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Bushi v. Sage Health Care, PLLC Appellant's Brief 2 Dckt. 34827

IN THE SUPREME COURT OF THE STATE OF IDAHO

STEPHEN BUSHI, M.D., Plaintiff-Appellant, vs. SAGE HEALTH CARE, PLLC, an Idaho limited liability company; CHARLES C. NOVAK, M.D., DAVID A. KENT, M.D.; and ROBERTO NEGRON, M.D., 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., Counter Claimants-Respondents, vs. STEPHEN BUSHI, M.D., Counter Defendant –Appellant.	)	

APPELLANT'S REPLY 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.

INTRODUCTION

The Respondents have failed to address the substance of Dr. Bushi's factually and legally supported positions that the District Court erred and abused its discretion by: (1) granting their motion for summary judgment; (2) subsequently *sua sponte* inserting Idaho Code § 12-120(3) as the statutory basis into their I.R.C.P. Rule 54(d)(5) memorandum of costs and attorney fees and Rule 54(e)(5) request for fees; and (3) awarding the exorbitant sum of $73,233.19 in attorney fees and $5,665 as discretionary costs. A review of the Respondents' brief which discusses the many disputed issues of material fact which were before the District Court conclusively illustrates this first point. The Respondents concede that none of their I.R.C.P. Rule 54 papers moving for an award of attorney fees specifically cited I.C. § 12-120(3) as a statutory basis. Instead, they incorrectly argue that there is no rule of civil procedure which requires that they do so. With respect to the unreasonable and excessive amount of attorney fees awarded, the Respondents do not even attempt to defend against any of the objectionable time entries, because they boldly assert that "Now that he has lost, and the bill comes due, he should not complain. He is hoist by his own petard." Respondent's Brief at 36. This comment does not merit a response by Dr. Bushi -- for after this Court reviews the District Court's determination of the amount of fees to be awarded under the standard of "reasonableness," and applies the Rule 54(e)(3) factors, it should decide that there was an abuse of discretion. Based upon the opening argument, and the rebuttal argument set forth below, Dr. Bushi respectfully requests that this honorable Court reverse the District Court's decisions granting summary judgment and awarding attorney fees and discretionary costs, and remand the case.

II.

ARGUMENT

A. The District Court Erred By Granting Summary Judgment On Dr. Bushi's Breach Of Fiduciary Duty Claims

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

In his opening brief, Dr. Bushi set forth legal authorities establishing that members of an LLC owed fiduciary duties to the other members of the LLC. Notably, the Appellee Members have never disputed, either below or now on appeal, that LLC members owe fiduciary duties to the other members of the LLC. Nevertheless, the District Court stated in the Order Granting Summary Judgment that it was "debatable" whether the Appellee Members even owed fiduciary duties to Dr. Bushi. *See* Record, p. 111. Even on appeal, the Appellee Members do not question whether fiduciary duties are owed. In fact, the Appellee Members concede the issue in their briefing on appeal. *See* Respondent's Brief, pp. 22-23 (arguing that Dr. Bushi breached fiduciary duties owed "to Sage and the other members," and that each Appellee Member was obligated to vote Dr. Bushi out of the LLC to comply with their "fiduciary duty owed to the other members (other than Bushi) and to the Company itself").

As if there were any doubt that each member of an LLC owes fiduciary duties to the other members, that conclusion is confirmed by the recent amendments to Idaho's Limited Liability Company Act. *See* I.C. § 30-6-409 ("A member of a member-managed limited liability company owes to the company and, subject to section 30-6-901(2), Idaho Code, the other members the fiduciary duties of loyalty and care stated in subsections (2) and (3) of this section.") (emphasis added). Thus, it is clear and undisputed that the Appellee Members owed

fiduciary duties to Dr. Bushi. The only real question on appeal is whether there are material issues of fact as to whether the Appellee Members breached their fiduciary duties to Dr. Bushi.

2. The Question Of Whether Fiduciary Duties Have Been Breached Is Generally A Question Of Fact

The District Court committed reversible error by concluding, as a matter of law, that the Appellee Members did not breach fiduciary duties owed to Dr. Bushi. Under Idaho law, that question is not a question of law for the Court. Instead, this Court has held that "whether a fiduciary duty has been breached is a question of fact for the jury." *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 414, 797 P.2d 117, 122 (1990).

Notably, the Appellee Members concede that the question of whether fiduciary breaches have occurred is a fact-intensive inquiry that must be determined on a case-by-case basis. *See* Respondent's Brief, p. 27 (conceding that "the question of whether a fiduciary relationship exists is necessarily fact specific to a particular case").

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

As fiduciaries, the Appellee Members were obligated to act in the best interest of the LLC and protect the interests of it members, and not act in their own self-interest. In blatant disregard of their fiduciary duties, the Appellee Members participated in a string of fiduciary breaches, all of which served to deprive 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. This is evidenced by the fact that the Appellee Members previously made their truthful disclosure to Wells Fargo Bank that each of their individual 25% ownership interest in Sage was valued at **$250,000**. Record, Exh. 11, ¶ ¶ 17-18, Exh. E.

First, the Appellee Members informed Dr. Bushi that they wanted him out as a member of Sage because he was dating a nurse practitioner – conduct not prohibited by the Operating Agreement or any other agreement between the parties. *See* Record, Exh. 11, ¶ 27. Then, the Appellee Members changed their pretext for wanting Dr. Bushi out of the LLC to the fact that Dr. Bushi had associated with a competing group of psychiatrists. Despite the fact that the Operating Agreement specifically allows a member to become associated with a competing company,[1] *see* Article VI, ¶ 8, the Appellee Members breached their fiduciary duties and the specific terms of the Operating Agreement 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; *see* Operating Agreement, Article VIII (providing 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"). Appellees further breached their fiduciary duties by intentionally taking Dr. Bushi off the schedule of Sage contracts that Dr. Bushi had been participating in, further depriving Dr. Bushi of profits and increasing the profits of the Appellee Members. *See* Record, Exh. 11, ¶ 29. Finally, instead of acting in good faith to negotiate a buyout for the fair value of Dr. Bushi's membership interest in Sage consistent with their fiduciary duties, the Appellee members concocted a plan to dissociate Dr. Bushi from the Company through legal maneuvering to amend the Operating Agreement with their three votes to allow the Appellee Members to disassociate a member with their three votes, and with no

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[1] The Appellee Members offer a competing interpretation of Article VI, ¶ 8, but that interpretation is inconsistent with the clear terms of Article Vi, ¶ 8. S*ee* Respondents' Brief, p. 29.

other stated cause or reason. *Id*. at ¶ 35. The Defendants did not even care if Plaintiff showed up to the meeting. *Id*. at ¶ 36.

This string of self-interested actions establish a breach of fiduciary duty in that each action serves 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. More importantly, these actions served to increase the Appellee Members' individual profits and interest in Sage. *See* 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."). 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. The Appellee Members' Reliance On The Operating Agreement Is Misplaced

The crux of the Respondents' Brief is that the Appellee Members could not have breached any fiduciary duties because they acted in technical compliance with the Operating Agreement. According to the Appellee Members, there can never be a breach of fiduciary duties if there is no breach of the Operating Agreement. This argument is incorrect and has been rejected by other courts, especially in the context of partners/members being forced of out partnerships or limited liability companies by the other partners/members.

