-121, which already authorizes a fee award in any civil case brought frivolously, unreasonably or without foundation. We do not think the rule should be so applied in this case, nor do we think it could be without contravening the clear language of I.C. s 6-918A.

*Kent v. Pence*, 116 Idaho 22, 23-24, 773 P.2d 290, 291-92 (Ct. App. 1989).

Six months after *Kent*, in a claim for attorney fees on appeal under I.R.C.P. 11, the Court of Appeals stated:

The State of Alaska, as represented by the Idaho Attorney General, has requested an award of attorney fees and costs in this appeal. The state invokes I.R.C.P. 11(a)(1) and I.C. s 12-121, arguing that the appeal was brought groundlessly and without good faith. We have previously stated our position that Rule 11(a)(1) is not a broad compensatory law, but is a court management tool. As we said in *Kent v. Pence*, 116 Idaho 22, 773 P.2d 290 (Ct. App. 1989), the rule does not exist to duplicate I.C. s 12-121, which has long been construed to authorize an attorney fee award in any civil case brought frivolously, unreasonably, or without foundation. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979). Rather, the rule serves a separate, cognizable purpose, focusing upon discrete pleading abuses or other types of litigative misconduct within the overall course of a lawsuit.

*Kent*, 116 Idaho at 23, 773 P.2d at 291. Compare *Stevens v. Fleming*, 116 Idaho 523, 777 P.2d 1196 (1989) (approving use of Rule 11 sanctions where appellants' attorney failed to make proper factual inquiry before filing suit). Here, the state does not contend that any particular litigative misconduct occurred during the course of this lawsuit; instead, it simply argues that Hansen's appeal was meritless.

*Alaska v. Hansen*, 116 Idaho 927, 929, 782 P.2d 50, 52 (Ct. App. 1989).

In 1989, the Supreme Court affirmed an award of attorney fees under I.R.C.P. 11(a)(1) in *Stevens v. Fleming*, 116 Idaho 523, 777 P.2d 1196 (1989). In that case the plaintiffs sued the owner of an apartment building for the wrongful death of their 78-year-old father in a fire. Later the plaintiffs added the city's fire chief and his wife as defendants for not inspecting the building. The amended complaint was dismissed and attorney fees were granted to the fire chief under I.R.C.P. 11 because plaintiff had not provided the city with the required 120 day tort claim notice. The Supreme Court affirmed stating:

Having failed to file a notice of claim against the city until January 1987, it is clear that plaintiff's counsel failed to reasonably inquire into whether the amended complaint [against the fire chief] was warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

116 Idaho at 532, 777 P.2d at 1205.

In *Durrant v. Christensen*, 117 Idaho 70, 785 P.2d 634 (1990) (Durrant I), the Supreme Court discussed the theory of I.R.C.P. 11 at length. The trial court had denied I.R.C.P. 11 attorney fees on the grounds there was no evidence of "bad faith." *Id.* at 73, 785 P.2d at 637. The Supreme Court relied upon a decision of the Federal Ninth Circuit Court and ruled that "A showing of subjective bad faith is no longer necessary for the imposition of [I.R.C.P. 11] sanctions." *Id.* at 74, 785 P.2d at 638. The Court reversed the denial of attorney fees and remanded the case to the trial court to "determine whether the plaintiffs made a proper investigation upon reasonable inquiry" before filing the action. *Id.* On remand the district court found no grounds for I.R.C.P. 11 sanctions; this decision was later affirmed by the Supreme Court. *Durrant v. Christensen*, 120 Idaho 886, 821 P.2d 319 (1991) (Durrant II).

However, it is interesting that in Durrant II, the Supreme Court first stated, "The trial court also found that the actions of the Durrants and Sellers were reasonable under the circumstances and that an award of sanctions against them under I.R.C.P. 11(a)(1) was not appropriate." *Id.* at 887, 821 P.2d at 320. The Supreme Court observed that on appeal the burden is upon the appellant to show that the district court committed error and then stated, "Applying this rule to this case, we presume that the record of the hearing concerning the temporary restraining order supports the decision of the trial court, that the Durrants and Sellers were reasonable under the circumstances, and that sanctions against them under I.R.C.P. 11(a)(1) were not appropriate." *Id.* at 888, 821 P. 2d 320. These statements almost make it sound like it is a question of the reasonableness of the actions of the parties, rather than whether the attorney or party made a "reasonable inquiry" before filing suit. These decisions do not answer all questions, but they do make it clear that I.R.C.P. 11 fees are not a question of bad \*548 faith. I.R.C.P. 11 attorney fees

can be awarded even though the attorney has not acted in bad faith. In *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 816 P.2d 320 (1991), the trial court granted I.R.C.P. 11 sanctions upon a finding that the plaintiff's claims were "not well grounded in fact." *Id.* at 369, 816 P.2d at 325. The Supreme Court reversed, stating:

Thus, it is evident that the trial court's imposition of sanctions against the Hanfs without finding a lack of a reasonable inquiry is not an adequate analysis under Rule 11. The trial court must determine whether the litigant "made a proper investigation upon reasonable inquiry." Without such a determination, an award of Rule 11 sanctions cannot be sustained.

*Id.* at 369, 816 P.2d at 325.

**An abuse of discretion standard is applied when determining whether a district court's imposition of Rule 11 sanctions is proper. *Slack v. Anderson*, 140 Idaho 38, 89 P.3d 878 (2004); *Gubler v. Brydon*, 125 Idaho 112, 867 P.2d 986 (1994).**

The United States Supreme Court has added a very important footnote to the corresponding Federal Rule 11. In *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989), the Court ruled that a Rule 11 sanction is a personal judgment against only the attorney *signing* the pleading. The Court held that the law firm where the attorney worked was not liable for the sanction, even though the attorney signed in a fashion indicating that he was signing as a member of the law firm, and even though the entire law firm was officially the attorneys of record. Justice Scalia wrote in the majority opinion, "The message thereby conveyed to the attorney, that is not a 'team effort' but in the last analysis is *yours alone*, is precisely the point of Rule 11." 493 U.S. at 127 (emphasis in original).

It seems likely that this decision will be followed in Idaho. Therefore, the trial court should realize that a I.R.C.P. 11 sanction is a judgment only against the signing attorney, and not against the law firm. Although amendments to the federal rule in 1993 changed this to now make the firm liable, Idaho has not adopted these amendments.

