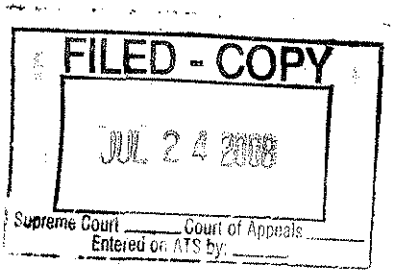
7-24-2008

# Bushi v. Sage Health Care, PLLC Appellant's Brief 1 Dckt. 34827

IN THE SUPREME COURT OF THE STATE OF IDAHO

| | |
|---|---|
| STEPHEN BUSHI, M.D.,<br><br>Plaintiff-Appellant,<br>vs.<br><br>SAGE HEALTH CARE, PLLC, an Idaho limited liability company; CHARLES C. NOVAK, M.D., DAVID A. KENT, M.D.; and ROBERTO NEGRON, M.D.,<br><br>Defendants –Respondents. | Supreme Court Case No. 34827 |
| SAGE HEALTH CARE, PLLC, an Idaho limited liability company; CHARLES C. NOVAK, M.D., DAVID A. KENT, M.D.; and ROBERTO NEGRON, M.D.,<br><br>Counter Claimants-Respondents,<br>vs.<br><br>STEPHEN BUSHI, M.D.,<br><br>Counter Defendant –Appellant. | |




# APPELLANT'S BRIEF

Appeal from the District Court of the
Fourth Judicial District for Ada County

Honorable Cheri C. Copsey, District Judge, Presiding

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# I.

# STATEMENT OF THE CASE

## A. Nature Of The Case

This is an appeal from the District Court's grant of summary judgment and an award of attorney fees in favor the Defendant/Appellant members of Sage Health Care PLLC. This case raises issues of whether three members of a four-member LLC breach fiduciary duties and the implied covenant of good faith and fair dealing when the three members act to deprive the fourth member of his profits due from, and ultimately his ownership in, the LLC.

## B. Statement Of Facts And Course Of Proceedings

### 1. Background

On May 19, 1994, Plaintiff-Appellant, Stephen T. Bushi ("Dr. Bushi"), along with Cantril T. Nielsen and Defendants-Appellees, Charles C. Novak and David A Kent, formed The Sage Group, LLC. *See* Clerk's Record on Appeal ("Record"), Exh. 11, ¶¶ 2-3. The name of the LLC was subsequently changed to Sage Health Care, PLLC (hereinafter "Sage"). *See* Record, p. 193. Each of the original members, all of whom are licensed psychiatrists, contributed $2,000, and each held a 25% interest in the LLC. *Id.* Dr. Nielsen subsequently withdrew from Sage. *See* Record, p. 12. In 2003, Defendant Appellee, Dr. Roberto Negron, acquired a 25% ownership interest in Sage. *Id.*

Sage is a professional services provider, consisting primarily of psychiatric services. However, much of its income is derived from other service providers, including therapists, nurse practitioners and physicians assistants, who add a great deal of benefit to the practice of psychiatry at Sage. *See* Record, Exh. 11, ¶ 16. A large part of Sage's income comes directly

from contracts entered into exclusively between Sage and other health care entities, such as St. Alphonsus Regional Health Center, Human Supports, Intermountain Hospital, Sun Health and the Idaho Department of Health and Welfare. *Id.* These contracts are the backbone of Sage's profits, and they subsidize the private practices of each of the doctors with an office in Sage. *Id.* at ¶ 23.

For the first several years of its operation, Sage did not generate much profit. *Id.* at ¶ 21. However, through the combined efforts of the members, Sage eventually became very profitable. In 2003, for the purpose of obtaining loans, each of the Sage members **valued their 25% ownership interest of Sage at $250,000**. *Id.* at ¶ 17.

Having helped build Sage into a profitable business, Dr. Bushi planned on remaining an equity owner and having the value of his membership interest substantially increase over the years such that it would provide a sizeable income stream for his retirement. *See Id.* at ¶ 8. The terms of Sage's Operating Agreement justified Bushi's expectation that he would remain an equity owner of Sage. In this regard, the Sage Operating Agreement provided for dissociation of a member only under limited and specified circumstances:

> DISSOCIATION OF A MEMBER
>
> 1. Mandatory Dissociation – A person shall cease to be a member upon the happening of any of the following events:
>
> 1.1 the Withdrawal of a Member with the consent of the majority of the remaining members prior to the date set forth in Section 5 of Article II;
>
> 1.2 in the case of a member who is a natural person, the death of the member of the entry of an order by a court of competent jurisdiction adjudicating the Member incompetent to manage the member's person [sic] estate;

1.3 in the case of a Member who is acting as a Member by virtue of being a trustee in a trust, the termination of the trust (but not merely the substitution of a new trustee);

1.4 in the case of a Member that is a separate Organization other than a corporation, the dissolution and commencement of winding up of the separate Organization;

1.5 in the case of a member that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter; or [sic]

2. Dissociation by Vote – A person shall cease to be a member upon a majority vote of other Members, upon the happening of any of the following events:

2.1 the bankruptcy of a Member;

2.2 the attachment, levy or execution upon a Member's Membership Interest;

2.3 the Member's loss of professional license;

2.4 a finding by a Member's professional society that the Member is guilty of an ethical violation;

2.5 the Member is unable to obtain professional liability insurance coverage;

2.6 the member is convicted of a felony.

*See* Record, pp. 38-62.

In about 2002, Dr. Bushi started to date a nurse practitioner who was and still is an employee of Sage. *See* Record, Exh. 11, ¶ 25. Dr. Bushi informed the other members of the LLC about the relationship. *Id.* No term in the Operating Agreement prohibited Dr. Bushi from maintaining his relationship with the nurse practitioner. However, because of the other members' concerns about their potential liability for a sexual harassment claim, arrangements were made that Dr. Bushi would have no role in supervising the nurse practitioner. *Id.*

At a member's meeting held on October 27, 2005, the other Sage members informed Dr. Bushi that they wanted him out as a member of Sage because he was dating the nurse practitioner. *Id.* at ¶ 27. Of course, as the Defendant members knew, the Operating Agreement did not prohibit the relationship and did not provide for dissociation of a member because of such a relationship.

After being informed that the other members wanted him out of Sage, Dr. Bushi became concerned about his future with Sage. Dr. Bushi spoke with another psychiatry group in November 2005, and decided to cover himself by also joining their practice group. *Id.* at ¶ 28. The Operating Agreement, Article VI, paragraph 8 (Conflicts of Interest) specifically allows a member to enter into business transactions that may be considered competitive with Sage, and further provides that each member waives and releases any and all claims and causes of action against the other member which might result from such transactions. *See* Record, p. 49. Thus, Dr. Bushi was entirely within his rights to join this other psychiatry group.

Dr. Novak, Dr. Kent and Dr. Negron (the "Appellee Members") thought otherwise, and at an owners' meeting held on December 8, 2005, they voted that Plaintiff would not be entitled to any profit sharing starting in the year 2006. *See* Record, Exh. 11, ¶ 29. The stated reason for this decision was "due to his connection with our competitor." *Id.* They also stopped scheduling Plaintiff in various Sage contracts that he had been participating in, which included the Consult Contract at St. Als, the Addiction Recovery Center Contract at St. Als and the Ada County Involuntary Holds Contract. *Id.* at ¶ 29.

At this same meeting, Dr. Novak, Dr. Kent and Dr. Negron also expressed that they wanted to buy out Plaintiff's membership interest, and Plaintiff was handed a figure prepared by

Craig Rasmussen, CPA, who acts as the Appellee Members' personal accountant as well as Sage's accountant. Plaintiff was told at the meeting that he had to make a decision to their offer by January 2006, and Plaintiff responded that he would not comment on any amount until he had spoken with his attorney. *Id.* at ¶ 30.

On January 17, 2006, an owners' meeting was convened and Dr. Bushi, Dr. Negron, Dr. Novak, Dr. Kent and Jennifer Teinert, the office manager, were present. They presented Plaintiff for the first time with a non-compete agreement providing that he would not go into competition in any practice against them. In return, Dr. Bushi would be paid an amount equal to $15,000 for his withdrawal and dissociation from Sage, payable over three years, and Plaintiff would be required to withdraw and forfeit any and all rights of ownership which he currently had in Sage. *Id.* at ¶ 31.

Following Dr. Bushi's attendance at the meeting, Dr. Bushi's counsel wrote the Appellee Members a letter, rejecting the Appellee Members' bad faith demand. *Id.* at ¶ 33. Dr. Bushi's counsel explained that Dr. Bushi was entitled to an apportionment of the profit distributions equal to his membership interest as provided in the Operating Agreement. Dr. Bushi's counsel further expressed that, until a mutually satisfactory agreement had been reached on the value of Dr. Bushi's membership interest, he would remain a member of Sage and retain all of his rights and interest associated with being a member. *Id.* at ¶ 34.

On January 24, 2006, Dr. Bushi received a notice for a January 30, 2006 meeting of members of Sage Health Care. *Id.* at ¶ 35. When Dr. Bushi informed Dr. Novak that he could not make the announced meeting because he would be out of town, Dr. Novak stated that it did

not matter whether he attended the meeting because Dr. Bushi was out and his vote did not matter. *Id.* at ¶ 36.