In *Alloy v. Wills Family Trust*, 944 A.2d 1234 (Md. App. 2008), the court rejected the very argument being offered by the Appellee Members. The court explained that "courts have widely recognized that a general partner's exercise of management authority with the goal of

putting coercive financial pressure on a limited partner may amount to a squeeze-out in breach of the general partner's fiduciary duties, even though that exercise of authority is explicitly permitted by the partnership agreement. *Id*. at 1264. "[W]hether a technical breach has occurred is not the sole consideration" because "actions taken in accordance with a partnership agreement can still be a breach of fiduciary duty if partners have improperly taken advantage of their position to obtain financial gain." *Id.* (citing *Schafer v. RMS Realty*, 741 N.E.2d 155, 175 (Ohio App. 2000). Thus, "**actions allowed by an agreement can be a breach of fiduciary duty when they are not taken in good faith and for legitimate business purposes**." *Id.*

Similarly, in *Labovitz v. Dolan*, 545 N.E.2d 304 (Ill. App. 1989), the court rejected the argument that technical compliance with a partnership agreement precludes a claim for breach of fiduciary duties. *Id.* at 313 (rejecting the defense that the partnership agreement allowed the squeeze-out of a partner and explaining that, "although the Articles clearly gave the general partner the sole discretion to distribute cash as he deemed appropriate, that discretion was encumbered by a supreme fiduciary duty of fairness, honesty, good faith and loyalty to his partners"); *see also Sexton Law Firm v. Milligan*, 948 S.W.2d 388, 395 (Ark. 1997) ("[C]laims for breach of fiduciary duty and breach of contract are not identical causes of action. . . . It follows that, regardless of the express terms of an agreement, a fiduciary may be held liable for conduct that does not meet the requisite standards of fair dealing, good faith, honesty, and loyalty.") (emphasis added).

5. The Cases Cited By The Appellee Members Do Not Stand For The Proposition That Technical Compliance With The Operating Agreement Shields The Appellee Members From A Breach Of Fiduciary Duty Claim

The Appellee Members' cite several cases, purportedly for the proposition that action consistent with an operating agreement can never constitute of breach of fiduciary duties. The cases cited for that proposition do not so hold, and they are distinguishable from the case at hand. For example, in *Gowin v. Granite Depot*, 634 S.E.2d 714 (2006), the managing member of an LLC amended the articles of organization to allow for elimination of a member for nonpayment of his capital contribution. The court, however, did not hold that, as a matter of law, there can be no breach of fiduciary duties if the operating agreement is not violated. The *Gowin* case did not involve a court reaching the fiduciary duty issue on a dispositive motion. In what was apparently a non-jury case, the trial court concluded that there was no breach of fiduciary duties after a full hearing involving testimony from the parties. *See id.* at 717, 722. The court specifically explained that "[w]hether an act constitutes a breach of fiduciary duty will depend on the circumstances of each case," and concluded that, under the specific facts of the case, the evidence did not establish a breach of fiduciary duty. *Id.* at 722.

Notably, in *Gowin*, the LLC Agreement was amended to allow for the dissociation of any member upon specific circumstances – the nonpayment of the member's required capital contribution. Here, the Appellee Members did not amend the Operating Agreement to allow for the dissociation of any member upon specific circumstances. Instead, they amended the Operating Agreement for the sole purpose of dissociating Dr. Bushi, **for no stated reason whatsoever**. Only now that litigation has ensued do the Appellee Members attach a reason for the dissociation.

Tolley v. THI Co., 140 Idaho 253, 92 P.3d 513 (2004), is similarly inapposite. There, Tolley's ex-husband was a shareholder in a family owned corporation, THI Co, and his shares in THI Co. were governed by a Stock Purchase and Redemption Agreement. While Tolley had signed a Spouses' Consent to the Stock Purchase and Redemption Agreement, Tolley was not a shareholder and was not a party to the Stock Purchase and Redemption Agreement. When Tolley and her ex-husband divorced, Tolley obtained shares in THI Co. through a property settlement agreement. Tolley then asserted that THI Co. was obligated, pursuant to the Stock Purchase and Redemption Agreement (to which she was not a party), to pay her for her newly acquired shares in THI Co. While Tolley claimed that the Stock Purchase and Redemption Agreement required THI Co. to purchase her shares, the Court found that the Agreement unambiguously provided that THI Co. had the option to purchase the shares, but was not required to do so.

The Court granted summary judgment on Tolley's claims for breach of contract and breach of the implied covenant of good faith and fair dealing because Tolley was not a party to the Stock Purchase and Redemption Agreement. The Court then granted summary judgment on Tolley's claim for breach of fiduciary duty. However, the Appellee Members either misunderstand or mischaracterize the Court's analysis. According to the Appellee Members:

> The court held that even though *Tolley* was a shareholder, and the corporation's refusal resulted in frustration of her reasonable economic expectation, since the corporation was acting in accordance with the terms of the shareholders' agreement, there was not breach of fiduciary duty.

See Respondents' Brief, p. 24 (emphasis added).

The Court's opinion, however, does not hold that there could be no breach of fiduciary duties if the defendants acted consistent with the Stock Purchase and Redemption Agreement. Indeed, Tolley was not even arguing that the defendants breached their duties by refusing to purchase her shares in THI Co. Instead, Tolley argued that the defendants, who were members of Tolley's family, breached their fiduciary duties by not clearly explaining to her the meaning of the Stock Purchase and Redemption Agreement. *See id.* at 511 (arguing that the shareholder defendants owed Tolley fiduciary duties that required them "to clearly state to her that no payment obligation was created in the Agreement in the event of her divorce from Lee." The Court simply held that Tolley's claim failed because "[t]here is no evidence or allegation by [Tolley] of misrepresentations, concealment of facts, or fraud." *Id.* at 512. Thus, the case does not stand for the proposition for which the Appellee Members have cited it.

None of the cases cited by the Appellee Members deals with a situation where members of an LLC act to deprive one member of an LLC of his/her membership interest while at the same time increasing the voting members' interests in the LLC.

6. The Unpublished Opinions Cited By Dr. Bushi Are Valid Persuasive Authority

The Appellee Members have criticized Dr. Bushi for citing to unpublished authorities. The Appellee Members mistakenly assert that citation to unpublished authorities violates Rule 15(f) of the Internal Rules of the Idaho Supreme Court. Rule 15(f) merely provides that unpublished Idaho cases are not binding precedent in Idaho. It does not prohibit parties from citing unpublished cases from other jurisdictions as persuasive authorities. *See also Dan Wiebold Ford, Inc. v. Universal Computer Consulting Holding, Inc*., 142 Idaho 235, 127 P.3d

138 (2005) (citing multiple unpublished opinions). Dr. Bushi understands that the unpublished opinions he has cited to are not binding on this Court. Of course, neither are the published opinions from other jurisdictions. Instead, Dr. Bushi offers the unpublished opinions as persuasive authority that may help this Court resolve issues that have not yet been directly addressed by any published Idaho opinion.

Notably, neither party has located any published opinions, in Idaho or otherwise, that address the factual situation presented here – where three members of an LLC first vote to deprive another member of all profits and then, apparently after realizing that they cannot do so, vote to amend the operating agreement in a way that would allow them to dissociate the fourth member. It is not surprising that that the parties have not found published authorities on all fours with this case. It is unlikely that many other LLC members have, or ever would, so blatantly disregard their fiduciary duties as to concoct such a scheme to dissociate an LLC member.

The unpublished cases cited by Dr. Bushi stand for the same proposition as the above-cited published cases – that LLC members can breach fiduciary duties even if acting in technical compliance with the operating agreement.