The Idaho Supreme Court's decision in *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991) involved an I.R.C.P. 11 award of attorney fees in the amount of \$421,138.91 against an out-of-state attorney. On appeal the attorney contended that he did not sign the last amended complaint, but that the Idaho attorney had signed it. He contended that under *Pavelic* [*Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989)] he could not be held liable. However, because the attorney had failed to urge this defense in the trial court, which occurred before *Pavelic* was announced, the Idaho Supreme Court held that it would not consider the defense on appeal. The Court then examined the trial court's award of attorney fees under I.R.C.P. 11. The trial court found that the attorney brought the complaint "without having sufficient factual foundation to sign and reasonably believe a cause of action existed against Idaho Power." *Sun Valley*, 119 Idaho at 96, 803 P.2d at 1001. On review, the Supreme Court stated this was the wrong inquiry, as the trial judge should have considered whether the attorney "made a proper investigation upon reasonable inquiry." *Id.* at 95, 803 P.2d 933. Because of the erroneous inquiry, the Supreme Court reversed the I.R.C.P. 11 award of

attorney fees without remanding the case to the trial court for further findings. *Id.* at 96, 803 P.2d at 1002.

In another case, the Court of Appeals affirmed a \$2,800 I.R.C.P. 11 sanction against an attorney for filing an action for a prescriptive easement. The Court found that the attorney "failed to 'make reasonable inquiry' "as to whether the complaint was well grounded in fact and supported by the law. *Young v. Williams*, 122 Idaho 649, 653, 837 P.2d 324, 328 (Ct. App. 1992).

**Where an attorney pursued an appeal after his client had fired him, the Supreme Court dismissed the appeal. After the case was remanded, the trial court awarded attorney fees as a sanction under I.R.C.P. 11 based on the frivolous pursuit of an appeal. The Court of Appeals held that the district court abused its discretion because a trial court cannot impose sanctions under I.R.C.P. 11 for appellate misconduct. *Curzon v. Hansen*, 137 Idaho 420, 49 P.3d 1270 (Ct. App. 2002).**

For a very good discussion of the Federal Rule and a somewhat conservative approach to its application, see *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988).

**(b) I.R.C.P. 16(i)**

Rule 16 of the Civil Rules addresses the procedure, objectives and suggestions for the use of pretrial conferencing in efficiently managing civil litigation. It contemplates the issuance of scheduling and planning orders designed to facilitate resolution of the parties' disputes. I.R.C.P. 16(i) was formulated to encourage the parties to comply with the pretrial process outlined in the provisions of the general rule, by authorizing the use of sanctions by the trial court against parties or their attorneys who fail without justification to comply with the court's pretrial orders. This Rule is identical to Federal Rule 16(f) and reads as follows:

**Rule 16(i) Sanctions:** If a party or party's attorney fails to obey a scheduling or pre-trial order, or if no appearance is made on behalf of a party at a scheduling or pre-trial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanctions, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred \*548 because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

The application of I.R.C.P. 16(i) was described by the Court of Appeals in *Fish Haven Resort, Inc. v. Arnold*, 121 Idaho 118, 822 P.2d 1015 (Ct. App. 1991). The appellate court observed: "A party or attorney who does not comply with pretrial orders or is otherwise deficient may be sanctioned pursuant to I.R.C.P. 16(i) and, as referenced therein, I.R.C.P. 37(b)(2), which

outlines sanctions for the violation of discovery orders. I.R.C.P. 37(b)(2) authorizes the court to strike pleadings in whole or in part, and to treat disobedience of orders as contempt of court." *Id.* at 121, 822 P.2d at 1018. *Fish Haven* was an action for damages for breach of contract to purchase a resort business. The question before the court on appeal concerned the trial court's imposition of the sanction of striking the defendant's answer and counterclaim and summarily entering judgment against the defendant in the amount prayed for by the plaintiff in its complaint[, as a]. **The sanction was the** result of the defendant's noncompliance with a pretrial order when the defendant's attorney failed to appear at and participate in a scheduled pretrial conference. The appellate court found that the sanction chosen by the district court was an abuse of discretion because the lower court had not considered the adequacy of any lesser sanction as an alternative. The Court remanded the case to the trial court to determine the imposition of a more appropriate sanction. Clearly, an award to the plaintiff for its attorney fees incurred with respect to the activity caused by the defendant's noncompliance with the trial court's pretrial order would have been a viable alternative sanction to be considered by the trial court.

**In *Nepanuseno v. Hansen*, 140 Idaho 942, 947, 104 P.3d 984, 989 (Ct.App. 2004), the Court of Appeals affirmed the award of attorney fees as a sanction against a party for violation of pretrial and discovery orders.**

***(c) I.R.C.P. 30(g) and I.R.C.P. 37***

Rules 30(g) and 37 and their several subsections provide for sanctions, including attorney fees, for failure to comply with discovery processes. Most of these sanctions go against a party or the party's attorney. Most of these rules also provide for alternate methods of imposing the sanction such as striking a pleading, dismissing an action, or awarding expenses.

The potential application of I.R.C.P. 37 as to attorney fees is broad. This is particularly true of I.R.C.P. 37(e), which allows sanctions for disobedience of any order of the court. In fact, these rules are not often used to assess attorney fees against a client or his attorney. Generally, the sanction takes some other form, such as ordering an answer stricken and allowing the plaintiff to proceed to judgment. *McPherson v. McPherson*, 112 Idaho 402, 406, 732 P.2d 371, 375 (Ct. App. 1987). In *Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 287-88, 766 P.2d 751, 757-58 (1988), the Idaho Supreme Court directed the trial court to award attorney fees under I.R.C.P. 37(c) where a party improperly denied a request for an admission of fact. ***See also Bailey v. Sanford*, 139 Idaho 744, 754, 86 P.3d 458, 468 (2004).** Attorney fees may be awarded under I.R.C.P. 37(b) against a pro se party for failure to comply with a discovery order. *Nollenberger v. Nollenberger*, 122 Idaho 186, 832 P.2d 757 (1992); *State Dep't of Labor and Indus. Serv. v. Hill*, 118 Idaho 278, 283, 796 P.2d 155, 160 (Ct. App. 1990).

***(d) I.R.C.P. 41(a)(2). Dismissal By Order of Court.***

The Supreme Court has held that attorney fees upon dismissal under I.R.C.P. 41(a)(2) are not mandatory and are in the discretion of the trial court. *Rohr v. Rohr*, 118 Idaho 689, 693, 800 P.2d 85, 89 (1990).

***(e) I.R.C.P. 56(g). Affidavits in Summary Judgment***

### *Proceedings Made in Bad Faith.*

Rule 56(g) allows attorney fees to be awarded as a sanction for filing an affidavit in bad faith in opposition to a motion for summary judgment. The scope of the rule is quite narrow and there are no cases interpreting it.

