5-11-2010

Garner v. Povey Clerk's Record v. 5 Dckt. 37561

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

DANIEL S. GARNER and SHERRI JO GARNER husband and wife; NOLA GARNER, a widow and NOLA GARNER as trustee of the NOLA GARNER LIVING TRUST, dated 7-29-07, Plaintiffs-Respondents, vs. BRAD POVEY and LEIZA POVEY, husband and wife, Defendants-Appellants, and HAL J. DEAN and MARLENE T. DEAN, husband and wife, DOUGLAS K. VIEHWEG and SHARON C. VIEHWEG, husband and wife, JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM as trustees of the JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST, dated 9-17-04; FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign title insurer with an Idaho certificate of authority; and FIRST AMERICAN TITLE COMPANY, INC. an Idaho Corporation, Defendants.	Supreme Court No. 37561-2010

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DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow; and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007,

Plaintiffs,

vs.

Hal J. Dean and Marlene T. Dean, husband and wife; Douglas K. Viehweg and Sharon C. Viehweg, husband and wife; Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Revocable Trust, dated September 17 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation,

Defendants.

Case No. CV-08-342

MOTION TO DISALLOW COSTS

Idaho R. Civ. P. 54(d)(6)

The plaintiffs, Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow; and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007

(Garners), through counsel, Thatcher Beard St. Clair Gaffney PA, respectfully submit this Motion to Disallow Costs pursuant to Rule 54(d)(6) of the Idaho Rules of Civil Procedure. This motion is supported by the argument below, the second affidavit of Daniel S. Garner, and the affidavit of Jeffrey D. Brunson.

BACKGROUND AND INTRODUCTION

Since the late 1980s, the defendant Garners have routinely accessed their property west of the Twin Lakes Canal (Garner property) via what has been commonly described in this litigation as the Northern Road. The Garners have sporadically accessed their property via the Neigum Driveway. During a period of time from 1990 to 1992, the Poveys owned the servient estate through which the Northern Roadway passes. The Poveys sold the servient estate prior to the commencement of this lawsuit. In late May 2008, the Viehwegs, successors to the Poveys' interest in the servient estate, obstructed access to the Garner property via the Northern Roadway by erecting a fence across it. The Viehwegs and First American Title Company took the position that the Garners did not have legal access to their property via the Northern Roadway. Faced with the prospect of losing effective access to their property, the Garners conducted extensive investigation and an evaluation to determine what judicial relief was available to them. In the course of this process, the Garners concluded that certain acts and omissions by the Poveys, including the manner in which the Poveys transferred the servient estate to the Deans, Neigums, and Viehwegs, were at the heart of the plight in which the Garners found themselves. Thus, the Garners named the Poveys as defendants in the lawsuit.

At the time the Garners sought leave from the Court to amend their complaint, the Poveys moved to dismiss the Garners' proposed second amended complaint. The parties briefed the issues, and the Court heard oral argument from counsel. The Court denied the Poveys' motion to

dismiss and specifically found that the Garners had made colorable claims of easement interference and breach of warranty. (Decision and Order on Povey Defendants' Motion to Dismiss Amended Complaint at 8.) Shortly after the Court denied the Poveys' motion to dismiss, counsel for the Deans, Neigums, and Viehwegs reached out to counsel for the Garners in an effort to reach settlement. Complex settlement negotiations between the Garners and the Deans, Neigums, and Viehwegs commenced in April 2009. During the settlement negotiations, the Poveys gave notice of depositions of the Garners to be held on June 2 and June 3. On the eve of the depositions, counsel for the Deans, Neigums, and Viehwegs requested that the Poveys cancel or postpone the depositions. The basis for this request was that the Deans, Neigums, and Viehwegs were close to reaching settlement with the Garners. As indicated in the affidavit of Blake S. Atkin, the depositions were not canceled. Following the depositions, the Garners continued active settlement negotiations with the Deans, Neigums, and Viehwegs. After months of negotiation, the Garners reached a settlement agreement with the Deans, Neigums, Viehwegs, and First American Title Company in late September 2009. Under the agreement, the Garners obtained an assurance that they would have legal access to their property via a surveyed and recorded easement. Several days prior to the execution of the settlement agreement, on September 1, the Poveys moved for summary judgment. On October 27, 2009, the Court issued its memorandum decision granting the Poveys' motion for summary judgment. The Poveys subsequently filed and served a copy of their Memorandum of Costs and Fees on November 9, 2009. For the reasons stated below, the Court should disallow entirely the attorney fees claimed by the Poveys. Also, it should disallow the costs claimed by the Poveys to the extent those costs are unreasonably incurred.

ARGUMENT

The Court should deny the Poveys' request for attorney fees entirely because no contract, statute, rule of civil procedure, or other provision provides a basis for this Court to award attorney fees to the Poveys in this case. Idaho Rule of Civil Procedure 54(e)(1) states:

> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation....

IDAHO R. CIV. P. 54(e)(1). In their memorandum of costs and fees, the Poveys cite two bases for an award of attorney fees: Idaho Code § 12-120(3) and Idaho Code § 12-121. *See* Poveys' Mem. Costs and Fees at 2-5. The Poveys are not entitled to an award of attorney fees under § 12-120(3) because there is no commercial transaction at issue in this lawsuit, and even if there were a commercial transaction, it was not the basis of the Garners' claims on which the Poveys prevailed. Likewise, the Poveys are not entitled to an award of attorney fees under § 12-121 because the Garners pursued their claims in good faith with a reasonable basis in law and fact. *See Treasure Valley Concrete, Inc. v. State of Idaho*, 132 Idaho 673, 677-78, 978 P.2d 233, 237-38 (1999).

I. The Poveys are not entitled to attorney fees under Idaho Code § 12-120(3).

a. There is no commercial transaction at issue in this lawsuit.

Nola Garner's ownership of property at issue in this lawsuit is traceable to her purchase from the Poveys in 1992. However, that purchase was not a commercial transaction for purposes of § 12-120(3) analysis. In considering § 12-120 attorney fee claims, the Supreme Court of Idaho has recognized that "the term commercial transaction is not generally applied to real estate transactions, or to issues involving the ownership of property." *Treasure Valley*, 132 Idaho at

677, 978 P.2d at 237 (1999).[1] If Gary's and Nola's purchase of real property from the Poveys qualifies as a "transaction" at all, it was indisputably *a real estate transaction*, not a commercial transaction. Thus, there is no basis for applying § 12-120(3). As discussed further below, even if the Court were to deem the sale of real estate from the Poveys to Nola Garner in 1992 a commercial transaction, that transaction was so remotely connected to the issues litigated in this case that it could not provide the basis for awarding attorney fees under § 12-120(3).

The Poveys make much ado of the fact that in their complaint, the Garners characterized Nola's and Gary's acquisition of property from the Poveys in 1992 as a commercial transaction. This characterization was nothing more than an attempt by the Garners to exhaust every conceivable and alternative basis for recovery at the complaint stage, and, as this Court has already recognized in this case, pleading in the alternative is expressly allowed under Rule 8 of the Idaho Rules of Civil Procedure. (Decision and Order on Povey Defendants' Motion to Dismiss Amended Complaint at 5-6.) In light of *Treasure Valley*, cited above, § 12-120 does not apply. Moreover, after describing Nola's and Gary's purchase of property from the Poveys as a commercial transaction in their complaint, the Garners never styled their claims as grounded in a commercial transaction in further stages of the litigation in the fashion customary of § 12-120 situations.[2] Finally, it must be noted that in their answer to the Garners' complaint, the Poveys *denied* that Nola's and Gary's 1992 purchase from the Poveys was a commercial transaction.[3] It would be illogical and arbitrary for the Court to find a commercial transaction based on how the Garners pled the issue in their complaint when the Poveys, who now readily embrace the

[1] *See also C & G v. Rule*, 135 Idaho 763 25 P.3d 82 (2001)(where issue was a determination of rights in an easement, attorney fees under § 12-120(3) were not appropriate).
[2] The relevance the 1992 sale has to the Garners' claims is that it was the method by which Nola acquired her interest in the property at issue in this case.
[3] The Poveys denied paragraph 37 of the Garners' second amended complaint, which contains the allegation that the 1992 purchase of real estate was a commercial transaction.

commercial transaction concept, denied there was a commercial transaction when they answered the Garners' complaint.

b. Even if the real estate transaction between Gary and Nola and the Poveys was a commercial transaction, it was not the gravamen of the lawsuit.

Although the Poveys are the prevailing party with respect to the claims asserted against them[4], the specific grounds that provide for an award of attorney fees pursuant to Idaho Code § 12-120(3) do not exist in this case. The Idaho Supreme Court has ruled frequently on the issue of awarding attorney fees under § 12-120(3) and it has consistently applied the same rules. "[I]n any civil action to recover . . . in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney fee to be set by the court." *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 783, 792 P.2d 345, 348 (1990). However, "the award of attorney's fees is not warranted every time a commercial transaction is remotely connected with the case." *Id.* at 784, 349; *Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 131 Idaho 657, 663, 962 P.2d 1041, 1047 (1998). Rather, "[t]he critical test is whether the commercial transaction *comprises the gravamen of the lawsuit.*" *Esser Electric v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 921, 188 P.3d 854, 863 (2008)(emphasis added). Attorney's fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover." *Brower*, 117 Idaho at 784, 792 P.2d at 349. "To hold otherwise would be to convert the award of attorney's fees from an exceptional remedy justified only by statutory authority to a matter of right in virtually every lawsuit filed." *Id.*

Here, the gravamen of the Garners' lawsuit is a dispute over the existence of and the

[4] The Poveys prevailed as to the claims the Garners brought specifically against the Poveys, but the Court should take into account the fact that the Garners obtained favorable results in their claims against the other defendants in the overall action.

Poveys' interference with the Garners' easement, not a commercial transaction. The so-called "transaction" by which Nola and Gary acquired their property was not the gravamen of the lawsuit; the transaction itself was not integral to the Garners' claims; and it was not the basis upon which the Garners attempted to recover. Instead, the basis upon which the Garners attempted to recover in this lawsuit was the Poveys' acts of interference with the Northern Roadway, ie: acts of physical interference and deeding servient estate property without identifying and excepting the Garner easement in those deeds.[5] The majority of the interfering acts the Garners alleged against the Poveys were many years removed from Nola's and Gary's purchase of property from the Poveys, and these acts of interference certainly did not arise out of a commercial transaction, or even a real estate transaction for that matter.

The Idaho Supreme Court case of *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 152 P.3d 594 (2007), illustrates what it means for a commercial transaction to be so integral to a claim that it must be considered the basis upon which the plaintiff seeks recovery. In *Blimka*, the plaintiff ordered and paid for 26,500 pairs of blue jeans from the defendant wholesaler. Upon receipt of the blue jeans, the plaintiff determined that the blue jeans did not conform to the representations of quality made by the defendant wholesaler, so the plaintiff rejected the goods. This rejection led to litigation between the parties, and the plaintiff claimed fraud, breach of implied warranty of merchantability, and breach of express warranty. Because these claims

[5] The Poveys misrepresent the arguments the Garners made in this case. In their brief, the Poveys state, "In their memorandum in opposition to these Defendants' Motion for Summary Judgment, Plaintiffs again tied all their claims back to the commercial transaction between Gary and Nola Garner and went on to argue that all the arguments made by them apply to their claims under the warranty deed." Mem. Costs and Fees at 3. In reality, the Garners only referenced Gary's and Nola's purchase of property from the Poveys to show how the Garners (Gary and Nola, but not Daniel) acquired their interest in the property and how the Poveys' obligation to protect the Garner easement arose. The Garners did not "tie their claims" to any commercial transaction. Moreover, the Garners always maintained that Daniel's claims against the Poveys arose completely independently of Gary's and Nola's purchase of property from the Poveys. Daniel's later acquisition of an interest in the property Nola and Gary purchased did not affect the independent basis he had for making a claim against the Poveys, and Daniel's independent basis was not grounded in any transaction with the Poveys of any nature.

arose directly out of the defendant's conduct within the context of the commercial transaction (ie: fraudulent representations about the quality of the blue jeans and the ultimate sale of nonconforming blue jeans to the plaintiff), the court found that a commercial transaction was integral to the lawsuit and constituted the basis upon which the plaintiff sought recovery. *Blimka*, 143 Idaho at 729, 152 P.3d at 600.

The instant case is distinguishable from *Blimka*.[6] Here, the wrongful conduct that gave rise to the Garners' claims against the Poveys did not occur within the context of a commercial transaction. Rather, most of it occurred much later. If, for example, the Garners had sued the Poveys for some material representation made by the Poveys during the process of negotiation for the 1992 sale of the property, then a commercial transaction[7] could have been the gravamen or basis of the lawsuit. Such, however, is not the case. From the very outset, the gravamen of this lawsuit was, and still is, an easement dispute. In *Brown v. Miller,* 140 Idaho 439, 95 P.3d, 57 (2004), the Idaho Supreme Court declined to award attorney fees to the prevailing party under § 12-120 in a case where the main issue was an easement. The court reasoned, "Because this case involves an easement, there is no basis for an award of fees under this statute."[8] *Brown*, 140 Idaho at 445, 95 P.3d at 64. Here, as in *Brown*, the central issue in this case is an easement, so an award of attorney fees under § 12-120 is not appropriate.

II. The Poveys are not entitled to attorney fees under Idaho Code § 12-121.

The Court devoted thirty four pages to analyzing and discussing the issues raised by the

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[6] *See also Esser Electric v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 188 P.3d 854 (2008). In *Esser*, the plaintiff claimed against the defendant for breach of contract and unjust enrichment. The defendant counterclaimed, alleging breach of contract and fraud. All these claims arose directly out of the parties' contractual agreements wherein the defendant hired the plaintiff to provide material and perform labor on a commercial property. Like *Blimka*, *Esser* is distinguishable from the instant case.

[7] This hypothetical example assumes, *arguendo*, that the real estate transaction was a commercial transaction. As explained above, however, real estate transactions are generally not considered commercial transactions under § 12-120(3).

[8] It is unclear from the opinion what the alleged commercial transaction was, but the implication of the court's decision is clear: easement cases are generally not the type of case in which § 12-120 attorney fees are awarded.

parties' arguments regarding the Poveys' motion for summary judgment, the various motions related to the summary judgment motion, and the Garners' motion for leave to amend their complaint. The Court's decision clearly illustrates that it thoughtfully researched and considered the issues, many of which were complex. Nevertheless, the Poveys assert that the Garners pursued their claims frivolously, unreasonably, and without foundation. Given all the circumstances of this litigation, the Garners did not pursue any claims in bad faith, frivolously, or without foundation. Thus, the Poveys are barred from recovering attorney fees under § 12-121.

The award of attorney fees under § 12-121 is within the Court's discretion. However, "[t]he award of attorney fees pursuant to I.C. § 12-121 is not a matter of right, ...and a court should only award fees 'when it is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation.'" *C & G v. Rule*, 135 Idaho 763, 769, 25 P.3d 76, 82 (2001)(*citing Owner-Operator Indep. Drivers Ass'n, Inc. v. PUC*, 125 Idaho 401, 408, 871 P.2d 818, 825 (1994)). "[W]hen a party pursues an action which contains fairly debatable issues, the action is not considered to be frivolous and without foundation." *C & G*, 135 Idaho at 769, 25. P.3d at 82. "Legal arguments that are supported by a good faith argument for the extension or modification of the law in Idaho are not so plainly fallacious to be deemed frivolous." *Gibson v. Bennett*, 141 Idaho 270, 277, 108 P.3d 417, 424 (Idaho Ct. App. 2005)(citation omitted). "[A] claim is not necessarily frivolous or lacking in merit simply because it ultimately fails as a matter of law." *Gulf Chem. Employees Fed. Credit Union v. Williams*, 107 Idaho 890, 894, 693 P.2d 1092, 1096 (Idaho Ct. App. 1984). "A misperception of the law, or of one's interest under the law is not, by itself, unreasonable. Rather, the question is whether the position adopted was not only incorrect, but so plainly fallacious that it could be deemed frivolous, unreasonable or without foundation." *Snipes v.*

Schalo, 130 Idaho 890, 893, 950 P.2d 262, 265 (Idaho Ct. App. 1997).

The record in this action shows that the Garners pursued their claims in good faith and supported them with plausible and legitimate legal arguments. If the Garners' claims were so plainly frivolous, the Court would have disposed of them in connection with the Poveys' motion to dismiss.[9] The Court, however, denied the Poveys' motion to dismiss and expressly found that the Garners had alleged facts and legal theories constituting colorable claims. (*See* Decision and Order on Povey Defendants' Motion to Dismiss Amended Complaint at 11.) The fact that the Court did not ultimately agree with the Garners' analysis on the various claims does not render those claims frivolous. *See Gulf Chem.*, 107 Idaho at 894, 693 P.2d at 1096. Moreover, the Garners presented issues for the Court's consideration that were at least debatable. This fact seems evident from 1) the Court's active participation and extensive questioning of both parties during the hearing on the Poveys' motion for summary judgment, and 2) the extent of analysis and myriad case citations involved in the Court's memorandum decision.

An instructive case is *C & G*. In that case, the plaintiff, Galvin, sued the defendant railroad company, Union Pacific, and others, alleging that certain quitclaim deeds conveyed an easement interest and not a fee simple interest. In construing the deeds in question, the court determined, contrary to Galvin's assertion, that the quitclaim deeds did, in fact, convey a fee simple interest. Union Pacific sought attorney fees under both § 12-120 and § 12-121. Although Union Pacific prevailed in the action, the court denied attorney fees under both statutes, and, with respect to § 12-121 explained, "Although the Court disagrees with Galvin's arguments regarding the construction of the deeds, we do not find that the action was brought frivolously,

[9] This assertion is especially true with respect to the Garners' claims for breach of warranty and interference with an easement by conveyance. The success of those claims was not dependent upon any further discovery. Rather, those claims were based on undisputed facts and recorded instruments, all of which were made part of the second amended complaint.

unreasonably, or without foundation. We thus decline to award fees to Union Pacific under I.C. § 12-121." *C & G*, 135 Idaho at 769, 25 P.3d at 82. The instant case is similar in this respect to *C & G*. While the Court ultimately disagreed with the Garners' analysis of the effect of various deeds in this case, there is no basis for claiming the action "was brought frivolously, unreasonably, or without foundation." *Id.*

For the first time in this litigation, the Poveys argue that the Garners brought this lawsuit for some illicit purpose, ie: "to avenge a perceived slight by Brad Povey against his niece, Plaintiff Sherri-Jo Garner, and her husband, Plaintiff Daniel Garner." Mem. Costs and Fees at 4. The only evidence supporting this egregious accusation is an affidavit of Jeffrey Neigum, a former defendant in this case. Mr. Neigum's affidavit contains false and irrelevant information, and it should not impact this Court's determination of whether to award attorney fees under § 12-121, or any other statute or rule for that matter.

The Garners brought this lawsuit because they were threatened with loss of year-round access to property upon which they rely for their economic livelihoods. Second Aff. Daniel Garner ¶ 5. The purposes of this lawsuit were to ensure future access to the Garner property and to hold responsible those who played a role in diminishing or eliminating the Garners' access, not to "get even with the Poveys." *Id.* Mr. Neigum could not possibly know the motivation behind the Garners' lawsuit, for the conversation alleged to have taken place between Daniel Garner and Mr. Neigum in ¶¶ 4-5 of Mr. Neigum's affidavit never occurred. Second Aff. Daniel Garner ¶ 4.

In view of the entire litigation, Mr. Neigum's affidavit notwithstanding, the Poveys have not met the very high standard for showing they are entitled to attorney fees under § 12-121. Although ultimately unsuccessful in their claims against the Poveys, the Garners brought these

claims in good faith with a reasonable basis in fact and law. The Court should deny the Poveys attorney fees under § 12-121.

III. The Poveys attorney fees were not reasonably incurred.

Even if the Court were to award attorney fees to the Poveys under either theory they have advanced, the Court should significantly reduce those fees to a reasonable amount. Rule 54 of the Idaho Rules of Civil Procedure provides for a discretionary award of *reasonable* attorney fees to the prevailing party. Idaho R. Civ. P 54(e)(1). The amount of $42,587.50 in attorney fees is excessive and unreasonable. The Poveys did not litigate claims brought by or against other parties in this lawsuit or counterclaims brought by themselves. They litigated only those issues brought by the Garners. While complex, the claims brought by the Garners did not reasonably require the amount of fees generated by the Poveys' counsel. Moreover, the Poveys' approach to this litigation needlessly generated expense by both parties. The Poveys filed an ill-fated motion to dismiss that was not well supported by the facts of the case at the time. The Poveys pressed forward in deposing the Garners despite a request from counsel for the Deans, Neigums, and Viehwegs to postpone the depositions because settlement negotiations were underway. The depositions themselves were very lengthy, given the issues in the case.

