

February 2019

Attorney Fee Awards in Idaho: A Handbook

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Recommended Citation

Ingrid Batey, *Attorney Fee Awards in Idaho: A Handbook*, 52 IDAHO L. REV. 583 (2019).
Available at: <https://digitalcommons.law.uidaho.edu/idaho-law-review/vol52/iss2/6>

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ATTORNEY FEE AWARDS IN IDAHO: A HANDBOOK

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I. INTRODUCTION

Idaho adheres to the “American Rule,” which requires each party to pay its own attorney fees unless otherwise provided by statute or contract.¹ In Idaho, as elsewhere in the country, an ever-growing number of statutes and court rules allow for attorney fee awards based either on the substance of the underlying litigation, or as a sanction for improper party conduct. The wide array of statutes providing for awards of attorney fees are, for the most part, highly context-specific. Where a litigant fails to correctly apply a statutory or contractual provision to the facts of her case, she may disqualify herself from receiving an award of attorney fees from the outset. Thus, it is useful for litigants in Idaho courts to understand the basic mechanisms by which a party may obtain an award of attorney fees.

This Article is intended to provide an up-to-date overview of the statutes and procedural rules governing attorney fee awards in Idaho.² This Article deals only with attorney fee awards under Idaho law, as applied in Idaho courts.³ Within that context, several generally applicable principles and procedural considerations deserve attention at the outset.

Idaho courts do not possess a general equitable authority to order a party to pay an opponent’s attorney fees.⁴ Thus, a party seeking an award of attorney fees must cite a statutory or contractual basis for doing so.⁵ Where a party sets forth multiple claims, each claim for which

1. *Mortenson v. Stewart Title Guar. Co.*, 235 P.3d 387, 398, 149 Idaho 437, 448 (2010).

2. For previous commentary on attorney fee awards in Idaho, see Hon. Jesse R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 IDAHO L. REV. 1 (2001); see also Mark D. Perison, *A Guide to Attorney Fee Awards in Idaho*, 32 IDAHO L. REV. 29 (1995).

3. This Article does not attempt a discussion of attorney fee awards based on federal statutes, rules, or caselaw.

4. *Fournier v. Fournier*, 874 P.2d 600, 602, 125 Idaho 789, 791 (Idaho Ct. App. 1994).

5. *Mortenson*, 235 P.3d at 398, 149 Idaho at 437.

she would like to obtain an award of attorney fees must be accompanied by a relevant basis.⁶ It bears mentioning that pro se litigants are not entitled to attorney fees.⁷ However, attorney fees may be awarded against pro se litigants.⁸

A party invoking a statutory basis for an award of attorney fees should be aware that a substantial number of Idaho statutes allow for attorney fees only to a “prevailing party.”⁹ Idaho Rule of Civil Procedure 54 sets forth the method by which a trial court is to determine when a party prevails:

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall . . . consider the final judgment or result of the action in relation to the relief sought by the respective parties. 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.¹⁰

Although both parties may partially prevail at trial,¹¹ Idaho Supreme Court cases suggest that on appeal, only one party may prevail for the purposes of a “prevailing party” analysis.¹² The Idaho Supreme Court has also held that where a case is remanded, neither party can be said to “prevail” on appeal for the purposes of an attorney fee award based on a “prevailing party” analysis.¹³

In order to properly request attorney fees after a jury verdict or court decision, a party must submit her memorandum of costs within 14 days of the entry of judgment.¹⁴ Idaho Rule of Civil Procedure 54(d)(5), which governs the proper procedure for filing a memorandum of costs, provides:

6. *Willie v. Bd. of Trustees*, 59 P.3d 302, 307, 138 Idaho 131, 136 (1996).

7. *See Michalk v. Michalk*, 220 P.3d 580, 591, 148 Idaho 224, 235 (2009).

8. *Id.*

9. *See, e.g.*, IDAHO CODE § 12-120(1) (2015) (providing for attorney fees for prevailing parties in civil actions where amount pleaded does not exceed \$35,000); IDAHO CODE § 12-120(3) (2015) (providing for attorney fees for prevailing parties in civil actions brought to enforce commercial transactions); *but c.f.* IDAHO CODE § 32-704(3) (2015) (providing for attorney fees in divorce proceedings based on a series of elements dealing with the circumstance of the parties rather than a prevailing party analysis).

10. IDAHO R. CIV. P. 54(e)(1)(B).

11. *Id.*

12. *See Sanders v. Bd. of Trs.*, 322 P.3d 1002, 1007, 156 Idaho 269, 274 (2014) (declining to award attorney fees on appeal where both parties prevailed in part).

13. *Hoskins v. Circle A Constr., Inc.* 63 P.3d 462, 469, 138 Idaho 336, 343 (2001).

14. IDAHO R. CIV. P. 54(d)(5). Because attorney fees are deemed “costs” under the Idaho Rules of Civil Procedure,¹⁴ a request for attorney fees must be included in this memorandum.

At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment Failure to file such memorandum of costs within the period prescribed by this rule shall be a waiver of the right of costs.¹⁵

Under this rule, a party may also request attorney fees prior to the entry of judgment.¹⁶ A party who does not comply with these timing requirements is deemed to have waived her right to an award of attorney fees and costs.¹⁷

A party who does not timely file her memorandum of costs can move the court to enlarge the time for filing.¹⁸ However, such a motion will only be granted where the moving party can show that her failure to timely file the memorandum of costs was the result of “excusable neglect.”¹⁹ Because there is little case law dealing with the definition of “excusable neglect” with regard to an untimely memorandum of costs,²⁰ an attorney would be well-advised not to take any chances, and to file her memorandum of costs within the fourteen-day timeframe prescribed by the Idaho Rules of Civil Procedure. A party seeking an award of attorney fees must also submit an affidavit wherein the attorney explains the “basis and method of computation of the attorney fees claimed.”²¹

When determining what amount of attorney fees is appropriate, a trial judge must examine the factors set forth in Idaho Rule of Civil Procedure 54(e)(3):

- the time and labor required;
- the novelty and difficulty of the questions;
- the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law;
- the prevailing charges for like work;

15. IDAHO R. CIV. P. 54(d)(5).

16. *Id.* (“A memorandum of costs prematurely filed shall be considered as timely.”).

17. *Id.*

18. Idaho R. Civ. P. 6(b).

19. *Id.*; see also Idaho R. Civ. P. 54(d)(5).

20. Multiple searches in Westlaw for excusable neglect in the context of an untimely memorandum of costs revealed only a single unpublished case. See *generally* Mesenbrink Lumber, LLC v. Lightly, No. 38451, 2014 WL 3895234.

21. IDAHO R. CIV. P. 54(e)(5).

- whether the fee is fixed or contingent;
- the time limitations imposed by the client or the circumstances of the case;
- the amount involved and the results obtained;
- the undesirability of the case;
- the nature and length of the professional relationship with the client;
- awards in similar cases;
- 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; and
- any other factor which the court deems appropriate in the particular case.²²

This lengthy list of factors provides judges with a great deal of discretion in determining what amount of attorney fees is appropriate.

On appeal, the standard of review for a trial court's award of attorney fees is abuse of discretion.²³

II. ATTORNEY FEE AWARDS PURSUANT TO CONTRACTUAL PROVISIONS

Idaho Rule of Civil Procedure 54(e)(1) provides that a court may award reasonable attorney fees to a prevailing party when such an award is authorized by contract.²⁴ Idaho Courts have reasoned that contractual terms which provide for the recovery of attorney fees arising from actions to enforce the contract demonstrate that the contracting parties chose to place the risk of litigation expenses on the unsuccessful party.²⁵ As the product of voluntary, mutual choice, such contractual provisions are "generally honored in Idaho."²⁶ While attorney fee awards pursuant to contract are as varied as the contractual terms providing for such awards, it may be helpful to note a few overall rules.

22. IDAHO R. CIV. P. 54(e)(3)(A) through (L).

23. *Berkshire Invs., LLC v. Taylor*, 278 P.3d 943, 956, 153 Idaho 73, 86 (2013).

24. Idaho R. Civ. P. 54(e)(1).

25. *Holmes v. Holmes*, 874 P.2d 595, 598, 125 Idaho 784, 787 (Idaho Ct. App. 1994).

26. *Zenner v. Holcomb*, 210 P.3d 553, 560, 147 Idaho 444, 452 (2009).

First, if parties dispute the meaning of a contractual provision relating to attorney's fees, a court will—as with any contract—adhere to the plain language of the contract.²⁷ Only where a contractual provision is ambiguous will a court go beyond the language of the contract itself to determine the parties' intent.²⁸

Second, even where a contract is not otherwise enforceable, a court may award attorney fees under that contract.²⁹ This concept is illustrated in *Bauchman-Kingston Partnership, LP v. Haroldson*, decided by the Idaho Supreme Court in 2008.³⁰ There, a land contract that did not comply with the statute of frauds was held to be unenforceable.³¹ However, the Court nevertheless allowed for an award of attorney fees under an attorney fee provision within the contract.³² The Court explained that “[a] party may be awarded attorney fees based on an agreement so providing, even when the court determines that the agreement is not enforceable.”³³

Third, where a contractual provision only provides for an award of fees to only one party to the contract, “[the] provision cannot be given reciprocal effect so as to award attorney fees to the other party.”³⁴ Thus, if A and B enter into a contract, and a provision of that contract provides only for an award of attorney fees to A in an action to enforce the contract, B cannot cite that provision to obtain an award of attorney fees.³⁵

Fourth, where there is a conflict between a statute and a parties' contractual provision, the contractual provision will prevail.³⁶ Idaho courts give great deference to the bargained-for terms of an agreement between contracting parties.³⁷ For example, in *Zenner v. Holcomb*, the Idaho Supreme Court illustrated the high value that Idaho courts place on the freedom to contract. There, the Court explained that where the terms of a contract conflict with a statute, the terms of the contract will govern:

In *Farm Credit Bank*, we stated that I.C. § 12-120 “does not override a valid agreement” . . . Likewise, we hold that the general entitlement to costs under I.R.C.P. 54(d)(1) does not

27. *Mihalka v. Shepherd*, 181 P.3d 473, 478, 145 Idaho 547, 552 (2008).

28. *Id.* (holding that a trial court did not abuse its discretion by declining conduct a factual inquiry into the meaning of an unambiguous contractual provision).

29. *See Bauchman-Kingston P'ship, LP v. Haroldson*, 233 P.3d 18, 25, 149 Idaho 87, 94 (2008) (holding that a provision granting attorney fees in a land contract that did not comply with the statute of frauds was enforceable).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Hon. Jesse R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 IDAHO L. REV. 1, 62 (2001).

35. *See id.*

36. *Zenner v. Holcomb*, 210 P.3d 553, 560, 147 Idaho 444, 452 (2009).

37. *Id.*

override a valid agreement. This standard also promotes the freedom to contract, which is a “fundamental concept underlying the law of contracts and is an essential element of the free enterprise system.” When faced with an action that could implicate both a contract and a statute, the contract will be the governing source of an attorney fee award.³⁸

At issue in *Zenner* was a contractual term providing for *actual* attorney fees (rather than “reasonable” attorney fees) to the prevailing party in an action to enforce the contract.³⁹ Instead of applying Idaho Rule of Civil Procedure 54(d), which provides for reasonable attorney fees, the Court held that the prevailing party was entitled to its actual attorney fees pursuant to the contract.⁴⁰

Finally, contractual terms that provide for attorney fees in favor of a party who successfully brings an action to enforce the contract will generally be awarded on appeal.⁴¹

III. STATUTORY ATTORNEY FEE AWARDS BASED ON THE SUBSTANCE OF THE ACTION

A. Commercial Transactions: Idaho Code Section 12-120(3)

Idaho Code section 12-120(3) authorizes an award of attorney fees to the prevailing party⁴² in a claim arising from a commercial transaction.⁴³ Section 12-120(3) provides:

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's fee to be set by the court, to be taxed and collected as costs.⁴⁴

Commercial transactions are broadly defined in section 12-120(3) as “all transactions” except those for personal or household purposes.⁴⁵ Commercial transactions that have been deemed to fall under the purview of section 12-120(3) range from an industrial contract for the sale of wheat⁴⁶ to an employer-employee contract.⁴⁷

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *See infra*, Part II (discussing what constitutes a “prevailing party”).

43. IDAHO CODE § 12-120(3) (2015).

44. *Id.*

45. *Id.*

46. *See generally* *Agrisource Inc. v. Johnson*, 332 P.3d 815, 156 Idaho 903 (2014).

In order to invoke section 12-120(3), courts look to whether an asserted commercial transaction is the “gravamen” of the claim at issue.⁴⁸ The Idaho Supreme Court has explained that a “gravamen” of a claim is “the material or significant part of a grievance or complaint.”⁴⁹ In order to determine whether a commercial transaction at issue can be deemed the “gravamen” of a claim, courts look to whether the transaction is “integral” to the claim, and whether the transaction serves as “the basis of the party’s theory of recovery on that claim.”⁵⁰

When only one element of a larger, multi-element claim is commercial in nature, relief is generally unavailable under section 12-120(3).⁵¹ But in a suit involving multiple claims, a party may utilize section 12-120(3) as a basis for an attorney fee award with respect to the *individual claims* that meet the requirements of section 12-120(3).⁵² As the Idaho Supreme Court recently explained in *Sims v. Jacobson*:

This Court has stated that Idaho Code section 12-120(3) applies when “the commercial transaction comprises the gravamen of the lawsuit.” However, we have interpreted that rule to require courts to consider the gravamen of each claim within the lawsuit When a lawsuit has multiple claims, courts look to each individual claim to determine what statutory basis allows attorney fee recovery on that claim. Thus, whether a party can recover attorney fees under Idaho Code section 12-120(3) depends on whether the gravamen of a claim is a commercial transaction. In other words, courts analyze the gravamen claim by claim.⁵³

Under the reasoning set forth in *Sims*, a party in a multi-claim suit can take heart if a commercial transaction underlies just one claim of many. As *Sims* illustrates, so long as the commercial transaction is the gravamen of an individual claim, attorney fees are available under section 12-120(3) (albeit with respect to that claim only).⁵⁴

A Commercial Transaction Triggering Section 12-120(3) Does Not Require an Actual Contract

Although the term “commercial transaction” may carry connotations of a transaction based on an actual contract, a party seeking attorney fees under section 12-120(3) is not required to allege the existence of

47. *Sanders v. Bd. of Trs.*, 322 P.3d 1002, 1007, 156 Idaho 269, 274 (2014).

48. *Great Plains Equip., Inc. v. Nw. Pipeline Co.*, 36 P.3d 218, 224, 136 Idaho 466, 472 (2001).

49. *Sims v. Jacobson*, 342 P.3d 907, 912, 157 Idaho 980, 985 (2015).

50. *Id.*

51. *See Farmers Nat’l Bank v. Green River Dairy, LLC*, 318 P.3d 622, 627, 155 Idaho 853, 858 (2014) (holding that IDAHO CODE § 12-120(3) is not a source of attorney fees where only one element of a larger claim is commercial in nature).

52. *Sims*, 342 P.3d at 911–12, 157 Idaho at 984–85.

53. *Id.* (quoting *Brower v. E.I. DuPont De Nemours & Co.*, 792 P.2d 345, 349, 117 Idaho 780, 784 (1990)).