#### *(f) I.R.C.P. 65(c). Security Given With Injunction or Restraining Order*

Rule 65(c) allows the award of attorney fees to a party who has been wrongfully enjoined or restrained and who prevails in lifting the injunction or restraining order. Attorney fees awarded under this rule are limited to the amount of the bond given as security for injunction or restraining order, so that it appears that the attorney fees are really damages for a wrongful injunction or restraining order. **Determining the amount of the bond lies in the discretion of the trial court.** *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 400-402, 744 P.2d 121, 128-130 (Ct. App. 1987). Additionally, attorney fees under I.R.C.P. 65(c) are limited to only those attorney fees incurred in opposing the injunction or restraining order, and not the other legal services involved in the trial on its merits. *Devine v. Cluff*, [111 Idaho 476, 725 P.2d 181] 110 Idaho 1, 713 P.2d 437 (Ct. App. 1986). However, if the legal services for defending the action on the merits are the same as the legal services in dissolving the restraining order, those attorney fees may be granted under I.R.C.P. 65(c). *Durrant v. Christensen*, 117 Idaho 70, 73, 785 P.2d 634, 637 (1990). **[However I]** If defendant was not wrongfully restrained, attorney fees cannot be granted. *Brady v. City of Homedale*, 130 Idaho 569, 573, 944 P.2d 704, 708 (1997).

### **3. Attorney Fees Under Contract**

Attorney fees can be awarded by the trial court when provided for by contract. *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 361, 48 P.3d 1241, 1250 (2002). The express provisions of the contract must be examined to determine whether attorney fees are appropriate. If the contract provides for attorney fees for only one party, this provision cannot be given reciprocal effect so as to award attorney fees \*548 to the other party. *Barnes v. Hinton*, 103 Idaho 619, 621, 651 P.2d 555, 557 (Ct. App. 1982). However, it would appear that in such situations attorney fees could be awarded under I.C. s 12-120(3) where the requirements of the statute are met.

The provisions of I.R.C.P. 54(e) apply in processing a contractual claim for attorney fees. The criteria of I.R.C.P. 54(d)(1)(B) are used to determine the prevailing party in the contract litigation. *Chadderdon v. King*, 104 Idaho 406, 411-12, 659 P.2d 160, 165-66 (Ct. App. 1983). Additionally, I.R.C.P. 54(e)(3) is used in determining the amount of the attorney fee award under the contract, *Bank of Idaho v. Colley*, 103 Idaho 320, 326, 647 P.2d 776, 782 (Ct. App. 1982), subject to any limitation set by the contract.

The question has arisen as to whether attorney fees can be recovered under a contract when the contract has been terminated or forfeited and the action is brought to rescind or vitiate that contract. In 1977 the Idaho Supreme Court reasoned, "Having terminated the contract, [the

respondents] cannot later assert the attorney fee clause in it while defending successfully against appellants' action to reinstate the contract." *Ellis v. Butterfield*, 98 Idaho 644, 650, 570 P.2d 1334, 1340 (1977).

However, attorney fees were later granted in an action where a buyer sought rescission of a contract after the seller's breach when such fees were provided for in the contract. It was possible for the buyer to rely on a provision in the very contract he sought to rescind because the buyer was also defending against the seller's counterclaim to enforce the contract. *Ayotte v. Redmon*, 110 Idaho 726, 718 P.2d 1164 (1986). Also, attorney fees were awarded in an unsuccessful action to forfeit a contract. *Daniel v. O'Dell*, 129 Idaho 8, 921 P.2d 185 (Ct. App. 1996). In *Daniel*, an action to terminate a real estate purchase agreement, attorney fees in favor of the defendant were affirmed where the court concluded that the defendants were the prevailing party and entitled to attorney fees under the agreement. *See id.* at 12-13, 921 P.2d 185 at 189-90.

In claims for attorney fees under a contract, the trial court must first interpret the contract to determine if attorney fees are appropriate before making the discretionary determination as to who is the prevailing party. *Thieme v. Worst*, 113 Idaho 455, 461, 745 P.2d 1076, 1082 (Ct. App. 1987). The contract can be a settlement agreement in a divorce. ***Foster v. Schorr*, 139 Idaho 563, 567, 82 P.2d 845, 849 (2003)**; *Noble v. Fisher*, 126 Idaho 885, 891, 894 P.2d 118, 124 (1995); *Holmes v. Holmes*, 125 Idaho 784, 787, 874 P.2d 595, 598 (Ct. App. 1994). Tender of payment on a promissory note secured by a deed of trust prevents the award of attorney fees in an action to collect on the note. *Brinton v. Haight*, 125 Idaho 324, 332, 870 P.2d 677, 685 (Ct. App. 1994).

#### **D. Is There A Prevailing Party?**

After the court has determined that it has proper parties before it for the award of attorney fees, that there is a basis for the award of attorney fees, and that all of the prerequisites for attorney fees have been met, the court must then decide whether there is a prevailing party. In making this determination the trial judge has an abundance of discretion and the ruling will not be reversed by an appellate court in the absence of an abuse of that discretion. *International Eng'g Co., Inc. v. Daum Indus., Inc.*, 102 Idaho 363, 366, 630 P.2d 155, 158 (1981); *Suitts v. First Sec. Bank*, 125 Idaho 27, 35, 867 P.2d 260, 268 (Ct. App. 1993); *Evans v. Sawtooth Partners*, 111 Idaho 381, 387, 723 P.2d 925, 931 (Ct. App. 1986); *Chadderdon v. King*, 104 Idaho 406, 411, 659 P.2d 160, 165 (Ct. App. 1983).

In determining whether there is a prevailing party, the trial court should first look to the Civil Rules for guidance. The attorney fee rule I.R.C.P. 54(e)(1) incorporates I.R.C.P. 54(d)(1)(B), which provides:

**Prevailing Party.** In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties, whether there were multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of

such issue or claims. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

The definition of a prevailing party in I.R.C.P. 54(d)(1)(B) applies to a determination of attorney fees under a contract as well as under a statute. *Burnham v. Bray*, 104 Idaho 550, 554-55, 661 P.2d 335, 339-40 (Ct. App. 1983). It would appear that the appellate decisions are creating a uniform method of determining the prevailing party, so that it would seem that the criteria of the rule would apply to all requests for attorney fees, including those under a Civil Rule.