The Appellee Members proceeded to hold the special meeting of members, and Dr. Bushi's counsel appeared by proxy in his absence. The Appellee Members voted to amend Article XI of the Operating Agreement to provide for the dissociation of a member "[b]y an affirmative vote of all but one of the members." *Id.* at ¶ 37. In other words, the three members of the four-member LLC amended the Operating Agreement to allow themselves to dissociate the fourth member for any or no reason whatsoever.

The effect of this amendment was that Dr. Novak, Dr. Kent and Dr. Negron dissociated Dr. Bushi, thus depriving him of his interest in the company that he had helped build into a profitable entity. The dissociation of Dr. Bushi, of course, served the Appellee Members' self interests in that it served to immediately increase each Appellee Member's interest in Sage from 25% to a full 33%, thus padding their own pocket books now and into the future with the profits of Sage. While the Appellee Members personally benefited from their actions, Dr. Bushi was left with nothing, other than the $11,240 he was offered for the "book value" of his membership interest. *See* Record, Exh. 4.

**2. Separate Litigation By Sage Against Dr. Bushi**

On June 9, 2006, Sage filed a lawsuit against Dr. Bushi in the District Court of the Fourth Judicial District, Ada County Case No. 0610585 (hereinafter, the "Separate Litigation"). That Separate Litigation arose out of Sage's misguided claim that Dr. Bushi had used a business line of credit for his own purposes. Dr. Bushi had obtained a line of credit from Wells Fargo in 2005. The name on the line of credit account was listed as "Sage Health Care, PLCC Stephen Bushi."

Dr. Bushi at all times believed that this line of credit was his personal line of credit, not a business line of credit for Sage. *See* Record, Exh. 11, ¶ 32. After learning that Dr. Bushi had obtained funds on the line of credit, Sage requested that he pay off the line of credit and Sage then filed suit against Dr. Bushi. Dr. Bushi repaid the line of credit and Sage subsequently dismissed its lawsuit. Dr. Bushi's use of the line of credit was not an act of conversion or otherwise wrongful. Instead, it was simply a matter of Dr. Bushi's misunderstanding of the name under which the line of credit had been opened. *Id.* More importantly, the use of the line of credit was never asserted by the other members as the reasons for Dr. Bushi's dissociation. *Id.* As will be discussed below, however, the Appellee Members have now opportunistically claimed that it was the reason for the dissociation. That claim is not only irrelevant, but, as discussed in more detail below, it finds no factual support in the record, especially in the context of a motion for summary judgment in which all facts and inferences must be drawn in favor of the non-moving party.

**3. Procedural Posture**

On October 19, 2006, Dr. Bushi filed a complaint against Sage asserting claims for (1) breach of fiduciary duty; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment; (4) breach of operating agreement; (5) declaratory relief; and (6) equitable accounting. *See* Record, pp. 8-22. Appellees filed a counterclaim, asserting two claims. *See* Record, pp. 23-37. First, Appellees brought a breach of contract claim, even though it was based on the same facts as the Separate Litigation that had already been dismissed. More specifically, the breach of contract counterclaim alleged that Bushi breached the Operating Agreement by using what Dr. Bushi mistakenly believed to be his own personal line of credit. Second,

Appellees sought declaratory relief related to the validity of their actions in amending the Operating Agreement.

Dr. Bushi brought a motion to dismiss Appellees' counterclaim for breach of contract, and the District Court granted that motion on grounds that the cause of action was moot. Between the time that Dr. Bushi filed his motion to dismiss and when the District Court granted that motion, Appellees filed a motion for summary judgment. That motion sought summary judgment both on Dr. Bushi's complaint and Appellees' counterclaims. The District Court granted Appellees' motion for summary judgment. *See* Record, pp. 96-116.

Appellees then filed a Memorandum of Costs and Attorney Fees, asking the District Court to award costs and fees "under Idaho Rules of Civil Procedure 54(d)(1) and 54(e)(1) and **Idaho Code § 12-121**." *See* Record, Exh. 14 (emphasis added). At no point in Appellees' Memorandum of Costs and Attorney Fees, the affidavits in support thereof, or Appellees' reply briefing, did Appellees seek fees under the commercial transaction provision of Idaho Code § 12-120(3). *See* Record, Exhs. 14-17. The District Court declined to award attorney fees under Idaho Code § 12-121, but awarded fees under Idaho Code § 12-120(3), even though Appellees' moving papers never made a claim for fees under that section of the Idaho Code. *See* Record, pp. 164-177. Moreover, the District Court granted fees in the amount of $ 73,233.19, which is an excessive and unreasonable amount in this case. *Id.*

Dr. Bushi appeals both the entry of summary judgment in favor of Appellees and the award of attorney fees in favor of Appellees.

## II.

## ISSUES PRESENTED ON APPEAL

(1) Whether the District Court erred in its Order Granting Sage Health Care's Motion for Summary Judgment.

(2) Whether the District Court erred in its Order Granting Sage Health Care's Motion for Attorney Fees, dated October 25, 2007, by awarding Defendant's attorney fees in the amount of $73,233.19, costs as a matter of right in the amount of $72.00, and discretionary costs in the amount of $5,665.00.

## III.

## ARGUMENT

### A. Standard Of Review

This Court reviews *de novo* a trial court's grant of a motion for summary judgment. *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 662, 115 P.3d 751, 753 (2005). The Court should affirm the summary judgment order only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (citing I.R.C.P. 56(c)). "When making its determination, the Court construes all facts in the light most favorable to the nonmoving party." *Id.*

This Court's review of whether the District Court properly awarded attorney fees is also de novo. *See Bingham v. Montane Resource Associates*, 133 Idaho 420, 423, 987 P.2d 1035, 1038 (1999) ("When a dispute centers around whether the district judge properly awarded attorney fees under a statute in the first instance, the Court exercises free review."). Only if the

Court agrees that attorney fees were properly awarded does the Court review the reasonableness of the award of attorney fees award. That review is on an abuse of discretion standard. *See Lettunich v. Lettunich*, 185 P.3d 258, 262, __ Idaho __ (2008).

### B. The District Court Relied On Allegations Not In The Record And Improperly Resolved Factual Issues In Favor Of The Moving Parties

The well-established rule on summary judgment is that all facts must be construed in the light most favorable to the non-moving party and all reasonable inferences must be drawn in the non-moving party's favor. *Cascade Auto Glass*, 141 Idaho 660, 662. The District Court, however, did not apply this standard. The Appellee Members have opportunistically attempted to justify the dissociation of Dr. Bushi on grounds that Dr. Bushi used a business line of credit for his own purposes. As an initial matter, the alleged use of the business line of credit was never even asserted by Sage as a basis for his dissociation until asserted in this litigation. Instead, the Appellee Members' expressly stated reasons for wanting to dissociate Dr. Bushi was that he was dating a nurse practitioner and his decision to associate with a competing group of psychologists. *See* Record, Exh. 11, ¶ 29.

More importantly, the District Court misapplied the summary judgment rule of construing facts in favor of the non-moving party by ignoring Dr. Bushi's explanation of the allegations. Dr. Bushi's use of the line of credit was not an act of conversion. Instead, it was simply a matter of Dr. Bushi's misunderstanding of the name under which the line of credit had been opened. *Id.* at ¶ 32.

Additionally, while the District Court adopted almost verbatim the Appellee Members' version of the facts, none of the allegations of Dr. Bushi's use of the business line of credit are

even in the record. On summary judgment, the Court is permitted to consider only the "pleadings, depositions, and admissions on file, together with the affidavits, if any." *See* I.R.C.P. 56(c). None of the affidavits submitted in support of the motion for summary judgment make any mention of the alleged use of a business line of credit. *See* Record, Exhs. 2-6. Instead, those allegations are contained only in the first count of Appellees' Counterclaim, which has been dismissed. *See* Record, pp. 30-32. Thus, those allegations are not in the record and cannot be relied upon for purposes of Appellees' motion for summary judgment.

It is abundantly clear that the District Court's view of this case was tainted by the allegations of conversion. The District Court's order granting summary judgment recited in great detail the allegations against Dr. Bushi (even though these factual issues were not in the record and should have been resolved in favor of Dr. Bushi for purposes of summary judgment). *See* Record, pp. 101–103 (Order, pp. 6-8). The District Court repeatedly referred back to these allegations as justifying the Appellee Members' actions. For example, on page 14 of the District Court's Order, the District Court asserts that, "[u]nder the original agreement, they could not vote to remove [Dr. Bushi] even though he [used the operating line of credit] without the knowledge of the other Members and in clear violation of the operating Agreement language." *See* Record, p. 109. The District Court further explained that, under the terms of the Operating Agreement, the Appellee Members were "without remedy" against Dr. Bushi, thus justifying their amendment of the Operating Agreement. *Id.* at pp. 109-110.