As it appeared settlement with the Deans, Neigums, and Viehwegs, was imminent, the Garners offered to settle with the Poveys because the Garners had accomplished the most important objective of the lawsuit: securing access to their property west of the Twin Lakes Canal. On September 17, 2009, the Garners offered to dismiss the lawsuit against the Poveys, with each party to bear its own costs and fees. Affidavit of Jeffrey D. Brunson ¶ 2. The Poveys refused this request and did not present a counteroffer. The Poveys' refusal to accept the offer to dismiss, or at least to discuss reasonable settlement terms, caused both parties to incur significantly greater costs and attorney fees in order to further brief and argue the summary

judgment issues. This circumstance shows that the Garners sought to prevent the costs for both parties from escalating. The Poveys, on the other hand, unreasonably increased the cost of the litigation.

The Poveys' claim for legal research is excessive. Mr. Atkin has not explained the basis for calculating these charges. Most law firms pay a flat rate for computerized research. Mr. Atkin does not make it clear how his firm pays for legal research in his affidavit, but assuming it pays a flat rate, these charges do not reflect what was actually paid for legal research.

IV. Mr. Atkin's affidavit fails under Rule 54(e)(5).

Rule 54(e)(5) requires that a claim for attorney fees as costs shall be supported by an affidavit of the attorney stating the basis and method of computation of the attorney fees claimed. Idaho R. Civ. P. 54(e)(5). The affidavit of Mr. Atkin fails to comply with this rule. While Mr. Atkin attempted to supply an affidavit, the affidavit does not appear to be signed (other than the mark "/s/" appearing in the signature field), and in any event, the affidavit is not properly notarized. The affidavit of the Poveys' attorney failing, the Court should disallow all attorney fees.

CONCLUSION

Based on the foregoing, the Court should disallow all attorney fees claimed by the Poveys as costs. Further, the Court should reduce any costs recoverable as a matter of right to a reasonable amount.

Respectfully submitted this 23rd day of November, 2009.

Michael W. Brown
of Thatcher Beard St. Clair Gaffney, *Attorneys*
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on November 23, 2009, I served a true and correct copy of *Motion to Disallow Costs* on the following individuals by the method of delivery designated:

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624 E. Center
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Pocatello, ID 83204

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Dated: November 23, 2009

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DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow; and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007,

Plaintiffs,

vs.

Hal J. Dean and Marlene T. Dean, husband and wife; Douglas K. Viehweg and Sharon C. Viehweg, husband and wife; Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Revocable Trust, dated September 17 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation,

Defendants.

Case No. CV-08-342

AFFIDAVIT OF JEFFREY D. BRUNSON

STATE OF IDAHO
ss.
County of Madison

I, JEFFREY D. BRUNSON, having first been sworn, depose and state:

1. I am over the age of eighteen, am competent to testify, and do so from personal knowledge.

2. Attached as Exhibit A is a true and correct copy of a letter, dated September 17, 2009, I sent to counsel for the Poveys, Blake Atkin, Esq.

Dated: November 23, 2009.

JEFFREY D. BRUNSON

Subscribed and sworn to before me on November 23, 2009.

Notary Public for State of Idaho
Residing at REXBURG
My Commission Expires: 5/12/2014
(SEAL)

MICHAEL W. BROWN
NOTARY
PUBLIC
STATE OF IDAHO

CERTRIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on November 23, 2009, I served a true and correct copy of AFFIDAVIT OF JEFFREY D. BRUNSON upon the following by the method of delivery designated:

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September 17, 2009

VIA FACSIMILE (801) 533-0380

September 17, 2009

Blake S. Atkin
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Re: Franklin County Case No. CV-08-342, Rule 408 Offer to Compromise

Dear Blake:

Following your telephone conversation with Michael Brown late yesterday and your letter dated today, I believe it would be helpful to address a few issues before both parties make extensive efforts to prepare for the hearing you scheduled for October 6. It is my hope that the issues discussed in this letter will facilitate settlement.

Attorney Fees

If I understand your position correctly, your primary objective in continuing to litigate this case is to seek recovery of the Poveys' attorney fees incurred in this action. You indicate in your letter that your clients will not agree to any settlement unless the Garners pay your clients' attorney fees in the amount of $34,900.

Your demand strikes me as peculiar, considering how your client's attorney's fees were incurred. At the settlement conference, when your clients' attorney fees were presumably insubstantial, your clients indicated their willingness *to pay the Garners* to settle their claims. Since that time, other than the fees incurred in answering the Garners' second amended complaint, the bulk of the attorney fees incurred by your client came as a result of the following actions initiated by you: 1) filing an unsuccessful motion to dismiss (which you subsequently acknowledged to me had little chance of being granted), 2) insisting on conducting two full days of depositions (even though counsel for Deans, Neigums, and Viehwegs asked you to postpone the depositions because a settlement agreement, which would impact the course of the litigation as to your clients, appeared likely), and 3) filing a motion for summary judgment. While it is clearly your prerogative to take these actions, it would be unfair to accuse the Garners of causing your clients' large legal bill at this stage of the litigation.

Assuming for argument's sake only that you were able to prevail in this case, I believe your confidence in your ability to recover attorney fees in this case is misplaced. The primary issue in this case is the existence of and interference with the Garners' easement. These issues are not grounded in a commercial transaction between our clients. Even the Garners' breach of warranty claim is based on your clients' interference with the Garner easement. Thus, an award of attorney fees pursuant to Idaho Code § 12-120 appears highly unlikely.

Consider the following case addressing the award of attorney fees: In *Brown v. Miller*, 140 Idaho 439, 95 P.3d 57 (2004), the Idaho Supreme Court upheld the district court's denial of attorney fees claimed by the party that prevailed at the district court level. In determining whether Idaho Code § 12-120 applied to the case, the court reasoned, "Because this case involves an easement, there is no basis for an award of fees under this statute." *Brown*, 140 Idaho at 445, 95 P.3d at 63. The central issue in this case is an easement, which provides no § 12-120 basis for attorney fees. The gravamen of this case deals with easement and interference with easement and is not a commercial transaction.

The only other basis for recovery of attorney fees would be under Idaho Code § 12-121. In order to prevail under that statute, the court would need to find, "from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation." *Brown*, 140 Idaho at 445, 95 P.3d at 63. Such a finding by the court again is unlikely, especially given the fact that the court denied your clients' motion to dismiss. In its order, the court indicated that the Garners made colorable claims of interference and breach of warranty.

Assigned Claims

Turning to more substantive issues in the litigation, it seems you underestimate the strength of the claims the Garners will have received by assignment from the Deans, Neigums, and Viehwegs. As you know, the Garners intend to move the court for leave to amend their complaint by adding the claims assigned by Deans, Neigums, and Viehwegs. This motion will likely be granted because a trial date has not even been set and the Garners will have only very recently received the assigned claims.

The Garners are still evaluating potential claims the Deans, Neigums, and Viehwegs could have brought against the Poveys. Nevertheless, it seems clear that one or more of those parties could have brought claims for breach of warranty and fraud against the Poveys. These claims arise from the fact that the Poveys had knowledge of the existence of the Garners' interest in the *northern roadway*, but conveyed the underlying servient estate properties without indicating or acknowledging these properties were subject to the Garners' northern roadway easement. I know you have repeatedly claimed the Poveys have done nothing but enhance the Garners' easement. The facts, however, indicate otherwise. In anticipation of the sale of his property to the Neigums, Mr. Povey approached Daniel Garner and sought to persuade him to relinquish the northern roadway easement and accept the middle roadway instead. This fact indicates Mr. Povey 1) acknowledged Daniel's easement over the northern roadway and 2) understood that the prospective buyers would be less inclined to buy what is now the Viehweg property with its being subject to Daniel's easement over the northern roadway. Daniel rejected this proposal, but Mr. Povey went ahead and conveyed the parcel to the Neigums and represented that Daniel's

easement covered the middle roadway (twenty feet in width), not the northern roadway (thirty feet in width) in which Mr. Povey knew Daniel had an interest. Mr. Povey subsequently conveyed a parcel to Viehwegs. As you know the deed from the Poveys to the Viehwegs contains no reference whatsoever to any Garner easement even though the Poveys knew of both the Garners' claim to the northern roadway and the easement identified in the Neigum deed. These actions are the underlying cause of this entire lawsuit, and the Garners will soon own all causes of actions stemming therefrom.

Povey's fraudulent conduct also gives rise to a punitive damages claim. The case law discussing the tort of fraud's relationship with punitive damages suggests that proof of fraud satisfies both the "bad act" requirement and the "bad state of mind" requirement for punitive damages. *See Umphrey v. Sprinkel*, 106 Idaho 700, 710, 682 P.2d 1247, 1257 (1983). "It is well established in this state that punitive damages may be awarded when the defendant has committed fraud." *Id.*; *see also Jolley v. Puregro Co.*, 94 Idaho 702, 496 P.2d 939 (1972). In *Umphrey* the Court found that the defendant's "practice of falsely representing that building lots would be supplied with adequate water and access falls squarely within the ambit of deceptive business practices in which the award of additional punitive damages is authorized." *Id.* at 711, 682 P.2d at 1258. The facts here establish the Poveys committed fraud by knowingly inducing the Viehwegs to purchase property subject to the Garner easement while falsely representing that the property was free from any encumbrances. These same facts also give rise to a punitive damages claim.

The foregoing facts establish claims on which the Garners, as assignees of those claims, will likely prevail if they are tried before a jury. In any event, the Garners will allege in their third amended complaint triable issues of fact that will preclude a motion to dismiss and summary judgment.[1]

Conflict of Interest

When I was discussing this case with my client last night he mentioned that you had represented him. This is consistent with what you told me early on in this case when you stated you were going to have to find other counsel for the Poveys because you had a conflict of interest. Do you have a conflict of interest? I would like to avoid filing a motion to disqualify you if you in fact do not have a conflict.

Response to Offer and Counteroffer

I have conveyed to the Garners your clients' offer to settle upon payment of $34,900 in attorney fees as requested by your clients. The Garners decline that offer. However, after considering the likely expense of protracted litigation, including necessary discovery the Garners would conduct following the amendment of their complaint, the Garners have authorized me to extend another offer to your clients. The Garners offer your clients a walk away, meaning both parties would release each other from all claims and counterclaims, stipulate to the dismissal with prejudice of the lawsuit, and bear their own attorney fees and costs incurred in this action. Please convey this

[1] Even if the judge doesn't allow the amendment, there are triable issues of fact on the Garners' claims against the Poveys.

offer to your clients. In counseling with your clients, I urge you to consider the issues raised in this letter. This offer is a good faith attempt on the part of the Garners to bring peaceful resolution to this matter and to avoid significant expenses to be incurred by both sides if the litigation continues. This is a one-time offer and will not be renewed. This offer will remain open until 5:00 p.m. on September 18, 2009.

If you have any doubt about the veracity and merit of the Garners' current claims or the claims that are to be assigned please do not hesitate to contact me to discuss.

Sincerely,

Jeffrey D. Brunson
cc: clients

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Attorney for the Povey Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR FRANKLIN COUNTY, STATE OF IDAHO

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, v. Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation, Defendants.	**REPLY MEMORANDUM IN SUPPORT OF MEMORANDUM OF COSTS INCLUDING ATTORNEY FEES** Case No. CV-08-342 Judge Dunn

Defendants Brad and Leiza Povey ("Poveys"), by and through undersigned counsel, hereby submit this Reply Memorandum in Support of Memorandum of Costs Including Attorney Fees.

INTRODUCTION

As if to underscore the need for an award of attorney fees in this case, Plaintiffs' opposition to the Povey Defendants' Memorandum of Costs Including Attorney Fees misstates the course of the litigation, exaggerates the facts and overstates the law they try to set forth. When the facts of this case are analyzed in light of the claims made against the Poveys and the law as it relates to the recovery of attorney fees by a prevailing party, there can be no doubt that an award of attorney fees is necessary to remedy the wrong that was perpetrated by the Plaintiffs bringing the Poveys into this litigation.

ARGUMENT

I. TRANSACTIONS INVOLVING REAL ESTATE ARE NOT PRECLUDED FROM APPLICATION OF IDAHO CODE § 12-120(3)

Plaintiffs take the position that Idaho Code § 12-120(3) cannot apply to this case because this is a case involving real estate. Plaintiffs reach that position by reference to an antiquated interpretation of Idaho Code § 12-120(3) that has been expressly overruled.

Plaintiffs quote from Treasure Valley Concrete, Inc. v. Idaho, 978 P. 2d 233, 237 (Id. 1999): "the term commercial transaction is not generally applied to real estate transactions, or to issues involving the ownership of property." Plaintiffs fail to point out that this quote is taken from the case of Bastian v. Albertson's Inc., 643 P.2d 1079 (Id. Ct. App. 1982) and that case was expressly

overruled on that point in Herrick v. Leuzinger, 900 P. 2d 201, 214 (Id. Ct. App. 1995).

A transaction involving real estate can be a "commercial transaction" for purposes of § 12-120(3). See, Lexington Heights Development v. Crandlemire, 140 Idaho 276, 92 P.3d 526 (2004)(sale of real estate is a commercial transaction); Troupis v. Summer, __ P.3d __, 2009 WL 3232677 (Id. 2009)(action by cotenant for partition of real estate is a commercial transaction under section 12-120(3)). The assertion that § 12-120(3) cannot apply when real estate is involved in an otherwise commercial transaction is much too broad. There is a group of real estate cases that are excepted from application of § 12-120(3), but our Supreme Court has limited that exception to those cases where the gravamen of the case is ownership of real estate.

The case Plaintiffs cite in footnote 1 of their Motion to Disallow Attorney Fees clarifies this principle. The discussion in C&G, Inc. v. Rule, 135 Idaho 763, 25 P.3d 82 (2001), makes it clear that it is not the existence of a real estate issue in the case that takes it outside the realm of §12-120(3), but rather the fact that the case involves determination of property rights.[1] The Court's citation to precedent and its description of each case on which it relies shows that its holding would not apply to Plaintiffs' claims against the Poveys since Poveys never disputed the Garner' property rights, and Plaintiffs' claims against Poveys could not result in a determination of any property rights.

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[1] The Treasure Valley Concrete case is one of those "determination of property rights" cases. The issue in that case was an interpretation of a mineral reservation under a state statute. Likewise, Brown v.Miller, 140 Idaho 439, 96 P.3d 57 (2004) is completely inapplicable. Not only did the case focus on ownership of the easement in question, but there the Court was dealing with the application of § 12-120(1) with a jurisdictional limit of $25,000. Here, the Garners sought $500,000 in damages from the Poveys, and, as alleged by the Plaintiffs, the Poveys' claim arises under section (3) of § 12-120.

> The present situation is instead more analogous to situations involving the determination of property rights where this Court and the Court of Appeals have uniformly denied an award of attorney fees. *See,* Jerry J. Joseph C.L.U. Ins. Assoc. v. Vaught, 117 Idaho 555, 789 P.2d 1146 (Ct.App.1990) (denying attorney fees under I.C. § 12-120(3) in an action where property owner sought a judgment compelling adjoining property owners to reimburse it for irrigation assessments, to record an instrument establishing an access easement, and to remove a fence hindering its use of the easement and where after settlement, adjoining property owners breached the settlement agreement); Chen v. Conway, 121 Idaho 1006, 829 P.2d 1355 (Ct.App.1991) (determining that a quiet title action involving dispute over the existence of a prescriptive easement was not a commercial transaction under I.C. § 12-120(3)); Durrant v. Christensen, 117 Idaho 70, 785 P.2d 634 (1990) (holding that an action in which landowners sought adjudication of water rights and a permanent restraining order prohibiting the defendant from interfering with their diversion and use of water determined was not based on a commercial transaction as defined in I.C. § 12-120(3)); Sun Valley Hot Springs Ranch, Inc. v. Kelsey, 131 Idaho 657, 962 P.2d 1041 (1998) (stating that an action to determine ownership and easement rights did not fall within the meaning of a commercial transaction under I.C. 12-120(3) and therefore attorney fees were properly denied). Accordingly, we decline to award fees to Union Pacific under I.C. § 12-120(3).
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> C&G at 82.

If one of the property owner Defendants in this case were trying to recover attorney fees from Plaintiffs, C&G and the cases it cites might be relevant. However, the Poveys simply had no dog in the fight between the Garners and the other Defendants. As it relates to the Poveys, this case is not a case that could "determine property rights." The Poveys own no property in the vicinity, and the Poveys have never disputed the Garners right of way claim. 2 As between the Poveys and the Garners, it is the "determination of property rights" issue that is tangential to the litigation. The exclusion of the Poveys from the settlement discussions that determined the property rights in this

case shows that the litigation brought against the Poveys is not one of those "situations involving the determination of property rights where [the Courts] have denied an award of attorney fees."

Where a party alleges the existence of a contract that would be a commercial transaction under the statute, "that claim triggers the application of the statute, and the prevailing party may recover attorney fees even if no liability under the contract is established." Lexington Heights Development, LLC v. Crandlemire, 140 Idaho 276, 92 P.3d 526, (2004)(alleged sale of real estate triggered application of section 12-120(3)). Here, Plaintiffs triggered application of § 12-120(3) by stating that it was the commercial transaction of purchasing the real estate that lay at the heart of their claims. "The purchase of the real estate by Gary and Nola from Povey Defendants was a commercial transaction under Idaho Code Sec. 12-120(3) so Plaintiffs, as successors to Gary and Nola, should be entitled to recover their reasonable attorney fees from Defendants Brad Povey and Leaza Povey." See, Second Amended Complaint, ¶ 37.[3]

II. THE ALLEGED BREACH OF WARRANTY ARISING FROM GARY AND NOLA'S PURCHASE OF THE PROPERTY FROM POVEYS WAS THE GRAVAMAN OF PLAINTIFFS' COMPLAINT.

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2 "In answering paragraph 32 of the second amended complaint, the Povey defendants admit that they were on notice of the existence of the established road and that it was used by the plaintiffs." See, Answer to Second Amended Complaint, in Court File.

3 Plaintiffs argue that the Poveys' denial of the compound allegations in paragraph 37 somehow negates the application of § 12-120(3) to this case. That assertion is wrong both factually and legally. Factually it is wrong because when fairly read, the Poveys were denying that the Garners had a need to employ attorneys and seek damages as a result of any action by the Poveys. Legally it is wrong because the Idaho cases are myriad that point out that the invocation by the plaintiff of a commercial transaction claim triggers the right to recover attorney fees, even if it later is shown that the claim was without merit or even that the commercial transaction never existed. Miller v. St. Alphonsus Regional Medical Center, Inc., 139 Idaho 825, 87 P.3d 934 (2004)(If a party asserts a claim that is based upon the existence of an alleged commercial transaction, attorney fees are awardable to a prevailing party who defends against such claim even if the alleged commercial transaction is found not to have existed).

A careful reading of C&G and its treatment of precedent suggests that there is not, in fact, an exception in §12-120(3) for transactions involving real estate, but only a specific application of the general test, i.e., whether the real estate transaction was the gravamen of the action and the basis on which Plaintiffs sought to recover. The Court found that, in those cases it cited, § 12-120(3) did not apply because the commercial transaction was not "integral to the claim, and [did not] constitute the basis upon which the party is attempting to recover." Citing, Brower v. E.I. DuPont De Nemours & Co., 117 Idaho 780, 784, 792 P.2d 345, 349 (1990).

The real issue under § 12-120(3) is whether Gary and Nola's purchase of property from the Poveys, and the warranty they claimed that purchase entailed, was the gravamen of the action brought by the Plaintiffs. Johannsen v. Utterbeck, Id. 2008, 2008 WL 4595248 (The critical test in determining application of §12-120(3) is whether the commercial transaction comprises the gravamen of the lawsuit; it must be integral to the claim and constitute the basis upon which the party is attempting to recover). Breach of warranty claims are covered by § 12-120(3). Walker v. American Cyanamid Co., 130 Idaho 824, 948 P.2d 1123 (1997). And, when they commenced this action against the Poveys, the Garners claimed that their breach of warranty claim was the basis for their recovery: "The purchase of the real estate by Gary and Nola from Povey Defendants was a commercial transaction under Idaho Code Sec. 12-120(3) so Plaintiffs, as successors to Gary and Nola, should be entitled to recover their reasonable attorney fees from Defendants Brad Povey and Leiza Povey." See, Second Amended Complaint, ¶ 37.

In their opposition to the motion for summary judgment, the Garners argued that the sale to

Gary and Nola and the alleged "breach of warranty" in connection with that sale was at the heart of their claims. On page 18 of the Memorandum in Opposition to Poveys' Motion for Summary Judgment, the Garners argued:

> The Garners' breach of warranty claim arises from many of the same facts and circumstances described above in II.A. [alleged efforts by Poveys to eliminate the Garners' easement and so-called wrongful conveyance to third parties]. It also arises from the fact that the Poveys failed to warrant and defend title to the parcel, with its appurtenant original access road easement, Nola and Gary bought from the Poveys in 1992. . . . the Garners' breach of warranty claim is supported within the allegations of the Amended Complaint because it may arise out of the . . . deeds given by the Poveys to the Deans, Neigums, and Viehwegs.