The trial court should initially realize that there is not always a prevailing party. Therefore, even though attorney fees would potentially be appropriate, no award should be made if the trial court determines that neither side was a prevailing party. *Owner-Operator Indep. Drivers Ass'n v. Idaho Pub. Util. Comm'n*, 125 Idaho 401, 407, 871 P.2d 818, 824 (1994); *Powell v. Sellers*, 130 Idaho 122, 130, 937 P.2d 434, 442 (Ct. App. 1997). Where both parties have prevailed, it is within the court's discretion not to award fees to either party. *Burnham*, 104 Idaho at 554-55, 661 P.2d at 339-40. Even if an action is \*548 brought under I.C. s 12-120(1) as a claim under \$25,000, attorney fees are not to be granted if the court finds that the plaintiff was not the "prevailing party." *Record Steel & Constr., Inc., v. Martel Constr., Inc.*, 129 Idaho 288, 923 P.2d 995 (Ct. App. 1996). However, if a contract provides for attorney fees to any party who "employ[s] legal counsel," then attorney fees may be granted even though the party did not prevail. *Post v. Murphy*, 125 Idaho 473, 476, 873 P.2d 118, 121 (1994) (relating to Subdivision Restrictive Covenants).

On the other hand, even though neither party recovers a judgment on a claim and counterclaim, the court may nevertheless determine that one of the parties was a prevailing party for the purpose of awarding attorney fees. *Chadderdon v. King*, 104 Idaho 406, 412, 659 P.2d 160, 166 (Ct. App. 1983); *Deutz-Allis Credit Corp. v. Bakie Logging*, 121 Idaho 247, 256-57, 824 P.2d 178, 287-88 (Ct. App. 1992). However, in one unusual case, the Supreme Court held that -- because of the terms of a lease -- attorney fees could be collected by the lessor under a contract (the lease), even though there was no prevailing party. *Farm Credit Bank of Spokane v. Wissel*, 122 Idaho 565, 836 P.2d 511 (1992). The Court held:

We affirm the trial court's determination that there was no 'prevailing party' for purposes of awarding costs under I.R.C.P. 54(d)(1). However, we vacate the trial court's order and remand the case to the trial court to specifically address FCB's and the Ketterlings' claim to attorney fees and costs pursuant to the express provision in the farm lease, set out above [i.e., fees to the lessor in any action on the lease], and to make findings of fact and conclusions of law with regard to any entitlement on the part of plaintiff-appellants to fees and costs under that contractual provision. The two questions which the trial court must resolve are (1) whether appellants found it necessary to bring suit or action under the terms of this lease, and (2) whether the bringing of the suit or action was prompted by caprice or bad faith.

*Id.* at 569, 836 P.2d at 515.

If the parties settle an action, and the plaintiff recovered "all the substantive relief it had sought," then the trial court should consider that party the prevailing party. *Jerry J. Joseph C.L.U., Ins. Assocs., Inc. v. Vaught*, 117 Idaho 555, 557, 789 P.2d 1146, 1148 (Ct. App. 1990). On the other hand, a dismissal of one of several claims in an action does not mean that the party against whom the claim was made is a prevailing party for the purpose of the awarding fees: the dismissal of a claim is but one of many factors to consider, and the timing of the dismissal of a claim may be another. *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 692, 682 P.2d 640, 645 (Ct. App. 1984). However, where an action involving a single claim is, prior to trial, voluntarily dismissed with prejudice by the plaintiff because the wrong defendant has been sued, the named defendant is the prevailing party for the purposes of I.C. s 12-120(3) because the defendant has obtained the most favorable outcome that could possibly be achieved in the action. *Daisy Mfg. Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 999 P.2d 914 (Ct. App. 2000). Similarly, where the trial court granted the defendant's motion to dismiss on the ground that the plaintiff had failed to name the proper party in the commencement of the action to collect on an account receivable, the defendant is the prevailing party under the same rationale used in *Paintball Sanders v. Lankford*, 134 Idaho 322, 325-26, 1 P.3d 823, 826-27 (Ct. App. 2000).

Even though the plaintiff prevails in an action, this does not necessarily mean that he is a prevailing party. A water association brought a test case in the magistrate division against a homeowner to collect a water assessment fee of \$234 and was awarded \$26 at trial in *Yellowpine Water User's Ass'n v. Imel*, 105 Idaho 349, 670 P.2d 54 (1983). The Supreme Court stated "[W]e hold that [plaintiff] is not a prevailing party" because the plaintiff's demand for \$234 was "excessive" and the defendant had tendered the payment of \$26 before trial. *Id.* at 352, 670 P.2d at 57. However, it is not necessary that the plaintiff prevail in the exact amount prayed for in his complaint. The Supreme Court reversed the denial of attorney fees in a foreclosure of a materialman's lien for \$11,000 in which judgment was rendered for slightly more than \$8,000. *Barber v. Honorof*, 116 Idaho 767, 780 P.2d 89 (1989). In *Barber v. Honorof*, the Court held that the fact that the plaintiff did not prevail in the amount requested in his complaint was not automatic grounds for denial of attorney fees and remanded the case back to the trial court to reconsider the question of attorney fees "after consideration of all relevant factors bearing on the determination." *Id.* at 771, 780 P.2d at 93; *see also J.E.T. Dev. v. Dorsey Constr. Co., Inc.*, 102 Idaho 863, 642 P.2d 954 (Ct. App. 1982). If a new trial is granted, the determination of the "prevailing party" is deferred until the new trial is completed. *Ernst v. Hemenway & Moser Co., Inc.*, 126 Idaho 980, 987-88, 895 P.2d 581, 588-89 (Ct. App. 1995). Where the jury found the defendant 51% negligent and the plaintiff 49% negligent, the trial court's ruling that there was no prevailing party was upheld on appeal. *Adams v. Krueger*, 124 Idaho 74, 77, 856 P.2d 864, 867 (1993).

In complex litigation with multiple counts, the parties often prevail on some counts and not on others. There is often an attempt by the parties to segregate each count for the purpose of determining attorney fees. In such a case, the plaintiff prevailed on some of its counts of its complaint but did not on others. The plaintiff argued \*548 that under certain counts it should be allowed mandatory attorney fees under I.C. s 12-120. The trial court denied attorney fees and the Supreme Court affirmed upon the basis that "there was no overall prevailing party." *Int'l Eng'g Co., Inc. v. Daum Indus., Inc.*, 102 Idaho 363, 367, 630 P.2d 155, 159 (1981).

However the Court of Appeals has stated, "[W]here the parties have succeeded on entirely separate claims, those claims are properly distinguished and should be analyzed separately in determining whether attorney fees are appropriate." *Bumgarner v. Bumgarner*, 124 Idaho 629, 644, 862 P.2d 321, 325 (Ct. App. 1993).