As another example, the District Court explained during the hearing on the Appellees' motion for attorney fees that the allegations of conversion served as the "context" for the amendment of the Operating Agreement. The District Court insisted on relying on these

allegations, despite objections from Dr. Bushi's counsel that the allegations were both irrelevant and were not supported by any affidavit:

> MR. SCHOSSBERGER: Your honor, I start by saying I take exception to this continuing going back to raising this theory of conversion in the original complaint which was in a separate action which was dismissed which then was also dismissed by this Court in the counterclaim.
>
> THE COURT: I know, but that was the basis for this whole litigation. That's what really started it. So I do think it is relevant for the purposes of these arguments and it was certainly something that I took into account in trying to put context around what it was that the members did in deciding to revise the operating agreement. So I'm not going to ignore it, counsel.

September 27, 2007 Transcript, p. 89, LL. 16 – p. 90 L. 2; *see also* pp. 90, L. 6 – p. 91, L. 25.

Thus, it is clear that the allegations against Dr. Bushi played a very large role in the District Court's decision. The District Court's resolution of the issue in favor of the Appellee Members was erroneous because (1) it violates the rule that facts must be construed in favor of the non-moving party for purposes of summary judgment; and (2) those allegations are not even included in the record. These two mistakes skewed the entire analysis the District Court performed in granting summary judgment.

### C. The Appellees Breached Their Fiduciary Duties To Dr. Bushi

The District Court erred in granting summary judgment on Dr. Bushi's claim for breach of fiduciary duties. In granting summary judgment on the breach of fiduciary duty cause of action, the District Court concluded that it was "debatable" whether the Appellee Members even

owed fiduciary duties to Dr. Bushi. *See* Record, p. 111.[1] Thus, the first question presented to this Court is whether members of an LLC owed fiduciary duties to other members. While this question has been answered in the affirmative by courts around the country, it has apparently not yet been squarely answered by an Idaho court. The second question presented in this appeal is whether Dr. Bushi has raised a material issue of fact as to whether the Appellee Members have breached their fiduciary duties.

### 1. As Members Of Sage, The Appellee Members Owe Fiduciary Duties To Each Other Member

Although apparently not yet addressed squarely by an Idaho court,[2] whether members of a limited liability company owe each other fiduciary duties is hardly "debatable." Courts and commentators have almost universally found that basic fiduciary duties govern the conduct of LLC members. *See, e.g.*, NTS AM. JUR. 2D *Limited Liability Companies* § 11 (2008) ("A limited liability company, like a partnership, involves a fiduciary relationship."); *id.* (stating that members of an LLC also owe one another "the duty of utmost trust and loyalty) (citing *McConnell v. Hunt Sports Enterprises*, 132 725 N.E.2d 1193, 1214 (Ohio Ct. App. 1999)); *Purcell v. Southern Hills Investments, LLC*, 847 N.E.2d 991, 997 (Ind. Ct. App. 2006) (holding

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[1] Yet, during oral argument the Court responded to Dr. Bushi's counsel and acknowledged, "I agree with you that there are fiduciary duties owed. . . . So there is a fiduciary duty – I agree with you that there are fiduciary duties owed between – among the members. I agree with you about that." Mr. Schossberger: "Members owe each other a fiduciary duty." The Court: "Correct." *See* Transcript, p. 67, ll. 4 – 18.

[2] This Court rightly declined to rule on the question of fiduciary duties between members of an LLC in *Blickenstaff v. Clegg*, 140 Idaho 572, 97 P.3d 439 (2004). Although it was unnecessary to answer the question in that case, the facts before the Court in this case present a more appropriate opportunity to find that members of a limited liability company owe one another fiduciary duties.

that "common law fiduciary duties, similar to the ones imposed on partnership and closely-held corporations, are applicable to Indiana LLCs"). This is the natural and logical result, given that the two business entities from which LLCs borrow form and substance – corporations and partnerships – have well-established and robust fiduciary duties that govern the actions between and among partners, directors, officers, and controlling shareholders. *See* 2 O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 6.3 (Rev. 2d ed. 2005) ("[F]iduciary duty has a strong tradition in both of the core sources for LLC law."); LIMITED LIABILITY COMPANIES: *Tax and Business Law* § 10.09, at *2 (2008) ("Do special fiduciary duties exist within a closely held limited liability company? There is certainly ample analogy in two of three types of entities that are the progenitors of the limited liability company. In both general partnerships and closely held corporations, the burdens of fiduciary duties extend beyond those individuals or entities with formal management authority, and the protections range beyond the organization, reaching directly to the owners."); *Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC*, 158 P.3d 1183, 1190 (Wash. Ct. App. 2007) ("The role of members in a member-managed LLC is analogous to that of partners in a general partnership, and partners are held accountable to each other and the partnership as fiduciaries."); *Willoughby Rehabilitation & Health Care Center, LLC v. Webster*, 831 N.Y.S.2d 357 (2006) ("A limited liability company is hybrid business entity having attributes of both a corporation and a partnership . . . . A partner, and by analogy, a member of a limited liability company, has a fiduciary obligation to others in the partnership or limited liability company . . . .") (quotation marks and citation omitted).

Nothing in the Idaho Code precludes this Court from confirming that LLC members owe each other basic fiduciary duties. Idaho Code § 53-622(1) prescribes the standard that members and managers of an LLC must comply with to be shielded from liability in discharging their duties on behalf of the corporation. Much like the statutory adoption of the business judgment rule in the corporate context, however, "the enactment of this statutory provision . . . does not alter the long-standing duties of loyalty, good-faith and fair dealing owed by a fiduciary acting on his or her own behalf." *Jordan v. Hunter*, 124 Idaho 899, 905 n.3, 865 P.2d 990, 996 (Ct. App. 1993). Fiduciary duties exist between and amongst members of an LLC, just as they exist between and amongst directors of a corporation, notwithstanding statutory provisions proscribing liability for actions taken in members' official capacity. *See Todd v. Sullivan Construction LLC*, ___ P.3d ___, 2008 WL 2757050, at *6 n.1 (Idaho July 17, 2008) (recently decided case not yet released for publication) (suggesting that Idaho Code § 53-622(1) only protects members of an LLC acting in their official capacity on behalf of the LLC).

In fact, the Idaho statutes suggest that in a member-managed LLC, members owe each other fiduciary duties. Idaho Code § 53-622(c) states that members of an LLC do not owe each other fiduciary duties simply because they are members in a *manager-managed* limited liability company. The wording of this provision suggests that conversely, in a *member-managed* LLC, the members owe the LLC and each other the fiduciary duties of care and loyalty. The Idaho Limited Liability Act expressly incorporates "principles of law and equity" that are not displaced by specific provisions. Idaho Code § 53-668(2). Fiduciary duties have a long history and fulfill important roles in checking minority-interest oppression. Because implying common law fiduciary duties to members of an LLC serves the same equitable function as it does in

partnerships and closely-held corporations – namely, to protect the reasonable expectations of co-venturers and to protect minority interest-holders from oppression at the hands of the majority – this Court should incorporate common law fiduciary duties into the law governing limited liability companies.

### 2. Dr. Bushi Has Raised A Material Issue Of Fact As To Whether Appellee Members Breached Their Fiduciary Duties

As fiduciaries, Appellees were obligated to act in the best interest of the LLC and protect the interests of it members, not act in their own self-interest. In Justice Cardozo's oft-quoted words, "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty . . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. *Meinhard v. Salmon*, 249 N.Y. 458, 463-464, 164 N.E. 545, 546 (N.Y. 1928); *see also Jensen v. Sidney Stevens Implement Co.*, 210 P. 1003, 1005 (Idaho 1922) ("The law guards the fiduciary relation, which the relation of principal and agent is, with jealous care. It seeks to prevent the possibility of a conflict between duty and personal interest. It demands that the agent shall work with an eye single to the interest of his principal."); 59 A AM. JUR. 2D *Partnership* § 280 ("[E]very partner is bound to act in a manner not to obtain any advantage over his or her copartner in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. A partner cannot act too quickly to protect his or her own financial position at the expense of his or her partners, even in the absence of malice.") (citations omitted).

The Appellee Members breached their fiduciary duties in several ways. Each of the four members of Sage had a 25% interest in Sage. Bushi worked to build Sage into the profitable

company that it is, and Bushi had a right and the expectation to remain an equity owner of Sage and have the value of his membership interest substantially increase over the years so that it would provide a sizeable income stream for his retirement.

The members had agreed that a member could be dissociated only under specific circumstances. More specifically, the members agreed upon the only events that would trigger an automatic disassociation without a vote of a member as provided in Article XI, ¶ 1.1-1.5, and the for-cause events which would trigger a disassociation of a member following the majority vote of the other members, as provided in Article XI, ¶¶ 2.1-2.6. *See* Record, 53-54. The members did not agree that a member could be kicked out of the LLC for any or no reason at the whim of the other members. This understanding makes sense in light of the circumstances. Why would Dr. Bushi put his time and effort into building Sage into a profitable company if the other members could simply vote to dissociate him at any time for any reason or for no reason at all?

The record in this matter is undisputed that prior to the self-serving amendment to the Operating Agreement, the Appellee Members had no authority to disassociate Plaintiff either with or without cause. The members all understood this, and understood that they would remain members of Sage and enjoy the appreciation in value of their respective membership interest unless a members chose to proceed under the terms of Article X, ¶ 1, or where a mandatory or a for-cause event triggering disassociation occurred under Article XI.