54. *Id.*

a contract.⁵⁵ So long as the parties to the suit directly engaged in a transaction of a commercial nature, and so long as that transaction constitutes the gravamen of the claim at issue, section 12-120(3) will apply regardless of whether or not a contract is alleged to exist.⁵⁶ As the Idaho Court of Appeals explained in *Erickson v. Flynn*:

[T]he Idaho Supreme Court [has] declared that “Idaho Code § 12-120(3) does not require that there be a contract between the parties before the statute is applied; the statute only requires that there be a commercial transaction.” We interpret this statement to mean that the term “commercial transaction” may extend beyond situations where a contract was formed.”⁵⁷

In *Sims*, the Idaho Supreme Court reiterated that an actual contract is not required to obtain an award of attorney fees under section 12-120(3).⁵⁸ The *Sims* Court held that attorney fees under 12-120(3) were available in a quantum meruit claims.⁵⁹ The Court explained that “[q]uantum meruit is not a contract claim, but ‘Idaho Code § 12-120(3) does not require that there be a contract between the parties before the statute is applied.’”⁶⁰

A Commercial Transaction Triggering Section 12-120(3) Must Be Directly Between the Litigants

While a commercial transaction for the purposes of section 12-120(3) need not involve an actual contract, Idaho courts do require that the commercial transaction at issue be a transaction that actually occurred between the litigating parties.⁶¹ A suit that arises between two parties based on a commercial transaction with a non-party will not trigger section 12-120(3).⁶² The Idaho Supreme Court illustrated this principle in *Great Plains Equipment, Inc. v. Northwest Pipeline Corporation*.⁶³ In that case, subcontractors brought claims against a pipeline company after a general contractor went bankrupt.⁶⁴ One of the subcontractor’s claims was for unjust enrichment based on the subcontractor’s agreement with a contractor, and the contractor’s agreement with the pipeline company.⁶⁵ The Idaho Supreme Court acknowledged that the

55. See *Great Plains Equip.*, 36 P.3d at 223, 136 Idaho at 471.

56. *Id.*

57. *Erickson v. Flynn*, 64 P.3d 959, 965, 138 Idaho 430, 436 (Idaho Ct. App. 2002) (quoting *Great Plains Equip.*, 36 P.3d at 224, 136 Idaho at 472).

58. *Sims*, 342 P.3d at 912, 157 Idaho at 985.

59. *Id.*

60. *Id.* (quoting *Great Plains Equip.*, 36 P.3d at 224, 136 Idaho at 472).

61. *Erickson*, 64 P.3d at 966, 138 Idaho at 437.

62. *Id.*

63. See *Great Plains Equip.*, 36 P.3d at 223, 136 Idaho at 471.

64. *Id.*

65. *Id.*

unjust enrichment claim was commercial in nature.⁶⁶ However, the Court denied the pipeline company an award of attorney fees because the gravamen of the suit was not a commercial transaction between the pipeline company and subcontractors, who were parties to the suit.⁶⁷ The Court noted that “[i]n this case, . . . the only commercial transaction took place between the respective subcontractor and [the general contractor], and [the general contractor] and [the pipeline company].”⁶⁸ As such, the parties to the suit were not directly involved in a commercial transaction. Thus, the prevailing party was not entitled to recover attorney fees under section 12-120(3).⁶⁹

The Mere Allegation of a Commercial Transaction is Sufficient to Trigger Idaho Code Section 12-120(3)—Proof of an Actual Commercial Transaction is Not Required

Importantly, section 12-120(3) is triggered by the *allegation* of a commercial transaction which constitutes the gravamen of a claim—not by the actual occurrence of a commercial transaction.⁷⁰ Even where no actual commercial transaction has occurred between parties to a lawsuit, Idaho courts have repeatedly awarded attorney fees to prevailing party on the grounds that the losing party merely alleged a commercial transaction.⁷¹ An example of such a case is *Garner v. Povey*, where plaintiffs alleged in their complaint that their suit was a commercial transaction falling under the ambit of Idaho Code section 12-120(3).⁷² Even though the *Garner* Court found that the suit did not involve a commercial transaction, the Idaho Supreme Court ultimately awarded attorney fees against the plaintiffs.⁷³ The Court noted that “according to the Garners’ complaint, the gravamen of this action was a commercial transaction of the type embraced by Idaho Code § 12-120(3).”⁷⁴ The Court also observed that a commercial transaction was “integral to the Garners’ claim and it was the basis upon which they sought to recover.”⁷⁵ The Court reaffirmed its position that where a party alleges either the existence of a contractual relationship or commercial transaction of a type contemplated by section 12-120(3), that allegation alone provides

66. *Id.*

67. *Id.*

68. *Id.* at 224, 136 Idaho at 472.

69. *Great Plains Equip., Inc.*, 36 P.3d at 224, 136 Idaho at 472.

70. *See DAFCO LLC v. Stewart Title Guar. Co.*, 331 P.3d 491, 499, 156 Idaho 749, 757 (2014) (a party against whom attorney fees were sought had alleged a the existence of a commercial transaction, and when that party lost, court awarded attorney fee to other party); *see also Intermountain Real Properties, LLC v. Draw, LLC*, 311 P.3d 734, 741, 155 Idaho 313, 320 (2013) (“[W]hen a plaintiff alleges a commercial contract exists and the defendant successfully defends by showing that the commercial contract never existed, the court awards the defendant attorney fees.”).

71. *Id.*

72. 259 P.3d 608, 617, 151 Idaho 462, 471 (2011).

73. *Id.*

74. *Id.*

75. *Id.*

the basis for a claim for attorney fees under section 12-120(3), regardless of whether or not the contract or commercial transaction actually took place.⁷⁶

While this rule may seem counterintuitive, it is consistent with the language of section 12-120(3), which provides for attorney fees “in . . . actions to recover” based on commercial transactions.⁷⁷ Since the language of the statute emphasizes the grounds for recovery in the action itself, Section 12-120(3) is triggered by an *allegation* of a contract or commercial transaction rather than an *ex-post* factual finding that a contract or commercial transaction existed.⁷⁸

A Word of Caution: The Line Between Commercial Transaction and Those for “Personal or Household Purposes” Can Be Unclear

As the language of Idaho Code section 12-120(3) makes clear, transactions for personal or household items do not fall under the ambit of section 12-120(3).⁷⁹ For example, the Idaho Supreme Court has held that the refinancing of a plaintiff’s home did not constitute a “commercial transaction” under Idaho Code section 12-120(3).⁸⁰ This is a logical conclusion, since a transaction to refinance one’s home is quintessentially a transaction for “personal or household purposes.”⁸¹

Yet the distinction between commercial transactions which fall under the purview of section 12-120(3) and those that do not can be a fine one.⁸² Idaho courts make precise distinctions in determining whether or not a commercial transaction for the purposes of section 12-120(3) is integral to a claim.⁸³ In *PHH Mortgage Services Corp. v. Perriera*, a mortgage company bought a home at a foreclosure sale, and later brought suit to eject the residents of the home.⁸⁴ The residents brought a counterclaim to dispute the foreclosure sale of their home.⁸⁵ The Idaho Supreme Court declined to award attorney fees, holding that a commercial transaction was not sufficiently integral to the parties’ dispute.⁸⁶ However, in *Taylor v. Just*, the Court awarded attorney under Idaho Code section 12-120(3) where a plaintiff brought suit based on his attempt to bid on property during a foreclosure sale with the purpose of reselling

76. *Id.*

77. IDAHO CODE § 12-120(3) (2015) (emphasis added).

78. *Garner*, 259 P.3d at 617, 151 Idaho at 471.

79. IDAHO CODE § 12-120(3).

80. *Bajrektarevic v. Lighthouse Home Loans, Inc.*, 155 P.3d 691, 694, 143 Idaho 890, 893 (2007).

81. IDAHO CODE § 12-120(3).

82. *Id.*

83. *PHH Mortg. Services Corp. v. Perreira*, 200 P.3d 1180, 1190, 146 Idaho 631, 641 (2009).

84. *Id.*

85. *Id.*

86. *Id.*

it.⁸⁷ Since the validity of the foreclosure sale was the central issue of the case, and since both parties agreed that the foreclosure sale was a commercial transaction, the Court found that 12-120(3) provided for an award of attorney fees.⁸⁸

Upon first blush, the holdings in these cases may seem to conflict. But a closer look reveals that the holdings of *PHH* and *Taylor* are entirely consistent with the language of section 12-120(3).⁸⁹ In *PHH*, suit was brought to eject individuals from their home after a foreclosure sale, and the individuals counterclaimed to contest the validity of the foreclosure sale.⁹⁰ While a commercial transaction was involved—a foreclosure sale—the Court held that it was not the basis of the parties' claim.⁹¹ Conversely, in *Taylor*, where a foreclosure sale was also involved, the Court awarded attorney fees under section 12-120(3).⁹² But there, the gravamen of the claim was the validity of a foreclosure sale in which the buyer intended to resell the house rather than keep it for personal use, so an award of attorney fees was deemed proper under section 12-120(3).⁹³

In sum, a party seeking an award of attorney's fees under section 12-120(3) should be aware that the application of section 12-120(3) will depend not upon whether a commercial transaction existed, but whether a party alleged that a commercial transaction existed in a complaint or counterclaim.⁹⁴ In order to fully meet the requirements of section 12-120(3), the heart of a claim or counterclaim must be a commercial transaction.⁹⁵ A non-commercial claim that is simply related to a commercial transaction will not withstand Idaho courts' analysis of section 12-120(3).⁹⁶

B. Actions Where Amount Pleaded is \$35,000 or Less: Idaho Code
Section 12-120(1)

Whereas the provision discussed above—Idaho Code section 12-120(3)—concerns civil actions involving commercial transactions, Idaho Code section 12-120(1) provides for fees in all types of civil actions as long as the amount pleaded does not exceed a specified amount.⁹⁷ Until recently, Idaho Code section 12-120(1) provided for an award of fees

87. *Taylor v. Just*, 59 P.3d 308, 313, 138 Idaho 137, 142 (2002).

88. *Id.*

89. IDAHO CODE § 12-120(3).

90. *PHH Mortg. Services Corp.*, 200 P.3d at 1190, 146 Idaho at 641.

91. *Id.*

92. *Taylor*, 59 P.3d at 313, 138 Idaho at 142.

93. *Id.*

94. *Garner*, 259 P.3d at 617, 151 Idaho at 471.

95. *Taylor*, 59 P.3d at 312, 138 Idaho at 141.

96. *PHH Mortg. Services Corp.*, 200 P.3d at 1190, 146 Idaho at 64.

97. IDAHO CODE § 12-120(1) (2015).

where the amount pleaded was \$25,000 or less.⁹⁸ Now Idaho Code section 12-120(1) specifies a higher amount as the pleading ceiling:

[I]n any action where the amount pleaded is thirty-five thousand dollars (\$35,000) 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's fees. For the plaintiff to be awarded 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'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 percent (95%) of the amount awarded to the plaintiff.⁹⁹

True to the express language of the statute, Idaho courts require parties to actually plead \$35,000 or less of damages in order to successfully invoke section 12-120(1).¹⁰⁰ This requirement is strictly construed, as the Idaho Supreme Court illustrated in *Mickelsen v. Broadway Ford, Inc.*:

Mickelsen's amended complaint prays for, among other things, both "[d]amages not in excess of \$25,000" and "[r]escission of the lease." Rescission of the lease would result in cancelation of a debt owing on the lease and therefore must be included in the amount pleaded . . . since Mickelsen did not specifically allege that the total amount owing on the lease and the damages was \$25,000 or less, the amended complaint did not specifically state that the total recovery sought was \$25,000 dollars or less. Therefore I.C. § 12-120(1) is not applicable.¹⁰¹

Thus, a party seeking an award of attorney fees under this statute should be aware that even facially non-monetary claimed damages (such rescission of a lease, as in *Mickelsen*) can be considered by a court to determine whether section 12-120(1) applies.

When a plaintiff seeks an award of fees under this statute, she must provide to the defendant a demand for payment in writing at least ten days before the suit is commenced.¹⁰² The demand letter must in-

98. 2012 Idaho Sess. Laws 257.

99. IDAHO CODE § 12-120(1) (2015).

100. Medical Recovery Servs., LLC v. Bonneville Billing and Collections, Inc., 336 P.3d 802, 809, 157 Idaho 395, 402 (2014).

101. *Mickelsen v. Broadway Ford, Inc.*, 280 P.3d 176, 183, 153 Idaho 149, 156 (2012). *Mickelsen* was decided before the Legislature amended the statutory pleading maximum under § 12-120(1) from \$25,000 to \$35,000.00. 2012 Idaho Sess. Laws 257.

102. 2012 Idaho Sess. Laws 257.

clude the sum of money demanded.¹⁰³ In *Key Bank National Association v. PAL I, LLC*, the Idaho Supreme Court held that a plaintiff's demand letter which failed to include the sum of money sought did not fulfill the statutory requirements of section 12-120(1).¹⁰⁴

In order to avoid paying attorney fees, a defendant must tender to the plaintiff 95% of the amount ultimately awarded at trial.¹⁰⁵ When these terms are met, a court must award attorney fees to the prevailing party.¹⁰⁶ This fairly straightforward statute applies both at trial and on appeal.¹⁰⁷

C. Personal Injury Cases Where Claimed Damages Do Not Exceed \$25,000: Idaho Code Section 12-120(4)

Idaho Code section 12-120(4) authorizes courts to award attorney fees in personal injury actions.¹⁰⁸ The section is limited to cases where the amount of a claimant's alleged damages does not exceed \$25,000.¹⁰⁹ The purpose of this provision is to facilitate "efficient and early settlement" by influencing the bargaining power of parties to personal injury actions where a relatively modest amount is claimed.¹¹⁰ Section 12-120(4) provides that:

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's fees. For the plaintiff to be awarded 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, than on defendant, not less than sixty (60) days before the commencement of the action; provided that no attorney's fees shall be awarded 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 plaintiff.¹¹¹

103. *Keybank Nat'l Ass'n v. PAL I, LLC*, 311 P.3d 299, 309, 155 Idaho 287, 297 (2013).

104. *Id.*

105. IDAHO CODE § 12-120(1) (2015).

106. *Chavez v. Barrus*, 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008).

107. *Id.*

108. IDAHO CODE § 12-120(4) (2015).

109. *Id.*

110. *Gonzales v. Thacker*, 231 P.3d 524, 528, 148 Idaho 879, 883 (2009).

111. IDAHO CODE § 12-120(4) (2014) (emphasis added).

The Idaho Supreme Court has held that Idaho Code section 12-120(4) is the exclusive source of attorney fee awards in personal injury actions where the amount of plaintiff's claim does not exceed \$25,000.¹¹²

Section 12-120(4) allows for attorney fee awards only to plaintiffs.¹¹³ There has been some dispute over the years as to the meaning of "claimant" in the language of this provision.¹¹⁴ In 2003, the Idaho Court of Appeals decided *Gillihan v. Gump* (*Gillihan I*) holding that the legislature's choice the word "claimant"—rather than the term "prevailing party"—provides only successful *plaintiffs* in personal injury actions with an award of attorney fees.¹¹⁵ The next year, the Idaho Supreme Court reversed *Gillihan I*.¹¹⁶ In *Gillihan II*, the Idaho Supreme Court, by plurality opinion, held the word "claimant" in the provision could also refer to successful *defendants* in personal injury cases.¹¹⁷

A few years later in *Gonzales v. Thacker*, the Idaho Supreme Court noted that because *Gillihan II* was a plurality opinion, it was not controlling precedent.¹¹⁸ The *Gonzales* Court then examined the legislative history of Idaho Codes section 12-120(4).¹¹⁹ The Court explained that because the legislature had deleted the words "prevailing party" and replaced them with "claimant," the legislature intended that Idaho Code section 12-120(4) apply only to plaintiffs in personal injury cases.¹²⁰

Generally, a plaintiff seeking an award of attorney fees under section 12-120(4) must include all items of damages sought at trial in its original statement of claim.¹²¹ A statement of claim—not to be confused with a prayer for relief—is defined as "a written statement signed by the plaintiff's attorney" and served on the defendant or the defendant's insurer at least sixty days before commencement of the action.¹²² Under Idaho Code section 12-120(4), a statement of claim must include:

- (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

112. *Gonzalez*, 231 P.3d at 529, 148 Idaho at 884.