In determining whether to award attorney fees to a counter-claimant, the trial court must examine the final outcome of the entire litigation to determine who is the prevailing party, even though the counterclaim, if processed separately, would mandate attorney fees. For example, if a party is required to bring a compulsory counterclaim under which attorney fees would be mandatory under I.C. s 12-120, the trial court must nevertheless look at the final outcome of the entire action to determine the prevailing party, even though this might destroy what would otherwise be mandatory attorney fees on the counterclaim. *Jones v. Whiteley*, 112 Idaho 886, 890, 736 P.2d 1340, 1344 (Ct. App. 1987).

In the case of *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 626 P.2d 767 (1980), the secured creditor foreclosed upon the assets and brought an action for deficiency and the debtor counterclaimed for damages for violation of procedural requirements. The creditor prevailed and obtained judgment, but the debtor was awarded nominal damages on its counterclaim. The trial court granted full attorney fees to the plaintiff creditor. The Supreme Court reversed the award holding,

Where parties have each prevailed on different causes of action tried in the same lawsuit, attorney fees may be apportioned accordingly. [Citation.] We therefore set aside the trial court's award of attorney fees. On remand, the trial court should re-evaluate the matter of attorney fees after this controversy is ultimately resolved.

102 Idaho at 121, 626 P.2d at 777.

Rule 54(d)(1)(B) provides that in determining the prevailing party the court must consider "the resultant judgment or judgments obtained." In the final analysis, the trial court must determine who is the most prevailing party in its sound or broad discretion, and in doing so should view the end result of the entire litigation in order to determine whether there is an overall prevailing party. As stated by the Court of Appeals, "The determination of a prevailing party involves a three-part inquiry. The court must examine (1) the result obtained in relation to the relief sought; (2) whether there were multiple claims or issues; and (3) the extent to which either party prevailed on each issue or claim." *Jerry J. Joseph C.L.U. Ins. Assocs., Inc. v. Vaught*, 117 Idaho 555, 557, 789 P.2d 1146, 1148 (Ct. App. 1990). *See also Sanders v. Lankford*, 134 Idaho 322, 325, 1 P.3d 823, 826 (Ct. App. 2000); *Anderson v. Schweigel*, 118 Idaho 362, 366, 796 P.2d 1035, 1039 (Ct. App. 1990).

There is no requirement by statute or rule that the trial court expressly find or determine who is the prevailing party. However, it would aid appellate review if such findings were made. If attorney fees are denied the non-prevailing party, it might be advisable to include in the order of denial a statement to the effect that attorney fees were denied because the claimant was not a prevailing party.

## E. What Amount Of Attorney Fees Should Be Awarded?

### (The Hard Part)

#### 1. I.R.C.P. 54(e)(3)

After the trial court has determined that (1) the attorney fee claimant is a proper party, (2) there is an applicable statute, rule or contract provision, (3) all conditions or requirements have been met, and (4) the claimant is the most prevailing party, the trial court must then proceed to determine the amount of the attorney fee award. Idaho appellate courts have repeatedly stated that this determination is within the sound discretion of the trial court and that it will not be disturbed on appeal unless there is an abuse of discretion. [See, e.g., *Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986).] *Sun Valley Potato Growers v. Texas Refinery*, 139 Idaho 761, 769, 86 P.3d 475, 483 (2004). The "reasonableness" of the amount of an attorney fee award is based on the trial court's consideration of certain factors, which are set forth in I.R.C.P. 54(e)(3). *Id.*

I.R.C.P. 54(e)(3) was adopted by the Supreme Court in 1979, and amended in 1990, to provide some assistance in making this determination. I.R.C.P. 54(e)(3) enumerates the factors which should be considered in determining the amount of the award:

**Amount of Attorney Fees.** In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such 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 the 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.

I.R.C.P. 54(e)(3) is helpful, but it does not declare the purpose or goal to be achieved in determining the amount of the award. Appellate decisions help to answer this question.

Because most attorneys keep computerized time records of their services, there may be a tendency to \*548 compute the attorney fee based upon a time and reasonable hourly charge. However, in *Craft Wall of Idaho, Inc. v. [Stonebreaker] Stonebraker*, 108 Idaho 704, 701 P.2d 324 (Ct. App. 1985), the Court of Appeals held, "The time and labor actually required, however, is not the 'be all, end all' of the attorney fee question.... A court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney." *Id.* at 705-06, 701 P.2d at 325-26.

After the Supreme Court ruled that fees for paralegals are not to be included in attorney fees, *Hines v Hines*, 129 Idaho 847, 855, 934 P.2d 20, 28 (1997), I.R.C.P. 54(e)(1) was amended in 1999 to read:

In any civil action the court may award reasonable attorney fees, *which at the discretion of the court may include paralegal fees*, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. (Emphasis [supplied] added).[.]

[Although I.R.C.P. 54(e)(5) requires an attorney to present an affidavit stating the basis and method of computation of the attorney fee claimed, the submission of hourly time sheets is not an absolute necessity. In *Hackett v. Streeter*, 109 Idaho 261, 706 P.2d 1372 (Ct. App. 1985) the Court of Appeals held, "We recognize that the introduction of hourly time sheets into evidence is not a prerequisite to an award of reasonable attorney fees." *Id.* at 263, 706 P.2d at 1374. However, it may be wise to require the party seeking fees to itemize the time spent on a case. In *All American Realty, Inc. v. Sweet*, 107 Idaho 229, 687 P.2d 1356 (1984), the Supreme Court held that the trial court erred in not requiring the party claiming attorney fees to itemize time spent on the case when requested by opposing counsel. *Id.* at 231, 687 P.2d at 1358.]

Rule 54(e)(5) requires an attorney to present an affidavit stating the basis and method of computation of the attorney fee claimed. The introduction of hourly time sheets into evidence is not a prerequisite to an award of attorney fees. *Hackett v. Streeter*, 109 Idaho 261, 263, 706 P.2d 1372, 1374 (Ct. App. 1985). However, in *All American Realty, Inc. v. Sweet*, the Supreme Court held that the trial court erred in not requiring the party claiming attorney fees to itemize the time spent on the case when requested by opposing counsel. 107 Idaho 229, 231, 687 P.2d 1356, 1358 (1984).

Although a party may be entitled to an award of attorney fees, the trial court may be unable to determine the proper amount to be awarded. When a party refused to submit time sheets, it was foreclosed from an award of attorney fees because the trial court was

prevented from properly determining the amount of the award. The Supreme Court reasoned that, if the trial court is required to consider the factors enumerated in Rule 54(e)(3), the court must have sufficient information concerning the factors. While some information can come from the court's own knowledge and experience and some from the record in the case, there is other information that can only come from the party who is requesting the attorney fee award. Therefore, that party must submit time sheets or be foreclosed from collecting attorney fees. *Sun Valley Potato Growers*, 139 Idaho at 769, 86 P.3d at 783.