Even now, the Garners continue to acknowledge, as they must because the Poveys no longer own the ground the Garners were seeking, that the transactions by which the Poveys sold property to the other Defendants is the gravamen of the Complaint against the Poveys.

> The Garners concluded that certain acts and omissions by the Poveys, including the manner in which the Poveys transferred the servient estate to the Deans, Neigums, and Viehwegs, were at the heart of the plight in which the Garners found themselves. Thus, the Garners named the Poveys as defendants in the lawsuit.

Motion to Disallow Costs at p. 2.

And of course, those transactions only have relevance because of the claim of warranty the Garners allege arose out of the commercial transaction by which the Poveys sold real estate to the Garners. "The Garners' breach of warranty claim is supported within the allegations of the Amended Complaint because it may arise out of the . . . deeds given by the Poveys to the Deans, Neigums, and Viehwegs." Memorandum in Opposition to Summary Judgment at pg. 18. While the Garners now are trying to distance themselves from the commercial transaction by which the Poveys sold Nola and

Gary their property, [4] that transaction has always been integral to the claims made by the Garners throughout the litigation. The Garners were careful in their Complaint to point out that all the Garners, including Dan Garner, were now owners of the property that the Poveys sold to Gary and Nola and entitled to the rights conveyed in that transaction. Second Amended Complaint at ¶15. Then, in invoking §12-120(3), the Garners alleged "Plaintiffs, as successors to Gary and Nola, should be entitled to recover their reasonable attorney fees from Defendants Brad Povey and Leiza Povey." Second Amended Complaint at ¶37.

The Garners point out that Dan Garner had claims that arose separate and apart from the claims asserted by him through succession to the breach of warranty claims of Gary and Nola. While this makes for an interesting theoretical question, it makes no difference in this case. When one considers that the way the Garners embroiled the Poveys in this controversy is by specific reference to the supposed breach of warranty arising from the Povey sale from which all the Garners eventually became owners of property, it becomes obvious that that transaction was at the heart of their claim and the basis on which they were seeking recovery from the Poveys.

As they pointed out in their opposition to summary judgment, "The Garners' breach of warranty claim arises from many of the same facts and circumstances described above in II.A. [alleged efforts by Poveys to eliminate the Garners' easement and so-called wrongful conveyance to third parties]. So even if Daniel had not tried to coat-tail on his parents' breach of warranty claims, it

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[4] For instance. the Garners make the ridiculous attempt to relegate their breach of warranty claims to "nothing more than an attempt by the Garners to exhaust every conceivable and alternative basis for recovery at the complaint stage." Motion to

would have had no substantial impact on the amount of attorney fees the Poveys incurred. There simply is, at this late date, no room for argument that the gravamen of the claim against the Poveys was other than the warranty Plaintiffs claim arose out of the sale to Gary and Nola.

III. THE POVEYS RECOVERY OF ATTORNEY FEES SHOULD NOT BE REDUCED.

The Garners put forth various reasons why the recovery by the Poveys should be less than the full amount of attorney fees that the Poveys incurred. None of the arguments has any substance.

The Garners take the position that the award of attorney fees to the Poveys should be reduced because the Garners obtained some of what they were seeking from the other Defendants. In this regard, the Garners are making the Poveys' argument for them. The Poveys have never taken the position that the Garners were not entitled to an access, and never denied that the Garners had an easement across the Northern Road. The Poveys, in fact, are the only ones who ever recorded on any deed the Garners' right to access and expressly set out in the Niegum deed the route of the easement that has now been settled upon by the other parties. The Poveys applaud the Garners on their success with the other Defendants. In making this argument, the Garners have forgotten that counsel for the Poveys proposed a stand down between the Garners and the Poveys for just that purpose—so that the parties who had no insurance for these claims would not incur unnecessary attorney fees. The Poveys simply were always at a complete loss to understand why the Garners embroiled them in this litigation, and then revoked the stand down agreement, until Jeffrey Niegum shed his light on that

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Disallow Costs at pg. 5. The Court is well aware that is not how the case was tried.

question.

The Garners' arguments about the Poveys incurring unnecessary costs by refusing unreasonable settlement offers after the summary judgment motion was filed is at least a gross distortion of reality. The Poveys offered settlement several times during the course of the litigation. Early on in the case, when the attorney fees were less than $3,000, the Poveys offered to settle and eat the attorney fees they had incurred. No response from the Garners. Before filing the deposition notices, the Poveys pointed out the upcoming large expenditure of fees and offered to settle. No response from the Garners. Not once did the Garners propose settlement until after the summary judgment motion was filed. Even at that point Poveys offered to settle, but only if the Garners were willing to reimburse some of the fees. See, Affidavit of Blake S. Atkin dated September 29, 2009, in Court File. It was only then that the Garners sent the threatening letter attached to the Brunson affidavit which they have the audacity to call a settlement proposal. Too little, too late.

IV. THE COURT SHOULD AWARD FEES UNDER IDAHO CODE SECTION 12-121.

The award of attorney fees pursuant to I.C. § 12-121 is not a matter of right, and a court should only award fees "when it is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." Owner-Operator Indep. Drivers Ass'n, Inc. v. PUC, 125 Idaho 401, 408, 871 P.2d 818, 825 (1994). In this case, the Affidavit of Jeffrey Niegum in which he revealed Daniel Garner's and Sherri-Jo Garner's ulterior motive for embroiling the Poveys in this lawsuit when coupled with the otherwise inexplicable events that occurred in this

case, provides the basis for just such an abiding belief.[5]

When speaking of inexplicable events, one must start with the filing of the Complaint against the Poveys. It simply is counterintuitive to sue a former owner of property when the current owner and his title insurer challenges your right of access. Particularly, without first asking the Poveys what their position is on the right of access.

Related to the first inexplicable event is the Garners' decision not to include as defendants all of the grantors on the deed. Brad and Leiza Poveys' co-grantors on the deed, Hank and Melanie Povey were not named as defendants in the case. The stated reason for not suing Hank and Melanie while suing Brad and Leiza is that:

> Plaintiffs are informed and believe that Henry Nels Povey and Melanie Povey, husband and wife, . . . will acknowledge the four Poveys had acquired the property subject to the right-of-way of Daniel while the Poveys had the right to use the right of way to access their property west of Twin Lakes Canal. Henry and Melanie Povey should acknowledge Daniel, his wife, Nola and the Nola trust have had the right to use of the right of way to access their property west of twin lakes canal. . . . Because of the expected cooperation of Henry and Melanie for Daniel and his wife and Nola and the Nola Trust to preserve their access rights Daniel and his wife and Nola and the Nola trust do not claim damages against them.

Second Amended Complaint at ¶34.

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[5] Plaintiffs have submitted the Second Affidavit of Daniel Garner, apparently in response to the Jeffrey Niegum Affidavit. That affidavit is as telling in what it does not say as for what it does say. It does not deny that he and his wife had an axe to grind with Brad Povey over the sale of the Troy Grave's Dairy, but rather employs an evasive technique—trying to explain physically why Daniel Garner would not want to become a dairy farmer. Interestingly, even though Jeffrey Niegum describes the dispute as arising out of Brad's intervention with his father—Sherri-jo Garner's grandfather—there is no affidavit from Sherri-Jo.

This is the attitude that one would expect from a litigant in the Garners' situation. But not just with respect to two of their grantors in title, but to all four. This discriminatory treatment of Brad and Leiza Povey is even more inexplicable when it became clear that Brad and Leiza took the same position with regard to the right of way as is ascribed to Hank and Melanie. In their Motion to Dismiss the Amended Complaint, the Povey Defendants stated:

> The court should note that the very same circumstances that led the Plaintiffs to not include Henry and Melanie Povey in the amended complaint would appear to apply with equal force to the Povey Defendants. The Amended Complaint does not allege that Brad and Leiza Povey will not acknowledge the four Poveys had acquired the property subject to the right-of-way of Daniel while the Poveys had the right to use the right-of-way to access their property west of Twin Lakes Canal. Nor does the Amended Complaint allege that Brad and Leiza Povey would fail to acknowledge Daniel, his wife, Gary and Nola, and the Nola Trust have had the right to use of the right-of-way to access their property west of the Twin Lakes Canal . There is no reason to believe that Brad Povey will be any less solicitous of the Garners' interests than his brother. Indeed, as pointed out in the motion to dismiss, Brad Povey is the only person who put any provision in any deed to memorialize the access rights of the Garners.

Reply in Support of Motion to Dismiss at note 1.

Only the retaliation motive set out in the Niegum Affidavit explains the otherwise bizarre behavior of suing only two of the four grantors.

Next on the list of inexplicable events was the demand in January 2009, that the Poveys respond to the Complaint after the Poveys' lawyer had negotiated a stand down agreement to prevent the running of attorney fees by the only parties who were not covered by insurance, while the Garners litigated with the insured Defendants. See, Affidavit of Blake S. Atkin in Opposition to Motion for Enlargement of Time dated September 29, 2009, at ¶6 in Court File. At the time the demand made

little sense. Certainly, it does not fit well with the current position of the Garners that the litigation and fees incurred by the Poveys was unnecessary given the ongoing, albeit secret, settlement negotiations with the other Defendants. Given the information revealed by Jeff Niegum, the reason the Poveys were required to respond to the Complaint in January was so that the Garners could be exacting their pound of flesh while negotiating with the other Defendants.

The next inexplicable event or series of events was the Garners' refusal to include the Poveys in the settlement negotiations which were going on unbeknownst to the Poveys. The Poveys made several settlement overtures to the Garners, but received no settlement offers in return until after they filed their summary judgment motion. See, Affidavit of Blake S. Atkin in Opposition to Motion for Enlargement of Time dated September 29, 2009, in Court File.

The conduct of the Garners toward the Poveys in this litigation is inexplicable until one considers the facts revealed in the Jeffrey Niegum Affidavit. If this litigation was brought and maintained against the Poveys to satisfy Dan and Sherri-Jo's need for revenge, then their conduct of the litigation makes perfect sense—it's just that use of litigation for that purpose is inappropriate.

A more appropriate case for an award of attorney fees under Idaho Code §12-121 for an action that was pursued, defended, or brought frivolously, unreasonably, or without foundation can hardly be imagined.

In this regard, it would be well to note that fees are appropriate not only in the case where the complaint is filed frivolously, but also where the action has continued to be pursued unreasonably or without foundation. As pointed out above, the Poveys never took a position that the Garners were

not entitled to the right of way that they asserted. Yet, the Garners continued to demand that the Poveys defend the Garners' $500,000 claim long after it became clear that the claim had no merit. In fact, the Garners continue to assert blame and wrongdoing on the part of the Poveys even though this Court has ruled that no wrongdoing occurred. Some examples of that stubborn litigiousness are:

> Here the wrongful conduct that gave rise to the Garners' claims against the Poveys did not occur within the context of a commercial transaction. Rather, most of it occurred much later.

Motion to Disallow Costs at p. 8.

> I named the Poveys as defendants in this lawsuit because their actions led to my access being in jeopardy.

Second Affidavit of Daniel Garner at ¶ 5.

This stubborn unwillingness to acknowledge their error in embroiling the Poveys in this lawsuit solidifies the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation. Even in jurisdictions where the American rule generally applies, situations like this case often result in an award of attorney fees. "There are numerous exceptions to the general attorney fees rule because 'a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity.' Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994). Exceptions include: 'when a party acts 'in bad faith, vexatiously, wantonly, or for oppressive reasons,'" *id.* (citation omitted). Here, there is ample justification for the Court to exercise its discretion to award fees.

V. THE AFFIDAVIT OF BLAKE S. ATKIN WAS PROPERLY SIGNED AND NOTARIZED.

Counsel for the Poveys apologizes that the copy of the Affidavit of Blake S. Atkin mailed to opposing counsel was not a signed and notarized copy. A signed and notarized copy was filed with the Court, and can be provided to opposing counsel upon request. The Affidavit with its attachment provides the Court with the time spent on each task of the litigation with the hourly rate charged for each item. As such it appears to comply with the requirements of the Rule. If the Court deems more detail is necessary, Counsel would be happy to attempt a more thorough expose of the attorney fees incurred in this case. Attached hereto as Exhibit A, is a Supplemental Affidavit of Blake S. Atkin in Support of Memorandum of Costs Including Attorney Fees.

CONCLUSION

For the foregoing reasons the Court should grant the Povey Defendants an award of all the fees and costs they have incurred in this case.

DATED THIS 24 day of December, 2009.

ATKIN LAW OFFICS, P.C

Blake S. Atkin
Attorney for the Povey Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this __ day of December, 2009, he caused to be served a true and correct copy of the **REPLY MEMORANDUM IN SUPPORT OF MEMORANDUM OF COSTS INCLUDING ATTORNEY FEES** upon the following by the method of delivery designated:

Gordon S. Thatcher Michael Brown Thatcher, Beard, St. Clair, Gaffney 116 S. Center P.O. Box 216 Rexburg, Idaho 83440	x U.S. Mail	___Hand Delivery	___ Fax
Franklin County Court 39 West Oneida Preston, Idaho 83263	x U.S. Mail	___Hand Delivery	___ Fax
Judge Stephen S. Dunn 624 E. Center Pocatello, Idaho 83201	x U.S. Mail	___Hand Delivery	___ Fax

Blake S. Atkin

FILED

09 DEC 28 PM 1:25

FRANKLIN COUNTY CLERK

DEPUTY

Blake S. Atkin ISB# 6903
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414

ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Salt Lake City, Utah 84101
Telephone: (801) 533-0300
Facsimile: (801) 533-0380

Attorneys for the Povey Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR FRANKLIN COUNTY, STATE OF IDAHO

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, v. Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation. Defendants.	**AFFIDAVIT OF BLAKE S. ATKIN** Case No. CV-08-342 Judge Dunn

STATE OF IDAHO)

:ss

COUNTY OF FRANKLIN)

Blake S. Atkin, having been first duly sworn, deposes and says:

1. Attached hereto are two letters dated September 16, 2009 and September 21, 2009 that I sent on or about those dates to counsel for the Garners.

Blake S. Atkin

SUBSCRIBED and SWORN to before me this 24 day of December, 2009.

Shelda Wanner exp 08/10/10

Notary Public

SHELDA WANNER NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of December, 2009, I caused to be served a true and correct copy of **AFFIDAVIT OF BLAKE S. ATKIN** upon the following by the method of delivery designated:

Gordon S. Thatcher Michael Brown Thatcher, Beard, St. Clair, Gaffney 116 S. Center P.O. Box 216 Rexburg, Idaho 83440	x U.S. Mail	___Hand Delivery	___ Fax
Franklin County Court 39 West Oneida Preston, Idaho 83263	x U.S. Mail	___Hand Delivery	___ Fax
Judge Stephen S. Dunn 624 E. Center Pocatello, Idaho 83201	x U.S. Mail	___Hand Delivery	___ Fax

Blake S. Atkin

770

ATKIN LAW OFFICES

A PROFESSIONAL CORPORATION
837 South 500 West, Suite 200
BOUNTIFUL, UTAH 84010
TELEPHONE (801) 533-0300
FACSIMILE (801) 533-0380
e-mail: batkin@atkinlawoffices.net

September 16, 2009

Michael W. Brown
343 E. 4th North
P.O. Box 216
Rexburg, Idaho 83440

Via fax: (208) 359-5888

Dear Michael:

As we discussed on the phone yesterday, I have repeatedly explained to you and your clients my view that their action against the Poveys was from the beginning absolutely indefensible. I invited you to dismiss the case early on without repercussions, but my pleas were ignored. At one point I even suggested dismissal of my clients by a certain date and that if it did not happen by that date your clients would have to first make my clients whole before the case could be dismissed. Again my warnings were ignored.

Obviously, your suggestion, at this late date and after substantial attorney fees have been incurred, that my clients pay you money will not be considered. That is not to say that the Poveys are opposed to settlement. It is heart breaking for them to be embroiled in this litigation with close neighbors, friends and family, but at this point and given our repeated pleas for reason, they are not in a position to settle without being made whole. In that regard, the Poveys have incurred fees to date of $34,900. Upon payment of that amount the Poveys will agree to a full and complete settlement with the Garners who I now understand from your correspondence own all the claims that might have been brought by any of the parties.

This offer will remain open until September 20, 2009.

Sincerely,

/S/

Blake S. Atkin

BSA:ra
Cc: Brad Povey

ATKIN LAW OFFICES

A PROFESSIONAL CORPORATION
837 SOUTH 500 WEST, SUITE 200
BOUNTIFUL, UTAH 84010
TELEPHONE (801) 533-0300
FACSIMILE (801) 533-0380
e-mail: batkin@atkinlawoffices.net

September 21, 2009

Jeffrey D. Brunson
343 East 4th North Ste. 223
P.O. Box
Rexburg, Idaho 83440

VIA FAX: (208) 359-5888

Dear Jeff:

I read your letter dated September 17, 2009 this morning. I note that the settlement offer you made in that letter expired on September 18, 2009, but there are a number of statements that you make in that letter that I cannot leave unanswered.

First of all, I do not have a conflict of interest. I have never represented Danny Garner. The reluctance I initially felt about getting involved in this litigation is due to the deep friendship I feel toward your clients. Nola Garner is one of my very favorite people. I am close friends with Danny's brother, Lynn, and I consider Danny a friend and had hoped to keep it that way. In fact, my final decision to represent the Poveys was in no small part fueled by my hope that I could bring some light to the conflict and convince these parties to settle before the money was spent. In that regard I must say that I take personal offense at your accusation that the fees incurred to date are my fault. I specifically told you early on when the fees were only a few thousand dollars that my clients would walk away at that point, but later that would no longer be an option. You chose to ignore my warning. After the depositions were noticed you could have tried to settle at that point. You made no attempt. Now, having seen the light and hopefully recognizing that the fight between the Garners and the Poveys makes no sense whatever, instead of making a conciliatory offer you instead threaten to widen the litigation by asserting claims that the other parties chose not to assert. This appears to me to be more of the foolishness that has brought us to the point that the amount of fees incurred makes this case impossible to settle. I do believe that the claims pursued to this point were brought, and at least pursued after it became obvious that they were being pursued unreasonably and without foundation. Similarly, I suspect that the other parties chose not to pursue the assigned claims precisely because they did not want to have to pay the Povey's fees for having pursued such outrageous claims.

Sincerely,

/s/
Blake S. Atkin

Cc: Brad and Lieza Povey

Blake S. Atkin ISB# 6903
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414

ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Salt Lake City, Utah 84101
Telephone: (801) 533-0300
Facsimile: (801) 533-0380

Attorneys for the Povey Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR FRANKLIN COUNTY, STATE OF IDAHO

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007,

Plaintiffs,

v.

Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation,

Defendants.

SUPPLEMENTAL AFFIDAVIT OF BLAKE S. ATKIN IN SUPPORT OF MEMORANDUM OF COSTS INCLUDING ATTORNEY FEES

Case No. CV-08-342

Judge Dunn

STATE OF IDAHO)
SS:
COUNTY OF FRANKLIN)

Blake S. Atkin, having been first duly sworn deposes and says:

1. I am attorney of record for the Povey Defendants in the above entitled matter.

2. I have personal knowledge of the matters set forth herein.

3. Attached hereto is a supplemental printout of the Costs and attorney fees incurred by the Povey Defendants in this matter.

4. My normal hourly rate is $450.00 per hour, but in this matter I billed only $200.00 per hour. As the Court can see from perusal of the attachment, I am careful not to bill for any work that is not absolutely necessary, and given my number of years litigating cases I am able to reduce the number of hours billed by pinpointing the work that actually needs to be done.

5. I am familiar with the rates charged in this community for attorney fees and given the nature of this litigation and the level of skill involved and considering the other factors set out in Rule 54, Idaho Rules of Civil Procedure it is my opinion that the rates charged by me and my staff are reasonable.

6. These costs and attorney fees were all reasonably and necessarily incurred in the defense of this matter.

DATED this 24 day of December, 2009.

Blake S. Atkin
Attorney for the Povey Defendants

SUBSCRIBED and SWORN before me this 24 day of December, 2009.