113. *Id.* at 529, 148 Idaho at 883.

114. *Id.*

115. *Gillihan v. Gump*, 99 P.3d 1083, 1087 140 Idaho 693, 697 (Idaho Ct. App. 2003) *rev'd*, 92 P.3d 514, 140 Idaho 264 (2004).

116. *Gillihan v. Gump*, 92 P.3d 514, 140 Idaho 264 (2004).

117. *Id.* at 517, 140 Idaho at 267.

118. *Gonzalez*, 231 P.3d at 529, 148 Idaho at 884.

119. *Id.*

120. *Id.*

121. IDAHO CODE § 12-120(4) (2015).

122. *Id.* If the plaintiff is unrepresented, she must sign the statement herself.

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.¹²³

As a general rule, if the plaintiff includes in the complaint or in the evidence at trial "a different alleged injury or a significant new item of damages that was not included in the plaintiff's statement of claim," she will "be deemed to have waived any entitlement to attorney's fees" of the omitted injury or item of damage under Idaho Code section 12-120(4).¹²⁴

However, Idaho courts have allowed plaintiffs some leeway where insignificant items of damages are not disclosed in a statement of claim but are later introduced at trial.¹²⁵ In *Contreras v. Rubley*, a trial court awarded attorney fees to a personal injury plaintiff under Idaho Code section 12-120(4), despite the fact that the plaintiff had introduced evidence of property damages that had not been included in his original statement of claim.¹²⁶ Specifically, the plaintiff had introduced evidence of \$2,500 of property damage to his vehicle at trial, but had not included property damage to his vehicle in his statement of claim.¹²⁷ On appeal, the Idaho Supreme Court found that though the claim for property damage was new, it was not significant enough in light of the total claimed amount to warrant a reversal of the trial court's award of fees:

Even though evidence of the property damage was new, it was not significant enough to constitute a waiver of Contreras' right to attorney fees. Contreras' original Statement of Claim to Rubley's insurer on June 18, 2002, sought \$20,000 in damages. The insurer disclaimed liability for the accident and made no tender to respondents in an attempt to settle the case. We agree with the district court that the \$2,500 car was not necessarily a significant item of damage when compared to the \$20,000 demand made in the Statement of Claim. As Rubley's insurer disclaimed any liability by concluding that [another party] was 100% responsible for the accident, it is difficult to see how a lack of awareness of damage to the car played any part in Rubley's insurer's refusal to settle prior to the commencement of this suit.

We affirm the district court's award of attorney fees¹²⁸

Contreras suggests that the significance of an additional amount not originally set forth in a statement of claim will depend upon its proportion to the overall claimed amount. Where an additional amount is sig-

123. *Id.*

124. *Id.*

125. *Contreras v. Rubley*, 130 P.3d 1111, 1115, 142 Idaho 573, 577 (2005).

126. *Id.*

127. *Id.*

128. *Id.*

nificantly less than a total claimed amount, the *Contreras* holding indicates that a court may grant—or, in the case of appellate courts, subsequently uphold—an award of attorney fees that includes the additional amount.¹²⁹ However, the language of *Contreras* suggests that if *Contreras*' statement of claim had been closer to the claimed amount of property damage, the outcome may have been different.¹³⁰ Thus, individuals seeking an award of fees under this statute would be wise to make sure that statements of claims are sufficiently detailed and contain all asserted items of damages.

Courts have held that the pleadings themselves do not need to expressly claim less than \$25,000, because the \$25,000 applies only to the statement of claim. Thus, a party whose pleading includes phrases such as “general damages in an amount to be proven at trial” or other non-specific requests for relief does not waive her right to receive an award of attorney fees under 12-120(4).¹³¹

D. Divorce Proceedings: Idaho Code Section 32-704

In divorce actions, trial courts may grant attorney fees after considering the parties' respective financial situations and other statutorily-specified factors. Idaho Code section 32-704 provides that a trial court may “from time to time after considering the financial resources of both parties and the factors set forth in section 32-705, Idaho Code, order a party to pay a reasonable amount for the cost to the other party . . . and for attorney's fees”¹³²

In considering whether the parties' financial resources warrant an award of attorney fees, Idaho courts have found that a substantial income disparity between the parties can be enough to support a finding that the party with the higher income ought to pay the other party's attorney fees.¹³³ However, even where there is some disparity between the parties' incomes, a party who possesses the financial resources to prosecute or defend the action on her own may not be granted an award of attorney fees.¹³⁴ The case law about the effect of income disparity in divorce proceedings is somewhat confusing, as the Idaho Court of Appeals observed in *Stephens v. Stephens*:

129. *Id.*

130. *Id.* (“[T]he \$2,500 car was not necessarily a significant item of damage when compared with the \$20,000 demand made in the Statement of Claim.”).

131. *See generally* *Cox v. Mulligan*, 128 P.3d 893, 142 Idaho 356 (2005).

132. IDAHO CODE § 32-704(3) (2006).

133. *Pieper v. Pieper*, 873 P.2d 921, 925, 125 Idaho 667, 671 (Ct. App. 1994).

134. *See Jensen v. Jensen*, 917 P.2d 757, 763, 128 Idaho 600, 606 (1996) (denying award of attorney fees to divorcing wife whose annual income was \$79,000—even though her ex-husband's income was \$191,000—on the grounds that she could afford the fees); *see also* *Perez v. Perez*, 6 P.3d 411, 415, 134 Idaho 555, 559 (Ct. App. 2000) (holding that an award of attorney fees is improper where party seeking fees has the financial resources to prosecute or defend the action).

There are Idaho appellate decisions stating that a disparity in the income of the parties is generally sufficient to justify an award of attorney fees under § 32-704. . . . Nevertheless . . . there are other Idaho cases which suggest that income inequality would not justify an award of the requesting party had sufficient other financial resources to pay his or her attorney fees. In some of these cases, the courts held that an order granting attorney fees was unwarranted, based solely on the value of the marital property awarded to the spouse requesting the fees. . . . Nevertheless, we conclude that a spouse's receipt of assets in the form of a property division sufficient to pay attorney fees does not necessarily preclude an award of attorney fees to that spouse. . . . Plainly, the current statute now mandates that courts in divorce proceedings consider elements beside necessity and the value of assets awarded in the property division in deciding whether an award of attorney fees is appropriate.¹³⁵

In other words, there is no bright-line rule for how a party's income will factor into a court's decision whether or not to award attorney fees in a divorce proceeding.

A trial court determining whether to award attorney fees in a divorce action is directed under section 32-704 to consider the same factors used to determine whether or not spousal maintenance is appropriate.¹³⁶ These factors are set forth in Idaho Code section 32-705.¹³⁷ In applying the factors, trial courts have broad discretion to consider a vast spectrum of facts, encompassing everything from the respective fault of the parties to the parties' tax consequences.¹³⁸ The list of factors—which is not exclusive—should be read in its entirety to best understand trial courts' broad discretion in awarding attorney fees in divorce proceedings:

The maintenance ordered shall be in such amounts and such periods of time that the court deems just, after considering all relevant factors which may include (a) The financial resources of the spouse seeking maintenance, including the marital property apportioned to said spouse, and said spouse's ability to meet his or her needs independently; (b) The time necessary to acquire sufficient education and training to enable the spouse seeking

135. *Stephens v. Stephens*, 61 P.3d 63, 65, 138 Idaho 195, 198 (Idaho Ct. App. 2002). The *Stephens* Court was referring to a 1980 amendment to Idaho Code section 32-704, which was originally enacted in 1875. The 1875 version of the statute fee awards were only appropriate when "necessary" to allow a divorcing wife to either initiate or defend in divorce proceedings. Idaho Terr. Sess. 1875, p. 639, § 7. After the 1980 amendment, the statute no longer required strict necessity and instead, provided a multi-factor analysis. 1980 Idaho Sess. Law 962.

136. *Stephens*, 61 P.3d at 64, 138 Idaho at 196.

137. IDAHO CODE § 32-705(2) (2006); *Stephens*, 61 P.3d at 64, 138 Idaho at 196.

138. IDAHO CODE § 32-705(2) (2006).

maintenance to find employment; (c) The duration of the marriage; (d) The age and physical and emotional condition of the spouse seeking maintenance; (e) The ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance; The tax consequences to each spouse; [and] (g) The fault of either party.¹³⁹

The legislative intent behind this multi-factor analysis is to ensure that the parties' respective needs—rather than their respective fault—provide the primary basis for an award of maintenance or attorney's fees.¹⁴⁰

In order to be upheld on appeal, a trial court's decision granting attorney fees in a divorce action under section 32-704 must include an analysis of the factors set forth in section 32-705.¹⁴¹ A recent case in which the Idaho Supreme Court upheld a trial court's award of attorney fees in a divorce illustrates the multi-factor analysis that must be shown for an award of attorney fees to withstand appellate scrutiny:

In this case, the magistrate court extensively analyzed the factors listed in I.C. § 32-705, and cited to them prior to awarding Bertha attorney fees. The magistrate court specifically considered: Bertha's inability to support herself, the longevity of the parties' marriage and Bertha's limited English skills, age, and lack of employment history. The court also considered the fact that Pedro would be able to adequately care for himself in light of the spousal maintenance award. Because the magistrate court properly considered and cited to the factors listed in I.C. 32-705, the district court did not err in affirming Bertha's award of attorney fees.¹⁴²

As this brief discussion illustrates, Idaho courts have broad discretion in determining whether to award attorney fees in divorce proceedings. Yet a trial court judge awarding attorney fees to a party in a divorce proceeding must apply the spousal maintenance factors set forth in §32-705 to ensure that the award of fees survives appeal.¹⁴³ Thus, it may be prudent for a litigant in a divorce proceeding to apply the spous-

139. *Id.*

140. When first enacted, the statute providing for spousal support used a party's fault or innocence as a determining factor in a trial court's decision to award alimony. However, in 1990 the legislature amended the statute with the intention of making the parties' respective needs form the basis for an award of fees. 1990 Idaho Sess. Laws 917.

141. *Noble v. Fisher*, 894 P.2d 118, 124, 126 Idaho 885, 891 (1995) (declining to uphold a trial court's decision to award attorney fees where decision did not cite to section 32-705, and noting that "prior decisions of this Court hold that in order to make an award of costs and attorney fees under section 32-704, the court must first consider and cite the factors listed in section 32-705 in its decision").

142. *Pelayo v. Pelayo*, 303 P.3d 214, 224, 154 Idaho 855, 865 (2013).

143. *Noble*, 894 P.2d at 124, 126 Idaho at 891.

al maintenance factors to the facts of her case when seeking an award of attorney fees.

E. Lien Foreclosure Proceedings Idaho Code Section 45-513

Idaho Code section 45-513, enacted in 1893, mandates an award of attorney fees to a plaintiff who successfully brings an action to foreclose a lien.¹⁴⁴ An award of attorney fees under this statute is automatic for a successful lien claimant.¹⁴⁵ Only the amount of the fee award is within the trial court's discretion.¹⁴⁶ Because this provision is so narrow, broader code provisions for providing fee awards—such as Idaho Code section 12-120(3), which governs attorney fee awards in commercial transactions¹⁴⁷—do not apply in a lien foreclosure actions.¹⁴⁸

The Idaho Supreme Court has long held that this code provision does not apply to a property owner who successfully *defends* an action brought by a lienholder.¹⁴⁹ Thus, a defendant in a lien foreclosure action who seeks attorney fees would be well-advised to assert an alternative basis for an attorney fee award.¹⁵⁰

Idaho Code section 45-513 has been challenged on constitutional grounds,¹⁵¹ and on the grounds that it violates a public policy encouraging settlement.¹⁵² These challenges have proven unsuccessful.¹⁵³

144. IDAHO CODE § 45-513 (2014); *see also* Olsen v. Rowe, 873 P.2d 1340, 1342, 125 Idaho 686, 688 (Idaho Ct. App. 1994).

145. *See* Fairfax v. Ramirez, 982 P.2d 375, 381, 133 Idaho 72, 78 (Idaho Ct. App. 1999) (noting that an award of attorney fees and costs in favor of successful lien claimant is mandatory, but that the *amount* of attorney fees is left to the court's discretion).

146. *Id.*

147. *See infra*, Part IV.A.

148. *See* Parkwest Homes, LLC v. Barnson, 302 P.3d 18, 26, 154 Idaho 678, 686 (Idaho 2013) (“[B]ecause section 45-513 is a specific statute providing for the award of attorney fees in a proceedings to foreclose a mechanic’s lien, Idaho Code section[s] 12-120(3) and 12-121, which are general statutes, do not apply.”) (quoting First Fed. Sav. Bank of Twin Falls v. Riedesel Eng’g, Inc., 301 P.3d 632, 638, 154 Idaho 626, 632 (Idaho 2012)).

149. *See* L & W Supply Co. v. Chartrand Family Trust, 40 P.3d 98, 104, 196 Idaho 738, 746 (2002) (“This Court has indicated that the section . . . [does] not provide recovery of attorney fees for defendants.”). *See also* Thompson v. Wise Boy Mining & Milling Co., 74 P. 958, 960, 9 Idaho 363, 363 (1903) (declining to construe Idaho Code section 45-513 as providing award of attorney fees to prevailing defendant, and noting that “the defendant in such cases is not prosecuting an action . . . and hence stands upon an entirely different principle from that of the party seeking to enforce his lien.”).

150. *See* Fairfax, 982 P.2d at 381, 133 Idaho at 78. There, the Court of Appeals held that because section 45-513 did not apply on appeal, parties were not barred from seeking award of attorney fees under an alternative statute. Since section 45-413 does not apply to defendants as a source of an award of attorney’s fees, it logically follows that that provision would not limit *defendants’* rights to recover under other statutes. For example, a defendant who believes he will prevail in a lien foreclosure action could assert that the plaintiff’s claim was brought unreasonably and invoke Idaho Code section 12-121. For more on section 12-121, *see infra* Part V.A. *See also supra* note 63 and accompanying text.

151. *See* Harrington v. McCarthy, 420 P.2d 790, 795, 91 Idaho 307, 312 (1966) [hereinafter Harrington] (rejecting claim that statute violated Equal Protection Clause for singling out debtors as a class).

It has also been asserted that this provision could give rise to an award of attorney fees for the preparation of the lien itself—a notion which the Idaho Supreme Court has rejected.¹⁵⁴ The Court has distinguished an award based on the action to *foreclose* on a lien, which can provide the grounds for a fee award, from the time spent *preparing* a lien, which is not recoverable.¹⁵⁵ However, in 1982, the Idaho Court of Appeals held that a stipulation to release a lien on the condition that the contractor receive compensation via a special fund was the “functional equivalent” of a lien, and thus, the lienholder’s attorney was entitled to attorney fees.¹⁵⁶ In that case, the Court of Appeals also held that a lienholder may be awarded attorney fees where the amount due under a contract is ultimately found to be less than the lienholder originally claimed.¹⁵⁷

The most common misapplication of section 45-513 is a request for attorney fees on appeal.¹⁵⁸ However, because the legislature deleted a provision of this statute that would have allowed for attorney fee awards on appeal, Idaho courts have long construed the statute as *not* providing for attorney fee awards on appeal.¹⁵⁹

F. Claims Arising Under Insurance Policies: Idaho Code Section 41-1839

Idaho Code section 41-1839 provides for attorney fee awards in claims arising from insurance disputes.¹⁶⁰ The Idaho Supreme Court has explained that section 41-1839 provides an incentive to insurers to settle justified claims so as to reduce the amount of insurance-related

152. See *Elec. Wholesale Supply Co. v. Nielson*, 41 P.3d 242, 253, 136 Idaho 814, 825 (2001) (rejecting argument that statute violates public policy against encouraging settlement).