The Appellee Members' attempt to distinguish the unpublished opinions actually does no more than prove Dr. Bushi's point that the question of whether the Appellee Members have breached fiduciary duties owed to Dr. Bushi is a question of fact for the jury to resolve. The Appellee Members attempt to distinguish the unpublished opinions on their facts on grounds that in those cases "there was no indication of wrongful conduct by the member who was removed." *See* Respondent's Brief, p. 27.

As an initial matter, this statement that the present case is distinguishable from any case that does not involve an "indication of wrongful conduct by the member who was removed," stands in stark contrast to the Appellee Members' repeated assertion that the reasons for Dr. Bushi's dissociation do not matter. If the reason the Appellee Members voted to amend the Operating Agreement and then voted to dissociate Dr. Bushi does not matter, then why do the Appellee Members keep repeating ad nauseam the disputed irrelevant allegation that Dr. Bushi converted funds from Sage?

More importantly, the Appellee Members' emphasis on the disputed allegations of wrongdoing actually demonstrates that this case involves material issues of fact not appropriate for resolution on a motion for summary judgment. The motivation for the Appellee Members' actions certainly are relevant to the trier of fact's determination of whether fiduciary duties were breached. *See Alloy v. Wills Family Trust*, 944 A.2d at 1264 ("actions allowed by an agreement can be a breach of fiduciary duty when they are not taken in good faith and for legitimate business purposes"). Whether Dr. Bushi committed wrongdoing certainly is a factor the trier of fact might consider in determining whether the Appellee Members breached fiduciary duties through their string of actions aimed at depriving Dr. Bushi of his profits and membership interest in Sage. However, the allegations of wrongdoing against Dr. Bushi are disputed, and it

was inappropriate for the District Court to resolve those disputed facts in favor of the party moving for summary judgment.[2]

7. The District Court Improperly Resolved Factual Issues In Favor Of The Moving Parties

The District Court erred by not following the well-established rule that, for purposes of summary judgment, 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 essentially held that the three Appellee Members' string of actions aimed at kicking Dr. Bushi out of the LLC were justified by Dr. Bushi's alleged wrongdoings. The District Court's opinion reads as if Dr. Bushi has been convicted of conversion or something worse. More importantly, the District Court's opinion ignores that the purported Appellees' affirmative defense allegations of conversion are disputed.[3]

Contrary to the Appellee Members' allegations of conversion, the Wells Fargo line of Credit was **opened by the bank** in the name of "Sage Health Care, PLCC Stephen Bushi."

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[2] *See* paragraphs 20 through 39 of the Affidavit of Stephen Bushi, M.D. In Opposition to Motion for Summary Judgment (Record, Exh. 11). Albeit the Appellee Members portray the line of credit issue as a cardinal sin, they know Dr. Bushi timely made every monthly payment, and paid off the entire principal amount, all without the Appellee Members or the Company being one penny out of pocket. *Id.* at ¶ 32; *see* Memorandum in Support of Motion to Dismiss Counterclaim (Record, Exh. 1).

[3] The Appellee Members did not set forth any facts in their affidavits in support of motion for summary judgment on this issue. They rely upon boilerplate allegations in their Counterclaim and purported affirmative defense of breach of contract - - which allegations were denied in Dr. Bushi's Answer to Counterclaim. *See* Record at 76 – 78, ¶ ¶ 4-18. Count One (Breach of Contract) of the Counterclaim was dismissed on April 4, 2007, prior to the due date of Dr. Bushi's opposition to the motion for summary judgment. Record at 91.

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; *Id.* at 76-77, ¶ ¶ 4 – 8. Wells Fargo routinely puts the name of the first person listed for the guarantors on all correspondence and addresses everything to that person's attention. There was an error in communication explaining why the business line of credit was activated instead of Dr. Bushi's personal line of credit - - but the District Court never heard that evidence. Thus, the two sides have differing views and factual accounts, but the facts and reasonable inferences must be drawn in favor of Dr. Bushi for purposes of this summary judgment motion.

The Appellee Members attempt to characterize the factual issues as merely a difference between conversion and embezzlement. *See* Respondents' Brief, p. 17-18. However, it is much more than that. Dr. Bushi has not been convicted of either offense, nor has any court or trier of fact ever had the opportunity to determine whether Dr. Bushi committed any wrongdoing. Simply stated, there is a material factual dispute over whether Dr. Bushi committed any wrongdoing.

Moreover, the factual allegations that the District Court adopted as if undisputed are not even contained in any affidavit. Rather, in support of their motion for summary judgment, the Appellee Members merely cited to the conclusory allegations in their Counterclaim, which had been dismissed and were moot when Dr. Bushi filed his opposition papers. The Appellee Members correctly note that similar allegations are also contained in the Appellee Members' "affirmative defense" of "Breach of Contract by Bushi." *See* Record, p. 26. However, the Appellee Members' purported affirmative defense was **NEVER** placed before the District Court

in the motion for summary judgment. Record at 87.[4] Thus, there is nothing of any relevance in the record before the Court relating to the **disputed** allegations of conversion.

In any event, even if this Court concludes that the record does include the Appellee Members' allegations of conversion, those allegations are disputed by Dr. Bushi's affidavit and his Answer to Counterclaim, creating a material issue of fact inappropriate for resolution on summary judgment.

8. The Dispute Over Whether Dr. Bushi's Converted Funds Highlights The Reason Why Summary Judgment Was Improperly Granted

A major point of contention in this appeal is whether the District Court did or did not consider the factual issue of whether Dr. Bushi had committed wrongdoing that justified his dissociation from Sage. The Appellee Member's contend that "[t]he 'factual issues' [related to allegations of conversion] were not considered by the District Court in granting summary judgment to Sage." *See* Respondents' Brief, p. 16 (citing the District Court's statement that "Given the Operating Agreement language, the Members' reasons for disassociation are irrelevant to this decision").

With all due respect to the District Court, it is clear that the District Court relied heavily on the disputed allegations of wrongdoing in granting summary judgment. As an initial matter,

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[4] The Appellees moved for summary judgment in Issues IV "Entering judgment on the Counterclaim that Bushi breached the provisions of the Operating Agreement," and V "Awarding damages to the Defendant/Counterclaimants on the Counterclaim of attorney's fees and costs incurred in the first action, CVOC 0610585". Record at 87. Both of these issues were dismissed on April 4, 2007, when the Court granted Dr. Bushi's motion to dismiss. The Appellees **DID NOT** move for summary judgment on the purported Third Affirmative Defense (Breach of Contract by Bushi). *Id*. at 87.

the District Court discussed the conversion allegations in great detail in the "Background" section of its Order Granting Summary Judgment. *See* Record, pp. 000096-117. In fact, the District Court specifically stated 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.

> 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 (emphasis added); *see also* pp. 90, L. 6 – p. 91, L. 25; Record, pp. 109-110 (**explaining that, under the terms of the Operating Agreement, the Appellee Members were "without remedy" against Dr. Bushi, *justifying* their amendment of the Operating Agreement**) (emphasis added). Thus, any assertion that the District Court did not rely heavily on the disputed allegations of conversion is flatly contradicted by the record.

More importantly, it is extremely disingenuous for the Appellee Members to now assert that the reason for Dr. Bushi's dissociation is not relevant. Again, if the reasons for dissociating Dr. Bushi does not matter if the Appellee Members acted in compliance with the operating agreement, then why do the Appellee Members keep repeating those allegations ad nauseam?