Despite the fiduciary duties that Appellees owed to Dr. Bushi, the Appellee Members participated in a string of fiduciary breaches, all of which were pointed at depriving Dr. Bushi of profits to which he was entitled and his ownership in Sage, and all of which served to increase the Appellee Members' individual profits and ownership interests in Sage. Contrary to how the

District Court characterized Dr. Bushi's breach of fiduciary duty claim, that claim is not limited to the amendment of the Operating Agreement. Instead, it encompasses a whole string of fiduciary breaches.

Appellees informed Dr. Bushi that they wanted him out as a member of Sage because he was dating a nurse practitioner. *See* Record, Exh. 11, ¶ 27. Of course, nothing in the Operating Agreement or any other agreement precludes such activity, much less provides for dissociation of a member because of such activity. In response to the Defendants' threat to kick him out, Plaintiff was obviously concerned about the future of his practice with Sage, and arranged to also become a part of another psychiatry group in November of 2005. *Id.* at ¶ 28. This action similarly does not violate the terms of the Operating Agreement. In fact, Article VI, ¶ 8 of the Operating Agreement specifically allows a member to become associated with a competing company. Nevertheless, the Defendants ignored the plain terms of the governing language in Article VI, ¶ 8 and breached their fiduciary duties by **voting that Plaintiff would not be entitled to any profit sharing starting in the year 2006, "due to his connection with our competitor**." *See* Record, Exh. 11, ¶ 29.

This action in voting to deprive one member of any profits is an obvious breach of fiduciary duty. In addition to being a breach of fiduciary duty, it was also a breach of at least two separate terms of the Operating Agreement. First it was a breach of Article VI, ¶ 8, which specifically allows a member to associate with a competing company. Second, it was a breach of Article VIII, which provides that "net profits, net losses, and other items of income, gain, loss,

deduction and credit shall be apportioned among the Members in proportion to their Sharing Ratios."[3]

Appellees further breached their fiduciary duties by intentionally taking Dr. Bushi off the schedule of Sage contracts that Dr. Bushi had been participating in, including the Consult Contract at St. Als, the Addiction Recovery Center Contract at St. Als, and the Ada County Involuntary Holds Contract. *See* Record, Exh. 11, ¶ 29. Again, this action served only to deprive Dr. Bushi of profits and increase the profits of the Appellee Members. Furthermore, at the December 8, 2005 meeting, Defendants attempted to strong hand Plaintiff by presenting him with a low ball offer to buy out his membership interest, and gave Plaintiff an ultimatum to decide to accept their offer by January, 2006. *Id.* at ¶ 30.

At the next owners meeting on January 17, 2006, Defendants went one egregious step further by presenting Plaintiff with a non-compete agreement providing that he would not go into competition in any practice against them, and in return Plaintiff would be paid $15,000, which amount would be considered as his buyout as a member of Sage, payable over three years. *Id.* at ¶ 31. Dr. Bushi's counsel responded with a letter, rejecting the Appellee Members' bad faith demands, and further explained that Dr. Bushi is entitled to a 25% apportionment of the total profit distributions of Sage in 2006 and that until the parties agreed a mutually satisfactory agreement on the value of Plaintiff's membership interest he would remain a member of Sage and retain all of his rights and interest associated with being a member. *Id.* at ¶ 34.

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[3] The members agreed to modify the method for distributing profits for the year 2005, but that agreement affected only the 2005 profits. *See* Record, Exh. 2. While the parties may disagree about the amount of profits Dr. Bushi was entitled to in 2006, the amount of profits is an issue of fact for the trier of fact to resolve.

The Defendants obviously did not like Plaintiff's legally sound position, and instead of acting in good faith to negotiate a buyout for the fair value of Plaintiff's membership interest in Sage consistent with their fiduciary duties, they met with their attorney and conspired to immediately attempt to expel Dr. Bushi from the Company through legal maneuvering to amend the Operating Agreement with their three votes allowing to disassociate a member with their three votes, and with no other stated cause or reason. *Id.* at ¶ 35. The Defendants did not even care if Plaintiff showed up to the meeting. *Id.* at ¶ 36. The notice of the special meeting of the members of Sage and the minutes of the special meeting indicate that there was no discussion about the amendment of the Operating Agreement which ostensibly operated to throw Plaintiff out of Sage. *Id.* at ¶¶ 37-38.

All of these actions establish a breach of fiduciary duty in that they all serve to deprive Dr. Bushi of the profits to which he is entitled and to deprive him of his interest in the profitable business he helped build. At the same time, all of these actions served to increase the Appellee Members' individual profits and interest in Sage. At the very least, these facts, when construed in the light most favorable to the non-moving party as they must be on summary judgment,

establish a material issue of fact as to whether the Appellee Members have breached their fiduciary duties.[4]

### 3. Other Jurisdictions Have Found A Breach Of Fiduciary Duty Under Similar Circumstances

When other courts have considered minority squeeze-outs in LLCs, similar to what occurred in this case, they have found that the majority members owed fiduciary duties to the minority members. In *Anderson v. Wilder*, 2003 WL 22768666 (Tenn. Ct. App. Nov. 21, 2003), plaintiffs were expelled from an LLC by a majority vote of the other members (defendants). The vote to expel plaintiffs was done according to the express terms of the operating agreement. The defendants bought out the plaintiffs' ownership interests according to the operating agreement for $150 per unit of ownership interest. One month later, the defendants sold units of ownership interest to a third party for $250 per unit. Plaintiffs sued for breach of fiduciary duty, and defendants moved for summary judgment, which was granted by the trial court.

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[4] The District Court committed reversible error in deciding that these facts, which do create a genuine issue of material fact on the breach of fiduciary duty claim, ". . . cannot form the basis of a breach of fiduciary duty claim in any event under I.R.E. 408 where evidence of conduct or statements made in compromise negotiations is not admissible." *See* Record, pp. 110 - 111, FN 17; p. 112, ll. 5 – 8. Dr. Bushi's evidence of the Respondents' breaches of fiduciary duty were not done by the Respondents in any "compromise negotiation." I.R.E. 408. Unilateral actions and directives by the Respondents towards Dr. Bushi do not fall within the intent and plain language of Rule 408. Moreover, this is another example wherein the Court acted *sua sponte* and went outside of the Record by improperly applying I.R.E. 408 in its decision. The Respondents did not assert I.R.E. 408 in their motion to strike paragraphs 27 – 31 of Dr. Bushi's affidavit. *See* Record, Vol. II, pp. 222 – 225. Further, the Court did not strike those paragraphs. *See* Transcript, pp. 55, l. 16 – p. 57, l. 20.

The appellate court reversed, stating that "finding a majority shareholder of an LLC stands in a fiduciary relationship to the minority . . . is warranted in this case." *Id.* at *6. The court endorsed the plaintiffs' reasoning by analogy to closely-held corporations and partnerships:

> [M]ember-managed limited liability companies are governed more like partnerships than conventional corporations. Since it is also well established as a fundamental rule of partnerships, that *all* partners, not just the majority, owe each other fiduciary duties, it logically follows that a majority of the members of an 'LLC' should owe a fiduciary duty to the minority members just like the duty a majority of the shareholders of an 'Inc.' owe the minority shareholders.

*Id.* at *3 (citations omitted) (emphasis in original).

Notwithstanding the fact that each action taken by the defendants was permitted by the operating agreement, the court ultimately held that there was an issue of material fact as to whether defendants expelled plaintiffs in violation of their fiduciary duty to deal fairly, honestly, and in good faith with plaintiffs. *Id.* at *7-11. *See also* 1 RIBSTEIN AND KEATING ON LIMITED LIABILITY COMPANIES § 9.6 (2008) (stating that "it may be a breach of duty for the members to expel a member solely or primarily in order to appropriate the value of the interest or for controlling members to appropriate benefits from minority members by exercising or selling control.").

Similarly, in *Zulawski v. Taylor*, 2005 WL 3823584 (N.Y. Sup. Ct. July 1, 2005), the plaintiff was removed as a member from an LLC by the other member. The plaintiff alleged that his co-member sought to, and ultimately succeeded, in cutting him out of the business and damaging his relationships with clients and employees. The court found that in working together, lending money, and managing the business together, plaintiff and defendant created a

relationship similar to a "joint venture or partnership." *Id.* at *4. The court analogized the relationship between LLC members in a closely held LLC to the relationship between partners. "A partner has a fiduciary obligation to other partners in the organization and owes a duty of individual and undiluted loyalty to those whose interests the fiduciary is to protect." *Id.* The court concluded that the plaintiff "undeniably" stated a cause of action for breach of fiduciary duty. *Id.* at *4-5.

#### 4. The Operating Agreement's Provision Allowing For Amendment Does Not Allow Appellee Members To Breach Their Fiduciary Duties

The District Court held that there could be no breach of fiduciary duties because the Operating Agreement allows for amendment by all but one of the members. This conclusion stems from the District Court's mistaken approach of analyzing this case simply in terms of whether the Operating Agreement allows for amendment by all but one of the members. Dr. Bushi does not contend that the act of amending the operating agreement, alone, constitutes a breach of fiduciary duties. Instead, it was the whole string of bad acts, beginning with the vote by the Appellee Members to deprive Dr. Bushi of any profits in 2006, that establishes the breach. That string of breaches culminated in the amendment, but the amendment was only part of the breach of fiduciary duties.