153. See *id.*; see also *Harrington*, 420 P.2d at 795, 91 Idaho at 312.

154. See *Pierson v. Sewell*, 539 P.2d 590, 597, 97 Idaho 38, 45 (1975) (holding that lien claimant’s attorney was not entitled to fee award for time spent preparing lien).

155. *Id.*

156. See *J.E.T. Dev. v. Dorsey Const. Co., Inc.*, 642 P.2d 954, 956, 102 Idaho 863, 865 (Idaho Ct. App. 1982) (“The cross-claim, seeking to recover from the special account fund, was the functional equivalent of an action to foreclose the lien . . . [Idaho Code section] 45-513 was applicable to the cross-claim.”).

157. *Id.* (holding that because “the Idaho Supreme Court has held that a reasonable attorney fee is an incident of foreclosure of [a] lien . . . [t]he lien itself is not rendered invalid merely because a claimant fails to prove the full amount of his original claim.”).

158. See, e.g., *Magleby v. Garn*, 296 P.3d 400, 154 Idaho 194 (2013); *Intermountain Real Properties, LLC v. Draw, LLC*, 311 P.3d 734, 155 Idaho 313 (2013).

159. See *Intermountain Real Properties*, 311 P.3d 734, 154 Idaho 194 (holding that Idaho Code section 45-513 does not provide for awards of attorney fees on appeal because the legislature deleted a provision that would have provided for attorney fee awards on appeal prior to adopting the statute).

160. IDAHO CODE § 41-1839 (2015).

litigation and its accompanying high costs.¹⁶¹ Section 41-1839 also aims to prevent the amount of money due to individuals under their insurance policies from being reduced by the cost of retaining an attorney.¹⁶²

Section 41-1839 allows an insured individual to receive an award of attorney fees against an insurer who fails to pay the amount justly due under the insured's policy of insurance within 30 days of the insured's submission of proof of loss under the policy:

(1) Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever that fails to pay a person entitled thereto within thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, or to pay to the person entitled thereto within sixty (60) days if the proof of loss pertains to uninsured motorist or underinsured motorist coverage benefits, the amount that person is justly due under such policy, certificate or contract shall in any action thereafter commenced against the insurer in any court in this state, or in any arbitration for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action or arbitration.

(2) In any such action or arbitration, if it is alleged that before the commencement thereof, a tender of the full amount justly due was made to the person entitled thereto, and such amount is thereupon deposited in the court, and if the allegation is found to be true, or if it is determined in such action or arbitration that no amount is justly due, then no such attorney's fees may be recovered . . .

(4) Notwithstanding any other provision of statute to the contrary, this section and section 12-123, Idaho Code, shall provide the exclusive remedy for the award of statutory attorney's fees in all actions or arbitrations between insureds and insurers involving disputes arising under policies of insurance. Provided, attorney's fees may be awarded by the court when it finds, from the facts presented to it that a case was brought, pursued, or defended frivolously, unreasonably or without foundation.¹⁶³

As explained above, a party seeking to collect the proceeds due under an insurance policy may only call upon Idaho Code sections 41-1839 and

161. *Martin v. State Farm Mut. Auto Ins. Co.*, 61 P.3d 601, 604, 138 Idaho 244, 247 (2002).

162. *Walton v. Hartford Ins. Co.*, 818 P.2d 320, 324, 120 Idaho 616, 620 (1991) (*overruled on other grounds by* *Greenough v. Farm Bureau Mut Ins. Co.*, 130 P.3d 1129, 142 Idaho 589(2006)).

163. IDAHO CODE § 41-1839 (2015).

12-123 to obtain an award of attorney fees—no other attorney fee statutes may be invoked.¹⁶⁴

Section 41-1839 did not always explicitly exclude other statutes from application to insurance cases.¹⁶⁵ In 1995, the Idaho Supreme Court applied section 12-120(3), which governs attorney fee awards in commercial transactions, to an insurance case that would have otherwise fallen under the purview of section 41-1839.¹⁶⁶ In response, the legislature amended section 41-1839 in 1996 to provide that section 41-1839 is the exclusive basis for a statutory award of attorney fees.¹⁶⁷ The legislature explained its reasoning for the change in its statement of purpose:

It has become necessary to amend Idaho Code Section 41-1839 The purpose of this amendment to Idaho Code Section 41-1839 is to . . . provide that Section 41-1839 is the exclusive attorneys' fee statute that applies to insurance disputes, and to provide incentives for insurance companies to reach agreements with their insureds rather than initiating litigation against their insureds whenever a claim may be filed.¹⁶⁸

Idaho Code section 41-1839, as amended in 1996, expressly provided that attorney fee awards in insurance cases were not available under Idaho Code section 12-120.¹⁶⁹ The same year, section 41-1839 was also amended so that subsection (4) would provide for an award of attorney fees under Idaho Code section 12-123,¹⁷⁰ as well as to provide for an award of attorney fees where an action is "brought, pursued or defended frivolously, unreasonably, or without foundation."¹⁷¹ This change allowed a party to invoke Idaho Code section 41-1839(4) where another party brings frivolous claims or engages in frivolous conduct, while upholding the legislative intent to protect insurers seeking to recover amounts due under their policies.

The Idaho Supreme Court has explained how an insurer can avoid paying an insured's attorney fees under the statute:

In order to avoid liability for attorney fees, the insurance company must either: (a) *pay* the amount justly due to the person entitled within the thirty-day period, or (b) tender the amount justly due to the person thereto *and* thereupon deposit such

164. *Id.*

165. 1996 Idaho Sess. Laws 1308.

166. *Cont'l Cas. Co. v. Brady*, 907 P.2d 807, 127 Idaho 830 (1995).

167. 1996 Idaho Sess. Laws 1308.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

amount in the court prior to the commencement of the lawsuit.¹⁷²

The Court has held that an insurance company does not “compensate” an insured for the purposes of this statute when the company mails a check with instructions not to cash it.¹⁷³

A party wishing to recover attorney fees under this statute must submit proof of loss to the insurance company within the parameters set forth in her insurance policy.¹⁷⁴ The statutory 30-day period in which an insurance company must pay the policy amount begins only after the proof of loss is submitted.¹⁷⁵ A party seeking to recover under this statute must also correctly cite the specific subsection of the statute under which the party wishes to recover.¹⁷⁶ In *Rogers v. Household Life Ins. Co.*, the Court declined to award fees when a party sought an attorney fee award and cited to 41-1839 without specifically naming subsection (4).¹⁷⁷

In order to get attorney fees under this statute, a party need only be awarded a higher amount of damages than the amount tendered by the insurance company.¹⁷⁸ Parties to litigation governed by section 41-1839 are not subject to the prevailing party analysis set forth under I.R.C.P. 54, because under the language of Idaho Code section 41-1839, “the court is not to compare the relief sought by insured with the result obtained”¹⁷⁹ Even if an insured does not receive a verdict for the total amount she originally claimed, she may still receive an award of fees under section 41-1839 so long as she is awarded a verdict that exceeds the amount offered by the insurer.¹⁸⁰

G. Claims Arising Under the Idaho Consumer Protection Act: Idaho Code Section 48-608(5)

Attorney fees are available to prevailing parties in actions brought pursuant to the Idaho Consumer Protection Act.¹⁸¹ This statute prohibits acts or practices that are unfair or deceptive in the course of trade or commerce within Idaho.¹⁸² The Act also forbids unfair competition.¹⁸³ Idaho Code section 48-608 specifically provides grounds for relief for parties aggrieved by a loss from purchase or lease of goods or ser-

172. *Estate of Holland v. Metropolitan Prop. and Cas. Ins. Co.*, 279 P.3d 80, 92, 153 Idaho 94, 106 (2012).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Rogers v. Household Life Ins. Co.*, 250 P.3d 786, 791, 150 Idaho 735, 740 (2011).

177. *Id.*

178. *Estate of Holland* at 88, 153 Idaho at 102.

179. *Id.*

180. *Id.*

181. IDAHO CODE § 48-601-19 (2015).

182. *Id.*

183. *Id.*

vices.¹⁸⁴ Idaho Code section 48-608 was amended in 2008.¹⁸⁵ The 2008 Amendment tacked on an extra penalty for unfair trade practices where the victim is elderly or disabled.¹⁸⁶

Section 48-608 contains a provision which allows for an award of fees for an aggrieved party who prevails in an action brought under the Idaho Consumer Protection Act:

In any action brought by a person under this section, the court shall award, in addition to the relief provided in this section, reasonable attorney's fees to the plaintiff if he prevails. The court in its discretion may award attorney's fees to a prevailing defendant if it finds that the plaintiff's action is spurious or brought for harassment purposes only.¹⁸⁷

Taylor v. McNichols provides an example of a spurious claim brought by a plaintiff which resulted in an attorney fee award to a defendant.¹⁸⁸ There, a plaintiff who had *not* purchased or leased any goods or services brought suit under Idaho Code section 48-608, which provides relief for parties harmed by a loss sustained in the course of a purchase or lease of goods or services.¹⁸⁹ Despite the fact that the plaintiff's claim failed as a matter of law, he appealed.¹⁹⁰ In affirming the trial court's decision, the Idaho Supreme Court awarded fees to the original defendant in this action because the original plaintiff "appealed his ICPA claim despite the fact that the claim clearly failed as a matter of law, and was brought spuriously for harassment purposes only."¹⁹¹ The Court went on to state that the *Taylor* respondents were also "entitled to attorney fees under I.C. § 12-121 . . . as this appeal was brought spuriously and without foundation, for harassment purposes only."¹⁹² This suggests that for Idaho Consumer Protection Action *defendants*, Idaho Code section 48-608(5) may be interchangeable with Idaho Code section § 21-121, as both provide for fee awards for meritless and/or bad faith claims.¹⁹³

Idaho courts have construed the words "prevailing party" in section 48-608 as giving rise to a strict requirement that courts utilize the prevailing party analysis set forth in Idaho Rule of Civil Procedure 54.¹⁹⁴ In *Israel v. Leachman*, the Idaho Supreme Court upheld a district court's determination that a party who prevailed on a claim under the

184. See generally IDAHO CODE § 48-608 (2015).

185. 2008 Idaho Sess. Laws 749. The attorney fee provision is now subsection (5) rather than subsection (4).

186. *Id.*

187. IDAHO CODE § 48-608(5) (2015).

188. *Taylor v. McNichols*, 243 P.3d 642, 665, 149 Idaho 826, 849 (2010).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. See IDAHO CODE § 12-121 (2015); IDAHO CODE § 48-608(5) (2015).

194. *Israel v. Leachman*, 72 P.3d 864, 867, 139 Idaho 24, 27 (2003).

Idaho Consumer Protection Act but lost on other claims brought in the same action was not entitled to attorney fees:

The determination of the award of attorney fees under I.C. § 48-608 is made through an application of the prevailing party analysis in [Idaho Rule of Civil Procedure] 54(d)(1)(b) The district court first looked at the relief requested by the parties. Then, the district court reviewed the claims between the parties and found that the [Plaintiffs] “clearly prevailed on the deceptive practice under the Idaho Consumer protection Act.” The district court went on to state [that the Defendants had prevailed on more claims than the Plaintiffs]

. . . .

The district court recognized that the issue of attorney fees was within its discretion and that the [Plaintiffs], if found to be the prevailing party, could be awarded attorney fees pursuant to I.C. § 48-608(4) The district court determined that each party prevailed in part and did not prevail in part and decided that each party should bear its own costs and fees.¹⁹⁵

The *Israel* plaintiffs contended that the Court should adopt a standard other than the Rule 54 prevailing-party analysis to ensure that parties harmed under the Idaho Consumer Protection Act could receive an award of fees, even where the parties do not prevail on the whole of their action.¹⁹⁶ The Court rejected this argument, explaining that it “decline[d] to interfere with this determination by limiting the scope of inquiry available to trial courts in fulfilling their discretionary functions under the rule, except by the established test of whether an abuse of discretion has occurred.”¹⁹⁷

Aside from the nuances of the prevailing-party analysis described in *Israel*, cases dealing with this rule provide a relatively straightforward application.¹⁹⁸

195. *Id.* (internal citations omitted).

196. *Id.*

197. *Id.*

198. In *Duspiva v. Filmlmore*, the Idaho Supreme Court succinctly stated that “Under I.C. § 48-608(5), a party who invokes the protection of the ICPA and prevails is entitled to reasonable attorney fees based on an application of the prevailing party analysis from I.R.C.P. 54(d)(1)(B).” 293 P.3d 651, 661, 154 Idaho 27, 37 (2013).

IV. STATUTORY ATTORNEY FEE AWARDS BASED ON PARTY
CONDUCT

A. Frivolous Claims or Defenses: Idaho Code Section 12-121

Idaho Code section 12-121 is generally construed to allow for attorney fee awards only in cases where a party's claim or defense is frivolous.¹⁹⁹ However, its language is deceptively broad:

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. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.²⁰⁰

This broad language seemingly allows a judge to award reasonable attorney fees to prevailing parties in "any civil action."²⁰¹ However, the Idaho Rules of Civil Procedure limit an award under § 12-121 to cases where the party against whom the award of fees is has "pursued or defended [a claim or appeal] frivolously, unreasonably, or without foundation."²⁰² Importantly, attorney fees under this statute are only available when the *entirety* of a party's claim or defense is deemed frivolous or without foundation.²⁰³ This limitation also holds true for cases on appeal.²⁰⁴ If a party presents even one legitimate issue—even when nestled among several unreasonable arguments—an award under Idaho Code section 12-121 is improper.²⁰⁵ Furthermore, where an attorney seeks a fee award on the grounds of frivolous *conduct* distinct from the party's claims or defenses, a fee award section 12-121 is also improper.

199. Idaho R. Civ. P. 54.

200. IDAHO CODE § 12-121 (2015); *see also* IDAHO R. CIV. P. 54 (setting forth an analysis of what constitutes a "prevailing party").

201. IDAHO CODE § 12-121 (2015).

202. IDAHO R. CIV. P. 54; *Telford Lands LLC v. Cain*, 303 P.3d 1237, 1249, 154 Idaho 981, 993 (Idaho 2013) (holding that application of section 12-121 is limited by Rule 54 to circumstances where a matter is brought or defended "frivolously, unreasonably, or without foundation."). *But c.f. infra*, Part VII.

203. *Bremer, LLC v. East Greenacres*, 316 P.3d 652, 661, 155 Idaho 736, 745 (2014).

204. *Id.* (holding that an award of attorney fees on appeal is only property when the Court is "left with abiding belief that the appeal was brought, pursued, or defended frivolously, unreasonably, or without foundation.") (quoting *Telford Lands LLC*, 303 P.3d at 1249, 154 Idaho at 993 (2013)).