Notary Public
My Commission expires: 08/10/10

SHELDA WANNER
NOTARY
PUBLIC
STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of December, 2009, I caused to be served a true and correct copy of the **SUPPLEMENTAL AFFIDAVIT OF BLAKE S. ATKIN IN SUPPORT OF MEMORANDUM OF COSTS INCLUDING ATTORNEY FEES** upon the following by the method of delivery designated:

Gordon S. Thatcher Michael Brown Thatcher, Beard, St. Clair, Gaffney 116 S. Center P.O. Box 216 Rexburg, Idaho 83440	x U.S. Mail	___Hand Delivery	___ Fax
Franklin County Court 39 West Oneida Preston, Idaho 83263	x U.S. Mail	___Hand Delivery	___ Fax
Judge Stephen S. Dunn 624 E. Center Pocatello, Idaho 83201	x U.S. Mail	___Hand Delivery	___ Fax

Blake S. Atkin

GARNER V. POVEY

FEES LISTING

Date	Explanation	Working Lawyer	Hours	Rate	Amount
Nov 5/2008	Meeting in Clifton	BSA	6.00	200.00	$ 1,200.00
Jan 29/2009	Research on motion to dismiss standards; research on pleadings facts that act as bar to complaint	JVM	5.50	175.00	$ 962.50
Feb 2/2009	Reviewing complaint; meeting with client; preparing motion to dismiss	BSA	6.00	200.00	$ 1,200.00
Feb 4/2009	preparing notice of appearance and motion and memo to dismiss; mailing and copying docs.	MLS	0.80	90.00	$ 72.00
Feb 4/2009	preparing notice of hearing on defendants' motion to dismiss amended complaint	MLS	0.30	90.00	$ 27.00
Feb 4/2009	faxing notice of hearing to opposing counsel and court	MLS	0.60	90.00	$ 54.00
Feb 21/2009	Reply to motion to dismiss	BSA	6.00	200.00	$ 1,200.00
Feb 23/2009	Prep for hearing	BSA	3.00	200.00	$ 600.00
Feb 23/2009	Reply in supp of M to Dismiss legal research	JHP	3.10	150.00	$ 465.00
Feb 24/2009	editing and preparing reply in support of motion to dismiss; faxing and mailing to opposing counsel and court	MLS	1.00	90.00	$ 90.00
Feb 25/2009	Prep for hearing on motion to dismiss	BSA	5.00	200.00	$ 1,000.00
Feb 26/2009	Hearing on motion to dismiss	BSA	4.00	200.00	$ 800.00
Mar 3/2009	Affidavits of Ivan Jensen and Ron Kendall	BSA	2.00	200.00	$ 400.00
Mar 4/2009	Affidavit of twin lakes	BSA	1.00	200.00	$ 200.00
Mar 4/2009	legal research on hearsay in idaho for case	JHP	0.40	150.00	$ 60.00
Mar 6/2009	Working on affidavits of Ron Kendall and Ivan Jensen	BSA	1.00	200.00	$ 200.00
Mar 11/2009	Affidavits	BSA	1.00	200.00	$ 200.00
Mar 30/2009	Answer to second amended complaint	BSA	4.00	200.00	$ 800.00
Mar 31/2009	reviewing amended complaint and second amended complaint for differences	MLS	2.00	90.00	$ 180.00
Mar 31/2009	Research re: warranty of title where not specific easement listed. Answer to second	BSA	8.00	200.00	$ 1,600.00

	amended complaint.					
Apr 1/2009	Answer to second amended complaint	BSA	8.00	200.00	$	1,600.00
Apr 3/2009	scanning and emailing copy of Thatcher affidavit (100 plus pages) to Blake	MLS	0.30	90.00	$	27.00

Apr 3/2009	Answer to second amended complaint and affidavits	BSA	4.00	200.00	$ 800.00
Apr 6/2009	Answer to a2d amended complaint	BSA	2.00	200.00	$ 400.00
Apr 13/2009	Preparation of discovery requests	BSA	3.00	200.00	$ 600.00
Apr 18/2009	Discovery requests	BSA	2.00	200.00	$ 400.00
Apr 21/2009	drafting and preparing discovery requests and interrogatories for mailing to opposing counsel; researching Idaho rules of civil procedure for definitions and instructions to discovery requests; phone call and email to Blake re issues with discovery	MLS	1.80	90.00	$ 162.00
Apr 22/2009	Discovery requests research re: warranty of title re: easement not described	BSA	5.00	200.00	$ 1,000.00
Apr 24/2009	editing, scanning, copying and preparing discovery (interrogs and req. for admissions) for mailing to opposing counsel and cert of service to court	MLS	0.40	90.00	$ 36.00
Apr 28/2009	Research	BSA	1.00	200.00	$ 200.00
Apr 29/2009	calling court to confirm room for depositions; drafting and preparing notice of depositions; call to court reporter to reserve	MLS	0.40	90.00	$ 36.00
Apr 29/2009	copying, scanning, faxing and mailing out notice of depositions to opposing counsel, court, judge and court reporter	MLS	0.60	90.00	$ 54.00
May 22/2009	Depos prep	BSA	1.00	200.00	$ 200.00
May 25/2009	Preparing for depositions	BSA	2.00	200.00	$ 400.00
May 26/2009	Prep for depositions	BSA	2.00	200.00	$ 400.00
May 27/2009	Prep for depos call to counsel re: documents	BSA	1.00	200.00	$ 200.00
May 29/2009	Prep for depos	BSA	3.00	200.00	$ 600.00
Jun 1/2009	Prep for depos	BSA	6.00	200.00	$ 1,200.00
Jun 2/2009	Deposition of Nola Garner	BSA	8.00	200.00	$ 1,600.00
Jun 3/2009	Deposition of Dan Garner	BSA	8.00	200.00	$ 1,600.00
Jun 8/2009	Drafting motion for summary judgment	BSA	3.00	200.00	$ 600.00
Jun 10/2009	Summary judgment motion	BSA	3.00	200.00	$ 600.00
Jun 11/2009	Summary judgment motion	BSA	4.00	200.00	$ 800.00
Jun 16/2009	Research re: Summary judgment motion	BSA	1.00	200.00	$ 200.00

Jun 17/2009	Motion for Summary Judgment	BSA	2.00	200.00	$	400.00
Jun 27/2009	Summary judgment motion	BSA	4.00	200.00	$	800.00

Jun 30/2009	editing and reviewing the mm in support of motion for summary judgment	MLS	0.40	90.00	$	36.00
Jul 7/2009	editing and reviewing the mm in supp of MSJ	MLS	0.60	90.00	$	54.00
Jul 7/2009	drafting motion in support of motion for summary judgment; editing and formatting mm in supp of motion for summary judgment	MLS	0.50	90.00	$	45.00
Jul 10/2009	reading through deposition testimony for citations to be used in MSJ; inputing citations from depositions and westlaw research into MSJ.	MLS	0.50	90.00	$	45.00
Aug 3/2009	working on placing deposition citations into motion and memorandum for summary judgment; researching case law on breach of warranty;	MLS	0.70	90.00	$	63.00
Aug 18/2009	editing and reviewing final draft of motion for summary judgment; comparing deposition changes to citations in msj; phone call with Blake re same	MLS	2.20	90.00	$	198.00
Aug 24/2009	call to clients re MSJ	MLS	0.10	90.00	$	9.00
Aug 25/2009	phone call with client re msj	MLS	0.40	90.00	$	36.00
Aug 26/2009	phone call with client re MSJ changes	MLS	0.30	90.00	$	27.00
Aug 29/2009	Review of last draft of sjm	BSA	3.00	200.00	$	600.00
Aug 31/2009	editing and reviewing final draft of MSJ with new additions	MLS	4.60	90.00	$	414.00
Sep 1/2009	editing and additing in final citations to MSJ; scanning, copying and preparing same for mailing	MLS	3.10	90.00	$	279.00
Sep 3/2009	drafting notice of hearing; 5 min; preparing fax cover sheets; faxing to all opp counsel, court and judge; drafting letter to clients re settlement agreement (5 min);	MLS	0.30	90.00	$	27.00
Sep 15/2009	Stipulation for court - discussions with opposing counsel	BSA	2.00	200.00	$	400.00
Sep 16/2009	Drafting settlement letter	BSA	2.00	200.00	$	400.00
Sep 21/2009	Motion to strike affidavits, opposition to motion to strike affidavits	BSA	8.00	200.00	$	1,600.00
Sep 22/2009	Opposition to motion to amend, opposition to motion to strike affidavits	BSA	6.00	200.00	$	1,200.00
Sep 23/2009	reply sjm	BSA	6.00	200.00	$	1,200.00
Sep 24/2009	adding deposition citations to motion to strike affidavits (30min); formatting and adding deposition citations to opp to mot	MLS	0.70	90.00	$	63.00

	for enlargement of time				
Sep 24/2009	motion to strike affidavits	JHP	4.60	150.00	$ 690.00
Sep 24/2009	reply sjm	BSA	6.00	200.00	$ 1,200.00

Sep 25/2009	adding citations from depositions to mm in opp to motion to strike affidavits; adding citations to reply msj	MLS	1.40	90.00	$ 126.00
Sep 25/2009	worked on motions and reply's to their 56(f) motion, motion to amend, reply in supp of our MSJ all in preparation for MSJ hearing that is coming up beginning of October.	JHP	6.80	150.00	$ 1,020.00
Sep 25/2009	Typing interrogatories into system	AG	1.00	90.00	$ 90.00
Sep 28/2009	reading through depositions for citations for mm in opp to motion to strike, mm in opp to motion for leave to amend; editing and formatting aff of Brad Povey (10 min); editing and formatting aff of BSA (15min);	MLS	2.60	90.00	$ 234.00
Sep 28/2009	worked on motions and reply's to their 56(f) motion, motion to amend, reply in supp of our MSJ all in preparation for MSJ hearing that is coming up beginning of October.	JHP	5.00	150.00	$ 750.00
Sep 28/2009	reply sjm	BSA	4.00	200.00	$ 800.00
Sep 29/2009	editing and reviewing final drafts of mm in supp of mot to strike aff of garner and povey, motion re same; editing and reviewing final draft of mm in opp to mot for enlargement of time (15 min); editing and reviewing final draft of mm in opp to mot to amend 2nd amended complaint (20min)	MLS	2.00	90.00	$ 180.00
Sep 29/2009	reply MM in supp of MSJ plus finalize other Povey docs to be filed today	JHP	3.50	150.00	$ 525.00
Sep 30/2009	adding citations to reply mm in supp of msj; editing and reviewing same	MLS	2.50	90.00	$ 225.00
Sep 30/2009	Supervising finalization of citations	BSA	1.00	200.00	$ 200.00
Oct 1/2009	preparing argument folder for hearing on 10/6; printing cases from westlaw, all pleadings related to 5 motions, etc.	MLS	3.20	90.00	$ 288.00
Oct 1/2009	final research for Reply in Supp of MSJ and finalize for filing.	JHP	1.00	150.00	$ 150.00
Oct 2/2009	preparing argument folder for 10/6 hearing on msj and other motions; printing cases from westlaw, etc.	MLS	1.70	90.00	$ 153.00
Oct 6/2009	Prep for and attend hearing on msj	BSA	6.00	200.00	$ 1,200.00
Oct 7/2009	editing and reviewing letter to opp counsel; scanning, copying and preparing same for mailing	MLS	0.10	90.00	$ 9.00
Oct 20/2009	discovery responses- doc requests and interrogs	JHP	2.00	150.00	$ 300.00

Oct 20/2009	editing and reviewing second request for production of documents, adding in definitions re same; editing and reviewing responses to first interrogs from plaintiffs, adding in general objections; preparing certs of service re discovery above	MLS	1.20	90.00	$	108.00

Oct 20/2009	inserting dictation into letterhead for opp counsel re stipulated statement; copying, scanning and preparing same for mailing	MLS	0.20	90.00	$ 18.00
Nov 2/2009	Preparing findings and conclusions	BSA	3.00	200.00	$ 600.00
Nov 3/2009	Findings and conclusions	BSA	3.00	200.00	$ 600.00
Nov 4/2009	Motion for atty fees, and judgment	BSA	4.00	200.00	$ 800.00
Nov 9/2009	editing and formatting mm of costs including atty fees; copying, scanning and preparing same (with all affidavits) for mailing to court and opp counsel	MLS	1.50	90.00	$ 135.00
Nov 9/2009	Memo of costs	BSA	3.00	200.00	$ 600.00
Nov 30/2009	Reading their motion to disallow atty fees	BSA	1.00	200.00	$ 200.00
Dec 1/2009	Reply re: atty fees	BSA	4.00	200.00	$ 800.00
Dec 2/2009	editing and formatting reply brief in supp of motion for costs and affidavit;	MLS	1.10	90.00	$ 99.00
Dec 3/2009	Reply atty fees	BSA	5.00	200.00	$ 1,000.00
Dec 3/2009	Reply re: fees research various issues	BSA	3.00	200.00	$ 600.00
Dec 4/2009	Reply to costs	BSA	4.00	200.00	$ 800.00
Dec 5/2009	Reply re: fees	BSA	1.00	200.00	$ 200.00
Dec 6/2009	Reply re: fees	BSA	2.00	200.00	$ 400.00
Dec 8/2009	research re: 120(3)	BSA	3.00	200.00	$ 600.00
Dec 9/2009	Reply on costs	BSA	3.00	200.00	$ 600.00
Dec 16/2009	reveiw Reply in supp of Att fees request	JHP	1.50	150.00	$ 225.00
Dec 17/2009	editing and reviewing reply mm, drafting supplmental aff of fees, and aff re settlement negotiations	MLS	1.50	90.00	$ 135.00
		Totals:	**279.00**		**$ 49,581.50**

DISBURSEMENTS

Other			
Jun 19/2009	Court Reporter - Deposition of Nola Garner	$	1,057.25
Jun 24/2009	Court Reporter - Deposition of Daniel S. Garner	$	1,057.00
Jun 24/2009	Court Reporter - Deposition of Sherri-Jo Garner	$	245.50
	Total Other	**$**	**2,359.75**
Faxes			
Feb 2/2009	Faxes 16 @ 0.50	$	8.00
Feb 24/2009	Faxes 8 @ 0.50	$	4.00
Apr 29/2009	Faxes 10 @ 0.50	$	5.00
Sep 29/2009	Faxes 207 @ 0.50	$	103.50
Oct 1/2009	Faxes 87 @ 0.50	$	43.50
Oct 20/2009	Faxes 20 @ 0.50	$	10.00
Nov 6/2009	Faxes 15 @ 0.50	$	7.50
	Total Faxes	**$**	**181.50**
Postage			
Feb 5/2009	Postage	$	3.51
Feb 24/2009	Postage	$	5.34
Apr 7/2009	Postage	$	4.66
Apr 24/2009	Postage	$	4.52
Apr 29/2009	Postage	$	6.34
Sep 1/2009	Postage	$	26.30
Sep 21/2009	Postage	$	0.44
Sep 28/2009	Postage	$	0.61
Sep 29/2009	Postage	$	8.76
Oct 1/2009	Postage	$	4.68
Oct 7/2009	Postage	$	0.44
Oct 12/2009	Postage	$	0.44
Oct 20/2009	Postage	$	0.44
Oct 20/2009	Postage	$	3.66
Nov 6/2009	Postage	$	2.64
Nov 9/2009	Postage	$	6.92
	Total Postage	**$**	**79.70**
Long distance			
Sep 19/2009	Long distance 2.70 @ 0.20	$	0.54
	Total Long distance	**$**	**0.54**
Photocopies			
Feb 5/2009	Photocopies 45 @ 0.20	$	9.00
Feb 6/2009	Photocopies 3 @ 0.20	$	0.60
Feb 24/2009	Photocopies 42 @ 0.20	$	8.40
Apr 7/2009	Photocopies 24 @ 0.20	$	4.80
Apr 24/2009	Photocopies 50 @ 0.20	$	10.00
Apr 29/2009	Photocopies 54 @ 0.20	$	10.80
Sep 1/2009	Photocopies 940 @ 0.20	$	188.00
Sep 21/2009	Photocopies 4 @ 0.20	$	0.80

Sep 28/2009	Photocopies 9 @ 0.20	$	1.80
Sep 29/2009	Photocopies 312 @ 0.20	$	62.40
Oct 1/2009	Photocopies 174 @ 0.20	$	34.80
Oct 7/2009	Photocopies 1 @ 0.20	$	0.20
Oct 12/2009	Photocopies 1 @ 0.20	$	0.20
Oct 20/2009	Photocopies 1 @ 0.20	$	0.20
Oct 20/2009	Photocopies 34 @ 0.20	$	6.80
Nov 6/2009	Photocopies 10 @ 0.20	$	2.00
Nov 9/2009	Photocopies 128 @ 0.20	$.	25.60
	Total Photocopies	**$** .	**366.40**

On-Line Research			
Feb 20/2009	On-Line Research	$	285.14
Mar 20/2009	On-Line Research	$	195.22
Apr 20/2009	On-Line Research	$	73.95
May 20/2009	On-Line Research	$	19.60
Jun 20/2009	On-Line Research	$	39.08
Aug 20/2009	On-Line Research	$	252.80
Oct 20/2009	On-Line Research	$	660.91
Nov 20/2009	On-Line Research	$	47.86
Dec 20/2009	On-Line Research	$	118.12
	Total On-Line Research	**$**	**1,692.68**
Overnight Shipping			
Oct 20/2009	Overnight Shipping	$	19.96
Oct 20/2009	Overnight Shipping	$	21.46
	Total Overnight Shipping	**$**	**41.42**
	Disbursements Total	**$**	**4,721.99**
	Fees Total	$	49,581.50
	Disbursements Total	$	4,721.99
	Grant Total	**$**	**54,303.49**

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DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO

Daniel S. Garner and Sheri-Jo Garner, husband and wife; Nola Garner, a widow; and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007,

Plaintiffs,

vs.

Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife; Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffrey J. Neigum and Kathleen A. Neigum Revocable Trust, dated September 17, 2004; Jeffrey J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation,

Defendants.

Case No. CV-08-342

MOTION TO STRIKE THE AFFIDAVIT OF JEFFREY J. NEIGUM

The plaintiffs, Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow; and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007

(Garners), through counsel, Thatcher Beard St. Clair Gaffney PA, respectfully request the Court to strike the affidavit of Jeffrey J. Neigum, dated October 24, 2009. The general basis for this motion is that the contents of Mr. Neigum's October 24, 2009 affidavit are impertinent, inappropriate, and irrelevant for purposes of determining whether the defendant Poveys are entitled to an award of attorney fees. Specifically, paragraph three lacks foundation for the assertion that the Garners never used the northern roadway. In paragraph five, Mr. Neigum improperly seeks to testify for the Garners as to the effect of certain actions of Brad Povey and as to the Garners' intentions. Oral argument is requested.

Respectfully submitted this 29th day of December, 2009.

Michael W. Brown
of Thatcher Beard St. Clair Gaffney, *Attorneys*
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho , I have my office in Rexburg, Idaho, and on December 29, 2009, I served a true and correct copy of *Motion to Strike the Affidavit of Jeffrey J. Neigum* on the following individuals by the method of delivery designated:

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Dated: December 29, 2009

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Attorneys for the Povey Defendants

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR FRANKLIN COUNTY, STATE OF IDAHO

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, v. Hal J. Dean and Marlene T. Deau, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation, Defendants.	**MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE THE AFFIDAVIT OF JEFFREY J. NEIGUM** Case No. CV-08-342 Judge Dunn

Defendants Brad and Leiza Povey, by and through undersigned counsel, hereby submit this Memorandum in Opposition to Plaintiffs' Motion to Strike the Affidavit of Jeffrey J. Neigum. Plaintiffs have moved to strike the Affidavit of Jeffrey J. Neigum on the ground that it is "impertinent, inappropriate, and irrelevant". The motion is not well founded. The Affidavit of Jeffrey J. Neigum (herinafter "Neigum Affidavit") complies with Rule 56(e), Idaho Rules of Civil Procedure, is competent evidence of pursuit of a frivolous claim for illicit purposes, and should not be stricken.

I. THE NEIGUM AFFIDAVIT DOES NOT CONTAIN INADMISSIBLE HEARSAY.

Plaintiffs do not articulate the grounds for moving to strike ¶5 of the Neigum Affidavit, but apparently are arguing that the paragraph contains inadmissible hearsay. They argue, "[i]n paragraph five, Mr. Neigum improperly seeks to testify for the Garners as to the effect of certain actions of Brad Povey and as to the Garners' intentions." See, Motion to Strike the Affidavit of Jeffrey J. Neigum, in Court File.

Paragraph 5 lays out that Mr. Neigum is recounting statements made to him by Plaintiff, Dan Garner.

> He even told me some of the details about the trouble between him and Brad Povey. He told me that Brad had intervened with Brad's father (the grandfather of Dan Garner's wife, Sherri-Jo,) to keep him from selling to Dan and Sherri-Jo the Troy Grave's dairy. That intervention by Brad had made Dan and Sherri-Jo very angry with Brad and that is why Dan wanted to make us mad so that we would sue Brad."

The statements are not hearsay at all. The affidavit cannot be stricken.