The mere fact that the Operating Agreement provides for amendment by the vote of all but one member does not insulate the Appellee Members from a claim that they breached their fiduciary duties. In this case, it is helpful to look to even more extreme examples to understand the District Court's mistake in concluding that a right to amendment means there can be no breach of fiduciary duties. For example, would the Appellee Members be breaching fiduciary

duties if they amended the Operating Agreement to provide that they could not only dissociate a member by a vote of all but one, but that they could keep the dissociated members capital contribution? Or that they could dissociate a member by a vote of all but one, and also amend the Operating Agreement to provide that the Dissociated Member would not be entitled to be paid for the fair value of his membership interest. Even worse, could they amend the Operating Agreement to provide that they could dissociate a member by the vote of all but one and that, upon dissociation, the dissociated member would be required to pay back to Sage all profits the dissociated member had been paid since the time Sage was created and that those profits would be redistributed to the Appellee Members? Could the Appellee Members amend the Operating Agreement to provide that Dr. Novak, Dr. Kent and Dr. Negron were permitted to convert all of the funds received by the LLC for their own purposes?

Dr. Bushi submits that each of the above examples would constitute a breach of fiduciary duties, even if the Operating Agreement "technically" allows for amendment. Again, it is not the amendment, itself, that is the breach of fiduciary duties. Instead, it is the self-interested act of depriving one member of his rights and benefits and transferring those rights and benefits to the same members that made the amendment.

**D. The Appellee Members Breached The Covenant Of Good Faith And Fair Dealing**

The implied covenant of good faith and fair dealing exists in all contracts. *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 287, 824 P.2d 841, 863 (1991). The covenant is implied by law and "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Id.* at 288. The implied covenant requires that the parties "perform in good faith the obligations imposed by their agreement." *Id.* "An action by

one party that violates, qualifies or significantly impairs any benefit or right of the other party under an employment contract, whether express or implied, violates the covenant." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 243, 108 P.3d 380, 390 (2005). The covenant is "an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions." *Id.*

The very same facts that establish a breach of fiduciary duty also support a claim of breach of the implied covenant of good faith and fair dealing. More specifically, by voting to deprive Dr. Bushi of any profits in 2006, the Appellee Members deprived Dr. Bushi of his right to share in the profits of Sage. The string of bad acts not only deprived Dr. Bushi of his right to profits, but ultimately deprived him of his ownership in the company that Dr. Bushi helped build.

In rejecting Dr. Bushi's claim for breach of the implied covenant of good faith and fair dealing, the District Court committed two mistakes. First, as explained above, the District Court erroneously analyzed this case only in terms of whether the Operating Agreement allows for amendment by all but one of the members. Again, Dr. Bushi's claim is not limited to just the amendment, but encompasses the entire string of actions by the Appellee Members all aimed at depriving Dr. Bushi of his profits and ultimately his entire interest in Sage. Even if the Appellee Members' actions in amending the Operating Agreement to allow them to kick Dr. Bushi out of sage, alone, were not a violation of the covenant of good faith and fair dealing, the Appellee members had already violated the covenant before the amendment. The string of bad faith conduct began when the Appellee Members voted that Plaintiff would not be entitled to any profit sharing starting in the year 2006, "due to his connection with our competitor." *See* Record, Exh. 11, ¶ 29. This deprived Dr. Bushi of his right to profits as provided for in Article VIII of

the Operating Agreement and of his right to associate with a competitor as provided for in Article VI, paragraph 8.

The second mistake committed by the Court was in its determination that there could be no breach of the covenant of good faith and fair dealing because there was no violation of any terms of the Operating Agreement. While it is true that a breach of the implied covenant sounds in contract, not tort, the District Court's conclusion that the Appellee Members did not violate the Operating Agreement is incorrect. The Appellee Members' string of bad faith actions deprived Dr. Bushi of the benefits set forth in at least two provision in the Operating Agreement. Even before voting to amend the Operating Agreement to allow for dissociation upon a vote of all but one member, the Appellee Members voted that Plaintiff would not be entitled to any profit sharing starting in the year 2006, "due to his connection with our competitor." *See* Record, Exh. 11, ¶ 29. This action deprived Dr. Bushi of the benefits of Article VIII of the Operating Agreement, which provides that "net profits, net losses, and other items of income, gain, loss, deduction and credit shall be apportioned among the Members in proportion to their Sharing Ratios." *See* Record, p. 51. It also deprived Dr. Bushi of the benefits of Article VI, paragraph 8 (Conflicts of Interest), which specifically allows a member to enter into business transactions that may be considered competitive with Sage, and further provides that each member waives and releases any and all claims and causes of action against the other member which might result from such transactions. *See* Record, p. 49.

Thus, Dr. Bushi has, at the very least, raised a material issue of fact as to whether the Appellee Members breached the implied covenant of good faith and fair dealing. The District Court's grant of summary judgment on this claim should be reversed.

## E. The District Court's Award Of Attorney Fees Should Be Reversed

Upon reversal of the District Court's entry of summary judgment, Appellees will no longer be a prevailing party in this matter and the District Court's award of attorney fees, therefore, must also be reversed. Even if this Court were to affirm the entry of summary judgment, the award of attorney fees should be reversed for two separate reasons – the Appellees waived any right to fees under Idaho Code § 12-120(3) and the amount of fees awarded was unreasonable.

### 1. Appellees Waived Any Right To Attorney Fees Pursuant To Idaho Code § 12-120(3) By Failing To Seek Attorney Fees Under That Statute

The District Court's award of attorney fees pursuant to Idaho Code § 12-120(3) must be reversed because Appellees' Rule 54(e)(5) request for attorney fees did not even seek fees pursuant to Idaho Code § 12-120(3). This Court has held that a request for attorney fees should not be granted if the party seeking attorney fees does not specify in its Rule 54(e)(5) motion the statute pursuant to which fees are being sought. *See, e.g., Bream v. Benscoter,* 139 Idaho 364, 369, 79 P.3d 723, 728 (2003) ("If the party is claiming that a statute provides authority for an award of attorney fees, the party must cite to the statute and, if applicable, the specific subsection of the statute upon which the party relies."). This rule is derived from the clear language of I.R.C.P. 54(e)(5) which provides:

> Attorney fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs; provided, however, the 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.

*Id.*

This Court has repeatedly and strictly applied the rule that a party seeking fees pursuant to I.R.C.P. 54(e)(5) must specify the statute under which it seeks attorney fees. For example, in *Bingham v. Montane Resource Associates*, 133 Idaho 420, 424, 987 P.2d 1035, 1039 (1999), the Court explained:

> The district judge's underlying assumption that he had the power to award fees on a basis not asserted by Montane is erroneous. In order to be awarded attorney fees, a party must actually assert the specific statute or common law rule on which the award is based; the district judge cannot *sua sponte* make the award or grant fees pursuant to a party's general request. . . . The district judge is not empowered to award fees on a basis not asserted by the moving party.

*Id.*; *see also KEB Enterprises, L.P. v. Smedley*, 140 Idaho 746, 754, 101 P.3d 690, 698 (2004) ("A trial judge cannot award attorney fees on a basis not asserted by the party requesting them.").

Here, Appellees' motion for attorney fees sought fees only under Idaho Code § 12-121, so the District Court's grant of attorney fees under Idaho Code § 12-120(3) must be reversed. On August 31, 2007, the Appellees filed their Memorandum of Costs and Attorney Fees, pursuant to I.R.C.P. 54(d)(5) and 54(e)(5), and specifically moved the Court for an award of costs and attorney fees "under Idaho Rule of Civil Procedure 54(d)(1) and 54(e)(1) and **Idaho Code § 12-121**." *See* Record, Exh. 14 (emphasis added). On September 10, 2007, Dr. Bushi filed his Objection and Memorandum in Opposition to Defendants/Counterclaimants Memorandum of Costs and Attorney Fees. *See* Record, Exh. 15. Consistent with the motion for attorney fees, Dr. Bushi's Opposition brief addressed only the question of whether fees were appropriate under Idaho Code § 12-121, i.e., whether Dr. Bushi's defense was frivolous. In the meantime, the Court entered a Summary Judgment order, providing that "[j]udgment regarding

awarding costs and reasonable attorneys' fees in favor of Defendants/Counterclaimants is reserved." *See* Record, pp. 129-131. Then, on September 14, 2007, the Appellees filed an Amended Memorandum of Costs and Attorney Fees. Once again, that Amended Memorandum of Costs and Attorney Fees sought fees only "under Idaho Rule of Civil Procedure 54(d)(1) and 54(e)(1) and **Idaho Code § 12-121**." *See* Record, Exh. 16. (emphasis added). Then, on September 20, 2007, the Appellees filed their Reply to Plaintiff/Counterdefendants' Objection and Memorandum in Opposition to Defendants/Counterclaimants Memorandum of Costs and Attorney Fees. *See* Record, Exh. 18. Once again, that briefing made absolutely no mention of Idaho Code § 12-120(3) or anything about a commercial transaction. Instead, the reply brief included only argument related to Idaho Code § 12-121 and whether Dr. Bushi's claims were brought frivolously.