The Appellee Members bring up the allegations of conversion on the very first page of their briefing on appeal, and those allegations are emphasized repeatedly throughout their briefing.

The reason the Appellee Members keep bringing up the disputed allegations of conversion is obvious. They want to paint Dr. Bushi as a thief, which they apparently succeeded in doing with regard to the District Court. Dr. Bushi trusts that this Court will agree that these disputed facts must be construed in favor of Dr. Bushi for purposes of summary judgment.

Indeed, this is a classic case of material issues of fact precluding summary judgment given that the fiduciary duty issue turns on the Appellee Members' good faith and motivations in dissociating Dr. Bushi. *See Alloy v. Wills Family Trust,* 944 A.2d at 1264("actions allowed by an agreement can be a breach of fiduciary duty when they are not taken in good faith and for legitimate business purposes." *Id.* According to the Appellee Members, they dissociated Dr. Bushi because he allegedly converted funds through use of a line of credit that Dr. Bushi believed to be his own. This theory and justification for the dissociation is not only disputed by Dr. Bushi, but is highly suspect given that nowhere in the record do the Appellee Members state this as the reason for dissociation. Instead, the record indicates that the motivation for the dissociation was Dr. Bushi's association with a competitor – conduct specifically authorized by the Operating Agreement. *See* Record, Exh. 11, ¶ 29. The allegations of conversion were never even asserted by the Appellee Members as a basis for Dr. Bushi's dissociation until asserted in this litigation. The January 24, 2006, notice of the special meeting to amend the Operating Agreement is silent. *See* Bushi Aff., ¶ 35, Exh. K (Record, Exh. 11). The minutes of the special meeting to amend and dissociate Dr. Bushi is silent. *Id.* at ¶ 37, Exh. L

While the Appellee Members insist that the dissociation was justified and motivated by the disputed allegations of wrongdoing, Dr. Bushi contends that his dissociation was motivated solely by the Appellee Members' self interest in increasing their profits and ownership interest in Sage, at the expense of Dr. Bushi. Regardless of the after-the-fact reasons the Appellee Members now set forth as the justification for their actions, the final result of their actions was that each of the Appellee Members walked away a richer man having increased his interest in Sage from 25% to 33%. Dr. Bushi, on the other hand, walked away deprived of his interest in the LLC that he helped build into a profitably entity. It is the sole province of the jury to weigh the evidence presented and determine whether the Appellee Members breached their fiduciary duties.

B. The District Court Erred By Granting Summary Judgment On Dr. Bushi's Breach Of Fiduciary Duty Claims

The Appellee Members misstate Dr. Bushi's claim for breach of the implied covenant of good faith and fair dealing. According to the Appellee Members, "Bushi now contends that the amendment of the Agreement, which permitted the other members to vote him out of the Company, violates a covenant of good faith and fair dealing implicit in the Operating Agreement." *See* Respondents' Brief, p. 31. This characterization is the same mistake committed by the District Court. Dr. Bushi does not contend that the act of amending the Operating Agreement, alone, was a breach of the implied covenant of good faith and fair dealing.

Dr. Bushi's claim is not limited to the amendment of the Operating Agreement, but instead 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 Appellee Members respond to this showing of bad faith by stating ". . . so what, it never happened," as if to argue that their wrongful actions are excused because they were not successful. *See* Respondents' Brief, p. 30. The Appellee Members' action in voting to deprive Dr. Bushi of his profits clearly demonstrates their bad faith. Moreover, once they realized that their actions in voting to deprive Dr. Bushi of his profits were wrongful, they followed up those action be taking the self-serving step of amending the Operating Agreement so that they could ultimately obtain their desired result – depriving Dr. Bushi of his interest in Sage and increasing their own personal interests in Sage. This string of bad faith conduct creates a material issue of fact as to whether the Appellee Members breached the implied covenant of good faith and fair dealing. Accordingly, the District Court should be reversed and the case remanded.

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

Dr. Bushi challenges the District Court's award of attorney fees because it abused its discretion by *sua sponte* inserting Idaho Code § 12-120(3) as a basis which did not exist in the Appellees' I.R.C.P. 54(e)(5) attorney fee request, and further abused its discretion in finding that

the claim of attorney fees in the amount of $73,233.19 is reasonable. "The burden is on the party opposing the award to demonstrate that the District Court abused its discretion." *Lettunich v. Lettunich*, 145 Idaho 746, 185 P.3d 258, 261 (2008); *citing Eastern Idaho Agricultural Credit Assn. v. Neibaur*, 133 Idaho 402, 412 987 P.2d 314, 324 (1999). To determine whether the trial court abused its discretion, this Court determines: (1) whether the trial court correctly perceived the issue as one discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Id*. The record demonstrates that there was an abuse of discretion by the District Court because it did not act within the outer boundaries of its discretion and consistent with the legal standards applicable to the specific choices available to it and because it did not reach its decision by an exercise of reason.

1. Idaho law requires that a party must specify in its I.R.C.P. 54(e)(5) attorney fee request the code section pursuant to which it makes the fee request and upon which code section the court will rely - - Appellee's failed to specify I.C. § 12-120(3) in its I.R.C.P. 54(e)(5) attorney fee request, that basis was waived, and the Court committed reversible error

The Appellee's mistakenly respond to Dr. Bushi's sound position as follows: "It is true that in the affidavit of the memorandum of costs and fees, Sage does not reference I.C.§ 12-120. But there is no requirement in Rules 54(d)(5) or 54(e)(5) that such a reference be included there." Respondent's Brief at 35. This Court has recently held contrary to the Appellee's assertion as follows:

> It is well established that '[a] **party claiming attorneys fees must assert the specific statute, rule, or case authority for its claim**.' *MDS Investments,, L.L.C. v. State*, 138 Idaho 456, 465 65 P.3d

> 197, 206 (2003). *See also Bream v. Benfcoter*, 139 Idaho 364, 79 P.3d 723 (2003). The Shelbys contend that the Nords failed to cite a rule, statute, or other authority in support of their requests for fees. The Shelbys are wrong. In their initial and subsequent fee request the Nords and the Company cited I.C. § 12-120, and requested fees "as a matter of costs because this was a commercial transaction as defined by Idaho Code § 12-120." We see nothing defective in this fee request…. 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**. Here, the Nords and Nord Excavating did so in their initial memorandum of costs and attorney fees, ….

Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc., 141 Idaho 716, 720-21, 117 P.3d 130, 135 (2005). Emphasis added.

In the case *Bream v. Benscoter, supra*, this Court provided that:

> Attorney fees are awardable only where they are authorized by statute or contract. *Hellar v. Cenarrusa*, 106 Idaho 571, 682 P.2d 524 (1984). 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**. *Appel v. LePage*, 135 Idaho 133, 15 P.3d 1141 (2000). If the party bases its claim for attorney fees upon a contract, then the party must likewise identify that portion of the contract upon which the party relies as authority for the awarding of attorney fees. The party must then provide a reasoned argument, supported by case law as necessary explaining why that statutory or contractual provision entitles the party to an award of attorney fees in this instance. For example, if the party seeks an award of attorney fees under Idaho Code § 12-120(3) on the ground that the case is inactioned to recover in a commercial transaction, the party should, to the extent necessary, provide facts, authority, and argument supporting the claim that the case involves a "commercial transaction" and that such transaction is the gravamen of the lawsuit. Because the Benscoters' have not supported their request for attorney fees on appeal with any authority or argument, we will not consider that issue.