Under Idaho Rules of Evidence, Rule 801(d)(1), "A statement is not hearsay if-- . . . . (2)

The statement is offered against a party and is . . . (A) The parties own statement."

These statements by Dan Garner are not hearsay and cannot be stricken.

Plaintiffs do not bother to explain why they think the affidavit is impertinent, but Defendants have been unable to find any law that would suggest impertinence is a ground for striking an affidavit. The Neigum Affidavit is clearly relevant, spelling out as it does that Dan Garner claimed he was trying to embroil the Poveys in litigation in order to get even with them. When he could not get the others to sue the Poveys, he did it himself. Seldom does one have better evidence of abuse of civil process than this.

DATED THIS 6th day of January, 2010.

ATKIN LAW OFFICS, P.C

Blake S. Atkin
Attorney for the Povey Defendants

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of January, 2010, I caused to be served a true and correct copy of **MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE THE AFFIDAVIT OF JEFFREY J. NEIGUM** upon the following by the method of delivery designated:

Gordon S. Thatcher Thatcher, Beard, St. Clair, Gaffney 116 S. Center P.O. Box 216 Rexburg, Idaho 83440 Facsimile: (208) 359-5888	_X_ U.S. Mail ___Hand delivery	_X_ Fax
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DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO

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Plaintiffs,

vs.

Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife; Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffrey J. Neigum and Kathleen A. Neigum Revocable Trust, dated September 17, 2004; Jeffrey J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation,

Defendants.

Case No. CV-08-342

REPLY MEMORANDUM RE: MOTION TO DISALLOW COSTS AND FEES

JUDGE DUNN

The plaintiffs, Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow; and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007

(Garners), through counsel, Thatcher Beard St. Clair Gaffney PA, respectfully submit the following reply memorandum in support of their motion to disallow costs and fees.[1]

INTRODUCTION

Attorney's fees under Idaho Code § 12-120(3) are awarded to the prevailing party in a lawsuit only where a commercial transaction comprises the gravamen of the lawsuit. Where there is no commercial transaction, § 12-120(3) does not provide a basis for an award of attorney's fees. Moreover, the mere characterization of or existence of some remotely related commercial transaction between parties to an action does not support an award of attorney's fees under § 12-120(3). In this case, the 1992 conveyance of real property from the Poveys to Gary Garner and Nola Garner was relevant to the issues litigated insofar as it established how the Garners acquired ownership of and warranty of title to some of the property west of the Twin Lakes Canal, but it was not the gravamen of the lawsuit. Instead, the Poveys' discrete actions of 1) conveying servient estate properties to third parties; and 2) physically obstructing the Garners' easement access to their property prompted the Garners' lawsuit and constituted the gravamen of the lawsuit. These discrete actions arose entirely independently of the 1992 conveyance from the Poveys to Gary and Nola. Thus, even if the 1992 conveyance of real estate was a commercial transaction,[2] it was not the gravamen of this lawsuit and by itself did not give rise to any of the Garners' claims.

Attorney's fees under § 12-121 are appropriate only in extraordinary circumstances where a party has brought or pursued a claim frivolously or without foundation or merit. Fees

[1] Although the Poveys apparently filed their responsive memorandum on December 24, 2009, counsel for the Garners did not receive a copy of it until after 5:00 p.m. on January 5, 2010. Due to the number of substantive issues the Garners were required to address in their reply brief, and due to the fact that three days before the hearing on this motion fell on a Sunday, the Court should, in the interest of justice, consider this memorandum.

[2] The Garners nevertheless maintain that the 1992 conveyance of the real estate in this case is not a commercial transaction for purposes of awarding attorney's fees under § 12-120(3).

under this statute are discretionary with the court and are not awarded against a nonprevailing party as a matter of right. In this case, although the Garners did not ultimately prevail in their claims against the Poveys, the record supports a finding that the Garners pursued their claims in good faith and relied on plausible legal theories and valid legal authority to support them.

ARGUMENT

The Poveys' claim for attorney's fees fails to meet the requirements of Idaho Code §§ 12-120(3) and 12-121. Because there is no other basis for an award of attorney's fees, the Court should disallow the Poveys' claimed attorney's fees.

I. The 1992 real estate conveyance is not a commercial transaction under § 12-120(3).

The Poveys' conveyance of real estate to Gary Garner and Nola Garner in 1992 is not a commercial transaction for purposes of awarding attorney's fees in this case. In their first brief, the Garners assert that "the term commercial transaction is not generally applied to real estate transactions, or to issues involving the ownership of property." *Treasure Valley Concrete, Inc. v. State of Idaho*, 132 Idaho 673, 677, 978 P.2d 233, 237 (1999). The Poveys respond by insinuating that this rule is no longer good law because of the Idaho Court of Appeals decision in *Herrick v. Leuzinger*, 900 P.2d 201, 214 (Id. Ct. App. 1995). *See* Defs.' Mem. Resp. Mot. Disallow Costs at 2-3. The Poveys are mistaken. As recently as 2008 the Idaho Supreme Court endorsed and cited the rule in *Treasure Valley* when it explained, "This Court has upheld a lower court's ruling that commercial transactions generally do not include real estate transactions or issues involving the ownership of property, such as an action to quiet title." *Anderson v. Rex Hayes Family Trust*, 145 Idaho 741, 745, 185 P.3d 253, 257 (Idaho 2008).

The present case is similar to *Anderson* and other property cases in which courts have consistently declined to award attorney's fees under § 12-120(3). *See, e.g., C & G Inc. v. Rule*,

135 Idaho 763, 25 P.3d 76 (2001)(where the court declined to award attorney's fees because dispute focused on real property issues). The Poveys argue that *C & G* should not apply to the present case "since the Poveys never disputed the Garner' [sic] property rights, and Plaintiffs' claims against Poveys could not result in a determination of any property rights." Defs.' Mem. Resp. Mot. Disallow Costs at 3-4. This argument fails. In fact, the majority of the present case focused on real property issues. For example, the Poveys went to great lengths to dispute the Garners' easement interest in the so-called northern roadway. A significant portion of the summary judgment proceedings in this case was devoted to determining whether the Poveys had the right to unilaterally designate the location of the Garner easement.[3] The Court's ultimate determination that the Poveys had no right to relocate the Garner easement certainly resulted in a "determination of property rights." Another example of how this case focused on real property issues is the parties' arguments about the effect of the deed by which Daniel Garner acquired his property. The Poveys based much of their argument on the fact that Daniel Garner's deed contained no explicit reference to the northern roadway, and a determination of this property issue influenced the outcome of the case. With these substantive issues the parties litigated in mind, the Court should apply the Idaho Supreme Court's rule articulated in *Treasure Valley* and confirmed in *Anderson* by declining to treat the 1992 real estate transaction as a commercial transaction.

II. Even if the 1992 conveyance was a commercial transaction, it still does not support an award of attorney's fees under §12-120(3).

Even if the 1992 conveyance is deemed a commercial transaction, it cannot provide the basis for an award of attorney's fees because its connection to the Garners' claims was remote

[3] *See* Defs.' Reply Mem. Supp. Mot. Summ. J. at 7-9. In their brief, the Poveys relied on *Bethel v. Van Stone*, 120 Idaho 522, 817 P.2d 188 (1991) to support their argument that they were entitled to relocate the Garner easement as long as they chose a reasonable and suitable location.

and it was not the basis upon which the Garners sought recovery. The Idaho Supreme Court has established that "[t]he critical test in determining whether a civil action is for a commercial transaction is whether the commercial transaction comprises the gravamen of the lawsuit; it must be integral to the claim and constitute the basis upon which the party is attempting to recover." *Johannsen v. Utterbeck*, 146 Idaho 423, 432, 196 P.3d 341, 350 (2008). "[T]he award of attorney's fees is not warranted every time a commercial transaction is remotely connected with the case." *Brooks v. Gigray Ranches*, 128 Idaho 72, 78, 910 P.2d 744,751 (1996)(*citing Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990)). In this case, the 1992 conveyance was neither integral to the Garners' claims, nor was it the basis upon which the Garners sought recovery. Thus, an award of attorney's fees is not warranted.

The Poveys argue strenuously that the 1992 conveyance was integral to the Garners' claims because it was directly related to the Garners' breach of warranty claim.[4] *See* Defs.' Mem. Resp. Mot. Disallow Costs at 6-9. This argument fails, however, because it misapprehends the relevance of the 1992 conveyance to the Garners' breach of warranty claim. Not one single aspect of the 1992 conveyance itself served as the basis on which the Garners sought recovery.[5] Instead, the Poveys' actions *years after* the 1992 conveyance (physical interference with the Garner easement and conveyance of servient estate properties to the Deans, Neigums, and Viehwegs without making the conveyed properties subject to the Garner

[4] Section II of the Poveys memorandum asserts "The alleged breach of warranty arising from Gary and Nola's purchase of the property from Poveys was the gravaman [sic] of Plaintiffs' complaint." See *See* Defs.' Mem. Resp. Mot. Disallow Costs at 5-6.

[5] *Cf. Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 152 P.3d 594 (2007). In *Blimka*, the Idaho Supreme Court determined that a commercial transaction was integral to the plaintiff's claim for fraud because the defendant's fraudulent statements during negotiations induced the plaintiff to enter the commercial transaction contemplated in the negotiations. Unlike in *Blimka*, where the defendant's conduct within the context of negotiating a commercial transaction was actionable and therefore the basis for recovery in the lawsuit, in the present case the Garners did not seek to recover based on any claimed actionable conduct by the Poveys within the context of the 1992 real estate transaction. The basis for recovery did not arise until years after the 1992 real estate transaction was closed and final.

easement) comprise the gravamen of the lawsuit and are the basis on which the Garners sought recovery. These actions are distinct and remote from the 1992 conveyance.

The 1992 conveyance is relevant only because it was the means by which the Garners acquired some of their property west of the Twin Lakes Canal and because it endowed the Garners with certain property rights (such as warranty of title and the right not to have servient estate owners interfere with their easement) they argued were subsequently violated by the Poveys.[6] The Garners have never complained or alleged that the Poveys' conduct in effecting the 1992 conveyance itself was wrongful. Thus, the 1992 conveyance is not the basis on which the Garners sought recovery. In order to understand that the 1992 conveyance is not the basis upon which the Garners sought recovery, the Court need only consider the likely course of events if the Poveys had not undertaken the post-1992 actions alleged by the Garners: The Garners would have had no reason to bring the lawsuit because the Viehwegs would have had no basis for believing they could erect a barrier obstructing the Garners' easement with impunity.

III. The Garners' description in their complaint of a commercial transaction between the Poveys and Gary and Nola in 1992 does not trigger § 12-120(3).

The Garners' characterization of the 1992 real estate conveyance as a commercial transaction in paragraph 37 of their second amended complaint does not per se trigger application of § 12-120(3), as urged by the Poveys. *See* Defs.' Mem. Resp. Mot. Disallow Costs at 5. In partially overruling its holding in *Magic Lantern Productions, Inc. v. Dolsot*, 126 Idaho 805, 808, 892 P.2d 480, 483 (1995), the Idaho Supreme Court explained, "To the extent that *Magic Lantern Productions, Inc. v. Dolsot* may be read to mandate an award of attorney's fees to the prevailing party when the other party has claimed fees pursuant to I.C. § 12-120(3), that

[6] The Garners recognize that the court did not ultimately grant them relief based on the Poveys' actions that the Garners alleged were wrongful. Nevertheless, for purposes of determining whether § 12-120(3) applies, the relevant issue is whether *the acts complained of by the Garners* constitute a commercial transaction. Clearly, they do not.

interpretation is disavowed." *Great Plains Equip. v. Northwest Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001)(citation omitted). "A prevailing party may rely on I.C. § 12-120(3) if pled by another party for recovery of attorney's fees *if it is warranted under the statute.*" *Id.*

The upshot of this holding is that the Garners' mere assertion in their complaint that a commercial transaction existed does not, as a matter of law, entitle the Poveys as prevailing party to rely on § 12-120(3). Instead, the court still must conduct the necessary analysis to determine whether the commercial transaction (1992 real estate conveyance) alleged in the Garners' second amended complaint actually comprised the gravamen[7] of the action. As explained by the *Great Plains* court, "The commercial transaction must be an actual basis of the complaint, that is, the lawsuit and the causes of action must be based on a commercial transaction, not simply a situation that can be characterized as a commercial transaction." *Great Plains*, 136 Idaho at 471, 36 P.3d at 223 (internal citations omitted). "To hold otherwise would be to convert the award of attorney's fees from an exceptional remedy justified only by statutory authority to a matter of right in virtually every lawsuit filled." *Id* (*citing Brower v. E.I. DuPont De Nemours and Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990)). Thus, the court must not award attorney's fees to the Poveys unless it determines that the 1992 real estate transaction was indeed the gravamen of this action. As argued above, the nexus between the 1992 real estate transaction and the events underlying the Garners' claims against the Poveys is too remote. The 1992 transaction was not the gravamen of this lawsuit.

In support of their argument that paragraph 37 of the Garners' second amended complaint automatically triggers application of § 12-120(3), the Poveys cite *Lexington Heights Development, LLC v. Crendlemire*, 140 Idaho 276, 92 P.3d 526 (2004) and *Miller v. St. Alphonsus Regional Medical Center, Inc.*, 139 Idaho 825, 87 P.3d 934 (2004). The Poveys cite

[7] *See Johannsen*, 146 Idaho at 432, 196 P.3d at 350.

these cases for the proposition that "invocation by the plaintiff of a commercial transaction claim triggers the right to recover attorney's fees, even if it later is shown that the claim was without merit or even that the commercial transaction never existed." Defs.' Mem. Resp. Mot. Disallow Costs at 5, fn. 3. As discussed above, a plaintiff's assertion of commercial transaction triggers the right to recover attorney's fees by the prevailing defendant *only if the alleged commercial transaction was actually the gravamen of the lawsuit. Lexington Heights* and *Miller* both illustrate this concept.

In *Lexington Heights*, a developer entered into a contractual agreement to purchase approximately ninety acres from the Crandlemires for purposes of building a residential development. Subsequent to this agreement, the Crandlemires refused to close the sale with the developer and ultimately conveyed approximately forty of the ninety acres to a third party. The developer sued the Crandlemires and sought, among other forms of relief, specific performance of the agreement and damages for breach of the agreement. The Idaho Supreme Court upheld the trial court's grant of summary judgment in favor of the Crandlemires because the original agreement between the developer and the Crandlemires contained an insufficient legal description. With respect to attorney's fees, the court ruled that the Crandlemires could be awarded attorney's fees pursuant to § 12-120(3) if, after resolution of their counterclaim against the developer (which was not addressed in the appealed grant of summary judgment), they were ultimately found to be the prevailing party. The court also reasoned that attorney's fees could be awardable to the Crandlemires under § 12-120(3) even though the contract on which the developer sued was found to be invalid.

The present case is distinguishable from *Lexington Heights*. In *Lexington Heights*, the court held that attorney's fees could be awarded to the Crandlemires not simply because the

developer *characterized* the basis of its claims against the Crandlemires as a commercial transaction, but because the alleged contract (commercial transaction) actually was the basis for the lawsuit. In the present case, although the Garners characterized the 1992 real estate transaction between the Poveys and Gary and Nola Garner as a commercial transaction, that transaction was not, in fact, the actual basis upon which the Garners sought recovery in this lawsuit. Instead, the Poveys' alleged interference with the Garners' easement was the basis.

Miller is analogously distinguishable from the present case. In *Miller*, a physician applied for medical staff privileges at a hospital. The hospital granted the physician temporary privileges while it conducted a thorough review of the physician's background. After its review, the hospital determined the physician should not receive privileges, so it terminated his temporary privileges and denied his application. The physician sued the hospital and sought an injunction requiring the hospital to grant him privileges and damages for breach of a contract he alleged was created between the hospital and him. The trial court ruled in favor of the hospital and awarded attorney's fees under § 12-120(3). The Idaho Supreme Court upheld the award of attorney's fees because even though it found that no contract existed between the physician and the hospital, the physician had alleged that a contract existed. *See Miller*, 139 Idaho at 839, 87 P.3d at 948. The physician's mere allegation that a contract existed, however, was not the sole reason why the court awarded attorney's fees. Crucial to the court's determination that attorney's fees should be awarded was its finding that "[t]he *focus* of the trial was whether the Hospital acted in good faith in the performance of its alleged contractual obligations." *Id* (emphasis added). Thus, the court awarded attorney's fees because the focus, or gravamen, of the trial was the alleged contractual agreement. In contrast to focus of the trial in *Miller*, the

focus in the present litigation was on actions and events[8] that occurred long after the alleged commercial transaction. The facts in both *Miller* and *Lexington Heights* are sufficiently distinguishable from the present case that they should not be read to trigger application of § 12-120(3) in the present case.

IV. The Poveys are not entitled to an award of attorney's fees under § 12-121.

The Court should not award attorney's fees under § 12-121 because the Garners brought their claims against the Poveys in good faith and based on legitimate facts and legal arguments. An award of attorney's fees under § 12-121 is within the sound discretion of the district court. *Anderson v. Goodliffe*, 140 Idaho 446, 449 95 P.3d 64, 67 (2004). "An award of attorney's fees pursuant to I.C. § 12-121 is only proper when an action was either brought or defended frivolously, unreasonably, or without foundation." *Kelly v. Silverwood Estates*, 127 Idaho 624, 630, 903 P.2d 1321, 1327 (1995). "Where a party's claim, though unsuccessful, is offered in good faith with no intent to delay or hinder justice, the district court does not abuse its discretion in denying attorney's fees." *Id.* at 630-31, 1327-28.

The present case involved a complicated fact pattern and fairly sophisticated legal issues. The evidence adduced by the Garners in support of their claims against the Poveys generated at least debatable questions. Throughout the course of this litigation, the Garners relied on plausible legal theories that the Court, based on thoroughness of its written decisions, carefully considered. The fact that the Garners did not ultimately prevail in its claims against the Poveys is of no consequence in determining whether the Garners pursued their claims frivolously,

[8] For example, the issues that dominated this litigation were 1) whether the Poveys physically obstructed the Garner easement; 2) whether the Poveys had a right to relocate the Garner easement from the original (northern) roadway to the Neigum driveway (middle roadway); and 3) whether the manner in which the Poveys conveyed servient estate properties to the Deans, Neigums, and Viehwegs constituted actionable interference with the Garners' easement. None of these issues arose out of or were closely connected to the 1992 real estate transaction. The Garners' allegations that the Poveys' interfered with the Garner easement were the gravamen of the lawsuit.

unreasonably, or without foundation. *See Herbst v. Bothof Dairies*, Inc., 110 Idaho 971, 975, 719 P.2d 1231, 1235 (1986)("The standard for determining whether such an award should be made is not whether the position urged by the nonprevailing party is ultimately found to be wrong, but whether it is so plainly fallacious as to be frivolous."). The Poveys have failed to show that the Garners' claims were "so plainly fallacious as to be frivolous."

Instead of attempting to show why the Garners' actual legal claims were frivolous or without merit, the Poveys speculate that the Garners' entire pursuit of their claims against the Poveys was based on a desire for revenge. Defs.' Mem. Resp. Mot. Disallow Costs at 10-13. In support of their revenge theory, the Poveys cite the recently produced affidavit of Jeffrey J. Neigum. The Court should disregard the information in this affidavit. The source of the affidavit is a former defendant in this lawsuit. The settlement agreement Mr. Neigum reached with the Garners requires Mr. Neigum to grant the Garners a widened easement over his "driveway," which was a point of contention throughout the settlement negotiations.[9] Mr. Neigum's bias 1) as a former defendant who was sued by the Garners, and 2) as a servient estate owner whose property will soon be encumbered by an enlarged Garner easement, negates the credibility of his affidavit. Moreover, Mr. Neigum's claim that Daniel Garner said he had a personal vendetta against Brad Povey (which claim Daniel Garner has rebutted and denied) in no way undermines the legitimacy or legal foundation of the claims the Garners asserted against the Poveys. Accordingly, the Court should focus its analysis on whether the Garners had a good faith basis and plausible legal arguments in support of their claims, not on a disgruntled former defendant's biased and controverted allegations.

In support of their allegation that the Garners pursued their claims based on a retaliatory

[9] This requirement is significant because the settlement agreement requires the grant of an easement considerably wider than the Daniel Garner easement identified in deed the Poveys gave to the Neigums.

motive against Brad Povey, the Poveys direct the Court's attention to the fact that the Garners did not sue Hank Povey and Melanie Povey, the other two grantors on the 1992 deed conveying property to Gary and Nola. According to the Poveys, the Garners' decision not to sue Hank and Melanie proves the Garners sued only for the sake of seeking revenge against Brad Povey. This argument is flawed, and by making it, the Poveys inadvertently support the Garners' argument made in Section II herein. The Garners only sued Brad and Leiza (and not Hank and Melanie) because only Brad and/or Leiza were responsible for the actionable conduct (interfering with the Garner easement) underlying the Garners' claims.[10] Thus, not only does the Garners' decision to sue only Brad and Leiza rebut the Poveys' theory of retaliatory motivation, it further proves that the 1992 real estate transaction was not the gravamen of the lawsuit. *See generally* Section II above.