If a party seeking attorney fees fails to file an affidavit stating the basis and method of computation as required by Rule 54(e)(5), the opposing party must object in the proceedings below or the issue cannot be raised on appeal. *Smith v. Mitton*, 140 Idaho 893, 901, 104 P.3d 367, 375 (2004).

It has been argued that attorney fees cannot exceed the amount which the party has contracted to pay his attorney. This concept was rejected by the Court of Appeals, which stated:

The [trial] court held there was nothing in the statute under which the fees were awarded (I.C. s 48-608(3)), nor in I.R.C.P. 54, to limit the amount of the reasonable attorney fees recovered to that actually incurred by the prevailing party by virtue of its contract with its attorney. Homeguard suggests that to allow recovery to the prevailing party in excess of the amount which the party is obligated by contract to pay to his attorney is improper. Homeguard argues the fee award should be limited to the minimum amount required to be paid under the attorney's contract of employment.

We disagree. Homeguard's position would require the court to place undue emphasis on one element of Rule 54(e)(3), above the other factors. We do not read the rule as being so limited. Under the rule the trial court is required, as was done here, to consider the existence and terms of the contingency arrangement. But the court is not required to give that factor any more weight than should be given to the other factors applicable to reaching the ultimate determination of the reasonableness of the amount to be awarded. We decline to impose the limitation suggested by Homeguard.

*Decker v. Homeguard Systems*, 105 Idaho 158, 162-163, 666 P.2d 1169, 1173-74 (Ct. App. 1983).

Therefore, the trial court is not limited to the amount of attorney fees which the party has agreed to pay his attorney. This makes it appear that the final goal in awarding attorney fees is not necessarily to make the party whole. Indeed, attorney fees may be awarded to a party who does not have to pay any attorney fees because the attorney has been provided without charge by an insurance company. *Futrell v. Martin*, 100 Idaho 473, 479, 600 P.2d 777, 783 (1979); *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 841, 801 P.2d 37 (1990).

If a contract limits the amount of recoverable attorney fees, a greater amount cannot be awarded under I.C. s 12-120. [*Chittendon*] *Chittenden & Eastman Co. v. Leasure*, 116 Idaho 981, 982, 783 P.2d 320, 321 \*548 (Ct. App. 1989) (contract provided for 15% of the claim as

attorney fees). In an action for quieting title the plaintiff was entitled to attorney fees for bringing that action but no fees for litigating a breach of covenant of title claim. *Koelker v. Turnbull*, 127 Idaho 262, 899 P.2d 972 (1995). "The only attorney fees which are recoverable as damages are those which are directly attributable to quieting title in the property." *Id.* at 266, 899 P.2d at 976.

The Court of Appeals has held that if a plaintiff sues several defendants, and prevails against only some of them, the trial court cannot assess all of the attorney fees of the plaintiff against the losing defendants, as they are not liable for work "devoted exclusively" to the claims against the other defendants. *Davidson v. Beco Corp.*, 116 Idaho 696, 698, 778 P.2d 818, 820 (Ct. App. 1989). Likewise, any party can be awarded attorney fees against another party only for the work done in defending the individual claim of each other party. *Tri-Circle, Inc. v. Brugger Corp.*, 121 Idaho 950, 959, 829 P.2d 540, 549 (Ct. App. 1992).

It has also been suggested that attorney fees should always bear a reasonable relationship to the judgment, and never be in excess of the amount of the judgment. The Supreme Court disagreed with this proposition in a pre-Rule 54(e)(3) decision, stating:

We must also disagree with defendants' argument that the amount of an award of attorney's fees must bear a reasonable relationship to the amount of the judgment. It is the rule in this jurisdiction that where attorney's fees are to be awarded the amount thereof is to be that sum which the trial court in its discretion determines is reasonable. The factors to be considered have been previously stated by this Court:

'What is a reasonable attorneys' fee is a question for the determination of the court, taking into consideration the nature of the litigation, the amount involved in the controversy, the length of time utilized in preparation for and the trial of the case and other related factors viewed in the light of the knowledge and experience of the court as a lawyer and judge; it is not necessary in this connection that he hear any evidence on the matter although it is proper that the court may have before it the opinion of experts.' *Halliday v. Farmers Ins. Exch.*, 89 Idaho 293, 300, 404 P.2d 634, 638 (1965).

*Smith v. Great Basin Grain Co.*, 98 Idaho 266, 281, 561 P.2d 1299, 1314 (1977).

**The amount of attorney fees to be awarded is properly determined by utilizing the factors in Rule 54(e)(3) and no one factor is to be given more weight than any other. Courts are not required to give the amount involved in the case more emphasis than that given to the other applicable factors. Furthermore, Rule 54(e)(3) does not require the amount of attorney fees to be proportionate to the size of the damages award. *Electrical Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 827, 41 P.3d 242, 255 (2001).**

In accordance with this decision, attorney fees have been approved in the sums of \$15,800 on a \$18,800 judgment, *Payne v. Foley*, 102 Idaho 760, 639 P.2d 1126 (1982); \$4,130 on an \$8,500 promissory note, *Spidell v. Jenkins*, 111 Idaho 857, 860, 727 P.2d 1285, 1288 (1986); [**\$10,090 on an \$8,700 claim, *Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986);**] \$5,868 on a \$1 nominal damages judgment for assault, *Odziemek v. Wesely*, 102 Idaho 582, 634

P.2d 623 (1981); \$3,000 on a \$2,000 judgment, *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 701 P.2d 324 (Ct. App. 1985); \$25,000 on a \$2,300 claim under a medical insurance policy, *Eriksen v. Blue Cross of Idaho Health Serv., Inc.*, 116 Idaho 693, 778 P.2d 815 (Ct. App. 1989); \$9,740 on a \$11,732 judgment for damages for defective carpet, *Meldco, Inc. v. Hollytex Carpet Mills*, 118 Idaho 265, 796 P.2d 142 (Ct. App. 1990); \$16,000 on a divorce decree, *Desfosses v. Desfosses*, 122 Idaho 634, 836 P.2d 1095 (Ct. App. 1992); \$18,500 on a \$25,000 trespass judgment with \$15,000 punitive damages, *Bumgarner v. Bumgarner*, 124 Idaho 629, 862 P.2d 321 (Ct. App. 1993); \$50,000 in an estate against a personal representative, *Kolouch v. First Sec. Bank of Idaho*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996); and \$10,500 in defense of an employment discrimination case, *Foster v. Shore Club Lodge Inc.*, 127 Idaho 921, 927, 908 P.2d 1228, 1234 (1995). An award of \$4,000 attorney fees in a case where the party recovered more than prayed for in the complaint was held not to be insufficient attorney fees. *Beco Constr. Co. v. Harper Constr., Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997).