The District Court denied Appellees' motion for attorney fees under Idaho Code § 12-121 – the only statutory basis asserted by Appellees. Nevertheless, and even though none of Appellees' Rule 54 motion, briefing or affidavits contained any reference to Idaho Code § 12-120(3), the District Court awarded attorney fees under Idaho Code § 12-120(3). *See* Record, pp. 150-163. This award of attorney fees must be reversed because it is inconsistent with this Court's rulings in multiple decisions that attorney fees can only be awarded under the statute cited by the moving party in support of its Rule 54 request for attorney fees.

Although conceding that "in the Affidavit of Memorandum of Costs and Fees, [Appellees' counsel] only references Idaho Code § 12-121 and I.R.C.P. 54," the District Court justified its *sua sponte* award of attorney fees on the grounds that Appellees' Answer and certain prior briefing had referenced Idaho Code § 12-120(3). This ruling must be reversed because it

contradicts both the clear language of I.R.C.P. 54(e)(5) and specific holding by this Court. The question is not whether Appellees have ever referenced Idaho Code § 12-120(3) or ever broadly asserted that this case involved a commercial transaction. Instead, the requirement is that Appellees specifically assert the statutory basis for their attorney fee request in their I.R.C.P. 54(e)(5) moving papers, i.e., their Memorandum of Costs and Fees or its supporting affidavits. *See Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 721, 117 P.3d 130, 135 (2005) ("And, of course, a party must specify, **in its Idaho R. Civ. P. 54(e)(5) fee request**, the code section or contract provision pursuant to which it makes the fee request.") (emphasis added). This rule arises from the clear language of Rule 54(e)(5), which provides that a request for attorney fees must be "included in the memorandum of costs" and "shall be supported by an affidavit of the attorney stating the basis and method of computation of the attorney fees claimed." (emphasis added).

**2. The Amount Of Attorney Fees Awarded Was Unreasonable**

In addition to erring through its *sua sponte* award of attorney fees under Idaho Code § 1-120(3), the District Court also erred in awarding an unreasonable amount in attorney fees. The District Court's award of attorney fees in the amount of $78,580.44 is unreasonable and outrageous. The time and labor actually expended by an attorney is to be considered under I.R.C.P. 54(e)(3)(A), but it is also to be evaluated under a standard of reasonableness. *Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc*, 134 Idaho 259, 263, 999 P.2d 914, 918 (Ct. App. 2000). "A court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney. . . . An attorney cannot 'spend' his time extravagantly and expect to be

compensated by the party who loses at trial." *Id.* (quoting *Craft Wall of Idaho, Inc. v. Stone Breaker,* 108 Idaho 704, 706 701 P.2d 324, 326 (Ct. App. 1985)). Thus, a court may disallow fees that were unnecessarily and unreasonably incurred or that were the product of attorney "churning." *Id.*

A review of Appellees' Memorandum of Costs and Attorney Fees completely fails to satisfy the Defendants' burden under Rule 54(e)(3). Instead, it appears to present a case of "churning." Plaintiff objects to the Defendants' use of what is either four attorneys, or three attorneys and a paralegal, on this noncomplex matter. The billings also indicate multiple duplication of work, and excessive time billed for the limited explanation of services rendered.[5] This Court's review of the fee bill in the amount of $74,580.44 allegedly incurred up to the resolution of a motion for summary judgment should demonstrate that the District Court abused its discretion. The following are blatant examples of excessive and unreasonable time entries which should not have been blindly accepted by the District Court:

> 10/30/2006 FR (Forest Goodrum) "Review of file documents and legal research - - 5.10/$1,147.50";
>
> 10/31/2006 FR Preparation and meeting with clients to review complaint and factual background of dispute; review and analysis of additional document package provided by clients - - 4.20/$945[6];
>
> 11/3/2006 FR Preparation of Answer and Counterclaim - - 7.4/$1,665[7];

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5 *See* Transcript, p. 99, l. 18 – p. 100, l. 12.

6 This time entry is unreasonable given that Attorney Goodrum at all times relevant prior to the filing of the Complaint represented the LLC and had first hand knowledge of the issues.

7 This time entry is unreasonable because the Answer contains a straight denial of all allegations and the Counterclaim was copied almost verbatim from the separate litigation complaint which was previously voluntarily dismissed. *See* Record, pp. 23 – 70.

11/7/2006 FR Final Answer and Counterclaim - - 2.1/$472.50[8];

11/21/2006 FR Preparation of introduction and Statement of Facts of Memorandum in Support of Motion for Summary Judgment; legal research - - 5.7/$1,282.50[9];

11/28/2006 FR Preparation of Memorandum for Motion for Summary Judgment - - 5.3/$1,192.50[10];

11/29/2006 FR Research for Motion for Summary Judgment - - 4.7/$1,057.50[11];

12/20/2006 FR Review Law Review article on LLC freeze outs - - 1.2/$270;

1/3/2007 FR Preparation and meeting with co-counsel regarding items to be included in scheduling order, issues presented in motion for summary judgment,; continued preparation of motion for summary judgment - - 5.2/$1,170[12];

1/3/2007 CT Interviews and conferences with counsel; obtain and review pleadings - - 1.0/$250[13];

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8 *See id.*

9 This time entry is unreasonable because the defendants' statement of material facts is only 8 pages long and copies almost verbatim the factual allegations of the Counterclaim, which was dismissed by the Court. *See* Record, Exh. 6.

10 This time entry is unreasonable because the defendants' memorandum is only 11 pages long, it dovetails the 11/21/2006 time entry, and the legal argument is straight forward. *See* Record, Exh. 5.

11 This time entry is unreasonable because there are two prior time entries for "legal research" and the defendants' memorandum merely quotes from provisions of the Idaho Limited Liability Company Act and cites to one Idaho case. *See* Record, Exh. 5.

12 This time entry is unreasonable and shows unnecessary duplication of work between two senior attorneys, Forrest Goodrum and Tom Arkoosh, and the additional time spent on the motion is excessive.

13 This time entry is unreasonable and shows unnecessary duplication of work between two senior attorneys, Forrest Goodrum and Tom Arkoosh.

3/1/2007 FR teleconference with D. Kent regarding status; prepare statement of material facts in support of motion for summary judgment - - 4.2/$225[14];

3/2/2007 FR Review data received from accountants for calculation of value of Bushi's membership and data for calculation of division of profit amount members; teleconference with S. Larson regarding meeting to prepare affidavit; instructions regarding footnoting statement of material facts to specific paragraphs in verified pleadings; continued preparation of statement of material facts - - 6.2/$1,395[15];

3/5/2007 FR meeting with S. Larsen and C. Rasmussen to review financial data for affidavits; prepare affidavits in support of motion - - 5.8/$1,305[16];

3/6/2007 FR preparation of affidavits for Rasmussen, Novak and Birch; telephone conferences with Birch and Larsen regarding same; receive and review two additional exhibits from Larsen; instructions regarding transmittal of affidavits; continued preparation of statement of material facts - - 7.4/$1,665[17];

3/7/2007 FR preparation of pleadings and affidavits for motion for summary judgment; there is teleconferences with affiants and clients regarding same; preparation of responses to requests for admissions; legal research for opposition to motion to dismiss - - 8.6/$1,935[18];

3/7/2007 PW receive and review file in preparation for drafting answers to request for admissions; investigative searches regarding Dr. Bushi; draft answers to Plaintiff's request for admissions; draft notice of service for same; prepare and forward to parties a notice of service to court - - 5.0/$500[19];

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[14] *See* FN 9 & 10.

[15] This time entry is unreasonable. *See* FN 9, 10 and 14; *See* Record, Exh. 4.

[16] *See* fn 15.

[17] This time entry is unreasonable. *See* fn 9, 10 and 14; *see* Record, Exhs. 2, 3 and 4.

[18] This time entry is unreasonable. *See* fn 16.

[19] This time entry is unreasonable and shows unnecessary duplication of work between Attorney Forrest Goodrum and a paralegal for both working on the responses to requests for admissions which were all "denied."

3/8/2007 FR preparation of pleadings for motions; teleconferences with Rasmussen regarding changes to affidavit; legal research for opposition to motion to dismiss counterclaim; preparation of memorandum in opposition - - 8.6/$1,935[20];

3/9/2007 FR preparation of pleadings for motion for summary judgment and opposition to Bushi's motion to dismiss counterclaim - - 7.3/$1,642.50[21];

3/9/2007 PW review and revise statement of facts in support of motion for summary judgment; assemble exhibits for memorandum in support of motion for summary judgment; review and revise memorandum in support for same; telephone call to clerk regarding: hearing date for summary judgment; review and finalize motion to vacate and reschedule Plaintiff's motion to dismiss; review and finalize memorandum in opposition to Plaintiff's motion to vacate; assemble exhibits for same; prepare all pleadings for filing with the court and service on parties; append and reindex pleading index - - 6.0/$600;

3/12/2007 PW receive and review Westlaw research cases; index same; search and review medical websites for Bushi Association with Sage references; run occupational licensing and certification search on Bushi; telephone calls to major medical facilities to confirm privilege status 2.0/$200.00;[22]

3/13/2007 CT obtain and review documents - - 1.5/$375[23];

3/19/2007 PW telephone call to clerk regarding status of hearing schedule; complete interrogatories and requests for production of documents to Plaintiff - - 2.5/$250[24];

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20 This time entry is unreasonable. *See* fn 9, 10, 14, 15, 16 and 17.