V. The Poveys' claimed costs and fees should be reduced because they are excessive or not permitted under Rule 54.

Even if the Court decides to award attorney's fees, the fees awarded should be substantially reduced from the fees cited in the supplemental affidavit of Blake S. Atkin. Both § 12-120(3) and § 12-121 provide for the award of a *reasonable* attorney's fee. The attorney's fees claimed by counsel for the Poveys are excessive and not reasonable, given the amount of legal work reasonably necessary to defend against the claims brought by the Garners. Throughout the fees listing in Mr. Atkin's affidavit, there are numerous entries for tasks such as "editing, reviewing, preparing, and inserting citations," and many of these entries appear repeatedly with respect to the same particular document or activity. For example, the entries between August 29, 2009 and September 1, 2009 are as follows:

[10] Hank Povey and Melanie Povey played no role in conveying servient estate properties to the Deans, Neigums, and Viehwegs. It would have been illogical to name Hank and Melanie as defendants when they did nothing to harm or injure the Garners.

Aug 29/2009	Review of last draft of sjm	BSA	3.00	200.00	$600.00
Aug31/2009	editing and reviewing final draft of MSJ with new additions	MLS	4.60	90.00	$414.00
Sep 1/2009	editing and adding final citations to MSJ; scanning, copying and preparing same for mailing	MLS	3.10	90.00	$279.00

While it is understood that such tasks are necessary in litigation, the frequency with which these entries appear in Mr. Atkin's fee listing, and the amount of time spent on them, renders the claimed fees excessive and unreasonable in this case. In the above example, 10.7 hours of billable time to review and edit a summary judgment motion is excessive. Even if the Court determines to award attorney's fees, it should reduce such any such award to an amount that is reasonable under the circumstances of this case.

The fees listing in Mr. Atkin's affidavit contains numerous items that are secretarial in nature and not awardable under Idaho Rule of Civil Procedure 54(e)(1), which provides for an award of attorney's fees and, at the court's discretion, paralegal fees, but not for secretarial time. *See P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 239, 159 P.3d 870, 876 (2007). The following are illustrative, but not exhaustive:

Feb 24/2009	editing and preparing reply in support of motion to dismiss; faxing and mailing to opposing counsel and court	MLS	1.00	90.00	$90.00
Apr 3/2009	scanning and emailing copy of Thatcher affidavit (100 plus pages) to Blake	MLS	0.30	90.00	$27.00
Apr 24/2009	editing, scanning, copying and preparing discovery (int-errogs and req. for admissions) for mailing to opposing counsel and cert of service to court	MLS	0.40	90.00	$36.00
Apr 29/2009	calling court to confirm room for Depositions; drafting and prepar-ing notice of depositions; call to	MLS	0.40	90.00	$36.00

	court reporter to reserve				
Apr 29/2009	copying, scanning, faxing and mailing out notice of depositions to opposing counsel, court, judge and court reporter	MLS	0.60	90.00	$54.00
Sep 1/2009	editing and additing [sic] in final citations to MSJ; copying and preparing same for mailing	MLS	3.10	90.00	$279.00
Sep 3/2009	drafting notice of hearing; 5 min; preparing fax cover sheets; faxing to all opp counsel, court and judge; drafting letter to clients re settlement agreement (5min);	MLS	0.30	90.00	$27.00
Oct 20/2009	inserting dictation into letterhead for opp counsel re stipulated statement; copying, scanning and preparing same for mailing	MLS	0.20	90.00	$18.00

The Court should strike all entries for secretarial functions from any award for attorney's fees.

CONCLUSION

Based on the foregoing, the Court should deny the Poveys' claim for attorney's fees.

Respectfully submitted this 11th day of January, 2010.

Michael W. Brown
of Thatcher Beard St. Clair Gaffney, *Attorneys*
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on January 11, 2009, I served a true and correct copy of *Reply Memorandum Re: Motion to Disallow Costs and Fees* on the following individuals by the method of delivery designated:

Blake S. Atkin
837 South 500 West
Suite 200
Bountiful, UT 84010
Fax: (801) 533-0380

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Franklin County Courthouse
39 W. Oneida
Preston, ID 83263
Fax: (208) 852-2926

☒ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Judge Stephen S. Dunn
Bannock County Courthouse
624 E. Center
P.O. Box 4126
Pocatello, ID 83204

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Dated: January 11, 2009

Michael W. Brown
of Thatcher Beard St. Clair Gaffney, *Attorneys*
Attorneys for the Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

Register#CV-2008-342

DANIEL S. GARNER, et al.,	)	
	)	
Plaintiffs,	)	MINUTE ENTRY AND ORDER
	)	
-vs-	)	
	)	
HAL J. DEAN, et al.,	)	
	)	
Defendants.	)	

On February 9, 2010, Michael D. Gaffney, counsel for Plaintiffs and Blake Atkin, counsel for Defendants, Brad and Leiza Povey appeared in Court. The Court notified the parties that no court reporter was available but the proceeding was being digitally recorded and asked if they wished to proceed in that manner. Counsel waived having a court reporter present.

This matter was set for Defendants' Motion for Attorney Fees. Mr. Gaffney additionally filed an Objection to Costs. The Court having reviewed the filings heard argument from counsel. After presentation of the argument the Court took this matter under advisement and will issue a written decision.

IT SO ORDERED.

DATED: February 9, 2010

STEPHEN S. DUNN
District Judge

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of February, 2010, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Michael Gaffney
THATCHER, BEARD, ST. CLAIR, GAFFNEY
(x) Facsimile: (208) 359-5888

Blake Atkin
ATKIN LAW OFFICE
(x) Facsimile: (801) 533-0380

Linda Hampton
Linda Hampton, Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

Register No.CV-2008-342

DANIEL S. GARNER, et al.,

Plaintiffs,

-vs-

HAL J. DEAN, et al.

Defendants.

MEMORANDUM DECISION ON POVEY DEFENDANTS' MOTION FOR COSTS AND FEES

This matter is before the Court on the Motion for Costs and Fees ("Motion") of the Defendants, Brad and Leiza Povey ("Poveys"). The Court has reviewed and considered all of the filings, both in favor of and in opposition to the Motion, the applicable law and the arguments of counsel provided at a hearing held on February 9, 2010. The Court now issues its decision on the Motion.[1]

BACKGROUND AND FACTS[2]

The Court focuses on the following facts and legal conclusions already made. On May 22, 1987 Daniel Garner acquired real property, by Warranty Deed, from Ralph R. and Thelma N.

[1] Poveys filed the Affidavit of Jeffrey Neigum in support of the Motion and Plaintiffs filed a Motion to Strike that Affidavit. That Motion is also under consideration herein and is decided below.

[2] The facts of this case were extensively set forth by the Court in the Memorandum Decision ("Decision") granting Poveys' Motion for Summary Judgment, filed on October 27, 2009, and are incorporated but not repeated here except as necessary to explain the Court's decision herein. When the Court refers to the "Complaint" it means the Second Amended Complaint filed March 13, 2009, together with the exhibits attached to the original Complaint filed September 17, 2008. Plaintiffs Daniel S. Garner and Sherri-Jo Garner are collectively referred to as "D. Garner" and Plaintiff Nola Garner, either individually or with Gary Garner, her husband, and as Trustee of the Nola Garner Living Trust, are referred to as "N. Garner." However, it is agreed that Daniel Garner is a party to the claim

McCulloch ("McCullochs").[3] Although an underlying Contract of Sale with McCullochs referenced a right-of-way across McCulloch's remaining property, this Court ruled that the Contract of Sale was merged into the warranty deed which did not mention any right-of-way or easement.[4] Nevertheless, the Court also concluded that D. Garner acquired an easement across McCulloch's remaining property by prescription or prior use.[5]

On May 23, 1990 Poveys acquired, by Warranty Deed, the remaining property owned by McCullochs.[6] On June 17, 1992 Poveys conveyed, by Warranty Deed, property they owned on the west side of Twin Lakes Canal to N. Garner.[7] The deed from Poveys to N. Garner did not mention any easement. While Poveys acknowledged that D. Garner and N. Garner have an easement across property Poveys retained after these transactions, they also contended that neither D. Garner nor N. Garner had an easement by agreement and that these easements could be moved or modified at Poveys' discretion.[8] This Court held that there were no express easements, but the Court disagreed with Poveys' contention that D. Garner and N. Garner did not have an easement in the precise location of the Northern Road, also finding that Poveys did not have the right to unilaterally change the location of that easement.[9]

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brought by N. Garner, as an heir of Gary Garner, who is deceased. Complaint, ¶¶ 14-15. Plaintiffs are collectively referred to as "Garners" or "Plaintiffs."

[3] *See* Complaint Exs. B-2, C and D.

[4] Decision, 11-14.

[5] *Id.*, 17-22.

[6] *Id.*, Ex. E.

[7] *Id.*, Exs. F and B-3.

[8] Memorandum in Support of Defendant Brad and Leiza Poveys' Motion for Summary Judgment, p. 2: "In order to determine if Summary Judgment is appropriate in favor of the Povey Defendants, the Court needs to make two determinations: First is whether the Garners have a right to use the particular portion of the roadway that became blocked by the fence, or whether their right of access could be satisfied by what Garners themselves term 'a replacement access road,' that existed long before the fence was built. See Second Amended Complaint, at ¶¶ 18, and 22 in Court file,...The answer to both those inquiries is no." (Emphasis added). P. 5: "The Garners have no right to a particular access route, but only a reasonable access." (Emphasis added). P. 6: "Under the cases cited above, Brad Povey could have unilaterally designated the path of the roadway, and as long as it was a convenient and suitable way, the law would uphold his designation."

[9] Decision, 14-22.

Between August 27, 1999 and October 4, 2005, Poveys conveyed portions of their remaining property to Defendants Dean, Neigum, and Viehweg. The deed to Dean transferred both easements of record and those which were visible on the premises.[10] The transfer to Neigum mentioned an easement in the Neigum Driveway or the Replacement Access Road but did not mention the Northern Road.[11] The transfer to Viehweg was for property that did impact the Northern Road but that deed did not mention any easement.[12] On May 28, 2008 Viehweg constructed a fence across part of the Northern Road, obstructing Garners access to the easement they had been using.

The Complaint alleges that Poveys purchased their property from McCullochs subject to D. Garner's easement and that they sold property to N. Garner subject to an easement in favor of N. Garner. The Complaint also asserts that Poveys interfered with Garners' easements by plowing over the Northern Road and by wrongfully conveying property to Dean, Neigum, and Viehweg without protecting Garners' easements in the Northern Road. Garners brought the action against Poveys "to preserve their right-of-way and to recover damages" for Poveys' "wrongful conduct in seeking to extinguish the right-of-way...."[13]

STANDARD OF REVIEW

Typically, in any determination of an award of costs and fees, the threshold question is which party prevailed. I.R.C.P. 54(e)(1) states: "In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract." [Emphasis added]. I.R.C.P. 54(d)(1)(B) governs the prevailing party issue:

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[10] *See* Complaint Exs. K and L.
[11] *Id.*, Ex. N. Importantly, the Neigum property did not touch on the Northern Road easement.
[12] *Id.*, Ex. P.
[13] Complaint, ¶ 37.

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

The determination of who is the prevailing party is committed to the sound discretion of the trial court. *Rockefeller v. Grabow,* 139 Idaho 538, 82 P.3d 450 (2003).

The legal basis for an award of costs is I.R.C.P. 54(d)(1). Some costs are awarded to a prevailing party as a matter of right, pursuant to I.R.C.P. 54(d)(1)(C), and some costs can be awarded in the discretion of the Court, pursuant to I.R.C.P. 54(d)(1)(D). Discretionary costs are allowed "upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party." When objections to discretionary costs are made the Court "shall make express findings as to why such specific item of discretionary cost should or should not be allowed." Such costs may also be disallowed without objection, in the discretion of the Court and upon express findings. The determination of whether a cost is "exceptional" involves an evaluation both of the cost itself, i.e., whether it is the kind of cost commonly incurred in the type of litigation at issue, and whether the case itself is exceptional. *City of McCall v. Seubert*, 142 Idaho 580, 130 P.3d 1118 (2006); *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 109 P.3d 161 (2005); *Fish v. Smith*, 131 Idaho 492, 960 P.2d 175 (1998).

The award of attorney fees is governed by I.R.C.P. 54(e)(1), which provides that such an award is discretionary to the prevailing party "when provided for by any statute or contract." In addition, the rule provides that fees can be awarded, pursuant to I.C. § 12-121, when a court "finds, from the facts presented to it, that the case was brought, pursued or defended frivolously,

unreasonable, or without foundation." Whether to award fees and the amount of the fees awarded are matters of discretion, unless it involves a specific determination of a statute which allows for attorney fees. *Grover v. Wadsworth*, 147 Idaho 60, 205 P.3d 1196 (2009); *Taylor v. Maile*, 146 Idaho 705, 201 P.3d 1282 (2009); *Contreras v. Rubley*, 142 Idaho 573, 130 P.3d 1111 (2006).

In exercising its discretion, the trial court must consider the factors set forth in I.R.C.P. 54(e)(3). *Sanders v. Lankford*, 135 Idaho 322, 1 P.3d 823 (Ct.App.2000); *Boel v. Stewart Title Co.*, 137 Idaho 9, 16, 43 P.3d 768, 775 (2002); *Brinkman* v. *Aids Insurance Co.*, 115 Idaho 346, 351, 766 P.2d 1227, 1232 (1988). The district court must, at a minimum, provide a record which establishes that the court considered these factors. *Building Concepts, Ltd. v. Pickering,* 114 Idaho 640, 645, 759 P.2d 931, 936 (Ct.App.1988). A trial court need not specifically address all of the factors contained in I.R.C.P. 54(e)(3) in writing, so long as the record clearly indicates that the court considered them all. *Brinkman*, 115 Idaho at 351, 766 P.2d at 1232. In addition, a court need not blindly accept those attorney fees requested by a party, and may disallow those fees that were incurred unnecessarily or unreasonably. *Craft Wall of Idaho, Inc. v. Stonebraker,* 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct.App.1985).

Poveys seek recovery of attorney fees on two statutory grounds, I.C. § 12-120(3) and I.C. § 12-121. Idaho Code § 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 fee to be set by the court, to be taxed and collected as costs.
>
> The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes.

"A court is not required to award reasonable attorney fees every time a commercial transaction is connected with a case. The critical test is whether the commercial transaction comprises the gravamen of the lawsuit; the commercial transaction must be integral to the claim and constitute a basis on which the party is attempting to recover." *Bingham v. Montane Resources Assoc.,* 133 Idaho 420, 426, 987 P.2d 1035, 1041 (1999). The award of attorney fees is warranted when the commercial transaction comprises the crux of the lawsuit. *Broods v. Gigray Ranches, Inc.*, 910 P.2d 744, 750 (1996). There is a two-part test in determining whether attorney fees are appropriate in a commercial transaction. "First, the commercial transaction must be integral to the claim, and second, the commercial transaction must provide the actual basis for recovery." *Iron Eagle Development, LLC v. Quality Design Systems, Inc.*, 65 P.3d 509, 515 (2003). If the complaint asserts a claim under a contract that qualifies as a commercial transaction under I.C. § 12-120(3), this statute must be applied even if no liability under the contract is established. *Lexington Heights Develop. LLC v. Crandlemire*, 140 Idaho 276, 287, 92 P.3d 526, 537 (2004); *Peterson v. Shore*, 146 Idaho 476, 197 P.3d 789 (Ct.App.2008). Even when allowed under this statute, the amount of the award is within the discretion of the court. *Johanneson v. Utterbeck*, 146 Idaho 423, 196 P.3d 341 (2008); *Lettunich v. Lettunich*, 141 Idaho 425, 111 P.3d 110 (2005).

As noted above, I.C. § 12-121 allows for the award of attorney fees if the court, in its discretion, determines that the action was brought, pursued or defended frivolously, unreasonably or without foundation. *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 156 P.3d 502 (2007); *Tolley v. THI, Co.*, 140 Idaho 253, 92 P.3d 503 (2004). When a case raised "fairly debatable questions" attorney fees should not be awarded. *Sunnyside Indus. and Professional Park, LLC v. Eastern Idaho Public Health Dist.*, 147 Idaho 668, 214 P.3d 654, 660

(Ct.App.2009); *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 515, 81 P.3d 416, 420 (2003). "An action is not deemed to have been brought frivolously simply because it ultimately fails." *Automobile Club Ins. Co.*, 124 Idaho at 879, 865 P.2d at 970; *Edwards v. Donart*, 116 Idaho 687, 688, 778 P.2d 809, 810 (1989). In addition, the court reviews the entire case and determines whether all of it was brought, pursued or defended frivolously, unreasonably and without foundation. If there is a legitimate matter raised, even though some matters were frivolous and/or unreasonable, attorney fees should not be awarded. *Joyce Livestock Co.*, 144 Idaho at 16, 156 P.3d at 517; *Thomas v. Madsen*, 142 Idaho 635, 639, 132 P.3d 392, 396 (2006); *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). Again the amount to be awarded is within the discretion of the trial court.

ANALYSIS AND HOLDING

I. Prevailing Party.

The Court's first determination is whether there is a prevailing party. The Court notes that Garners do not make any argument that Poveys are not the prevailing party in this case. Nevertheless, the Court makes an independent review of the result to determine if Poveys prevailed.

Clearly, Poveys' Motion for Summary Judgment was granted in all material respects. However, as noted above, Poveys' position that Garners were not entitled to a particular easement in the Northern Road but only a reasonable access that Poveys could identify, was not sustained by the Decision. Garners efforts to have a judicial confirmation that they had a legal easement in the Northern Road was sustained by the Decision and was a relief sought against Poveys. Poveys did, at all times throughout this litigation, concede some easement across their property in favor of Garners, and did prevail on any claims of interference, either physically or

by conveyance, with Garners' easements. In the exercise of its discretion, the Court concludes that Poveys are the prevailing party in this matter.

II. Costs as a Matter of Right. Rule 54(d)(1)(C) lists the costs the prevailing party are entitled to as a matter of right. The only costs sought by Poveys as a matter of right are deposition expenses in the amount of $2359.75. At least two of these depositions were referred to and reviewed by the Court in ruling on the motions filed in this case. The Court finds that all these costs were reasonably incurred. Poveys are awarded $2359.75 in costs as a matter of right.

III. Discretionary Costs. Discretionary costs are awarded if the Court finds that they were necessary, exceptional and reasonably incurred, and should, in the interests of justice, be assessed. The burden is on the party seeking the costs to make an adequate showing on all these elements, and the determination of whether to award such costs is within the Court's discretion.[14] The costs Poveys seek in the discretionary category consist of $174.00 for faxes, $70.14 for postage, $.54 for long distance calls, $338.80 for photocopies, $1526.70 for on-line research, and $41.42 for overnight shipping expenses, totaling $2151.60. Garners specifically object to the on-line research expenses, asserting that most firms pay a flat rate for computer research and noting that no support is offered by Poveys for that expense. The Court does note that no particular argument or evidence is offered to support the discretionary expenses claimed. While the Court finds that the costs claimed are necessary and reasonable, in the ordinary course of defending this litigation, the Court cannot conclude that any of the discretionary expenses claimed are "exceptional." Property cases dealing with ownership, easements, boundaries, etc., are not particularly extraordinary and are common in a rural state like Idaho. In addition, the expenses claimed are those typically and customarily incurred in the defense of such claims.

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[14] *Automobile Club Ins. Co. v. Jackson*, 124 Idaho 874, 880, 865 P.2d 965, 971 (1993); *Beco Construction Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 11, 936 P.2d 202, 209 (Ct.App. 1997).

There is no particular assertion here that would turn normal postage, shipping, copying, fax, and research expenses into exceptional ones. The request for discretionary costs is DENIED.

IV. **Attorney Fees.**

A. I.C. 12-121. Poveys assert that Garners' claim was brought against them frivolously, unreasonably and without foundation. The Court has set forth the standard that applies to such a claim. In summary, a claim is not frivolous, unreasonable or without foundation just because it does not prevail or if the questions considered are fairly debatable. If any one issue is legitimate, even if others are not, no attorney fees are awardable under this statute.