While a contingent fee agreement is one of the elements to consider in determining the award of attorney fees, I.R.C.P. 54(e)(3)(E), it is in no way binding upon the court. A \$52,006 one-third contingent fee award was approved by the Supreme Court upon the basis that it was not a "manifest abuse of discretion" where the Court found the trial court considered the other factors of I.R.C.P. 54(e)(3). *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 350-51, 766 P.2d 1227, 1231-32 (1988). A one-third contingent fee of \$30,500 amounting to \$150 per hour was approved although the fee award was reversed for other reasons. *Turner v. Willis*, 116 Idaho 682, 685, 778 P.2d 804, 807 (1989). The Supreme Court also approved a one-third contingent fee granted by the Industrial Commission. *Mortimer v. Riviera Apartments*, 122 Idaho 839, 848, 840 P.2d 383, 392 (1992).

In an action on an insurance policy for an underinsured motorist claim, the trial court awarded the plaintiff \$26,350 attorney fees, computed at \$150 per hour times 169 hours. The Supreme Court reversed and remanded on the amount of attorney fees because the trial court "did not give proper consideration to the contingent fee \*548 agreement." *Walton v. Hartford Ins. Co.*, 120 Idaho 616, 818 P.2d 320 (1991). The one-third contingent fee would have been \$100,000. The Supreme Court stated:

In our view the district court did not give proper consideration to the contingent fee agreement, even though it recited the I.R.C.P. 54(e)(3) factors. It should be kept in mind that in representing the Waltons, their counsel initially tried to orchestrate a settlement without litigation or arbitration, and certainly without delay, in which event the costs of counsel to the Waltons would have been only 25 percent of the recovery. However, it is abundantly clear that Hartford may very well have procrastinated as long as possible in order to avoid paying under the underinsured provisions of its policy sold to the Waltons, who willingly had paid the premium with the reasonable expectation that the Hartford umbrella covered them up to the amount of \$300,000. As it was, Hartford was quite willing to hold back from settling, and has cost the Waltons considerably more in attorney fees. Hartford's delay caused the ultimate result, not consistent with the statute, of substantially diminishing the Waltons' recovery. The district court, although well aware of *Brinkman*, considered it, but did not apply it in deciding the Waltons' claim for attorney fees.

*[Id.] 120 Idaho at 621, 818 P.2d at 325.*

Just as a contingent fee does not provide a minimum attorney fee, the contingent fee will not limit the amount of the attorney fee. *Decker v. Homeguard Systems*, 105 Idaho 158, 162-63, 666 P.2d 1169, 1173-74 (Ct. App. 1983). The Court of Appeals has discussed the relevance of the contingent fee agreement and the other factors listed in I.R.C.P. 54(e)(3):

The second standard governing the exercise of discretion in this case is the proper application of the factors listed in I.R.C.P. 54(e)(3). These factors guide the trial court in fixing the amount to be awarded as reasonable attorney fees. Under Rule 54(e)(3) the trial court is required to consider the existence and applicability of each factor. No one element is to be given undue weight or emphasis. *Decker v. Homeguard Systems, supra*. The Nalens contend that the trial judge placed undue emphasis on the contingency fee arrangement between them and their attorney. The trial judge's two memorandum decisions on this issue indicate that he relied heavily upon the contingency fee arrangement. However, the judge expressly stated that he analyzed in detail and took into consideration all the factors under Rule 54(e)(3). The judge explained that his reliance on the contingency fee calculation was mandated by the inability to determine the basis and method of computation of the Nalens' attorney's fees. Certainly, a court is permitted to examine the reasonableness of the time and labor expended by the attorney and need not blindly accept the figures advanced by the attorney. *Craft Wall of Idaho, Inc. v. Stonebraker, supra*. However, as explained below, we find that the trial judge erred in reasoning that the amount should be limited by a specific theory.

*Nalen v. Jenkins*, 113 Idaho 79, 81, 741 P.2d 366, 368 (Ct. App. 1987).

An award of attorney fees in an action on an insurance policy under I.C. s 41-1839 includes attorney fees for arbitration under the policy, even though **[the Arbitration Rules provide] the Idaho Uniform Arbitration Act provides in I.C. s 7-910** that all expenses of arbitration shall be shared equally. *Emery v. United Pacific Ins. Co.*, 120 Idaho 244, 247, 815 P.2d 442, 445 (1991).

**[The trial court therefore has an enormous amount of discretion in determining the amount of an attorney fee award. The rules do not require that the court state how it determined the amount of the award. *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 351, 766 P.2d 1227, 1235 (1988). However, such findings would be helpful on appeal to show that all of the factors of I.R.C.P. 54(e)(3) were considered.]**

**[In making this determination] In determining the amount of attorney fees to be awarded,** the court should consider all of the factors enumerated in I.R.C.P. 54(e)(3) without emphasizing any single factor. "We hold that when attorney fees are allowed under I.R.C.P. 54(e)(1), either by statute or contract, the amount should not be calculated based upon individual prevailing 'theories.' Rather, the amount should be determined by appropriate application of the I.R.C.P. 54(e)(3) factors." *Nalen*, 113 Idaho at 82, 741 P.2d at 369.

In making this overall discretionary determination, the trial court is admonished, "An attorney

fee award is not the proper place to give indirect relief from an adverse judgment. The arguably harsh effect of a judgment is not an appropriate 'other' factor to consider in fixing attorney fees under Rule 54(e)(3)." *DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 291, 678 P.2d 80, 83 (Ct. App. 1984).

**The trial court has an enormous amount of discretion in determining the amount of an attorney fee award. The rules do not require that the court state how it determined the amount of the award. *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 351, 766 P.2d 1227, 1235 (1988). Such findings are, however, helpful on appeal to show that the factors of Rule 54(e)(3) were considered. Although a trial court need not make specific findings demonstrating how it employed any of the factors listed in Rule 54(e)(3), it is required to consider those factors when determining the amount of the fees to award and it should, at a minimum, provide a record establishing that it considered the factors under the rule. *Pinnacle Engineers, Inc. v. Heron Brook, LLC*, 139 Idaho 756, 760, 86 P.3d 470, 474 (2004); *Sun Valley Potato Growers v. Texas Refinery*, 139 Idaho 761, 769, 86 P.3d 475, 483 (2004).**

**The court is required to take all eleven factors enumerated in Rule 54(e)(3), plus any other factor the court deems appropriate, into consideration when deciding upon an award of attorney fees. *Lettunich v. Lettunich*, 05.\_\_ ISCR \_\_\_\_\_ (2005).**