Bream, 139 Idaho at 369-70, 79 P.3d at 728-29.

The record is crystal clear that the Appellees did not assert the statutory basis of Idaho Code § 12-120(3) in their I.R.C.P. 54(e)(5) moving papers, which included two bites at the apple in the Memorandum of Costs and Attorney Fees filed August 31, 2007[5] and Amended Memorandum of Costs and Attorney Fees filed September 14, 2007,[6] and Supplemental Affidavit in Support of Memorandum of Costs and Attorney Fees filed September 14, 2007.[7] The Court abused its discretion in ignoring this pertinent case precedent, and in saving the Appellees from their fatal mistake of **NOT** also including a specific reference to I.C. § 12-120(3) together with the other cited statutory basis, I.C. § 12-121, which **WAS** specifically provided in their I.R.C.P. 54(e)(5) fee request.[8]

Dr. Bushi will quickly dispose of the Appellees' reliance upon the case *Magic Lantern Productions, Inc. v. Dolsot,* 126 Idaho 805 (1993).[9] The *Magic Lantern Productions'* holding relating to the automatic use of I.C. § 12-120(3) by the district court for a fee award when the code section is included in the non-moving party's pleading has been expressly abrogated by the holding in the case *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.,* 136 Idaho 466, 471, 36 P.3d 218, 223 (2001) ("to the extent that *Magic Lantern Productions, Inv. v. Dolsot,* 126

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5 Record at Exh. 14.

6 *Id.* at Exh. 16.

7 *Id*. at Exh. 17.

8 Under the Appellees incorrectly asserted legal position they did not have to make any specific citation to a rule of civil procedure or statute in their memorandum of costs and attorney fees and supporting affidavit. Yet, why then did they even bother to state on two occasions that the attorney fees "are allowable under Idaho Rule of Civil Procedure 54(d)(1) and 54 (e)(1) and Idaho Code § 12-121"? Record at Exhs. 14, 16 and 17.

9 Respondent's Brief at 33.

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.") It was error for the District Court to place any reliance upon this abrogated decision which was advanced by the Appellees.[10]

At the September 27, 2007, hearing on Dr. Bushi's Motion to Disallow the Appellee's Application for Attorney Fees, Dr. Bushi's counsel was presenting argument that, pursuant to the Appellees' Memorandum of Costs and Attorney Fees and Supporting Affidavit, the only statutory basis raised for an award of attorney fees is under Idaho Code § 12-121, and the Court surprisingly stopped counsel's argument, and interjected the following dialogue:

> Mr. Schossberger… Next, the only legal basis raised, the statutory basis for an award of fees is under 12-121. Mr. Goodrum –
>
> The Court: No, it's 12-120, subsection 3.
>
> Mr. Schossberger: Excuse me, your honor?
>
> The Court: It's 12-120 subsection 3. That's what they're asking for.
>
> Mr. Schossberger: Your Honor –
>
> The Court: Just as you did in your Complaint.
>
> Mr. Schossberger: Your Honor, let's look at – it's right here. The Memorandum of Costs and the Supplemental Memorandum of Costs and the Brief in Opposition. The Memorandum of Costs and Attorney Fees – excuse me, the Amended Memorandum dated September 14, paragraph 4, "the same are allowable under Idaho Rule of Civil Procedure 54(d)(1), 54(e)(1) and Idaho Code 12-121." The first Memorandum of Costs and Attorney Fees also has the exact same language in it. They have [sic] waived any

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[10] Record at 153. *See* Transcript, p. 94, L. 25-p.95, L. 7.

> argument under 12-120(3) that has not been raised as a statutory basis before this Court. That is what the opposition focused on, 12-121. That's what they raised in their memorandum and again in a supplemental memorandum. All we have before the Court is under 12-121. This Court must have the abiding belief that based upon the case law provided to it in the 2007 cases, that the overall action that all of the claims, all of the arguments were brought frivolously or unreasonably. We do not have that in this case, your Honor.

Transcript, p. 94, L. 25- p. 95, L. 24.

The Court then asked the Appellee's counsel to respond, and that discussion reads:

> The Court: … Do you have any response in particular to the response that you are not pursuing fees under 12-120, subsection 3.
>
> Mr. Goodrum: Well, your Honor, we're asking for fees under Rule 54 and Rule 54 provides that fees can be awarded under any statute that makes a provision for fees and I specifically plead 12-120 in my Verified Answer and Counterclaim. So I don't understand that argument even because this is a motion that we brought – I mean, the Memorandum of Costs and Fees were filed pursuant to the Rule and that's the reference to the Rule and it's right there. And the Rule itself incorporates any statute that provides for an award of costs and attorney fees. And I specifically plead it.

Id. p. 102, L. 18 – p. 103, L. 4.[11] At that time, Appellee's counsel did not give any other explanation as to how I.C. § 12-120(3) was before the Court as a statutory basis for an award of attorney fees when it was not cited in the Defendant's I.R.C.P. 54(e)(5) papers. Nevertheless, at the conclusion of the hearing, the Court contended that both parties alleged attorney fees under

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[11] The Appellees' counsel **DID NOT** "specifically plead "12-120" in the Verified Answer and Counterclaim. Record at 35. In paragraph 9, Count One, of the Counterclaim there was an allegation of present entitlement to attorney fees relating to the **previous action**, **CVOC 0610585**, that: "Defendant Counterclaimants incurred attorney's fees in prosecuting said action and ***were entitled*** to an award of attorney fees pursuant to the terms and provisions of I.C. § 12-120 and 12-121." *Id.* at 32. That counterclaim was dismissed. Record at 90-91.

12-120(3), and that any award of fees will be under 12-120(3) and not under 12-121 because the District Court agreed with Dr. Bushi's opposing argument. Transcript, p. 104, L. 13 – p. 105, L. 6. Dr. Bushi's counsel then reiterated Dr. Bushi's objections and stated on the record:

> Mr. Schossberger: For the record the Supplemental and the Memorandum of Costs did not include 12-123. There's preliminary argument before the judgment was issued and counsel – or, excuse me, Dr. Bushi raised that there has been no submission to the Court for fees. Here's what they think they could raise and here's why they should be denied. It was their chance and they had to submit that motion, that Memorandum. They waived their right under 12-120(3). In their moving papers it's only 12-121 and the record does not support 12-120(3). *Id*. at 105, LL. 9-17.

On the next day following the hearing, September 28, 2007, the District Court issued a "Scheduling Order" which contained the following erroneous language, "The Court heard argument regarding Sage Health Care's request for fees pursuant to *I.C. § § 12-120* and 12-121 *as set forth in its Motion for Summary Judgment, p. 11 on September 27, 2007.*" Record at 133 (emphasis added). Because of the Court's *sua sponte* comment that the attorney fee hearing included a request for fees pursuant to I.C. § 12-120(3) as set forth in the Appellee's Motion for Summary Judgment, p. 11, Dr. Bushi filed an objection and motion to strike the Court's improper reference to I.C. § 12-120 in the Scheduling Order. Record at 135-142.[12]

Here, the District Court crossed the outer line of its discretion and did not act consistently with the controlling legal standard of I.R.C.P. 54(e)(5). The District Court hunted down a legal argument, and then presented it on behalf of the Appellees, that their prior reference to I.C. § 12-

[12] The District Court took no action on the motion to strike.