This case raised important questions concerning the type of easements Garners had, what Poveys' responsibilities were regarding those easements, and whether Poveys had improperly interfered with those easements, either by physically plowing over them or in the conveyances to Dean, Neigum, and Viehweg. Poveys contended that they had the right to move Garners' easements to a different location, but they did not prevail on that issue. Poveys deed to Viehweg did not reference Garners' easements at all, leading Viehweg to believe there were no easements and that they could obstruct Garners' easements with a fence. While the Court concluded as a matter of law that Poveys had no duty with regard to the Viehweg deed, Poveys' duty was a serious and debatable question. There was a paucity of cases dealing with the duties of the servient estate holder with regard to any duty to protect the holder of a prescriptive or prior use easement and the Court had to carefully analyze many cases to decide what the duty was and whether Poveys breached that duty.

While the Court also concluded that the facts did not rise to the level to prevent summary judgment on the question of whether Poveys physically interfered with Garners' easements, a

careful analysis of those facts was necessary to reach that conclusion. The Court finds that the many questions discussed in this case about the scope of the easements and Poveys duties were "fairly debatable" and required substantial legal analysis for resolution.[15] Under this standard, the Court is not left with the abiding belief that Garners' claim was pursued frivolously, unreasonably or without foundation.

Poveys assert another basis for this part of their claim, i.e., that Garners' litigation tactics and motives were unreasonable. Poveys claim that Garners improperly failed to negotiate or agree to delay depositions while motions proceeded in this case, and that these tactics improperly increased the fees Poveys incurred. The Idaho Supreme Court has clearly held that the failure to negotiate a settlement is an improper basis for the award of attorney fees under I.C. § 12-121. *Smith v. Angell*, 122 Idaho 25, 830 P.2d 1163 (1992); *Anderson v. Anderson, Kaufman, et. al.*, 116 Idaho 359, 775 P.2d 1201 (1989). *See also Bosshardt v. Taylor*, 104 Idaho 660, 661, 662 P.2d 241, 242 (Ct.App.1983)("We have considered the possibility that the district judge intended to equate appellants' failure to enter into meaningful settlement negotiations with an "unreasonable" defense of the action...In our view, one party's failure to negotiate does not, by itself, establish the opposing party's right to attorney fees under I.C. § 12-121. An award of fees must be supported by a finding that one or more of the criteria prescribed by Rule 54(e)(1) have been satisfied.") Poveys have not cited any authority for their position that a failure to negotiate or some trial tactic can be a basis for a claim that a case is pursued frivolously, unreasonably or without foundation, and the Court has found none. The Court concludes that a claim under I.C. §

[15] Although not always factually similar, examples of cases where courts have found that claims related to easements or property ownership were not frivolous, unreasonable or without foundation include *Estate of E.A. Collins v. Geist*, 143 Idaho 821, 153 P.3d 1167 (2007); *Capstar Radio Operating Co. v. Lawrence*, 143 Idaho 704, 152 P.3d 575 (2007); *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 152 P.3d 2 (2006); and *C&G, Inc. v. Rule*, 135 Idaho 763, 25 P.3d 76 (2001).

12-121 must be based on an analysis of the legal positions taken in the case, and not on extraneous factors.

This analysis also applies to the last basis that Poveys assert, i.e., that Garners had an improper motive for bringing this claim, which was to rectify a problem or vendetta between Dan Garner and Brad Povey that was unrelated to the easement. Poveys offer the affidavit of Jeffrey J. Neigum in support of this position. Garners move to strike the affidavit and offer a counter affidavit from Daniel Garner on the issue. A motion to strike an affidavit is governed by I.R.C.P. 56 (e): "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Applying this standard, the Court GRANTS the Motion to Strike because the facts asserted in the affidavit are irrelevant to the question of whether Garners pursued this case frivolously, unreasonably or without foundation. There may be a variety of motives for bringing any lawsuit, some appropriate and some not. But the only question to be considered by this Court is whether the legal theories and facts of the case were pursued in violation of the requirements of I.C. § 12-121 and I.R.C.P. 54(e)(1). The Court has concluded above that the issues raised in this case were fairly debatable and legitimate, even when resolved against Garners. Again, the Court is not left with the abiding belief that the case was pursued frivolously, unreasonably or without foundation. No attorney fees are awarded on this basis.

B. I.C. § 12-120(3) – Commercial Transaction. "The test to determine whether [I.C. § 12-120(3)] applies is whether the commercial transaction comprises the gravamen of the lawsuit; it must be integral to the claim and constitute the basis upon which the party is

attempting to recover. *Johannsen v. Utterbeck*, 146 Idaho 423, 432, 196 P.3d 341, 350 (2008)." *Troupis v. Summer*, 148 Idaho 77, 218 P.3d 1138, 1141 (2009).

Poveys first assert that because Garners alleged, in the Complaint, that this case involved a commercial transaction, it must be deemed one and attorney fees must be allowed to the prevailing party.[16] However, Garners correctly point to *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001), where this same argument was made and rejected:

> There must be a commercial transaction between the parties for attorney fees to be awarded. To the extent that *Magic Lantern Productions, Inc. v. Dolsot,* 126 Idaho 805, 808, 892 P.2d 480, 483 (1995) may be read to mandate an award of attorney fees to the prevailing party when the other party has claimed fees pursuant to I.C. § 12-120(3), that interpretation is disavowed. A prevailing party may rely on I.C. § 12-120(3) if pled by another party for recovery of attorney fees if it is warranted under the statute. "[A] court is not required to award reasonable attorney fees every time a commercial transaction is connected with a case." *Bingham v. Montane Resource Associates,* 133 Idaho 420, 426, 987 P.2d 1035, 1041 (1999)(citing *Ervin Construction Co. v. Van Orden,* 125 Idaho 695, 704, 874 P.2d 506, 515 (1993)). [Emphasis added].

In short, it is not what is pled that is critical, but whether there is a commercial transaction that is integral to the claim and whether the commercial transaction is the basis for the result. Thus, the Court concludes that by simply pleading a commercial transaction in their Complaint, Garners have not conceded that a commercial transaction is the "gravamen" of this case.

Turning to the substantive issue, there are two different lines of cases that have analyzed whether a commercial transaction is the "gravamen" of litigation involving real property questions. In the first group of cases, courts have found that a dispute over real estate did constitute a commercial transaction and have awarded attorney fees. For example, in *Troupis*, the disputing parties owned real property in a partnership. The dispute involved an accounting of

[16] In the Complaint, ¶ 37, Garners assert: "The purchase of the real estate by Gary and Nola from Povey Defendants was a commercial transaction under Idaho Code Sec. 12-120(3) so Plaintiffs, as successors to Gary and Nola, should be entitled to recover their reasonable attorney fees from Defendants Brad Povey and Lezia Povey."

the division of common partnership expenses associated with the property. In finding that attorney fees should be awarded, the Idaho Supreme Court stated: "The Summers and Troupises owned the real property in question to conduct their business together. Therefore, the lawsuit was to recover on a commercial transaction and the Troupises are entitled to an award of attorney fees." 218 P.3d at 1141 (emphasis added).

In *Lexington Heights*, the dispute was between two parties over the sale of real property to be developed into residential units. When the seller tried to increase the sales price and the buyer refused, the seller wouldn't sell and the suit was for the damages caused by that refusal and the subsequent sale to another party. Thus, the essence of the suit was over the provisions of the sales contract. In ruling that this was a case involving a commercial transaction, the Idaho Supreme Court stated:

> The purpose of the alleged Agreement was for Lexington Heights to acquire the ninety acres to develop it into a subdivision. Therefore, the alleged Agreement was a commercial transaction. *Garner v. Bartschi,* 139 Idaho 430, 435, 80 P.3d 1031, 1036 (2003); *Taylor v. Just,* 138 Idaho 137, 59 P.3d 308 (2002); *Farm Credit Bank of Spokane v. Stevenson,* 125 Idaho 270, 869 P.2d 1365 (1994). Where a party alleges the existence of a contract that would be a commercial transaction under Idaho Code § 12-120(3), that claim triggers the application of the statute and the prevailing party may recover attorney fees even if no liability under the contract is established. *Miller v. St. Alphonsus Reg'l Med. Ctr., Inc.,* 139 Idaho 825, 87 P.3d 934 (2004); *Magic Lantern Prods., Inc.,* 126 Idaho 805, 892 P.2d 480 (1995).

140 Idaho at 287, 92 P.3d at 537 (emphasis added).

In *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 165 P.3d 261 (2007), a lender, Vanderford, brought suit to foreclose against real property offered as security for certain construction loans. In discussing the distinction between those real estate cases where fees are awarded and those where fees are not, the Idaho Supreme Court stated:

> Some cases dealing primarily with property ownership and easement rights have not been considered commercial transactions. *See Baxter v. Craney,* 135 Idaho 166, 174-75, 16 P.3d 263, 271-72 (2000) (boundary dispute is not commercial transaction because

> relationship between the parties is not of a commercial nature where land owners are engaged in the businesses of ranching and farming). Such decisions stem from the idea that an award of attorney fees under I.C. § 12-120(3) is not appropriate every time a commercial transaction is remotely connected with the case. *Sun Valley Hot Springs Ranch, Inc. v. Kelsey,* 131 Idaho 657, 663, 962 P.2d 1041, 1047 (1998). In this case the transactions involve accounts, notes, guarantees, and contracts for real estate development and sales are commercial transactions which constitute the gravamen of the lawsuit. The transactions in this case are dissimilar to land disputes between two neighboring businesses which the Court has previously held are not commercial transactions.

144 Idaho at 559, 165 P.3d at 273 (emphasis added).

In *Hoffer v. Callister*, 137 Idaho 291, 47 P.3d 1261 (2002), Hoffer purchased a commercial mobile home park from Callister. Hoffer later learned that the number of mobile homes in the park violated applicable zoning ordinances. Hoffer sued Callister and his predecessor seeking damages for breach of the real estate contract and breach of warranties associated with the deed of conveyance. At trial and on appeal Callister conceded that this case involved a commercial transaction and attorney fees were awarded.

An example of the second line of cases is *C&G, Inc. v. Rule*, 135 Idaho 763, 25 P.3d 76 (2001). In that case certain parcels of property were conveyed to the railroad by deed captioned "Right of Way Deed." Years later the railroad conveyed their interest in the property by quit claim deed. However, the plaintiff sued both the new owner and the railroad, asserting that the railroad's interest was only an easement, not fee simple. The railroad, who no longer owned the property, prevailed, but was denied any attorney fees. This case has, therefore, some significant factual similarities to the instant case. In affirming the district court's determination that no attorney fees should be awarded, the Idaho Supreme Court stated:

> The present action is primarily a dispute over whether the properties in question were conveyed in fee simple or as easements. As such, this case does not fall within the meaning of a commercial transaction as defined in I.C. § 12-120(3). The present situation is instead more analogous to situations involving the determination of property rights where this Court and the Court of Appeals have uniformly denied an award of attorney

> fees. *See Jerry J. Joseph C.L.U. Ins. Assoc. v. Vaught,* 117 Idaho 555, 789 P.2d 1146 (Ct.App.1990) (denying attorney fees under I.C. § 12-120(3) in an action where property owner sought a judgment compelling adjoining property owners to reimburse it for irrigation assessments, to record an instrument establishing an access easement, and to remove a fence hindering its use of the easement and where after settlement, adjoining property owners breached the settlement agreement); *Chen v. Conway,* 121 Idaho 1006, 829 P.2d 1355 (Ct.App.1991) (determining that a quiet title action involving dispute over the existence of a prescriptive easement was not a commercial transaction under I.C. § 12-120(3)); *Durrant v. Christensen,* 117 Idaho 70, 785 P.2d 634 (1990) (holding that an action in which landowners sought adjudication of water rights and a permanent restraining order prohibiting the defendant from interfering with their diversion and use of water determined was not based on a commercial transaction as defined in I.C. § 12-120(3)); *Sun Valley Hot Springs Ranch, Inc. v. Kelsey,* 131 Idaho 657, 962 P.2d 1041 (1998) (stating that an action to determine ownership and easement rights did not fall within the meaning of a commercial transaction under I.C. 12-120(3) and therefore attorney fees were properly denied). Accordingly, we decline to award fees to Union Pacific under I.C. § 12-120(3).

135 Idaho at 769, 25 P.3d at 82.

Likewise, in *Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000), one landowner sued the adjacent landowner claiming a new boundary by agreement or prescriptive use, although there never was any kind of express contract of sale between them. In ruling that no attorney fees could be awarded, the Idaho Supreme Court stated:

> The district court noted that both the Baxters and the Craneys are engaged in the businesses of ranching and farming, characterizing each party as being involved in a commercial endeavor. The district court, however, also summarily concluded that the relationship between the two parties was of a commercial nature. This simply is not the case. Idaho Code section 12-120(3) provides that attorney fees may be recovered by the prevailing party in a civil action to recover on "any commercial transaction." *Id.* The term "commercial transaction," as defined in I.C. § 12-120(3), includes all transactions except transactions for personal or household purposes. *See id.* This Court has previously recognized that "[a]ttorney fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover." *Brower v. E.I. DuPont DeNemours & Co.,* 117 Idaho 780, 784, 792 P.2d 345, 349 (1990).
>
> The present case is analogous to others decided by this Court and the Court of Appeals involving the determination of property rights. *See Jerry J. Joseph C.L.U. Ins. Assoc. v. Vaught,* 117 Idaho 555, 789 P.2d 1146 (Ct.App.1990) (denying attorney fees under I.C. § 12-120(3) in an action where property owner sought a judgment compelling adjoining property owners to reimburse it for irrigation assessments, to record an instrument establishing an access easement, and to remove a fence hindering its use of the easement

> and where after settlement, adjoining property owners breached the settlement agreement); *Chen v. Conway,* 121 Idaho 1006, 1012, 829 P.2d 1355, 1361 (Ct.App.), *opinion on review,* 121 Idaho 1000, 829 P.2d 1349 (1992) (determining that a quiet title action involving dispute over the existence of a prescriptive easement was not a commercial transaction under I.C. § 12-120(3)); *Durrant v. Christensen,* 117 Idaho 70, 785 P.2d 634 (1990) (holding that an action in which landowners sought adjudication of water rights and a permanent restraining order prohibiting the defendant from interfering with their diversion and use of water determined was not based on a commercial transaction as defined in I.C. § 12-120(3)); *Sun Valley Hot Springs Ranch, Inc. v. Kelsey,* 131 Idaho 657, 962 P.2d 1041 (1998) (concluding that an action to determine ownership and easement rights did not fall within the meaning of a commercial transaction under I.C. 12-120(3) and therefore attorney fees were properly denied). Like the above cases, this action is primarily a dispute over property ownership and easement rights and as such does not fall within the meaning of a commercial transaction as defined in I.C. § 12-120(3) and as applied by the courts.

135 Idaho at 174-75, 16 P.3d at 271-72.

Finally, in *Karterman v. Jameson*, 132 Idaho 910, 980 P.2d 574 (Ct.App.1999), the dispute was for specific performance of a lease/option agreement. The seller refused to convey the property and the buyer sued. The seller prevailed on summary judgment and the district court awarded fees based on a commercial transaction. The Idaho Court of Appeals reversed, holding:

> A transaction involving the sale and purchase of personal residential property is not a "commercial transaction" within the meaning of the statute. *Cf. Herrick v. Leuzinger,* 127 Idaho 293, 306, 900 P.2d 201, 214 (Ct.App.1995) (concluding where the purpose of a lease agreement was to operate a commercial cattle ranch, and the parties did not maintain a home on the ranch property, the lease was a commercial transaction and attorney fees were awardable pursuant to I.C. § 12-120(3)). Thus, because the lease-option agreement at issue here involves the lease and purchase of a dwelling for residential purposes, attorney fees cannot be awarded pursuant to this section.

132 Idaho at 916, 980 P.2d at 580.

What is the distinction between these two lines of cases and how are they to be applied to this case? This Court concludes that when there is a commercial relationship between the competing parties and/or the transaction in dispute is commercial in nature, then the courts have usually held that a commercial transaction is the gravamen of the matter and have awarded fees.

But when the transaction or the dispute is primarily involving a question of property ownership or property rights, the courts have concluded there is no commercial transaction and have not awarded fees.

In this case, there clearly was no contract or transaction at all between D. Garner and Poveys. Although D. Garner asserted that Poveys had an obligation to honor and protect his easement when they acquired their property from McCullochs, the reality is that there never was any kind of commercial transaction between D. Garner and Poveys at all. It is very similar to *C&G, Inc. v. Rule*, where the railroad, as a prior owner of the property was sued for actions they took in transferring their interest. The same principle applies here. Thus, this Court easily concludes that there is no commercial transaction as it applies to any claim between D. Garner and Poveys and attorney fees would not be awarded against D. Garner.

As to N. Garner, although there was a contract of sale between Poveys and N. Garner in 1992, that contract was not what is commonly referred to as a commercial transaction, i.e., it conveyed real property without having any kind of unique commercial purpose. There never was a "commercial" relationship between N. Garner and Poveys upon which this claim was based. The primary purpose of this litigation was to confirm N. Garner's easement right and to seek damages if that right was lost or interfered with, either physically or by conveyance, by Poveys. This claim is far more similar to the second line of cases that have held that a commercial transaction was not the gravamen of the claim.[17] This Court concludes that the gravamen of this case was the determination of property rights. A commercial transaction was

[17] *See, e.g., Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 131 Idaho 657, 663, 962 P.2d 1041, 1047 (1998) ("While the loan-mortgage transaction and the sale of Lot 44 are commercial transactions as defined in I.C. § 12-120(3), they are incidental to SVHS' claims. This action brought by SVHS is essentially an action whereby a landowner is attempting to enforce covenants against the owner of adjacent property. This case is analogous to holdings by this Court and the Court of Appeals involving the determination of property rights.")

not integral to the claim and was certainly not the basis for recovery.[18] Poveys prevailed, but not because of any commercial transaction or relationship. They prevailed because they did not breach any duty to Garners arising out of the easements Garners obtained by operation of law. To the extent that there was any commercial transaction involved in this case at all, it was incidental to the primary purpose of the litigation.

CONCLUSION

Based on the foregoing, the Court concludes that Poveys are the prevailing parties and are entitled to costs in the amount of $2359.75 as a matter of right. The Court concludes that any discretionary costs are not "exceptional" and no such costs are awarded. The Court also concludes that this case was not pursued frivolously, unreasonably and without foundation under I.C. § 12-121. Finally, the Court concludes that the gravamen of this litigation was the determination of property rights, and duties related thereto, and was not based on a commercial transaction under I.C. § 12-120(3). Therefore, no attorney fees are awarded to Poveys.

IT IS SO ORDERED.

DATED: March 9, 2010.

STEPHEN S. DUNN
District Judge

[18] *Iron Eagle Development, LLC v. Quality Design Systems, Inc.*, 65 P.3d 509, 515 (2003).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of March, 2010, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Michael W. Brown Thatcher, Beard, St. Clair, Gaffney PO Box 216 Rexburg, ID 83440	( ) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver (x) Facsimile: (208) 359-5888
Blake Atkin Atkin Law Office 7579 North Westside Highway Clifton, ID 83228	( ) U.S. Mail ( ) Overnight Delivery ( ) Hand Deliver (x) Facsimile: (801) 533-0380

DATED this 9th day of March, 2010.

Linda Hampton

Linda Hampton, Deputy Clerk

910

Blake S. Atkin ISB# 6903
Attorney for Appellants
7579 North Westside Highway
Clifton, Idaho 83228

ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Salt Lake City, Utah 84101
Telephone: (801) 533-0300
Facsimile: (801) 533-0380
Email: batkin@atkinlawoffices.net

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR FRANKLIN COUNTY

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs/Respondents, v. Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation, Defendants/Appellants.	Case No. CV-08-342 **NOTICE OF APPEAL**

TO THE ABOVE NAMES RESPONDENTS, DANIEL S. GARNER and SHERRI-JO GARNER, husband and wife; NOLA GARNER, a widow, and NOLA GARNER AS TRUSTEE

OF THE NOLA GARNER LIVING TRUST, dated July 19, 2007, AND THE PARTIES ATTORNEYS, GORDON S. THATCHER, MICHAEL W. BROWN, and JEFFREY D. BRUNSON, THATCHER, BEARD, ST. CLAIR, GAFFNEY, 116 S. Center, P.O. Box 216, Rexburg, Idaho, 83440, AND THE CLERK OF THE ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants, Brad Povey and Leiza Povey, husband and wife, appeal against the above-named Respondents, to the Idaho Supreme Court from the Memorandum Decision on Poveys Defendants' Motion for Costs and Fees entered in the above-entitled action on the day of March 9, 2010, by the Honorable Judge Stephen S. Dunn presiding.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the said Decision described in ¶1 above is an appealable decision under and pursuant to Rule 11 I.A.R.

3. A preliminary statement of the issues on appeal which the Appellants then intend to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellants from asserting other issues on appeal, are as follows:

(a) Whether the Trial Court erred in finding that a claim for relief under a warranty of title in a warranty deed conveying real estate for purposes of farming and a gravel pit operation was not an action on a commercial transaction for purposes of awarding attorney fees pursuant to Idaho Code section 12-120(3).