205. *Id.*; *see also* *Coward v. Hadley*, 246 P.3d 391, 398–99, 150 Idaho 282, 289 (2010) (holding that where a party or parties present multiple claims, "the entire course of the litigation must be taken into account, and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation.") (quoting *Michalk v. Michalk*, 220 P.3d 580, 591, 148 Idaho 224, 235 (2009)).

er.²⁰⁶ Instead, attorney fee awards based on frivolous conduct fall under the purview of Idaho Code section 12-123.²⁰⁷ Attorney fees under this statute are not available to a party who has prevailed due to a default judgment.²⁰⁸

B. Frivolous Conduct at the Trial Court Level: Idaho Code Section 12-123

Unlike Idaho Code section 12-121—which allows for attorney fees only when the entirety of a party’s position on a matter is unreasonable²⁰⁹—Idaho Code section 12-123 permits trial courts to award attorney’s fees against an opposing party for engaging in frivolous conduct:

[A]t 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.²¹⁰

The statute broadly defines “conduct” as “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.”²¹¹ “Frivolous conduct” is defined in subsection 12-123(1)(b) as follows:

“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.²¹²

The Idaho Supreme Court has held that conduct is frivolous when it serves to either harass or injure a party, or where it is not supported by

206. *Tapadeera, LLC v. Knowlton*, 280 P.3d 685, 691, 153 Idaho 182, 188 (Idaho 2012) (holding that a district court properly denied an award of attorney fees where the claimed fees were based on frivolous conduct rather than a frivolous claim, and noting that IDAHO CODE § 12-123—not IDAHO CODE § 12-121—would be the proper statute to apply).

207. IDAHO CODE § 12-123 (2015).

208. The Idaho Rules of Civil Procedure expressly provide that “attorney fees shall not be awarded pursuant to section 12-121 . . . on a default judgment.” IDAHO R. CIV. P. 54(e)(1). By definition, a defaulting party is not “defending” a claim.

209. IDAHO CODE § 12-121 (2015).

210. IDAHO CODE § 12-123(2) (2015).

211. IDAHO CODE § 12-123(1)(a) (2015).

212. IDAHO CODE § 12-123(1)(b)(i)–(ii) (2015). See *Total Success Invs. v. Ada High-
way Dist.*, 227 P.3d 942, 949, 148 Idaho 688, 695 (2010).

fact or a good faith argument in law.²¹³ Attorney fees may be awarded under this statute against a party or the offending party's attorney.²¹⁴

Section 12-123(b) sets forth specific procedural requirements that must be met in order for a party to obtain an award of attorney fees:

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 to each party allegedly adversely affected by 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 found to be frivolous, and to determine if an award is to be, 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.²¹⁵

The procedural requirements set forth in section 12-123 cannot be skirted.²¹⁶ In *Roe Family Services v. Doe*, the Idaho Supreme Court reviewed a district court judge's decision to award attorney fees as a sanction for frivolous conduct.²¹⁷ The Idaho Supreme Court reversed, because "there is a specific procedure set forth in the statute requiring a motion by a party and notice and a hearing. None of these procedures took place in the instant case, and thus, the award of fees was improper."²¹⁸

Unlike many of Idaho's fee-shifting statutes, a party does not have to prevail to be granted an award of attorney's fees under section 12-123.²¹⁹ However, section 12-123 cannot be invoked on appeal.²²⁰ Since a party invoking section 12-123 to obtain attorney fees must do so within 21 days after the entry of judgment at the trial-court level,²²¹ this section simply does apply to attorney fee awards on appeal.²²²

213. *Id.*

214. IDAHO CODE § 12-123 (2015).

215. IDAHO CODE § 12-123(b) (2015).

216. *Roe Family Servs. v. Doe*, 88 P.3d 749, 757, 139 Idaho 930, 938 (2004).

217. *Id.*

218. *Id.*

219. *Urrutia v. Harrison*, 330 P.3d 1035, 1039, 156 Idaho 677, 681 (2014).

220. *Berkshire Invs., LLC v. Taylor*, 278 P.3d 943, 956, 153 Idaho 73, 86 (2012).

221. *Id.*

222. IDAHO CODE § 12-123 (2015). See *Markin v. Grohmann*, 280 P.3d 726, 731, 153 Idaho 223, 228 (2012) (holding that section 12-123 does not provide for attorney fee awards on appeal); see also *Total Success Invs. v. Ada Highway Dist.*, 227 P.3d 942, 949, 148 Idaho

C. Frivolous Claim or Defense in Cases Involving Governmental Entities: Idaho Code Section 12-117

Idaho Code section 12-117 provides for attorney fee awards in proceedings between persons and state agencies or political subdivisions when a non-prevailing party acts without a reasonable legal or factual basis.²²³ As enacted in 1984, section 12-117 originally provided for attorney fee awards for persons who prevail against state agencies or political subdivisions.²²⁴ However, in 2000, section 12-117 was amended so that attorney fee awards would also be available to state agencies who have to *defend* against claims that do not have a reasonable legal or factual basis.²²⁵

In order to obtain an award of attorney fees under section 12-117, the party seeking an award of attorney fees must be the prevailing party, and the losing party must have acted without a reasonable basis in fact or law.²²⁶ The fact that attorney fees are requested in a suit involving a state agency or political subdivision does not automatically trigger section 12-117.²²⁷ The Idaho Supreme Court recently held that section 12-117 is not the exclusive basis for attorney fee awards in suits involving governmental entities.²²⁸

Idaho Code section 12-117 has been a source of much discussion over the past few years, primarily due to ambiguity surrounding the extent to which attorney fees may be awarded based on administrative proceedings.²²⁹ In order to give context to the statutory and interpretive evolution of section 12-117, it may be useful to briefly review the historical interpretation of the statute since its inception in 1984.²³⁰

As originally enacted in 1984, section 12-117 provided that:

In any administrative or civil judicial proceeding involving as adverse parties a state agency and a person, the court shall

688, 695 (2010) (holding that section 12-123 does not provide grounds for an award of attorney's fees on appeal).

223. IDAHO CODE § 12-117 (2015).

224. Idaho Code § 12-117 originally provided that "In any administrative or civil judicial proceeding involving as adverse parties a state agency and a person, the court shall award *the person* reasonable attorney's fees, witness fees, and reasonable expenses, if the court finds in favor of the person and also finds that the state agency acted without a reasonable basis in fact or law." 1984 Idaho Sess. Laws 501.

225. 2000 Idaho Sess. Law 675.

226. *City of Osburn v. Randel*, 277 P.3d 353, 356, 152 Idaho 906, 909 (2012).

227. *See State, Dep't of Transp. v. Grathol*, 343 P.3d 480, 158 Idaho 38 (2014); *see also* *Syringa Networks, LLC v. Idaho Dept of Admin*, 305 P.3d 499, 511, 155 Idaho 55, 67 (2013).

228. *See Grathol*, 343 P.3d 480; *see also* *Syringa Networks, LLC*, 305 P.3d 499.

229. *See, e.g.*, Stephen Adams, An Update on Attorney Fees in Cases Involving Governmental Entities, *THE ADVOCATE*, Aug. 2013; *see also* T. Heathe Clark, The Curious Case of Idaho Code Section 12-1187: Who Gets Paid?, *THE ADVOCATE*, Feb. 2012. Both of these articles provide a more detailed and nuanced analysis of the evolution of Idaho Code section 12-117 in recent years.

230. 1984 Idaho Sess. Law 501.

award the person reasonable attorney's fees, witness fees and reasonable expenses, if the court finds in favor of the person and also finds that the state agency acted without a reasonable basis in fact or law.²³¹

In 1984, the Idaho Supreme Court decided *Bogner v. State Department of Revenue Taxation*, where the Court applied section 12-121 to award attorney fees against an administrative agency.²³² The Court found support of its application of section 12-121 in the existence of then-newly-enacted section 12-117, which the Court interpreted to provide for awards of attorney fees based on administrative proceedings.²³³ However, the *Bogner* Court did not explicitly apply section 12-117 as a substantive basis for awarding attorney fees.²³⁴

A few years later, the Court decided *Stewart v. Department of Health and Welfare*.²³⁵ There, the Court directly applied section 12-117, and expressly held that this section allowed for an award of attorney fees to a prevailing party in an administrative proceeding when the losing state agency took a position that had no reasonable legal or factual basis.²³⁶

In 2009, the Idaho Supreme Court overruled *Stewart* in *Rammell v. Idaho State Department of Agriculture*.²³⁷ The *Rammell* Court determined that the language of section 12-117 did not provide the authority for administrative agencies to award attorney fees.²³⁸ The *Rammell* Court further explained that the only way a party to an administrative proceeding could get an award of attorney fees was through the course of a judicial appeal of an administrative determination.²³⁹

In response to *Rammell*, the Idaho legislature amended section 12-117 with retroactive effect to restore the interpretation of section 12-117 to its pre-*Rammell* state.²⁴⁰ As amended in 2010, section 12-117 would continue to provide attorney fee awards in administrative proceedings.²⁴¹ After the 2010 amendment, section 12-117 provided that:

Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the

231. *Id.*

232. *Bogner*, 693 P.2d at 1061, 107 Idaho at 859.

233. *Id.*

234. *Id.*

235. *See generally Stewart*, 771 P.2d 41, 115 Idaho 820.

236. *Id.*

237. *See generally Rammell v. Idaho State Dept of Agric.*, 210 P.3d 523, 147 Idaho 415 (2009) (*superseded* by 2010 Idaho Sess. Laws 49).

238. *Id.*

239. *Id.* ("A court may only make such an award of fees incurred in the appeal of an administrative determination.").

240. 2010 Idaho Sess. Laws 49.

241. *Id.*

state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.²⁴²

Later in 2010, Idaho Supreme Court decided *Smith v. Washington County*, where the Court denied attorney fees to a party who appealed an administrative decision.²⁴³ The *Smith* Court reasoned that as amended, the plain language of section 12-117 no longer allowed for an award of attorney fees during a judicial appeal of an administrative agency decision:

[A]s amended, I.C. § 12-117 does not allow a court to award attorney fees in an appeal from an administrative decision . . . It empowers only “the state agency or political subdivision, or the court, as the case may be, to award the fees [N]o mechanism exists for courts to intervene in administrative proceedings to award attorney fees. By using the phrase “as the case may be,” the Legislature indicated that only the relevant adjudicative body—the agency in an administrative proceeding or the court in a judicial proceeding—may award that attorney fees.²⁴⁴

In 2012, the Legislature again amended section 12-117 with unambiguous language providing for attorney fee awards during judicial appeals of administrative determinations:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision, or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.²⁴⁵

The 2012 amendment remains in force today.²⁴⁶ Last year in *Flying “A” Ranch, Inc. v. County Commissioners of Fremont County*, the Idaho Supreme Court awarded attorney fees to a party who prevailed on appeal from an administrative proceeding.²⁴⁷ The Court described the purpose of section 12-117 and its relation to administrative proceedings: “The dual purpose of I.C. § 12-117 is to (1) deter groundless or arbitrary agency action; and (2) to provide ‘a remedy for persons who have borne

242. *Id.*

243. *Smith v. Washington Cnty.*, 247 P.3d 615, 150 Idaho 388 (2010).

244. *Id.*

245. 2012 Idaho Sess. Laws 419.

246. IDAHO CODE § 12-117 (2014).

247. *Flying “A” Ranch, Inc. v. Cnty. Comm’rs*, 342 P.3d 649, 655–66, 157 Idaho 937, 943–44 (2015).

an unfair and unjustified financial burden attempting to correct mistakes agencies should never have made.”²⁴⁸ It thus appears that Idaho courts now recognize section 12-117 as providing for attorney fees in administrative proceedings, and through judicial appeals of such proceedings.²⁴⁹

D. Frivolous Claims Relating to Public Records Requests: Idaho Code Section 9-344(2)

Under Idaho law, a party who is denied a request to examine or copy public records may bring an action to compel the release of the records under the Public Records Act.²⁵⁰ In these actions, an infrequently-cited Idaho Code provision—section 9-344(2)—provides that a prevailing party will be awarded “reasonable costs and attorney fees” if the court finds that the request for documents, or the refusal to provide the documents, was frivolous.²⁵¹

The Idaho Supreme Court has held that section 9-344(2) provides the sole basis for an awards of attorney fees based on actions brought under the Public Records Act.²⁵² In *Henry v. Taylor*, the Court explained why this narrower statute applies to the exclusion of broader statutes:

To base an award on some other statute would be contrary to the legislature’s intent in including in the Act an attorney fee provision with a specified standard for awarding attorney fees in proceedings to enforce compliance with the Act. That statute is the exclusive bases for such an award.²⁵³

Thus, even though Idaho Code statute 12-117 provides for attorney fee awards in certain claims against government entities,²⁵⁴ that provision gives way to the narrower constraints of Idaho Code section 9-344(2).²⁵⁵ There is little else to be said about this particular provision as it is rarely comes up in cases.²⁵⁶

248. *Id.* (quoting *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 279 P.3d 100, 103, 153 Idaho 114, 117 (2012)).

249. *Id.*

250. IDAHO CODE § 9-343 (2014), *repealed by* 2015 Idaho Sess. Laws 363, codified at IDAHO CODE § 74-115 (2015).

251. *See* IDAHO CODE § 9-344(2) (2014), *repealed by* 2015, Idaho Sess. Laws 361.

252. *Henry v. Taylor*, 267 P.3d 1270, 1277, 152 Idaho 155, 162 (2011).

253. *Id.*

254. IDAHO CODE § 12-117 (2014).

255. *Hymas v. Meridian Police Dep’t*, 330 P.3d 1097, 1106, 156 Idaho 739, 748 (Idaho Ct. App. 2014).

256. For two examples of the relatively straightforward application of this rule, *see* *Wade v. Taylor*, 320 P.3d 1250, 1261, 156 Idaho 91, 102 (2014); *see also Henry*, 267 P.3d at 1277, 152 Idaho at 162.

E. Frivolous Habeas Claims: Idaho Code Section 12-122

Idaho Code section 12-122 allows a court to award attorney fee awards against prison or jail inmates who bring frivolous habeas claims.²⁵⁷ Section 12-122 provides:

In any habeas corpus Action brought by a state penitentiary or county jail inmate, the judge shall award reasonable attorney's fees to the respondent, if . . . the habeas corpus action was brought frivolously by the petitioner.²⁵⁸

In order for a claim to be “brought frivolously” under this section, a petition for a writ of habeas corpus must be “based upon claims which either had no basis in fact, or even if the allegations were true, they did not [legally] justify any relief to the petitioner.”²⁵⁹

The fact that a petition is dismissed for failure to state a claim upon which relief could be granted does not automatically render the claim frivolous.²⁶⁰ A court hearing the petition must apply the frivolity test, which asks whether the non-prevailing party took a position that is “plainly fallacious and, therefore, not fairly debatable.”²⁶¹ A court may make a discretionary determination that an action is not frivolous where it involves “a material issue of law that has not been settled by statute or by a Supreme Court decision in this state.”²⁶² In *Drennan v. Craven*, the Idaho Court of Appeals held that a petitioner who set forth issues of unsettled law did not have to pay the state's attorney fees.²⁶³ The *Drennan* Court noted that attorney fee awards against habeas petitioners who present matters of unsettled law would “not be appropriate” under section 12-122.²⁶⁴

F. Bad Faith in Tort Claims against Governmental Entities: Idaho Code Section 6-918A

Section 6-918A of the Idaho Tort Claims Act provides trial courts with discretion to award attorney fees against parties who bring or defend tort claims in bad faith.²⁶⁵ Section 6-918A provides:

257. IDAHO CODE § 12-122 (2014).

258. *Id.*

259. *Id.*

260. *Dopp v. Idaho Comm'n on Pardons & Parole*, 84 P.3d 593, 599, 139 Idaho 657, 663 (Idaho Ct. App. 2004).