**It is sufficient if the trial court states that it has taken the factors listed \*548 in Rule 54(e)(3) into consideration. The rule does not require that the trial court make a finding on each of the factors as a particular listed factor may or may not be relevant to the outcome in any particular case. *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 786, 69 P.3d 1035, 1047 (2003). The Supreme Court has also upheld awards of attorney fees where the record indicates that the trial court considered the relevant factors even though the rule was not referenced when making the award. Awards of attorney fees have been upheld where the record indicates that the parties briefed and argued the factors because it can be presumed from such a record that the trial court considered the factors of Rule 54(e)(3). *Pinnacle Engineers, Inc. v. Heron Brook, LLC*, 139 Idaho at 760-71, 86 P.3d at 474-75.**

**Criterion (D) of Rule 54(e)(3) requires the court to consider "the prevailing charges for like work." In *Lettunich v. Lettunich*, 05.\_\_ ISCR \_\_\_\_\_ (2005), the trial court found that the hourly fees of the prevailing party's lawyers were consistent with the fees charged by the "largest of Idaho firms." The award of attorney fees was vacated. Upon remand, the court "should consider the fee rates generally prevailing in the pertinent geographic area, rather than what any particular segment of the legal community may be charging." *Id.***

If the court determines that a claimant is entitled to attorney fees, this does not mean that the award must be in the full amount of reasonable attorney fees. A party may be the "most" prevailing party and therefore be entitled to some attorney fees, but because he did not entirely prevail, the court is permitted to apportion the attorney fees. I.R.C.P. 54(d)(1)(B), **[describing which describes the prevailing party[,] and [which] is incorporated with regard to attorney fees by I.R.C.P. 54(e)(1), states in part:**

The trial court in its sound discretion may determine that a party to an action prevailed in part

and did not prevail in part, and upon so finding may *apportion the costs [attorney fees] between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.* (Emphasis added.)

Therefore, suppose a plaintiff sues for \$100,000 arising out of a business transaction and prevails by getting a judgment for \$50,000. The trial judge might well find that the plaintiff is entitled to mandatory attorney fees under I.C. s 12-120(3) as a prevailing party. However, if the court thereafter finds that total reasonable attorney fees for the service of the attorney for the plaintiff would be \$20,000, it can "apportion" that figure downward because the plaintiff "prevailed in part and did not prevail in part." I.R.C.P. 54(d)(1)(B). Likewise, a plaintiff might sue on several counts and prevail on some of them but not prevail on others. The trial court does not have to grant a *full* "reasonable attorney fee" to the partially prevailing plaintiff. In those situations the "attorney fees may be apportioned accordingly." *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 121, 626 P.2d 767, 777 (1980). I.R.C.P. 54(d)(1)(B) states that this apportionment shall be done by the trial court "in a fair and equitable manner" after considering the final outcome of the case. Perhaps it would be appropriate in that type of case to adjudicate what a "full" attorney fee would be and then what a reasonable attorney fee is for a partially prevailing party.

In *Bumgarner v. Bumgarner*, 124 Idaho 629, 644, 862 P.2d 321, 336 (Ct. App. 1993), the appellate court **[agreed with the trial court's finding that the total attorney fee was \$37,065.50, but awarded \$18,532.75 for prevailing on one count.] affirmed the trial court's award of attorney fees in the amount of \$18,532.75 for prevailing on one count although the total amount of attorney fees was \$37,065.50.** *Badell v. Badell*, 122 Idaho 442, 450, 835 P.2d 677, 685 (Ct. App. 1992), followed a similar procedure. In *Badell*, the Court of Appeals affirmed the trial court's award of a 75% attorney fee where the court found that the plaintiff prevailed in part but did not prevail in part. In a claim for fees under a contract, the trial court must first interpret the contract to determine if fees are appropriate before making the discretionary determination as to who is the prevailing party. *Id.*

**"When both parties are partially successful, it is within the court's discretion to decline an award of attorney fees to either side." *Smith v. Mitton*, 140 Idaho 893, 903, 104 P.3d 367, 377 (2004). In *Smith*, the trial court adjusted the amount of attorney fees and awarded only a percentage of the adjusted attorney fees. The trial court properly exercised its discretion in adjusting the attorney fees by finding that there was no need for two attorneys and substantially reducing the fees for one of the two attorneys and deducting travel costs for attorneys living outside the area. Furthermore, since it was within the court's discretion to deny attorney fees to either party when both prevailed on some claims, the trial court properly exercised its discretion by apportioning the fees and awarding Smith a percentage of the adjusted attorney fees.**

A party claiming attorney fees does not have to submit evidence as to what is a reasonable fee. *Halliday v. Farmers Ins. Exch.*, 89 Idaho 293, 300, 404 P.2d 634, 641 (1965); *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977). At least such evidence is not required in every case. *Clark v. Sage*, 102 Idaho 261, 629 P.2d 657 (1981). The trial court can take judicial

notice of such evidence and determine attorney fees accordingly. *Dykstra v. Dykstra*, 94 Idaho 797, 800, 498 P.2d 1270, 1273 (1972).

Attorney fees in a default case cannot exceed the amount prayed for in the complaint. *Ellis v. Ellis*, 118 Idaho 468, 472, 797 P.2d 868, 872 (Ct. App. 1990). However, the plaintiff is not automatically \*548 entitled to the amount prayed for in the complaint upon default by the defendant, as the plaintiff must show reasonable attorney fees by a supporting affidavit stating the method of computation of the fees claimed. *Nickels v. Durbano*, 118 Idaho 198, 205, 795 P.2d 903, 910 (Ct. App. 1990).

There is also one procedural limitation in determining the amount of attorney fees in default cases. I.R.C.P. 54(e)(4) states that the attorney fees granted in a default judgment shall not exceed the amount of the judgment of the claim, exclusive of costs. This rule was adopted to prevent the award of attorney fees greatly in excess of the amount of the claim. It remains to be seen whether any attorney fees can be awarded if the defendant pays the claim in full after the filing of the suit. Additionally, it is uncertain whether this limitation applies to a prayer for attorney fees under some statute other than I.C. s 12-120.

#### IV. CONCLUSION

There is no way to quickly summarize the duties and responsibilities of the trial judge in determining a claim for attorney fees. In some cases the trial court has a great deal of discretion, while at other times the duty to award attorney fees is mandatory. In every case the trial court must exercise a great deal of discretion in determining the prevailing party and the proper amount of attorney fees. These tasks can be made easier if the trial judge will approach the questions in a systematic way. As there is no "best" way to attack these difficult questions, each judge should adopt a procedure that he or she finds to be the most efficient and consistent. Good luck!

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