(b) Whether the Trial Court erred in holding that the fact that an action was brought for an improper purpose is not relevant to the inquiry under Idaho Code section 12-121 whether the action is being pursued frivolously, unreasonably or without foundation.

4. No order has been entered sealing all or any portion of the record.

5. No reporter's transcript is needed or requested.

6. The Appellants request the following documents to be included in the clerk's record, in addition to those automatically included under Rule 28, I.A.R.: None

7. I certify:

(a) That a copy of this Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below: N/A

(b) That the reporter of the district court has been requested to provide the estimated fee for preparation of the reporter's transcript, but has advised the undersigned to send her a copy of this Notice of Appeal, upon which she will prepare an invoice of the estimated cost for preparation of the transcript, which amount shall then be paid to the reporter. N/A

(c) That the estimated fee for preparation of the clerk's or agency's record has been paid. N/A

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 26 day of March, 2010.

ATKIN LAW OFFICS, P.C

Blake S. Atkin
Attorney for the Povey Defendants

843

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of March, 2010, I caused to be served a true and correct copy of Appellants' **NOTICE OF APPEAL** upon the following by the method of delivery designated:

Gordon S. Thatcher Thatcher, Beard, St. Clair, Gaffney 116 S. Center P.O. Box 216 Rexburg, Idaho 83440	_X_ U.S. Mail	___ Hand delivery ___ Fax
Eric Olsen Racine, Olson Nye Budge & Bailey P.O. Box 1391 Pocatello, Idaho 83204-1391	_X_ U.S. Mail	___ Hand delivery ___ Fax
Ryan McFarland Hawley, Troxell Ennis & Hawley P.O. Box 1617 Boise, Idaho 83701-1617	_X_ U.S. Mail	___ Hand delivery ___ Fax
Franklin County Court 39 West Oneida Preston, Idaho 83263	_X_ U.S. Mail	___ Hand delivery ___ Fax
Court Reporter	_X_ U.S. Mail	___ Hand delivery ___ Fax

Blake S. Atkin

FILED

10 APR -2 PM 3:40

FRANKLIN COUNTY CLERK

DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

DANIEL S. GARNER, et al., Plaintiffs/Respondents, vs HAL J. DEAN, et al., Defendants/Appellants.	Supreme Court No. CLERK'S CERTIFICATE OF APPEAL

Appeal from: **Sixth Judicial District, Franklin County**
Honorable STEPHEN S. DUNN

Case number from court: CV-2008-342

Order or judgment appealed from: Memorandum Decision on Povey Defendants' Motion for Costs and Fees

Attorney for Appellant: Blake S. Atkin
Atkin Law Offices, P.C.
837 South 500 West, Suite 200
Salt Lake City, UT 84101

Attorney for Respondent: Michael W. Brown
Thatcher, Beard, St. Clair, Gaffney
PO Box 216
Rexburg, ID 83440

Appeal by: Defendants

Appeal against: Plaintiffs

845

Notice of Appeal filed: March 26, 2010

Appellate fee paid: Yes

Request for additional (clerk's) record filed: No

Request for additional reporter's transcript filed: No

Was reporter's transcript requested? No

Dated this 2nd day of April, 2010

SIXTH JUDICIAL DISTRICT DISTRICT COURT

V. ELLIOTT LARSEN

By Linda Hampton
Linda Hampton, Deputy Clerk

FILED

10 APR 13 PM 1:00

FRANKLIN COUNTY CLERK

YHampton DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

DANIEL S. GARNER, et al., Plaintiffs/Respondents, vs HAL J. DEAN, et al., Defendants/Appellants.	Supreme Court No. CLERK'S CERTIFICATE OF APPEAL

Appeal from: **Sixth Judicial District, Franklin County**
Honorable STEPHEN S. DUNN

Case number from court: CV-2008-342

Order or judgment appealed from: Memorandum Decision on Povey Defendants' Motion for Costs and Fees

Attorney for Appellant: Blake S. Atkin
Atkin Law Offices, P.C.
837 South 500 West, Suite 200
Salt Lake City, UT 84101

Attorney for Respondent: Michael W. Brown
Thatcher, Beard, St. Clair, Gaffney
PO Box 216
Rexburg, ID 83440

Appeal by: Brad Povey

Appeal against: Daniel S. Garner

847

Notice of Appeal filed: March 26, 2010

Appellate fee paid: Yes

Request for additional (clerk's) record filed: No

Request for additional reporter's transcript filed: No

Was reporter's transcript requested? No

Dated this 13th day of April, 2010

SIXTH JUDICIAL DISTRICT
DISTRICT COURT

V. ELLIOTT LARSEN

By Linda Hampton
Linda Hampton, Deputy Clerk

Blake S. Atkin ISB# 6903
Attorney for Appellants
7579 North Westside Highway
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Email: batkin@atkinlawoffices.net

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR FRANKLIN COUNTY

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs/Respondents, v. Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation, Defendants/Appellants.	Case No. CV-08-342 **AMENDED NOTICE OF APPEAL**

TO THE ABOVE NAMES RESPONDENTS, DANIEL S. GARNER and SHERRI-JO GARNER, husband and wife; NOLA GARNER, a widow, and NOLA GARNER AS TRUSTEE

OF THE NOLA GARNER LIVING TRUST, dated July 19, 2007, AND THE PARTIES ATTORNEYS, GORDON S. THATCHER, MICHAEL W. BROWN, and JEFFREY D. BRUNSON, THATCHER, BEARD, ST. CLAIR, GAFFNEY, 116 S. Center, P.O. Box 216, Rexburg, Idaho, 83440, AND THE CLERK OF THE ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants, Brad Povey and Leiza Povey, husband and wife, appeal against the above-named Respondents, to the Idaho Supreme Court from the Memorandum Decision on Poveys Defendants' Motion for Costs and Fees entered in the above-entitled action on the day of March 9, 2010, by the Honorable Judge Stephen S. Dunn presiding.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the said Decision described in ¶1 above is an appealable decision under and pursuant to Rule 11 I.A.R.

3. A preliminary statement of the issues on appeal which the Appellants then intend to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellants from asserting other issues on appeal, are as follows:

(a) Whether the Trial Court erred in finding that a claim for relief under a warranty of title in a warranty deed conveying real estate for purposes of farming and a gravel pit operation was not an action on a commercial transaction for purposes of awarding attorney fees pursuant to Idaho Code section 12-120(3).

(b) Whether the Trial Court erred in holding that the fact that an action was brought for an improper purpose is not relevant to the inquiry under Idaho Code section 12-121 whether the action is being pursued frivolously, unreasonably or without foundation.

4. No order has been entered sealing all or any portion of the record.

5. No reporter's transcript is needed or requested.

6. The Appellants request the following documents to be included in the clerk's record, in addition to those automatically included under Rule 28, I.A.R.:

a. Motion for Leave to Amend the Complaint, filed 1/29/09.

b. Affidavit of Gordon S. Thatcher in Support of Plaintiffs' Motion for Leave to Amend Complaint, filed 1/29/09.

c. Notice of Pendency of Action, filed 2/2/09.

d. Defendant: Dean, Hal J Appearance Blake S. Atkin, filed 2/4/09.

e. Notice of Appearance-Atkin for Povey, filed 2/4/09.

f. Memorandum in Support of Brad and Leiza Povey's Motion to Dismiss Amended Complaint, filed 2/4/09.

g. Defendant Brad and Leiza Povey's Motion to Dismiss Amended Complaint, filed 2/4/09.

h. First American Title Insurance Company's Notice of Non-Opposition to Plaintiff's Motion for Leave to Amend the Complaint, filed 2/9/09.

i. Response to Defendant Poveys' Motion to Dismiss Amended Complaint, filed 2/20/09.

j. First American Title Insurance Company's Notice of Non-Opposition to Defendant Brad and Leiza Povey's Motion to Dismiss Amended Complaint, filed 2/24/09.

k. DefendantS Brad and Leiza Povey's Reply in Support of Motion to Dismiss Amended Complaint, filed 2/24/09.

l. Court Minutes Hearing type: Motions Hearing date: 2/26/09 Time: 2:10 pm.

m. Order, filed 3/6/09.

n. Decision and Order on Povey Defendants Motion to Dismiss Amended Complaint, filed 3/13/09.

o. Amended Complaint filed, dated 3/13/09.

p. Second Amended Complaint, filed 3/30/09.

q. Defendant: First American title Company, Inc., Appearance Ryan T. McFarland, dated 4/9/09.

r. Notice of Appearance, filed 4/9/09.

s. Povey Defendants' Answer to Second Amended Complaint, filed 4/9/09.

t. Answer to Second Amended Complaint, filed 4/16/09.

u. Order for Submission of Information, filed 9/2/09.

v. Defendant Brad and Leiza Povey's Motion for Summary Judgment, filed 9/3/09.

w. Memorandum in Support of Defendant Brad and Leiza Povey's Motion for Summary Judgment, filed 9/3/09.

x. Stipulated Statement, filed 9/16/09.

y. Affidavit of Henry Povey, filed 9/23/09.

z. Affidavit of Michael W. Brown, filed 9/23/09.

aa. Affidavit of Daniel S. Garner, filed 9/23/09.

bb. Motion for Leave to Amend Second Amended Complaint, filed 9/23/09.

cc. Motion for Enlargement of Time, filed 9/23/09.

dd. Plaintiff's Motion to Strike Affidavits of Ron Kendall, Ivan Jensen, Ted Rice, Lorraine Rice, and Judy Phillips, filed 9/23/09.

ee. Memorandum in Opposition to Motion for Summary Judgment of Defendants Brad Povey and Leiza Povey, filed 9/23/09.

ff. Povey Defendants Memorandum in Opposition to Motion for Enlargement of Time, filed 9/29/09.

gg. Memorandum in Opposition to Motion for Leave to Amend Second Amended Complaint, filed 9/29/09.

hh. Memorandum in Opposition to Motion to Strike the Affidavits of Ron Kendall, Ivan Jensen, Ted Rice, Lorraine Rice, and Judy Phillips, filed 9/29/09.

ii. Motion to Strike the Affidavits of Henry Povey and Daniel S. Garner, filed 9/29/09.

jj. Memorandum in Support of Motion to Strike the Affidavits of Henry Povey and Daniel S. Garner, filed 9/29/09.

kk. Reply to Poveys' Memorandum in Opposition to Motion for Leave to Amend Second Amended Complaint, filed 10/2/09.

ll. Second Affidavit of Michael W. Brown, filed 10/2/09.

mm. Reply Memorandum in Support of Motion for Summary Judgment, filed 10/5/09.

nn. Response to Motion to Strike the Affidavits of Henry Povey and Daniel S. Garner, filed 10/5/09.

oo. Stipulation for Dismissal with Prejudice, filed 10/8/09.

pp. Order for Dismissal with Prejudice, filed 10/14/09.

qq. Memorandum Decision on Povey Defendants' Motion for Summary Judgment, filed 10/27/09.

rr. Memorandum of Costs Including Attorney Fees, filed 11/9/09.

ss. Judgment, filed 11/13/09.

tt. Second Affidavit of Daniel S. Garner, filed 11/23/09.

uu. Motion to Disallow Costs, filed 11/23/09.

vv. Affidavit of Jeffrey D. Brunson, filed 11/23/09.

ww. Reply Memorandum of in Support of Memorandum of Costs Including Attorney Fees, filed 12/24/09.

xx. Affidavit of Blake S. Atkin, filed 12/28/09.

yy. Supplemental Affidavit of Blake S. Atkin in Support of Memorandum of Costs Including Attorney Fees, filed 12/28/09.

zz. Motion to Strike the Affidavit of Jeffrey Neigum, filed 12/29/09.

aaa. Memorandum in Opposition to Motion to Strike the Affidavit of Jeffrey J. Neigum, filed 1/6/10.

bbb. Reply Memorandum Re: Motion to Disallow Costs and Fees, filed 1/12/10.

ccc. Minute Entry and Order, filed 2/9/10.

ddd. Decision or Opinion, filed 3/9/10.

eee. Notice of Appeal, filed 3/26/10.

7. I certify

(a) That a copy of this Amended Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below: N/A

(b) That the reporter of the district court has been requested to provide the

estimated fee for preparation of the reporter's transcript, but has advised the undersigned to send her a copy of this Amended Notice of Appeal, upon which she will prepare an invoice of the estimated cost for preparation of the transcript, which amount shall then be paid to the reporter. N/A

(c) That the estimated fee for preparation of the clerk's or agency's record has been paid. N/A

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 30th day of April, 2010.

ATKIN LAW OFFICS, P.C

Blake S. Atkin
Attorney for the Povey Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2010, I caused to be served a true and correct copy of Appellants' **AMENDED NOTICE OF APPEAL** upon the following by the method of delivery designated:

Gordon S. Thatcher Michael D. Gaffney Jeffrey D. Brunson Michael W. Brown Thatcher, Beard, St. Clair, Gaffney 116 S. Center P.O. Box 216 Rexburg, Idaho 83440 Facsimile: (208) 359-5888	__ U.S. Mail	___Hand delivery	_X__ Fax
Eric Olsen Racine, Olson Nye Budge & Bailey P.O. Box 1391 Pocatello, Idaho 83204-1391 Facsimile: (208) 232-6109	__ U.S. Mail	___Hand delivery	_X__ Fax
Franklin County Court Clerk of Court 39 West Oneida Preston, Idaho 83263 Facsimile: (208) 852-2926	___ U.S. Mail	___ Hand delivery	_X__ Fax
Judge Stephen Dunn Bannock County Chambers 624 E. Center Pocatello, Idaho 83201 Facsimile: (208) 236-7208	___ U.S. Mail	___ Hand delivery	_X__ Fax

Blake S. Atkin

FILED

10 MAY -4 PM 12: 14

FRANKLIN COUNTY CLERK

DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

DANIEL S. GARNER and SHERRI JO GARNER husband and wife; NOLA GARNER, a widow and NOLA GARNER as trustee of the NOLA GARNER LIVING TRUST, dated 7-29-07, Plaintiffs-Respondents, vs. BRAD POVEY and LEIZA POVEY, husband and wife, Defendants-Appellants, and HAL J. DEAN and MARLENE T. DEAN, husband and wife, DOUGLAS K. VIEHWEG and SHARON C. VIEHWEG, husband and wife, JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM as trustees of the JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST, dated 9-17-04; FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign title insurer with an Idaho certificate of authority; and FIRST AMERICAN TITLE COMPANY, INC. an Idaho Corporation, Defendants.	Supreme Court No. 37561-2010 CLERK'S CERTIFICATE OF APPEAL AMENDED

Appeal from: **Sixth Judicial District, Franklin County**
Honorable STEPHEN S. DUNN

Case number from court: CV-2008-342

Order or judgment appealed from: Memorandum Decision on Povey Defendants' Motion for Costs and Fees

857

Attorney for Appellant: Blake S. Atkin
Atkin Law Offices, P.C.
837 South 500 West, Suite 200
Salt Lake City, UT 84101

Attorney for Respondent: Michael W. Brown
Thatcher, Beard, St. Clair, Gaffney
PO Box 216
Rexburg, ID 83440

Appeal by: Brad Povey

Appeal against: Daniel S. Garner

Notice of Appeal filed: March 26, 2010

Notice of Amended Notice of Appeal filed: May 3, 2010

Appellate fee paid: Yes

Request for additional (clerk's) record filed: No

Request for additional reporter's transcript filed: No

Was reporter's transcript requested? No

Dated this 4th day of May, 2010.

SIXTH JUDICIAL DISTRICT
DISTRICT COURT

V. ELLIOTT LARSEN

By Linda Hampton
Linda Hampton, Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

DANIEL S. GARNER and SHERRI JO GARNER husband and wife; NOLA GARNER, a widow and NOLA GARNER as trustee of the NOLA GARNER LIVING TRUST, dated 7-29-07, Plaintiffs-Respondents, vs. BRAD POVEY and LEIZA POVEY, husband and wife, Defendants-Appellants, and HAL J. DEAN and MARLENE T. DEAN, husband and wife, DOUGLAS K. VIEHWEG and SHARON C. VIEHWEG, husband and wife, JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM as trustees of the JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST, dated 9-17-04; FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign title insurer with an Idaho certificate of authority; and FIRST AMERICAN TITLE COMPANY, INC. an Idaho Corporation, Defendants.	Supreme Court No. 37561-2010 CERTIFICATE OF EXHIBITS

I, V. Elliott Larsen, Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Franklin, do hereby certify that the following is a list of exhibits which were offered or admitted into evidence during the hearing in this cause:

NONE

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 10th day of May, 2010.

SIXTH JUDICIAL DISTRICT DISTRICT COURT

V. ELLIOTT LARSEN
CLERK OF THE DISTRICT COURT

By Linda Hampton
Linda Hampton, Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

DANIEL S. GARNER and SHERRI JO GARNER husband and wife; NOLA GARNER, a widow and NOLA GARNER as trustee of the NOLA GARNER LIVING TRUST, dated 7-29-07, Plaintiffs-Respondents, vs. BRAD POVEY and LEIZA POVEY, husband and wife, Defendants-Appellants, and HAL J. DEAN and MARLENE T. DEAN, husband and wife, DOUGLAS K. VIEHWEG and SHARON C. VIEHWEG, husband and wife, JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM as trustees of the JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST, dated 9-17-04; FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign title insurer with an Idaho certificate of authority; and FIRST AMERICAN TITLE COMPANY, INC. an Idaho Corporation, Defendants.	Supreme Court No. 37561-2010 CLERK'S CERTIFICATE OF APPEAL

I, V. Elliott Larsen, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Franklin, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I do further certify that all exhibits, offered or admitted in the above-entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Preston, Idaho, this 10th day of May, 2010.

SIXTH JUDICIAL DISTRICT
DISTRICT COURT

V. ELLIOTT LARSEN
CLERK OF THE DISTRICT COURT

BY: Linda Hampton
Linda Hampton, Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

DANIEL S. GARNER and SHERRI JO GARNER husband and wife; NOLA GARNER, a widow and NOLA GARNER as trustee of the NOLA GARNER LIVING TRUST, dated 7-29-07, Plaintiffs-Respondents, vs. BRAD POVEY and LEIZA POVEY, husband and wife, Defendants-Appellants, and HAL J. DEAN and MARLENE T. DEAN, husband and wife, DOUGLAS K. VIEHWEG and SHARON C. VIEHWEG, husband and wife, JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM as trustees of the JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST, dated 9-17-04; FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign title insurer with an Idaho certificate of authority; and FIRST AMERICAN TITLE COMPANY, INC. an Idaho Corporation, Defendants.	Supreme Court No. 37561-2010 CERTIFICATE OF SERVICE

I, V. Elliott Larsen, Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Franklin, do hereby certify that I have personally served or mailed, by United States Mail, one copy of the CLERK'S RECORD to each of the Attorneys of Record in this cause as follows:

Blake S. Atkin
Atkin Law Offices, P.C.
837 South 500 West, Suite 200
Salt Lake City, UT 84101

Michael W. Brown
Thatcher, Beard, St. Clair, Gaffney
PO Box 216
Rexburg, ID 83440

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 11 day of May, 2010.

V. ELLIOTT LARSEN
CLERK OF THE DISTRICT COURT

By Linda Hampton
Linda Hampton, Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * * *

DANIEL S. GARNER and SHERRI JO GARNER husband and wife; NOLA GARNER, a widow and NOLA GARNER as trustee of the NOLA GARNER LIVING TRUST, dated 7-29-07, Plaintiffs-Respondents, vs. BRAD POVEY and LEIZA POVEY, husband and wife, Defendants-Appellants, and HAL J. DEAN and MARLENE T. DEAN, husband and wife, DOUGLAS K. VIEHWEG and SHARON C. VIEHWEG, husband and wife, JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM as trustees of the JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST, dated 9-17-04; FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign title insurer with an Idaho certificate of authority; and FIRST AMERICAN TITLE COMPANY, INC. an Idaho Corporation, Defendants.	Supreme Court No. 37561-2010 CERTIFICATE OF SERVICE

I, Linda Hampton, Deputy Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Franklin, do hereby certify that I have personally served or mailed, by United States mail, postage prepaid, one copy of the Clerk's Record and any Reporter's Transcript to each of the parties or their Attorney of Record as follows:

Blake S. Atkin
Atkin Law Offices, P.C.
837 South 500 West, Suite 200
Salt Lake City, UT 84101

Michael W. Brown
Thatcher, Beard, St. Clair, Gaffney
PO Box 216
Rexburg, ID 83440

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 11 day of May, 2010.

SIXTH JUDICIAL DISTRICT
DISTRICT COURT

V. ELLIOTT LARSEN
CLERK OF THE DISTRICT COURT

By Linda Hampton
Linda Hampton, Deputy Clerk