120, located in a one sentence blurb just prior to the Conclusion of their Memorandum in Support of Motion for Summary Judgment, was good enough for the District Court. The Motion for Summary Judgment does not make any reference to I.C. § 12-120(3). Record at 87. Even if the Appellees had included a reference to I.C. § 12-120(3), it would have been irrelevant to this analysis because I.R.C.P. Rules 56(a), (b), (c), (d) and (e), address the substantive issues of a party's claim or counterclaim. It is only after the district court has issued a final decision or judgment can a party proceed under I.R.C.P. Rules 54(d)(1), (d)(5), and (e)(5) to claim a right of recovery for costs and attorney fees which were incurred in the action. The claim for costs and attorney fees is a completely new and separate stage of the litigation which comes after the party's claims and defenses have been decided by the District Court. This post-decision stage is governed by the provisions provided in I.R.C.P. 54 et al; otherwise, the very existence of I.R.C.P. 54 is rendered meaningless.

The Appellee's passing reference to I.C. § 12-120 in their Memorandum in Support of Motion for Summary Judgment is completely irrelevant and is not a substitute for their failure to include a specific citation to I.C. § 12-120(3) in their memorandum of attorney fees and supporting affidavit as required by I.R.C.P. 54(e)(5). Moreover, using this very reasoning, in Dr. Bushi's Memorandum in Opposition to Defendant's Motion for Summary Judgment, he specifically responded to the Defendant's issue VII "Awarding Attorney Fees and Costs to Defendant/Counterclaimant's in this Action as a Prevailing Party" as follows: "The issue raised in VII of the Motion is premature under I.R.C.P. 54(d)(1)(A)(B)." Record, Exh. 9, p. 3. The Appellee's improperly purported to assert this as an issue to be decided on summary judgment. Issue VII was not decided by the Court pursuant to the Motion for Summary Judgment. Record

at 96-116. At the summary judgment hearing on July 20, 2007, the only issues argued by the parties and heard by the Court were the substantive issues of the Counterclaimants' declaratory relief claim and as addressed by the Court in its Order Granting Sage Health Care's Motion for Summary Judgment dated July 31, 2007. The hearing on the motion for summary judgment was clearly not a hearing to discuss a request for an award of costs and attorney fees under I.R.C.P. 54(d)(1), 54(d)(5), 54(d)(6), [13] 54(e)(1), 54(e)(3) and 54(e)(5).

The Appellees filed their Memorandum of Costs and Attorney Fees, pursuant to **I.R.C.P. Rules 54(d)(1), (d)(5) and (e)(1) and I.C. § 12-121** on August 31, 2007. Under the request for attorney fees under Rule 54(e)(1), there was no citation or notice that attorney fees were being claimed pursuant to I. C. § 12-120(3). On September 10, 2007, Plaintiff filed his Objection and Memorandum In Opposition to Defendants' Memorandum of Costs and Attorney Fees brought under **I.R.C.P. Rules 54(d)(1), (d)(5) and (e)(1) and I.C. § 12-121**. On September 13, 2007, the Court *sua sponte* set the Hearing on the Defendants' request for Costs and Fees for September 27, 2007.

On September 13, 2007, the Court entered the Summary Judgment, and provided "(3) Judgment regarding awarding costs and reasonable attorneys' fees in favor of Defendants/Counterclaimants is reserved." The very next day, on September 14, 2007, Defendants filed their "Amended Memorandum of Costs and Attorney fees" and again asserted

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[13] Rule 54(d)(6). Objection to Costs. "Any party may object to the claimed costs of another party set forth in a memorandum of costs . . . and shall be heard and determined by the court as other motions under these rules." This is a completely later and separately heard court hearing.

that the requested costs and fees "are allowable under Idaho Rule of Civil Procedure **54(d)(1) and 54(e)(1)** and **Idaho Code § 12-121**." (Emphasis added.) This was the **ONLY NOTICE** given to Dr. Bushi of the authority and statutory basis upon which the Appellees were then and there actually seeking an award of attorney fees as listed in both of the Memorandum of Costs and Affidavits in Support of Memorandum of Costs and Attorney's Fees, and of **what would be argued at the Hearing on September 27, 2007**.

The record is clear that by the Appellees' failure to include any citation or reference to I.C. §12-120(3) in their request for fees under Rules 54(d)(1), 54(d)(5) and 54(e)(1), and 54(e)(5), they waived any claim to an award of attorney fees under I.C. § 12-120(3). It was absolutely incumbent upon them to include the specific statutory authority in their moving papers for an award of attorney fees. How else could Dr. Bushi be put on notice and respond in opposition under I.R.C.P. 54(d)(6). Again, the Appellees' bald assertion in their summary judgment memorandum, governed by I.R.C.P. 56(c), for an unknown future award of fees under § 12-120, which was made before the substantive claims had even been decided by the Court, is completely irrelevant.

There is nothing in the record to support the Court's language of "Sage Health Care's request for fees pursuant to I.C. § 12-120 as set forth in its Motion for Summary Judgment, p. 11."[14] In fact, during oral argument, when Defendants' counsel was asked by the Court to respond to Plaintiff's objection that there was no asserted argument for attorney fees under

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[14] None of the Defendants' moving papers for an award of attorney fees, i.e, from the date of the initial Memorandum of Costs and Attorney Fees dated August 31, 2007, through the date of the Hearing on September 27, 2007, make this reference.

I.C. § 12-120(3) before the Court at the Hearing, Mr. Goodrum **incorrectly** responded that Plaintiff had included the citation in his Verified Answer and Counterclaim, and that it was discussed in connection with Plaintiff's objection to the form of summary judgment sought by the Defendants' which had previously been pending before the Court.[15] Mr. Goodrum did not raise any other response on his own.

Contrary to the controlling law set by this Court in the case *Eighteen Mile Ranch, LLC, supra*, *Keb Enterprises, LP v. Smedley*, 140 Idaho 746, 754, 101 P.3d 690, 698 (2004); *Bream, supra*, and *Bingham v. Montane Resource Assocs.*, 133 Idaho 420, 424, 987 P.2d 1035, 1039 (1999), the District Court abused its discretion in purporting to set precedent that: it is sufficient for a party, moving pursuant to Rule 54 et al., for entitlement to an award of attorney fees, who specifically asserts in the I.R.C.P. 54(e)(5) papers that the sole basis is under I.C. § 12-121, to later assert without any notice to the opposing party, and at the time of oral argument divert away and rely upon a general reference to I.C. § 12-120, and not even any specific reference to any of the code's subparts 1-6, which was made at the end of a memorandum submitted under I.R.C.P. 56(c), and it is further okay that the requesting party **NOT** have any specific reference to the different statutory basis for an award of attorney fees, i.e., I.C. § 12-120(3), in any of the moving papers brought under I.R.C.P. Rules 54(d)(1), 54(d)(5), 54(e)(1), 54(e)(3) and 54(e)(5). In taking this position, the District Court acted outside of the outer boundaries of its discretion and acted inconsistently with the controlling legal precedent of this Court.

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[15] This argument about Plaintiff's Objection to Defendants' Proposed Form of Summary Judgment will be addressed *infra*.