261. *Id.*

262. *Id.*

263. *Drennan v. Craven*, 105 P.3d 694, 700, 141 Idaho 34, 40 (Idaho Ct. App. 2004) (“Because [petitioner] has presented material issues of unsettled law in this appeal and has prevailed in part on the appeal, attorney fees would not be appropriate under I.C. § 12-122 . . . We therefore deny [Respondent]’s request for attorney fees. . .”).

264. *Id.*

265. IDAHO CODE § 6-918A (2015).

At the time and in the manner provided for fixing costs in civil actions, and at the discretion of the trial court, appropriate and reasonable attorney fees may be awarded to the claimant, the governmental entity or the employee of such governmental entity, as costs, in actions under this act, upon petition therefor and a showing, by clear and convincing evidence, that the party against whom or which such award is sought was guilty of bad faith in the commencement, conduct, maintenance or defense of the action. In no case shall such attorney fee award or any combination or total of such awards, together with other costs and money judgment or judgments for damages exceed, in the aggregate, the limitations on liability fixed by section 6-926, Idaho Code. The right to recover attorney fees in legal actions for money damages that come within the purview of this act shall be governed exclusively by the provisions of this act and not by any other statute or rule of the court, except as may be hereafter expressly and specifically provided or authorized by duly enacted statute of the state of Idaho.²⁶⁶

A party seeking an award of attorney fees under the Idaho Tort Claims Act must demonstrate by “clear and convincing evidence” that the other party proceeded in bad faith.²⁶⁷

Section 6-918A’s requirement of proof of bad faith by clear and convincing evidence is considerably more onerous than the standard set forth in Idaho Code section 12-117, which provides for an attorney fee award against a nonprevailing party who acts “without a reasonable basis in fact or law” in suits involving governmental entities.²⁶⁸ However, section 12-117 is not available to parties who bring claims under the Idaho Tort Claims Act.²⁶⁹ Last year, the Idaho Supreme Court decided *Block v. City of Lewiston*, where a party who brought suit against the City of Lewiston under the Idaho Tort Claims Act.²⁷⁰ Lewiston sought an award of attorney fees under sections 12-117 and 6-918A.²⁷¹ Despite the fact that Idaho Code section 12-117 was enacted after the Idaho Tort Claims Act, the Court held that the enactment of section 12-117 did not create an exception to section 6-918A.²⁷² The *Block* Court explained its reasoning:

Because I.C. § 12-117 was enacted after I.C. § 6-918A, the question is whether its language provides sufficiently express and specific exception to the exclusive scope of § 6-918A.

266. *Id.*

267. *Id.*

268. IDAHO CODE § 12-117 (2015). See discussion *infra* Part IV.C.

269. *Block v. City of Lewiston*, 328 P.3d 464, 470, 156 Idaho 484, 490 (2014).

270. *Id.*

271. *Id.*

272. *Id.*

....

We have held that section 12-117's "[u]nless otherwise provided by statute" language allows that when "another statute expressly provides for the awarding of attorney fees against a state agency or political subdivision, attorney fees can be awarded under that statute also." While this language does not make I.C. § 12-117 the exclusive means of awarding attorney fees against a state agency, it also does not indicate a specific an express intent to provide an exception to I.C. §6-918A's exclusive scope. Rather, this language indicates that where another statute provides the exclusive means for awarding attorney fees, I.C. § 12-117 is not an exception to exclusivity. Therefore, I.C. § 6-918A is the exclusive means to award attorney fees to Lewiston in this case.²⁷³

Thus, section 12-117 does not provide for an award of attorney fees if brought against governmental entities under the Idaho Tort Claims Act.²⁷⁴

Idaho courts define bad faith as "dishonesty in belief or purpose."²⁷⁵ In order to demonstrate an opposing party's bad faith, a party must demonstrate an "instance of dishonesty in belief or purpose on the part of" the opposing party.²⁷⁶ A party's appeal which merely second-guesses the findings of a trial court does not, without more, rise to the level of bad faith.²⁷⁷ Thus, parties seeking an award of attorney fees under section 6-918A should state a specific factual basis for an allegation of bad faith.²⁷⁸

V. ATTORNEY FEE AWARDS BASED ON PROCEDURAL RULES

The Idaho Rules of Civil Procedure provide numerous mechanisms by which a court can sanction a party or her attorney for improper conduct.²⁷⁹ Some are more heavily utilized than others, and covering all of them in depth would be beyond the scope of this Article.²⁸⁰ This

273. *Id.* (footnote omitted).

274. *Id.*

275. *Cobbley v. City of Challis*, 139 P.3d 732, 737, 143 Idaho 130, 135 (2006).

276. *Renzo v. Idaho State Dep't. of Agr.*, 241 P.3d 950, 954, 149 Idaho 777, 782 (2010) ("The Department has not directed this Court to an instance of dishonesty in belief or purpose on the part of Renzo.").

277. *Id.*

278. *See, e.g., Block v. City of Lewiston*, 328 P.3d at 470, 156 Idaho at 490 ("In order for Lewiston and Cutshaw to recover attorney fees . . . they would have to show bad faith on Block's part by clear and convincing evidence Because Lewiston has not shown by clear and convincing evidence that Block has proceeded with bad faith in this appeal, no attorney fees are awarded.").

279. *See generally* the Idaho Rules of Civil Procedure.

280. *See, e.g.,* IDAHO R. CIV. P. 16(i) (attorney fee award where party or party's attorney fails to obey a scheduling or pre-trial order); IDAHO R. CIV. P. 56(g) (attorney fee awards where affidavits submitted in bad faith); IDAHO R. CIV. P. 68 (attorney fee award where

Section discusses two broad instances where the Idaho Rules of Civil Procedure may be invoked to provide an award of attorney fees: as a sanction for misconduct when parties do not comply with various discovery process requirements,²⁸¹ and where parties engage in improper conduct filing documents with the court during trial proceedings or on appeal.

A. Abuses of the Discovery Process: Idaho Rule of Civil Procedure 37

The Idaho Rules of Civil Procedure provide for attorney fee awards as a sanction for a wide array of discovery abuses.²⁸² Each subsection providing for an attorney fee award based on party conduct during the discovery process will be dealt with in turn.

1. Attorney Fees Incurred in Bringing or Defending A Motion to Compel

Sometimes during the discovery process, an opposing party may fail to comply with a discovery request. When this happens, the party who made the request may be forced to bring a motion to compel against the uncooperative party in order to keep the discovery process moving forward.²⁸³ However, as elsewhere in the litigation process, a motion to compel may be brought where it is not warranted.²⁸⁴ Idaho Rule of Civil Procedure 37(a) subsections (2) and (4) provide for attorney fees both in favor of a party who successfully brings a motion to compel discovery, and in favor of a party who successfully defends against a motion to compel discovery:

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that

plaintiff refuses to take defendant's reasonable settlement offer); IDAHO R. CIV. P. 65(c) (attorney fee awards in temporary restraining order and injunction proceedings).

281. The author would like to thank Professor John Rumel for suggesting that this Article discuss attorney fees as a sanction for failure to comply with discovery rules.

282. See generally IDAHO R. CIV. P. 37; see also IDAHO R. CIV. P. 30(d), (g).

283. Appellate cases dealing with attorney fee awards for and against parties who bring motions to compel are few and far between, probably because discovery issues are unlikely to make it to an appellate court.

284. See generally *Crown v. State Dep't. of Agric.*, 898 P.2d 1086, 127 Idaho 175 (1995) (upholding a district court's award of attorney fees to a party who successfully defended against a motion to compel).

the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. . . .

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the moving party or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses just.²⁸⁵

A party cannot obtain an award of attorney fees under subsection (a) unless the party actually files a motion to compel.²⁸⁶ In *Morgan v. Demos*, heard by the Idaho Supreme Court last year, a party sought attorney fees under Idaho Rule of Civil Procedure 37(a) based upon an opposing party's failure to respond to interrogatories.²⁸⁷ However, the party seeking an award of attorney fees had not filed a motion to compel discovery.²⁸⁸ The Court denied the litigant attorney fees because he "never complied with the predicate provisions of Rule 37(a)(2)," which is to file a motion to compel discovery.²⁸⁹ Thus, no matter how uncooperative the opposing party, a litigant who wishes to obtain an award of attorney fees under 37(b)(2) must, as a threshold matter, actually file a motion to compel discovery.²⁹⁰

The language of Rule 37(a)(4) limits recovery to expenses incurred in successfully bringing or defending a motion to compel discovery.²⁹¹ Such expenses occur before a court grants or denies a motion to compel, and should be distinguished from a party's failure to comply with a court's order compelling discovery, which falls under the purview of Rule 37(b). Rule 37(a)(4) limits a court's discretion by providing a presumptive award of attorney fees "unless" factors enumerated in the rule

285. IDAHO .R. CIV. P. 37(a)(2) & (4).

286. *Morgan v. Demos*, 321 P.3d 732, 739, 156 Idaho 182, 189 (2014).

287. *Id.* at 738, 156 Idaho at 188.

288. *Id.*

289. *Id.*

290. *See id.*

291. IDAHO .R. CIV. P. 37(a)(2) & (4).

are present.²⁹² The Court articulated the narrow discretion afforded to trial courts under Rule 37(a) in *Crown v. State, Department of Agriculture*:

The district court's decision to award sanctions for the growers' improper discovery litigation is reviewed only for an abuse of discretion. As the district court was clearly aware, the scope of discretion afforded under the "shall . . . unless" scheme of I.R.C.P. 37(a)(4) is very limited. Accordingly, by analyzing the merits of the growers' arguments within that framework, the district court sufficiently articulated an understanding of the bounds of its discretion And, because the court acted well within those boundaries, we will not disturb the award of sanctions.²⁹³

The "shall . . . unless" directive set forth in Rule 37 creates a strong presumption in favor of awarding attorney fees to a party who successfully brings or defends a motion to compel discovery.²⁹⁴ That presumption is a likely reason why few litigants seem to appeal trial court awards of attorney fees under Rule 37 and its various subsections.

2. Attorney Fees Incurred by an Opposing Party's Failure to Comply with a Discovery Order

Unlike Idaho Rule of Civil Procedure 37(a), which is limited to expenses incurred in bringing or defending against a motion to compel discovery, Rule 37(b)(2) allows a court to award attorney fees incurred by an opposing party's failure to comply with discovery orders:

Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this Rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: [the Rule goes on to identify several orders courts can make] . . . In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the

292. Idaho R. Civ. P. 37(a)(4).

293. *Crown v. State Dep't of Agric.*, 898 P.2d 1086, 1092, 127 Idaho 175, 181 (1995).

294. *See id.*

court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.²⁹⁵

As was the case with subsection (a) of Rule 37, there is little case law interpreting subsection (b). However, a 2004 case decided by the Idaho Court of Appeals illustrates the application of Rule 37(b).²⁹⁶ In *Nepanuseno v. Hansen*, the Court of Appeals sanctioned an attorney for failure to comply with a discovery order, despite the attorney's unusual defense for the violation:

[Plaintiff] also contends that the district court erred in awarding sanctions against his counsel for failure to comply with the court's pretrial order. The pretrial order set a deadline for disclosure of all experts one hundred fifty days prior to the May 7, 2002 trial date, or December 7, 2001. [Plaintiff] did not disclose his two expert witnesses, however, until February 2002. After [Plaintiff]'s late disclosure, [Defendant] filed a motion to strike the experts' testimony as sanctions for the untimely disclosure. In response, [Plaintiff]'s attorney, Richard Vance, represented that he suffered from severe dyslexia, which caused him to "mentally interpose the first week of May, the fifth month, with the last week of July, the seventh month," thereby incorrectly calendaring the trial date and the resulting deadlines. In addressing [Defendant]'s motion, the trial court noted that Vance presented no proof, by affidavit of a medical doctor or otherwise, to support his allegation of dyslexia. Although it was in the court's discretion to strike [Plaintiff]'s expert witnesses . . . the court determined that such a sanction would be unfair to [Plaintiff], who was not responsible for his counsel's failure to meet deadlines. The court also found that monetary sanctions against Vance were appropriate . . . [the trial court ordered] Vance to pay [Defendant]'s attorney fees for preparation of [Defendant]'s motion to strike and an associated motion for summary judgment Therefore, the award of attorney fees against [Vance], as a sanction for violation of the court's pretrial discovery order, is affirmed.²⁹⁷

Though the *Nepanuseno* decision illustrates the application of Rule 37(b), few other appellate court cases are available, likely due to the "shall award . . . unless" directive in subsection (b) and elsewhere in Rule 37. The strong presumption of an award of attorney fees created by the language in Rule 37 likely deters appeals of pre-trial orders under this rule.

295. Idaho R. Civ. P. 37(b)(2).

296. See *Nepanuseno v. Hansen*, 104 P.3d 984, 140 Idaho 942 (Idaho Ct. App. 2004).

297. *Id.* at 988–89, 140 Idaho at 946–47.

In extreme circumstances, a trial court may go further and simply dismiss a case with prejudice for a party's failure to comply with discovery orders.²⁹⁸ However, the Idaho Supreme Court has held that dismissals with prejudice under Rule 37(b) must be warranted by a "clear showing of delay and the ineffectiveness of lesser sanctions."²⁹⁹ Additionally, the dismissal with prejudice must be "bolstered by the presence of at least one aggravating factor."³⁰⁰ Such aggravating factors may include intentional conduct resulting in delay, delay caused by the plaintiff individually, and/or delay which causes prejudice to the defendant.³⁰¹

3. Attorney Fees Incurred by an Opposing Party's Failure to Admit

A party who fails to respond to a request for admission may be sanctioned under Rule 37(c) as follows:

Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.³⁰²

In *Carillo v. Boise Tire Company*, a litigant refused to respond to an opposing party's requests for admission.³⁰³ The opposing party sought an award of attorney fees pursuant to Idaho Rule of Civil Procedure 37(c).³⁰⁴ Although it was not disputed that the request for admission had not been answered, the trial court denied an award of fees.³⁰⁵ The trial court reasoned that the uncooperative litigant's denial of the requests for admission were "not of substantial importance."³⁰⁶ Since Rule 37(c) allows for courts to decline to sanction a party for failure to admit when "the admission sought was of no substantial importance,"³⁰⁷ The

298. *Blaser v. Riceci*, 810 P.2d 1120, 1121, 119 Idaho 834, 835 (1991).

299. *Id.*

300. *Id.* at 1121–22, 119 Idaho at 835–36.

301. *Id.*

302. IDAHO R. CIV. P. 37(c).

303. *Carillo v. Boise Tire Company*, 274 P.3d 1256, 1270, 152 Idaho 741, 755 (2012).

304. *Id.*

305. *Id.*

306. *Id.* at 755.

307. Idaho R. Civ. P. 37(c).

Idaho Supreme Court upheld the lower court's decision not to award fees as within the bounds of the lower court's discretion.³⁰⁸ Conversely, in *Schwan's Sales Enterprises v. Idaho Transportation Department*, the Idaho Supreme Court upheld a lower court's award of attorney fees as a sanction for a party's failure to admit or deny a request for admission.³⁰⁹ There, the offending party had claimed it did not have sufficient information to answer the request, but had not made a reasonable inquiry.³¹⁰ The Court explained that Rule 37(c) does not allow a party to assert lack of knowledge as a basis for failure to admit or deny without making a reasonable inquiry.³¹¹ Thus, the Court held, the trial court did not abuse its discretion.³¹²

4. Attorney Fees Incurred by Misconduct Relating to Depositions, Interrogatories, or Requests for Inspection

Subsection (d) of Rule 37 sets forth a variety of circumstances in which a party can be sanctioned for discovery-related misconduct:

Failure of Party to Attend at Own Deposition or to Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstance make an award of expenses unjust. The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

308. *Carillo*, 274 P.3d at 1270, 152 Idaho at 755.