21 This time entry is unreasonable. *See id.*; moreover, Dr. Bushi's motion to dismiss the counterclaim was granted.

22 This time entry is unreasonable and has no relevance to the issues presented on summary judgment.

23 This time entry for Attorney Arkoosh is unreasonable.

3/21/2007 PW Westlaw research for attorney fees on dismissal without prejudice - - 2.0/$200;

3/21/2007 PW Westlaw research in preparation for motion to dismiss hearing; review answers to complaint from Bushi; prepare memo regarding preparation of discovery request to Plaintiff; telephone call to clerk regarding hearing - - 2.0/$200;

3/22/2007 FR preparation and attendance at court hearing for arguments on motion to dismiss counterclaim - - 7.8/$1,755[25];

3/23/07 PW receive and review Plaintiff's interrogatories and requests for production; begin drafting responses to same - - 2.0/$200;

3/27/2007 PW continue drafting responses to Plaintiff's interrogatories and requests for production of documents - - 1.25/$125;

3/29/2007 FR preparation of pleadings, answers to Plaintiff's interrogatories and requests for production of documents - - 2.5/$562.50[26];

3/29/2007 PW meeting with FRG; review responses to Plaintiff's interrogatories and requests for production of documents - - 1.5/$150;

3/29/2007 PW continue drafting responses to Plaintiff's discovery requests - - 1.5/$150;

3/30/2007 PW continue drafting responses to Plaintiff's interrogatories and requests for production of documents - - 5.0/$500[27];

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24 This time entry is unreasonable and shows unnecessary duplication of work between Attorney Forrest Goodrum and this paralegal. See and compare time entry on 1/5/2007 FR prepare first set of interrogatories and requests for production of documents, notice of service, instructions regarding service on opposing counsel - - 3.1/$697.50.

25 This time entry is unreasonable. The issues on the motion to dismiss counterclaim were not complicated and the hearing lasted approximately one-half hour.

26 This time entry is unreasonable and shows unnecessary duplication of work between attorney Goodrum and the paralegal.

27 These time entries for the paralegal drafting responses to Plaintiff's interrogatories and requests for production of documents are unreasonable and not warranted by the limited number of basic discovery propounded.

4/3/2007 PW continue drafting responses to Plaintiff's interrogatories - - 4.0/$400[28];

4/4/2007 PW complete draft of responses to discovery; review and make revisions to same; assemble production documents; prepare document control index and labels; prepare notes on follow up and responses that will need supplementation - - 4.75/$475;

4/6/2007 PW preparation of pleadings - - continue drafting request for admissions; email to client regarding additional documents; receive and review response letter for Bushi's counsel regarding discovery deficiencies; assemble documents verifying production of financial spreadsheets and tax returns; draft proposed order for briefing on schedule for summary judgment hearing; draft letter to clerk and forward same - - 5.0/$500[29];

4/6/2007 FR preparation of pleadings, responses to Plaintiff's discovery request - - 4.8/$1,080[30];

4/10/2007 FR preparation of pleadings, responses to Plaintiff's discovery requests - - 4.2/$945[31];

4/10/2007 FR preparation of pleadings, responses to Plaintiff's discovery requests; telephone conferences with S. Larsen and C. Novak regarding same - - 2.7/$607.50[32];

4/10/2007 PW telephone conference with client regarding Plaintiff's affiliation with LLC Group in 2005 and other documents requested in preparation for production; office conference with FG regarding same; receive and review minutes received from client; continue drafting and

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28 This time entry is unreasonable; *see id.*

29 This time entry is unreasonable.

30 This time entry is unreasonable and shows unnecessary duplication of work between attorney Goodrum and the paralegal.

31 This time entry is unreasonable and shows unnecessary duplication of work between attorney Goodrum and the paralegal; *see id.* regarding the continuous preparation of responses to Plaintiff's simple discovery requests.

32 This time entry is unreasonable and shows unnecessary duplication of work between attorney Goodrum and the paralegal and is excessive.

making revisions to response to Plaintiff's discovery requests; continue review of documents for production - - 6.0/$600[33];

4/11/2007 FR preparation of pleadings, responses to Plaintiff's discovery requests; teleconference with C. Novak regarding same - - 3.5/$787.50;

4/11/2007 FR preparation of pleadings, responses to Plaintiff's discovery requests - - 1.8/$405;

4/11/2007 PW preparation of documents for production and document control; make revisions to responses to Plaintiff's first discovery requests; telephone conference with Jennifer regarding association of Plaintiff with other competing group; telephone conference with Jennifer regarding additional documents needed; receive and review meeting minutes and financial applications; prepare same for production; draft stipulation for protective order and proposed protective order - - 6.5/$650;

4/13/2007 SS (Skip Sperry) conference with co-counsel regarding: motion to compel; complete memorandum in support of motion to compel - - 2.8/$630[34];

4/16/2007 FR review and edit memorandum in support of motion to compel - - 1.1/$247.50[35];

4/18/2007 PW preparation of pleadings and assemble file and documents for document control - - 3.0/$300[36];

4/24/2007 FR preparation of pleadings, Defendant's second interrogatories and request for production - - 2.8/$630[37];

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33 This time entry is unreasonable.

34 This time entry is unreasonable and shows unnecessary duplication of work between two attorneys, Skip Sperry and Tom Arkoosh, and also indicates duplication of work of the time entry 4/12/2007 for attorney Sperry to prepare the supporting affidavit and memorandum for the motion to compel.

35 The time entry is unreasonable and shows unnecessary duplication of work between attorneys Goodrum and Sperry.

36 This time entry is unreasonable.

37 This time entry is unreasonable and shows unnecessary duplication of work between attorney Goodrum and the paralegal who had already prepared the Defendant's second set of interrogatories and request for production.

4/25/2007 FR preparation of pleadings, Defendant's request for admissions; meeting with co-counsel regarding waivers for production of information about patient complaints - - 5.1/$1,147.50[38];

4/26/2007 FR preparation of pleadings, second interrogatories and requests for production - - 1.1/$247.50[39];

5/7/2007 PW receive and review Plaintiff's correspondence regarding motion to compel; review discovery requests relating to same; prepare notes regarding same - - 1.0/$100;

5/7/2007 C.T. obtain and review letter from counsel; interviews and conferences with counsel - -1.0/$250;

5/8/2007 SS review letter from opposing counsel regarding: motion to compel. ... - - 1.2/$270[40];

5/29/2007 FR receive and review opposing counsel's memorandum in opposition to our motion for summary judgment and supporting affidavit; conference with co-counsel regarding same - - 6.2/$1,395[41];

5/30/2007 FR research for reply memorandum - - 6.6/$1,485[42];

5/31/2007 FR research for reply brief; telephone conference with client regarding Bushi's solicitation of hospital business - - 7.2/$1,620[43];

6/1/2007 FR research for reply brief - - 7.2/41,620[44];

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38 This time entry is unreasonable and excessive.

39 This time entry is unreasonable and shows unnecessary duplication of work between attorney Goodrum and the paralegal.

40 These time entries from the paralegal, attorney Arkoosh and attorney Sperry all relating to reviewing a letter from counsel on the motion to compel constitutes unnecessary duplication of work and is excessive.

41 This time entry is unreasonable and excessive.

42 This time entry is unreasonable and excessive.

43 This time entry is unreasonable and excessive and bills for an apparent collateral matter.

44 This time entry is unreasonable and excessive.

6/4/2007 FR receive amended notice of hearing; teleconferences with judge's chambers regarding same; preparation opposition and supporting memorandum; receive and review letter from judge returning hearing to original schedule; teleconference and letter from opposing counsel requesting stipulation; preparation of reply brief - - 6.7/$1,507.50[45];

6/5/2007 FR receive and review letter from opposing counsel regarding stipulation; review litigation schedule; teleconference with opposing counsel regarding same; receive and review stipulation; sign and return; preparation of reply brief - - 5.8/$1,305[46];

6/7/2007 SS continue reviewing opposition affidavits, memoranda and statement of fact; research evidentiary issues in preparation for drafting motion to strike and supporting memorandum - - 3.7/$832.50[47];

6/8/2007 SS begin drafting motion to strike and supporting memorandum - - 3.9/$877.50;

6/11/2007 SS complete first draft of motion and memo to strike - - 2.3/$517.50[48];

6/13/2007 FR preparation of reply brief - - 4.8/$1080[49];

6/14/2007 FR preparation of reply brief; teleconference with court regarding schedule for hearing - - 8.6/$1,935[50];

6/14/2007 TW draft revisions to motion to strike; make revisions and finalize memorandum in support of motion to strike; draft motion for enlargement; draft proposed order for motion for enlargement; continue review of Plaintiff's affidavits for testimony to be stricken and applicable

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45 This time entry is unreasonable and excessive. *See* Record, Exh. 8.

46 This time entry is unreasonable and excessive.

47 This time entry is unreasonable and excessive given the time entry of 6/5/2007 SS review motion for summary judgment opposition documents for inadmissible evidence, in preparation for motion to strike - - 1.8/$404.