The District Court further erred in distinguishing the case *Bingham v. Montane Resource Assocs.*, 133 Idaho 420, 424, 987 P.2d 1035, 1039 (1999) because there had been discussion about I.C. § 12-120(3) in response to Dr. Bushi's objection to the Appellees' proposed form of summary judgment. On August 15, 2007, Dr. Bushi filed his Objection to the Appellees' proposed form of summary judgment because they had jumped the gun and wanted to skip the procedural requirements contained in Rule 54 et al. with the language, "Number 3. Judgment is hereby entered awarding costs and reasonable attorneys' fees in favor of Defendant/Counterclaimant's as the prevailing parties in this litigation." Record at 119. Dr. Bushi correctly pointed out that the language should be deleted from the form of summary judgment because the Appellees had not filed a motion for an award of costs and attorney fees pursuant to I.R.C.P. 54, and had not supported such a motion with any legal basis for an award of attorneys fees. *Id.* It was only in connection with the objection to the language in paragraph three of the proposed form of summary judgment that Dr. Bushi argued that neither the Operating Agreement, or any of the attorney fee statutes, e.g., § § 12-120(3), 12-121 or 12-123, are applicable. *Id*. at 139-40.

Dr. Bushi also clearly put the Appellees on notice that a motion or award for an award of attorney fees **must be brought pursuant to I.R.C.P. 54,** and **should** such an application be made by the Appellees, then under any of their **yet to be asserted statutory grounds** it should be denied. *Id*. at 140. Dr. Bushi further provided in the objection to the proposed form of summary judgment, "The Court should follow this case precedent and deny **any motion for award of attorney fees under I.C. § 12-120(3)." … "Therefore, any request for an award of attorney fees under these statutes should be denied." …"Paragraph three from the form of**

the summary judgment should be stricken, and any future motion for an award of attorney fees should be denied." *Id*. at 118-20, and 140.

Plainly, at that point, the only issue before the District Court was whether it would sign the proposed form of summary judgment containing the objectionable language in paragraph three which insinuated that the Court had already made a finding that the Appellees are the prevailing party and entitled to an award of attorney fees. The District Court rightfully could not sign that form of summary judgment because the Appellees had not yet applied under the provisions of Rule 54 et al. for an award of costs and fees, and had not yet complied with the mandate of I.R.C.P. 54(e)(5) that the specific statutory basis or contractual language must be cited in the memorandum of attorney fees and supporting affidavit. Accordingly, the Court struck through the Appellees' language and provided, "Judgment regarding awarding costs and reasonable attorney fees in favor of Defendant/Counterclaimants is reserved." *Id*. at 131. Hence, an acknowledgement by the District Court that the Appellees must first comply with the provisions of I.R.C.P. 54 et al. before a judgment could be entered declaring them as the prevailing parties and awarding costs and attorney fees in their favor.

The Appellees realized this as well, and on August 31, 2007, prior to the Court's filing of the form summary judgment on September 13, 2007, they filed their Memorandum of Costs and Attorney Fees pursuant to I.R.C.P. 54(d)(5) and in the attorney affidavit, Mr. Goodrum testified that, "(4) that the same are allowable under Idaho Rules of Civil Procedure 54(d)(1), 54(e)(1) and Idaho Code § 12-121." The memorandum and attorney affidavit made no reference to Idaho Code § 12-120(3), and those moving papers did not incorporate by reference any allegation in

the Appellees' pleadings or language from their Memorandum in Support of Motion for Summary Judgment.

At that point, the Appellees waived any argument or basis to seek an attorney fee award under I.C. § 12-120(3). On September 10, 2007, in accordance with I.R.C.P. 54(d)(6), Dr. Bushi filed his Objection and Memorandum in Opposition to Defendant/Counterclaimant's Memorandum of Costs and Attorney Fees. Dr. Bushi only objected to and argued against an award of attorney fees under I.R.C.P. 54(e)(1) and I.C. § 12-121, as those were the only grounds asserted by the Appellees in the memorandum and supporting attorney affidavit. The day following the Court's entry of the Summary Judgment, on September 14, 2007, the Appellees filed their "Amended Memorandum of Costs and Attorney Fees and Supplemental Affidavit in Support of Memorandum of Costs and Attorneys' Fees," and once again testified and specifically moved the District Court for an award of attorney fees only "under Idaho Rules of Civil Procedure 54(d)(1), and **54(e)(1) and Idaho Code § 12-121.**" *Id*. at Exh. 16 and 17 (emphasis added). This is the irrefutable record. On September 20, 2007, Appellees filed their Reply to Dr. Bushi's Objection and Memorandum in Opposition to the Memorandum of Costs and Attorney Fees. *Id*. at Exh. 18.

In that reply to Dr. Bushi's objection to the request for attorney fees, the Appellees stated that, "This is Sage's Reply. We shall address the arguments advanced by Bushi in the order in which they were made." *Id*. at 2. The Defendants' heading No. 2 provides, "**IRCP 54(e)(1) IC § 12-121 Do Not Provide a Basis For An Award Of Attorney Fees" (BUSHI' OBJECTION PG. 4)."** The Defendants only presented argument on I.C. § 12-121. In the Appellees' Reply there is no reference to or discussion about I.C. § 12-120(3). Accordingly, at the time of the

attorney fee hearing on September 27, 2007, the only issue framed for the Court was whether the Appellees were entitled to an award of attorney fees under I.R.C.P. 54(e)(1) and Idaho Code § 12-121. That is the argument Dr. Bushi's counsel was prepared to make, and made until the District Court *sua sponte* changed the playing field to include the statutory basis of I.C. § 12-120(3) even though it was not specified in either of the Appellees' Memorandum of Attorney Fees and Supporting Affidavits. *See Eighteen Mile Ranch, supra,* 141 Idaho at 721. The District Court thereby abused its discretion and this Court should reverse the order awarding attorneys' fees.

2. The District Court Abused Its Discretion In Finding That The Attorney Fee Award Of $78,580.44 Is Reasonable.

In the case *Lettunich v. Lettunich*, this Court reconfirmed that, "The bottom line in an award of attorney fees is reasonableness." 145 Idaho 746, 185 P.3d 258, 262 (2008); *see Daisy Mfg. Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 263, 999 P.2d 914, 918 (CTAP. 2000) (The time and labor factor under I.R.C.P. 54(e)(3)(A) must be evaluated under a standard of reasonableness). An award of attorney fees in the amount of **$73,233.19** for a case which involved some basic written discovery and the briefing on one motion for summary judgment was not reasonable and constitutes an abuse of discretion by the District Court.[16]

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[16] No depositions were taken in this case. The District Court said that it disallowed the attorney time relating to the Plaintiff's motion to dismiss the counterclaim and there was only one other hearing on the Defendant's motion for summary judgment. There was no trial of the issues on the merits. Counsel for Plaintiff has been involved in a full week-long trial which resulted in attorney fees being incurred in the approximate amount of $55,000.

In the Appellees' amended memorandum of costs and attorney fees they claimed an award for 410.5 hours worked on this matter, which is divided among three senior attorneys and a paralegal. Record at Exh. 16. That total amount of time breaks down to a claim that the Appellees' counsel worked 7.5 hours a day for a total of 54 days on this non-complex litigation which did not involve depositions, expert witnesses, and a very straight-forward legal approach by the Appellees. A review of the affidavits in support of the Appellees' motion for summary judgment exposes the limited approach that they were taking in this action which was two-fold: (1) the operating agreement could be amended with a vote of all but one of the members; a notice was sent to the members of a special meeting to amend the operating agreement at which time the purpose of the amendment would be to include a provision that a member could be dissociated with a vote of all but one; the meeting took place and three of the members voted for the amendment and three of the members then took action upon the amendment to terminate Dr. Bushi's membership interest in the company; and (2) the operating agreement provided a net book value calculation of a dissociated member's membership interest and they had the company accountant perform that simple calculation. *See* Affidavits of Charles Novak and R. Craig Rasmussen, CPA (Record at Exhs. 2 and 4).