309. *Schwan's Sales Enters., v. Idaho Transp. Dep't*, 136 P.3d 297, 306, 142 Idaho 826, 835 (2006).

310. *Id.*

311. *Id.*

312. *Id.*

Appellate cases applying 37(d) are virtually non-existent.³¹³ However, given that this subdivision contains the same “shall award . . . unless” language seen in subsections (a), (b), and (c), a party who wishes to obtain an award of attorney fees under subsection (d) could lean on cases applying subsections (a), (b), and (c).

5. Pre-Trial Party Conduct Relating to Settlement Discussions

Parties’ conduct within settlement discussions falls outside the scope of discovery process sanctions.³¹⁴ Idaho courts have held that a party may not be sanctioned under these rules for failing to engage in settlement discussions, or for conduct in the course of settlement discussions.³¹⁵ The Idaho Supreme Court explained the role of settlement negotiations with discovery rule sanctions in *Bailey v. Sanford*:

Sanford argues the trial court abused its discretion by awarding attorney fees as a sanction for failing to participate in good faith in settlement negotiations. This Court has repeatedly held “[a] trial court’s consideration of failed settlement negotiations, or of a refusal to negotiate a settlement, when deciding whether to award attorney fees is prohibited under Idaho law.” Therefore, a trial court cannot sanction a party’s conduct at a settlement conference by award attorney fees to the other party.³¹⁶

While improper settlement conduct does not fall under the ambit of Rule 37, it is not entirely immune from sanctions.³¹⁷ Under Idaho Code section 12-121, courts may consider party actions in the settlement conference arena when determining whether to grant fees for frivolous conduct.³¹⁸

B. Improper Conduct in Filing Documents with the Court: Idaho Rule of Civil Procedure 11(a)(1) & Idaho Appellate Rule 11.2

Idaho Rule of Civil Procedure 11 and Idaho Appellate Rule 11 contain identical language.³¹⁹ Both rules authorize attorney fee awards against parties who frivolously file court documents, or who misuse judicial proceedings. Idaho Rule of Civil Procedure 11 and its appellate counterpart, Idaho Appellate Rule 11, both provide:

313. A Westlaw search conducted on May 1, 2016 for “37(d) /s fees” revealed no cases. A search on that date for “37(d) /s sanctions” revealed only four cases.

314. *Baily v. Sanford*, 86 P.3d 458, 139 Idaho 744 (2004).

315. *Id.* at 754.

316. *Id.*

317. *Hughs v. Fisher*, 129 P.3d 1223, 1234, 142 Idaho 474, 485 (2006).

318. *Id.*

319. Idaho .R. Civ. P. 11; Idaho App. R. 11.

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 or 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 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.³²⁰

Idaho Rule of Civil Procedure 11 has been described as a “management tool to be used by the district court to weed out, punish, and deter specific frivolous and other misguided filings.”³²¹

The Idaho Supreme Court held last year that the identical language of the Idaho Rule of Civil Procedure 11 and Idaho Appellate Rule 11 warrant identical analysis.³²² In *Flying “A” Ranch, Inc. v. Board of County Commissioner for Fremont County*, the Idaho Supreme Court explained that Idaho Rule of Civil Procedure 11 “provides two separate grounds for imposing sanctions: (a) frivolous filings and (b) misusing judicial procedures for an improper purpose.”³²³ The *Flying “A” Ranch* Court further explained that a party did not have to frivolously file documents *and* misuse judicial procedures for an improper purpose to be sanctioned, but instead, could be sanctioned for doing either.³²⁴

Prior to the Court's *Flying “A” Ranch* decision, the Court required a showing of bad faith before Idaho Appellate Rule 11 could be used to sanction a party. However, in *Flying “A” Ranch*, the Court declared that a finding of bad faith was no longer necessary to sanction a party for frivolous filings on appeal. The Court began by explaining its Idaho Rule of Civil Procedure 11 analysis, which inquired into reasonableness under the circumstances, with its prior Idaho Appellate Rule 41 analysis, which required a showing of bad faith:

[i]n *Riggins v. Smith*, [a case where Idaho Rule of Civil Procedure 11 was applied] we stated, “In light of an attorney's conduct in filing a pleading, the district court must determine

320. Idaho R. Civ. P. 11.

321. *Campbell v. Kildow*, 115 P.3d 731, 741, 141 Idaho 640, 650 (Idaho 2005) (citing *Curzon v. Hanson*, 49 P.3d 1270, 1273, 137 Idaho 420, 422 (2002)).

322. *Flying “A” Ranch, Inc. v. Bd. of Cty. Comm'rs for Fremont Cty.*, 328 P.3d 429, 156 Idaho 449 (2014).

323. *Id.*

324. *Id.*

whether the attorney exercised reasonableness under the circumstances and made a proper investigation upon reasonable inquiry into the facts and legal theories before signing and filing the document.” In affirming the award, we stated that “we find that the district court made sufficient findings of Smith’s failure to properly investigate . . . and of the unreasonableness of Smith’s inquiry to support its determination of sanctions against Smith under I.R.C.P. 11(a)(1).” We did not require a finding that the attorney also filed any document for an improper purpose. This Court has still required a finding of an improper purpose to impose sanctions on appeal under Idaho Appellate Rule 11.2, which has identical wording to Idaho Rule of Civil Procedure 11(a)(1). However, we will henceforth construe Appellate Rule 11.2 in the same manner as set for Civil Rule 11(a)(1). There is no reason to construe the identical wording in both rules differently.

Thus, Idaho Court of Appeal no longer looks to whether the signing party acted in bad faith, but instead, to whether signing the document was reasonable under the circumstances.³²⁵ Reasonableness of inquiry is determined by what a party would have reasonably believed at the time a document is filed.³²⁶ This objective “reasonable inquiry” standard is more onerous than the old “bad faith” standard, so a party seeking an award of attorney fees on appeal should be cognizant of the recent change in Idaho Appellate Rule 11.2.³²⁷

VI. “COMMON-LAW” GROUNDS FOR ATTORNEY FEE AWARDS

Idaho courts have recognized what are frequently referred to as two common-law exceptions to the American Rule.³²⁸ The first of these exceptions provides for attorney fees where a private individual vindicated an important public policy.³²⁹ The second applies in condemnation proceedings.³³⁰ Despite the fact that these doctrines are sometimes described as exceptions to the American Rule,³³¹ they are more accurately characterized as exceptions to Idaho courts’ usual interpretation of Idaho Code section 12-121.³³² Idaho Code section 12-121 is generally inter-

325. *Durrant v. Christensen*, 785 P.2d 634, 638, 17 Idaho 70, 74 (1990).

326. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 803 P.2d 993, 1001, 119 Idaho 87, 95 (1991).

327. *See generally* IDAHO APP. R. 11.2.

328. *Walters*, *supra* note 34, at 7.

329. *Heller v. Cenarrusa*, 682 P.2d 524, 530–31, 106 Idaho 571, 577–78 (1984) (explaining the Private Attorney General Doctrine).

330. *Telford Lands LLC v. Cain*, 303 P.3d 1237, 1248, 154 Idaho 981, 992 (2013).

331. *Walters*, *supra* note 34, at 7.

332. *Heller*, 682 P.2d at 531, 106 Idaho at 578.

preted as requiring frivolous conduct.³³³ However, the plain language of the award allows for attorney fees in “any civil action.”³³⁴ Both exceptions allow for attorney fees under an interpretation of section 12-121 that does not require a showing of frivolous conduct.³³⁵

A. The Private Attorney General Doctrine

Under the Private Attorney General Doctrine, Idaho courts may award attorney fees to a party who prevails in a suit that vindicates an important public policy.³³⁶ The Private Attorney General Doctrine is said to incentivize private litigation to enforce public rights.³³⁷ Some have questioned how strong that incentive actually is,³³⁸ because past decisions have made it difficult to predict whether a litigant invoking the doctrine would be successful.³³⁹

The Idaho Supreme Court first recognized the Private Attorney General Doctrine in 1980 when it decided *Ada County v. Red Steer Drive-Ins of Nevada, Inc.*³⁴⁰ There, the Court adopted California’s private attorney general doctrine, which utilized a three-part analysis to determine whether or not a party was entitled to an award of fees:

[T]hree basic factors are to be considered in awarding attorney’s fees under the theory of private attorney general. They are: “(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, [and] (3) the number of people standing to benefit from the decision.”³⁴¹

Ultimately, the Court in *Red Steer* declined to award fees under the Private Attorney General Doctrine.³⁴² But in *Hellar v. Cenarrusa*, the doc-

333. See discussion *supra* Part V.A.

334. IDAHO CODE § 12-121 (2015).

335. *Heller*, 682 P.2d at 531, 106 Idaho at 578.

336. See, e.g., *Fox v. Bd. of Cnty. Comm’rs, Boundary Cnty.*, 827 P.2d 697, 699, 121 Idaho 684, 686 (1992) (upholding award of attorney fees in favor of plaintiff who brought suit to protest relicensing procedures of taverns located near his property, and noting that plaintiff pursued the action “to ensure that Boundary County was governed by rule of law, not of man. . . . [a]s a result of this litigation, all of the citizens of Boundary County benefitted from [Plaintiff’s] perseverance”).

337. See generally *id.*

338. Mark D. Perison, *A Guide to Attorney Fee Awards in Idaho*, 32 IDAHO L. REV. 29, 53–54 (1995).

339. *Id.* (citing *Fox v. Bd. of Cnty. Comm’rs, Boundary County*, 121 Idaho 684, 827 P.2d 697 (1992) (upholding award of fees to plaintiff who brought suit to protest relicensing procedures of taverns located near his property); *Taggart v. Hwy. Bd. for N. Latah Cnty. Hwy. Dist.*, 115 Idaho 816, 771 P.2d 37 (1988) (reversing an award of fees to a plaintiff who brought suit against a highway district to protest classification of a road located close to his property)).

340. *Ada Cty. v. Red Steer Drive-Ins of Nevada, Inc.*, 609 P.2d 161, 167–68, 101 Idaho 95, 100–01 (1980).

341. *Id.* at 100 (quoting *Serrano v. Priest*, 569 P.2d 1303 (1977)).

342. *Id.* at 101.

trine was applied to uphold an award of attorney fees where a party successfully challenged a legislative reapportionment scheme as violating the Idaho Constitution.³⁴³ In holding that the reapportionment scheme was contrary to the Idaho Constitution, the court reasoned that an award of fees to the plaintiff under the Private Attorney General Doctrine was proper because:

The apportionment of the Idaho Legislature affects every Idaho citizen It would be hard to imagine a case which would be more appropriate for an award of attorney's fees under the Private Attorney General Theory than the instant case considering its magnitude and the number of Idaho citizens affected thereby.³⁴⁴

The defendants protested that Idaho law did not provide for an award of attorney fees in the absence of an applicable statute.³⁴⁵ The Court addressed this argument by suggesting that Idaho Code section 12-121 was the source of authority for an award of fees under the Private Attorney General Doctrine:

We continue to adhere to the so-called "American rule" to the effect that attorney fees are to be awarded only where they are authorized by statute or contract. Since I.C. § 12-121 provides the trial court with discretion to award fees to the prevailing party, there is a statutory basis and the question [] becomes whether the I.R.C.P. 54(e)(1) limitation restricting the award to those cases which are "defended frivolously, unreasonably, or without foundation" is applicable. We hold that the limitation does not apply where, as here, the award of attorney fees is under the Private Attorney General Doctrine.³⁴⁶

Instead of using a "common law" justification for the Private Attorney General doctrine, the *Heller* Court simply determined that Idaho Rule of Civil Procedure 54(e) did not limit Idaho Code section 12-121 frivolous or unreasonable cases in certain instances.³⁴⁷ Idaho Code section 12-121 still provided a statutory basis for an award of attorney fees.³⁴⁸ Thus, *Heller* strongly suggests that characterizing the Private Attorney General Doctrine as an exception to the American Rule is not always accurate. On the other hand, in *Fox v. Board of County Commissioners*, the Court upheld an award of attorney fees under the Private Attorney

343. *Heller v. Cenarrusa*, 682 P.2d 524, 531, 106 Idaho 571, 578 (1984).

344. *Id.*

345. *Id.*

346. *Id.* The express language of Idaho Code section 12-121 gives courts the broad authority to award attorney fees to the prevailing party "[i]n any civil action." IDAHO CODE § 12-121 (2014); See also discussion *supra* Part V.A.

347. *Id.*

348. *Id.*

General doctrine without invoking 12-121 as a basis.³⁴⁹ This inconsistency renders the Private Attorney General Doctrine to be somewhat unpredictable in its interpretation and application.

In 1984, Idaho Code section 12-117 was enacted to provide for attorney fee awards against individuals who successfully brought suit against public agencies.³⁵⁰ Eight years later, the Court, in *Roe v. Harris*, called into question the Private Attorney General Doctrine by holding it inapplicable in cases where parties could invoke Idaho Code section 12-117.³⁵¹ The *Roe* Court also discussed at length the interplay between section 12-117, the Private Attorney General Doctrine, and section 12-121:

The Court has never addressed the issue of the interplay between I.C. § 12-117 and the private attorney general doctrine. In many cases where the Court has discussed the private attorney general doctrine, I.C. § 12-117 did not apply because a state agency was not involved. . . . Idaho Code § 12-117 was amended in 1994 so that it now applies to "a state agency, a city, a county or other taxing district." I.C. § 12-117(1).³⁵² Thus, in some cases involving the private attorney general doctrine, I.C. § 12-117 did not apply, although it would now In *Hellar v. Cenarrusa* . . . the Court linked the authority to award attorney fees pursuant to the private attorney general doctrine to I.C. § 12-121. We must compare this formulation of the private attorney general doctrine to I.C. § 12-117

Therefore, we must first address whether there is a conflict between I.C. § 12-117 and the private attorney general doctrine, which draws its viability from I.C. § 12-121. If the question were simply a conflict between I.C. §§ 12-121 and -117, the latter would prevail Comparing the private attorney general doctrine with I.C. § 12-117, the private attorney general doctrine considers the *value of the prevailing party's contribution*, while I.C. § 12-117 considers the *character of the losing party's case*. This difference evidences a legislative intent to make the standard of I.C. § 12-117 the basis for an attorney fee award against a state agency, rather than the tests encompassed under the private attorney general doctrine. This legislative intent causes us to rule that the private attorney general doctrine is

349. See generally *Fox v. Bd. of Cnty. Comm'rs, Boundary Cnty.*, 827 P.2d 697, 121 Idaho 684, (1992) (explaining and applying the Private Attorney General Doctrine, and noting that because the Private Attorney General doctrine applied, there was no need to address Idaho Code section 12-121).

350. 1984 Idaho Sess. Law 501.

351. *Roe v. Harris*, 917 P.2d 403, 406-07, 128 Idaho 569, 572-78 (1996) *overruled by Rincover v. State, Dep't of Finance, Sec. Bureau*, 976 P.2d 473, 143 Idaho 547 (1998).