48 This time entry, along with the others relating to the motion to strike, are unreasonable and excessive.

49 This time entry is unreasonable and excessive.

50 This time entry is unreasonable and excessive.

rules of evidence for same; telephone conference with client regarding Plaintiff Wells Fargo Financial application - - 6.0/$600[51];

6/14/2007 SS finalize motion to strike - - 1.9/$427.50[52];

6/15/2007 SS review and revise all motions for summary judgment and motion to strike documents - - 4.1/$922.50[53];

6/18/2007 FR continued preparation of reply brief - - 7.3/$1,642.50[54];

6/19/2007 FR preparation of reply brief - - 5.2/$1,170[55];

7/5/2007 FR filing and service of reply brief and motion to strike - - 1.2/$270[56];

7/18/2007 C.T. obtain and review briefing; interviews and conferences with counsel - - 1.4/$490[57];

7/18/2007 SS review reply brief and other motion for summary judgment documents filed by opposition in preparation for hearing - - 2.1/$472.50[58];

7/19/2007 FR preparation for oral argument - - 6.2/$1,395[59];

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51 This time entry is unreasonable and shows unnecessary duplication of work between attorney Sperry and the paralegal on the motion to strike.

52 This time entry is unreasonable and excessive when combined with all of the other time entries on the motion to strike.

53 This time entry is unreasonable, excessive, and shows unnecessary duplication of work between attorneys Goodrum and Sperry and the paralegal.

54 This time entry is unreasonable and excessive.

55 This time entry is unreasonable and excessive.

56 This time entry is unreasonable and excessive.

57 This time entry is unreasonable and shows unnecessary duplication of work between the attorneys Goodrum, Sperry and Arkoosh.

58 This time entry is unreasonable and shows unnecessary duplication of work between attorneys Goodrum, Sperry and Arkoosh.

59 This time entry is unreasonable and excessive.

7/19/2007 SS preparation for hearing on motion to strike - - 6.9/$1,552.50[60];

7/20/2007 FR preparation for oral argument and oral argument of motions - - 4.5/$1,012.50[61];

7/20/2007 SS preparation for hearing on motion to strike - - 2.6/$585[62];

7/20/2007 SS travel and court appearance for hearing - - 2.1/$472.50[63];

8/3/2007 FR conference with paralegal regarding preparation of expert witness disclosure - - .2/$45[64];

8/3/2007 PW draft disclosure of expert witness; assemble exhibits for same; telephone call to Craig Rasmussen regarding additional disclosure information; office conference with SS regarding same - - 1.5/$150[65];

8/6/2007 FR conference with paralegal regarding supplemental discovery response concerning expert witness; review and sign expert witness disclosure - - .4/$90[66];

8/6/2007 PW review Plaintiff's interrogatories in preparation for supplementation of expert witness disclosure information; draft supplemental discovery responses to Plaintiff's interrogatories; draft notice of service for same; assemble and index pleading and discovery documents - - 2.5/$250[67];

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60 This time entry is unreasonable and excessive. Mr. Sperry argued for approximately 15 minutes.

61 This time entry is unreasonable and excessive.

62 This time entry is unreasonable and excessive.

63 This time entry is unreasonable and excessive and shows unnecessary duplication of work between attorneys Goodrum and Sperry.

64 The Court issued its order granting motion for summary judgment on July 31, 2007, and no further work on the case by the Defendants was necessary at that point.

65 *See id.*

66 *See id.*

67 *See id.*

8/6/2007 SS review expert disclosure and conference with /co-counsel regarding same - - .9/$202.50[68];

8/7/2007 FR preparation of pleadings; revision of supplemental discovery response - - .3/$67.50[69];

8/7/2007 PW telephone call to Craig Rasmussen regarding additional information for previous expert witness testimony cases; make revisions to supplemental response to Plaintiff's interrogatories; forward same to client for verification - - 1.5/$150[70];

8/8/2007 SS review motion for summary judgment opinion - - 1.2/$270[71];

8/9/2007 PW receive and review verification signed by client; prepare and serve supplemental discovery responses - - .5/$50[72];

8/14/2007 FR preparation of pleadings, summary judgment - - 1.5/$337.50[73];

8/17/2007 FR Bushi's objection to form of Judgment (award of attorney fees), legal research and prepare reply to objection - - 8.6/$1,935[74];

8/20/2007 FR continued preparation of reply to objection; instructions regarding service and filing; prepare letter to client regarding same - - 5.5/$1,237.50[75].

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68 *See id.*

69 *See id.*

70 *See id.*

71 This time entry is unreasonable, excessive and shows unnecessary duplication of work between attorneys Goodrum and Sperry to review the opinion.

72 The motion for summary judgment was granted by the Court on August 1, 2007, and all work done by the paralegal thereafter is unreasonable.

73 This time entry is unreasonable, excessive and shows unnecessary duplication of work between attorney Goodrum and the paralegal to prepare the form judgment. *See* and *compare* the time entries of PW on 8/10 and 13, 2007 to draft and revise the Judgment.

74 This time entry is unreasonable and excessive.

75 This time entry is unreasonable and excessive.

The above-noted time entries illustrate that the Respondents' requested attorney and paralegal fees were plainly excessive, unreasonable and improper duplication. The district court erred in awarding the exorbitant amount of $78,580.44 and should, therefore, be reversed.

### 3. The District Court Erred In Awarding Discretionary Costs In The Amount Of $5,665

The district court erred and committed an abuse of discretion in awarding $5,665 in discretionary costs related to the Respondents' accountant. *See* Record, pp. 161-62. Any items of costs not enumerated in or in an amount in excess of that listed in Rule 54(d)(1)(C) are discretionary costs, which the Court may award only "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." I.R.C.P. 54(d)(1)(D); *see Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314-15, 109 P.3d 161, 168-69 (2005). Costs are "exceptional" only when the nature of the case itself is exceptional or when the cost is exceptional for a particular type of case. *Hayden Lake*, 141 Idaho at 314-15. The trial court's exercise of discretion will not be upheld on appeal where it reflects erroneous assumptions by the trial court. *See DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 291, 678 P.2d 80, 83 (Ct. App. 1984).

The Amended Memorandum of Costs and Attorney Fees attached Exhibit B, which is a billing statement from the accounting firm Grow Rasmussen, LLP. Exhibit B provides: "Activity for period October 6-October 31, 2006: consultation regarding Dr. Bushi - - $370; Activity for period November-December 2006: consultations and calculations regarding the separation of Dr. Bushi - - $2,135; Activity for period March-April 2007: consultations, calculations and other work related to affidavit of Dr. Bushi departure - - $3,160 Total Charges

$5,665." *See* Record, Exh. 16, Exh. B. A review of the Rasmussen affidavit demonstrates that there was nothing necessary and exceptional about his limited factual involvement in this case. *See* Record, Exh. 4. Mr. Rasmussen's affidavit merely recounts what he had previously done back in January 2006 as the LLC's accountant when he was told to prepare an analysis of the estimated value of Dr. Bushi's membership interest as of January 31, 2006. *See id.* at ¶ 2. Mr. Rasmussen stated that in preparing that analysis, he was directed to follow the methodology set forth in the Sage Operating Agreement, and in accordance with the Operating Agreement, he prepared a calculation of the estimated value of Dr. Bushi's membership interest. *Id.* at ¶¶ 2-3. This was work he performed for the LLC long before the filing of the complaint on October 19, 2006. There was absolutely nothing necessary and exceptional regarding Mr. Rasmussen's involvement. Moreover, the district court decided as a matter of law that the language in Article 1, Section 3.3, of the Operating Agreement is clear and unambiguous, and that the LLC's valuation followed that provision. *See* Record, pp. 112-14. There was nothing exceptional about Mr. Rasmussen's affidavit testimony stating that Section 3.3 of the Operating Agreement was followed in his calculation of Dr. Bushi's membership interest as of the date of the vote to boot him out. *Id.* at 113-14. The Court merely utilized Mr. Rasmussen's factual testimony in this regard as to his accounting methodology. The Court did not rely upon Mr. Rasmussen as an "expert" under Idaho Rule of Evidence 702. Mr. Rasmussen did not offer any expert opinion in his affidavit. *See* Record, Exh. 4. Plainly, Mr. Rasmussen was not an expert witness in this matter decided on summary judgment. Thus, the district court's exercise of discretion should not be upheld by this Court wherein the record reflects the erroneous assumptions that Mr. Rasmussen was an expert witness, that his involvement was necessary and exceptional, and

that his costs were reasonably incurred and should in the interest of justice be assessed against Dr. Bushi. Accordingly, the Court should reverse the district court's award of the sum $5,665 as a discretionary cost.

## IV.
## CONCLUSION

For each of the above and foregoing reasons, this Court should reverse the district court's order granting summary judgment and remand for further proceedings.

RESPECTFULLY SUBMITTED this 24 day of July, 2008.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Steven F. Schossberger
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of July, 2008, I caused to be served a true copy of the foregoing APPELLANT'S BRIEF by the method indicated below, and addressed to each of the following:

Forrest R. Goodrum
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_____
Steven F. Schossberger