352. See *supra* Part IV.C.

not available as the basis for an award of attorney fees in a case against a state agency.³⁵³

In 2012, the Idaho Supreme Court reiterated that Idaho Code section 12-117 provides an exclusive basis for attorney fee awards against public agencies.³⁵⁴ The Court has since held that section 12-117 is not actually the exclusive basis for attorney fee awards in cases involving state agencies.³⁵⁵ However, due to the nature of the Private Attorney General Doctrine—vindicating a valuable public purpose—cases where the doctrine might be invoked are highly likely to fall under the purview of Idaho Code section 12-117. The Idaho Legislature’s recent expansion of Idaho Code section 12-117 to administrative proceedings is likely to further limit the application of the doctrine in the future.³⁵⁶ Because of the inconsistencies in Idaho courts’ application and analysis of the Private Attorney General Doctrine, a party requesting attorney fees from a public entity would be well advised to cite Idaho Code section 12-117 as a basis for an award of attorney fees.³⁵⁷

B. Condemnation Proceedings

Idaho courts may award attorney fees in eminent domain proceedings.³⁵⁸ Similar to cases involving the Private Attorney General Doctrine, Idaho courts today utilize a broad reading of Idaho Code section 12-121 to award attorney fees in cases between condemnors and condemnees.³⁵⁹ Because Idaho courts awarding fees in condemnation proceedings invoke section 12-121, such awards have a statutory basis and thus are not a literal exception to the American Rule.

In 1983, the Idaho Supreme Court decided *Ada County Highway District By and Through Fairbanks v. Acarrequi*.³⁶⁰ There, the Court upheld a lower court’s award of attorney fees to a litigant who successfully obtained an award of attorney fees against a local highway district.³⁶¹ The Court announced what came to be described as a common-law exception to the American Rule:

[W]e adopt a new view and hold that, in condemnation actions, attorneys’ fees may be awarded to the condemnee without a

353. *Harris*, 917 P.2d at 406–07, 128 Idaho at 572–78 (1996).

354. *Arambarris v. Armstrong*, 274 P.3d 1249, 1255, 154 Idaho 734, 740 (2012).

355. *See discussion supra* Part IV.C.

356. *See discussion supra* Part IV.C.

357. *See discussion supra* Part IV.C

358. *See generally* *Ada Cty. Highway Dist. v. Acarrequi*, 673 P.2d 1067, 105 Idaho 873 (1983), *overruled on other grounds by* *State Dep’t of Transportation v. Grathol*, 343 P.3d 480, 158 Idaho 38 (2015).

359. *Telford Lands LLC v. Cain*, 303 P.3d 1237, 1248, 154 Idaho 981, 992 (2013).

360. *See generally* *Acarrequi*, 673 P.2d 1067, 105 Idaho 873.

361. *See generally id.*

showing and finding that the action was brought and pursued frivolously, unreasonably, or without foundation. . . .

. . . .

We now hold that an award of reasonable attorneys' fees to the condemnee in an eminent domain proceeding is a matter for the trial court's guided discretion and . . . such award will only be overturned upon a showing of abuse [of discretion.]³⁶²

Although the *Acarrequi* Court did not expressly state that section 12-121 provided the basis for its award of attorney fees in that case,³⁶³ subsequent cases have cited to *Acarrequi* as standing for the proposition that section 12-121 provides the basis for attorney fee awards in condemnation proceedings.³⁶⁴

In order to determine whether a party is entitled to an award of fees in an eminent domain proceeding, Idaho courts apply a series of factors set forth in *Acarrequi*.³⁶⁵ These include:

- whether the condemnor had extended a settlement offer of at least ninety percent of the eventual jury verdict;
- whether the settlement offer was made in a reasonably timely fashion;
- whether there was any dispute as to the actual public use and necessity of the condemned property; and
- whether the condemnee voluntarily relinquished possession of the property at issue during the process of resolving a just compensation issue.³⁶⁶

Commentators have noted that at least one case decided since *Acarrequi* arguably gave little weight to the *Acarrequi* factors and seemed to leave the determination of an award of attorney fees largely to the district court's discretion.³⁶⁷ However, in recent cases the Court reaffirmed the *Acarrequi* factors as the proper framework under which to analyze whether or not a condemnee is entitled to an award of attorney fees.³⁶⁸

Until 2014, only condemnees had received awards of attorney fees in condemnation proceedings.³⁶⁹ However, last year in *State Depart-*

362. *Id.* at 1070–71, 105 Idaho 873, 876–77 (1983).

363. *Id.*

364. *Telford Lands LLC v. Cain*, 303 P.3d 1237, 1248, 154 Idaho 981, 992 (2013).

365. *Ada Cty. Highway Dist. v. Acarrequi*, 673 P.2d 1067, 105 Idaho 873 (1983), *overruled on other grounds by State Dep't of Transportation v. Grathol* 343 P.3d 480, 158 Idaho 38 (2015). *See* discussion *supra* note 358.

366. *Acarrequi*, 673 P.2d 1067, 105 Idaho 873.

367. *See* Perison, *supra* note 2, at 33; *see also* State, ex rel. Ohman v. Ivan H. Talbot Family Trust, 820 P.2d 695, 698–99, 120 Idaho 825, 828–29 (1991).

368. *Telford Land LLC*, 303 P.3d at 1248, 154 Idaho at 992.

369. *See* Grathol, 343 P.3d at 480, 158 Idaho at 38.

ment of Transportation v. Grathol, the Idaho Supreme Court awarded attorney fees to a condemnor for the first time:

Despite never awarding fees to a condemnor, we have left open that possibility. We stated in *Acarrequi*: “Except in the most extreme and unlikely situation, we cannot envision an award of attorneys’ fees and costs to a condemnor.” In subsequent decisions, this Court did not limit or withdraw that statement. Indeed, we reassert that courts can award attorney fees to a condemnor in extreme and unlikely situations.³⁷⁰

The *Grathol* Court reiterated that a condemnee seeking an award of fees based on an eminent domain proceeding must meet the *Accarequi* factors.³⁷¹ However, the Court set forth a heightened standard for condemnors seeking an award of attorney fees:

First, the condemnor must have met all of [the] *Acarrequi* factors that applied to the condemnor. Second, the condemnor’s case must have been brought reasonably, not frivolously, and have adequate foundation. Finally, the condemnee must meet the standard in section 12-121. Fees can be awarded under section 12-121 only when the court “finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation.” When a district court decides in its discretion that a case meets all three of these elements, the condemnor recovers its attorney fees.³⁷²

If a condemnor can show the existence of the above factors, a court in its discretion can deem the case to be “extreme and unlikely” under the requisite *Acarrequi* analysis, and the condemnor may receive an award of attorney fees.³⁷³ Given the existence of Idaho Code section 12-117, which specifically deals with suits against government entities, it is unclear why section 12-121 is still applied to condemnation proceedings.

VII. A NOTE ON IDAHO APPELLATE RULE 41

Idaho Appellate Rule 41 is frequently—and incorrectly—cited as a substantive basis for an award of attorney fees on appeal.³⁷⁴ Idaho Appellate Rule 41 sets forth the procedure for obtaining an award of attorney fees on appeal. The first and most important requirement of the rule is that the party must place a request for fees in its initial brief:

370. *Id.* at 493, 158 Idaho at 51.

371. *Id.*

372. *Id.*

373. *Id.* at 493–94, 158 Idaho 51–52.

374. *See, e.g.,* *W. Home Transp., Inc. v. Idaho Dep’t of Labor*, 318 P.3d 940, 944, 155 Idaho 950, 954 (Idaho 2014).

Any party seeking attorney fees on appeal must assert such a claim as an issue presented on appeal in the first appellate brief filed by such party as provided by Rules 35(a)(5) and 35(b)(5); provided, however, the Supreme Court may permit a later claim for attorney fees under such conditions as it deems appropriate.³⁷⁵

Idaho Rule of Appellate Procedure 41 goes on to set forth other procedural requirements for requesting a fee award on appeal:

(b) Oral Argument on Attorney Fees. At the time of oral argument of an appeal, the parties may present argument as to whether or not the party claiming attorney fees has a legal right thereto.

(c) Adjudication of Right to Attorney Fees. The Supreme Court in its decision on appeal shall include its determination of a claimed right to attorney fees, but such ruling will not contain the amount of attorney fees allowed.

(d) Amount of Attorney Fees. If the Court determines that a party is entitled to attorney fees on appeal, the party claiming attorney fees shall file a claim concurrently with, or as part of, the memorandum of costs provided for by Rule 40. The claim for attorney fees, which at the discretion of the court may include paralegal fees, shall be accompanied by an affidavit setting forth the method of computation of the attorney fees claimed. Attorney fees may also include the reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing the party's case. The opposing party may object to the amount of attorney fees claimed in the same manner as provided for objections to a memorandum of costs in Rule 40. The Court shall determine the amount of attorney fees or remand this question to the district court or agency to hear additional evidence and determine the amount of attorney fees to be allowed. Upon the determination of the amount of attorney fees, the Clerk shall insert the amount thereof in the remittitur in the same manner as the Clerk inserts costs pursuant to Rule 40(f).

(e) Number of Copies. An original and six copies of the claim or memorandum for attorney fees, objections to attorney fees, and briefs in support of or in opposition thereto shall be filed with the Clerk of the Supreme Court.³⁷⁶

Idaho Appellate Rule 41 is often misapplied in Idaho courts by parties who misunderstand that the Rule is a procedural directive to parties seeking an award of fees on appeal, rather than a substantive source of

375. IDAHO APP. R. 41(a).

376. IDAHO APP. R. 41(b)–(e).

authority for a court to award fees.³⁷⁷ To some degree, this is understandable, for language in some cases where I.A.R. 41 has been cited alongside Idaho Code section 12-121 could give the impression that I.A.R. 41 does provide a substantive basis for a fee award. This is particularly evident when I.A.R. 41 is utilized in tandem with Idaho Code section 12-121, which provides a substantive basis for an award of attorney fees at trial and on appeal.

An example of the distinction between I.A.R. 41 and Idaho Code section 12-121 can be seen in *Durrant v. Christensen*, where the Idaho Supreme Court applied I.A.R. 41 and Idaho Code section 12-121 as follows:

Christensen has requested an award of attorney fees on [petitioner]’s direct appeal as provided for by I.A.R. 41(a) and I.C. § 12-121. Such an award is appropriate when we are left with an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation The appellants . . . have presented no persuasive argument that the district court, in granting attorney fees, abused its discretion or misapplied the law, and we award attorney fees on appeal to Christensen in an amount to be determined as provided by I.A.R. 41(d).³⁷⁸

At first blush, it might be assumed that the Court was citing both Idaho Appellate Rule 41 and Idaho Code section 12-121 as a grant of authority to award attorney fees for frivolous appeals. However, a more critical look at *Durrant* reveals that the party, Christensen, requested attorney fees on appeal by following the procedural requirement of Idaho Appellate Rule 41(a) by requesting fees in his brief.³⁷⁹ Idaho Appellate Rule 41(d) was simply cited by the *Christensen* court as the procedural mechanism which the Court would determine the amount to be awarded.³⁸⁰ In other words, Idaho Code section 12-121 was the substantive basis upon which the Court awarded attorney fees, and Idaho Appellate Rule 41 provided the procedural mechanism for doing so.³⁸¹

The Idaho Supreme Court recently provided a succinct explanation of the relationship of Idaho Appellate Rule 41 to other rules and stat-

377. *W. Home Transp.*, 318 P.3d at 944, 155 Idaho at 954.

378. *Durrant v. Christensen*, 785 P.2d 634, 638–39, 117 Idaho 70, 74–75 (1990). *See also* *Nield v. Pocatello Health Services, Inc.*, 332 P.3d 714, 763, 156 Idaho 802, 852 (2012) (“Ms. Nield is entitled to attorney’s fees and costs under Idaho Code § 12-121 and Idaho Appellate Rules 40 and 41. Idaho Code section 12-121 and I.A.R. 41 allow for the award of attorney fees and costs in a civil action where a matter was defended frivolously, unreasonably, and without foundation.”).

379. *Durrant*, 785 P.2d at 638–39, 117 Idaho at 74–75.

380. *Id.*

381. *Id.*

utes that grant a court with the actual authority to award attorney fees to parties on appeal:

Davis seeks an award of attorney fees under Idaho Appellate Rules 40 and 41. He has not cited any statutory or contractual provision authorizing such award. Idaho Appellate Rule 40 provides for the awarding of costs on appeal, and Rule 41 specifies the procedure for requesting an award of attorney fees on appeal. *Neither rule provides the authority for awarding attorney fees . . .* Therefore, we will not address that issue.³⁸²

In *International Real Estate Solutions, Inc. v. Arave*, decided last year, the Idaho Supreme Court addressed the misapplication of Idaho Appellate Rule 41 in cases where an appeal is allegedly frivolous or unreasonable:

International Real Estate also requests attorney fees under I.A.R. 41, arguing that such an award is appropriate because the Araves brought this appeal frivolously and unreasonably. “We have repeatedly held that simply requesting an award of fees pursuant to Idaho Appellate Rule 41, without citing any statutory or contractual basis for the award, is insufficient to raise the issue of attorney fees on appeal.” *Athay v. Stacey*, 142 Idaho 360, 371, 128 P.3d 897, 908 (2005). Here, Intermountain Real Estate has failed to cite any statutory basis for its separate request for an award under I.A.R. 41.³⁸³

As the *International Real Estate Solutions* Court explained, the Idaho Supreme Court has, in fact, repeatedly explained that a party’s mere citation to the rule is not, on its own, enough to warrant an award of attorney fees.³⁸⁴ Thus, despite some language that might indicate to the contrary, a party who wishes to obtain an award of fees on appeal must adhere to I.A.R. 41 by citing to a separate substantive basis for an award of attorney fees.³⁸⁵

VIII. CONCLUSION

As this Article hopefully illustrates, there are a vast array of contexts in which a litigant may obtain an award of attorney fees. However, the American Rule remains in force in Idaho in that a litigant must ac-

382. *Gilman v. Davis*, 67 P.3d 78, 81–82, 138 Idaho 599, 602–03 (2003) (emphasis added).

383. *Int’l Real Estate Solutions, Inc. v. Arave*, 340 P.3d 465, 47–71, 157 Idaho 816, 821–22 (2014).

384. *See, e.g., W. Home Transp., Inc. v. Idaho Dep’t of Labor*, 318 P.3d 940, 944, 155 Idaho 950, 954 (2014) (declining to award attorney fees on appeal where party cited only to IAR 41 in its brief); *see also Int’l Real Estate Solutions, Inc.*, 340 P.3d at 471, 157 Idaho at 822; *Athay v. Stacey*, 128 P.3d 897, 908, 142 Idaho 360, 371 (2005).

385. *W. Home Transp.*, 318 P.3d at 944, 155 Idaho at 954 (2014).

curately cite to a contractual provision or an applicable statute as a prerequisite to receiving an award of attorney fees. Thus, it is well worth a relatively modest time investment to ensure that one properly sets forth a basis for an award of attorney fees.

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* The author would like to recognize University of Idaho alum Tammy Springer, whose idea it was to create an updated overview of attorney fee awards in Idaho. The author would also like to thank Mark Perison, author of *A Guide to Attorney Fee Awards in Idaho*, for providing advice during the early planning stages of this piece. See Mark D. Perison, *A Guide to Attorney Fee Awards in Idaho*, 32 IDAHO L. REV. 29 (1995). Finally, the author would like to express her warmest gratitude for the advice and guidance of her faculty advisor, Professor Rich Seamon.