Aside from the inflammatory background argument advanced by the Appellees, that was the plain legal argument advanced in support of their motion and later adopted by the Court. *See* Memorandum in Support of Sage's Motion for Summary Judgment (Record at Ex. 5); *see* Order Granting Sage Health Care's Motion for Summary Judgment (Record at 96-116). The billing of 410 hours on this matter is outrageous.

When the Appellees' memorandum of costs and attorney fees was reviewed and analyzed it was evident that "padding" or "churning" was present in the billings. Accordingly, in compliance with I.R.C.P. Rules 7(b)(1) and 54(d)(6), Dr. Bushi filed an objection and memorandum in opposition to the Appellees' memorandum of costs and attorney fees, and because the totality of the billings were viewed as inflated or not necessarily and reasonably incurred, Dr. Bushi stated to the Court as follows:

> 4. **PLAINTIFF SPECIFICALLY OBJECTS TO DEFENDANTS' ITEMIZED COSTS AND ATTORNEY FEES**.
>
> Although Plaintiff firmly asserts that there is no legal basis to support any award of costs or attorney fees to the Defendants, and without waiver thereof, Plaintiff nevertheless **objects to each and every entry listed on Exhibit A attached to the memorandum of costs and attorney fees dated August 31, 2007**. …
>
> The Defendants' request for an award of attorney fees in the amount of $78,580.44 is unreasonable and outrageous. With the exception of the limited time entries for telephone conferences, Plaintiff objects to every time entry as blatantly excessive and unreasonable. These time entries appear to present a case of "churning." 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 (CTAP. 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.*

> Additionally, what has been provided as an attachment to the Memorandum of Costs and Attorney Fees completely fails to satisfy the Defendants' burden under Rule 54(e)(3). 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. Again, Plaintiff does not believe that the Court should get to this detailed analysis, but if it does, Plaintiff challenges the time entries on Exhibit A as excessive, unreasonable, duplicative, and not necessarily incurred by counsel.

Record at Exh. 15, pp. 7-8. Plainly, Dr. Bushi set forth the particular grounds of the objection and the applicable civil rule upon which the Court should rely to disallow the request for attorney fees. *See* I.R.C.P. 54(d)(6). Because Dr. Bushi specifically objected to the 12 pages of the Appellees' counsel's billings by way of exclusion of those limited entries which were not objectionable, and the memorandum of attorney fees was already before the Court, Dr. Bushi saw no utility in duplicating those 12 pages of the invoice when it was already in the hands of the District Court.

At the hearing on September 27, 2007, Dr. Bushi was ready to address the specific objections to those specific time entries at the oral argument, but the District Court was not open to that approach and expressed a limiting of the time for hearing. The tone of the hearing by the District Court towards Dr. Bushi's counsel was abrupt and at times adversarial, and on this particular issue of the objections to the reasonableness of the claimed attorneys fees, the transcript is illustrative as follows:

> Mr. Schossberger: If the court does make that finding under 12-121, then we have very, very strenuous objections to the amount of fees that have been requested in this case. They are so incredibly excessive and outrageous, the

	billings just really – – they scream [sic] of duplication and excessiveness and I will just highlight briefly examples.
The Court:	If you didn't highlight it in your moving documents, I don't want to go through it page by page. You should have done it in your moving documents.
Mr. Schossberger:	In the moving documents – –
The Court:	In your opposition and you didn't.
Mr. Schossberger:	I specifically objected in the documents – –
The Court:	I understand that.
Counsel:	– – to every entry other than telephone calls. If the Court will go back through, which it is required to do under 54(e)(3) and look under time and labor requirements, the Court will see that counsel has charged numerous times seven hours here for reply brief. The next day eight hours for reply brief. The next day six hours for reply. He's also charging all of the paralegal fees.

Transcript at p. 99, L. 18 – p. 100, L. 13.

Further, in the Court's order granting motion for attorney fees and costs, the District Court stated that the, "objection is not sufficient." Record at 158. This statement was made in the face of the fact that the District Court did not allow Dr. Bushi to further address his written objections as to the unreasonableness of the attorney fees at the time of oral argument. Dr. Bushi's counsel was dismayed that the District Court would not allow counsel to go through the objectionable entries page by page as the issue had clearly been reserved in the objection and memorandum to disallow the attorney fees. *See, e.g., Lettunich v. Lettunich*, 145 Idaho 746,

185 P.3d 258 (2008).[17] In this regard, the District Court abused its discretion in not allowing Dr. Bushi to further make his record.

In spite of the District Court's stance that Dr. Bushi's objection set forth in his written opposition under I.R.C.P. 54(d)(6) was not sufficient, the District Court commented that it, "did carefully review all the fees." Record at 160. The District Court then stated that, "Based on the Court's review the Court finds that the amount of $73,233.19 is fair and reasonable." A review of the attorney billings, as raised by Dr. Bushi in his written objection and attempted to be further discussed at the time of oral argument, and as provided in pages 31-42 of Dr. Bushi's opening brief, should yield the conclusion that the District Court's award of the sum $73,233.19 is not reasonable, and an abuse of discretion occurred because the District Court did not reach its decision by an exercise of reason.

This point is further highlighted by the District Court's most interesting use of the word "fair" together with the word "reasonable" in the decision. Record at 161. The tenor of what the District Court perceived as "fair" in awarding the excessive and unreasonable amount of attorney fees is further illustrated by the following position expressed from the bench at the attorney fee hearing as follows:

> 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

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[17] The Third Judicial District Court conducted a two-day hearing during which it questioned counsel about every single time entry to which the opposing counsel had raised the broadest written objection or raised the objection for the first time at the time of hearing.

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.**

Transcript at p. 89, L. 16 – p. 90, L. 2.[18] This tainted view and sense of justice in what would be "fair" as an exorbitant award of attorney fees is further illustrated in the order granting motion for attorney fees and costs wherein the District Court gave that message with the following language:

> This case was hard fought. It stems from a business relationship gone sour, in which the Plaintiff, Bushi, used the limited liability company's line of credit for his own personal use, running up $61,263.86 as of April 28, 2006, with 15.5% interest, in liability to the company. Bushi did this without the other members' consent or knowledge and in violation of the operating agreement. Bushi had the bank statements sent to him and did not repay the money until he was sued in a previous lawsuit. … The Court agrees with Sage Health Care's characterization of the numerous and voluminous affidavits Bushi filed in opposition to Sage Health Care's motion. Bushi fought every conceivable issue of fact and law. It was a very contentious motion and hearing. The Court, itself, spent a great deal of time considering all the information in writing its 21-page memorandum decision. Sage Health Care's attorneys are all extremely well experienced.

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[18] From that point forward the District Court appeared adversarial and heavy-handed with counsel. *See* Transcript, p. 90, L. 3 – p. 102, L. 13; p. 104, L. 13 – p. 105, L. 19.

> Furthermore, while Bushi characterizes the issues as "noncomplex," the Court disagrees. The law was complex and, more importantly, the facts were complex in determining what was relevant and material was complex. Moreover, the Court notes that the law on limited liability companies is far from settled. Therefore, the Court finds the issues in this case deserve more time than might normally be associated with a case. **Moreover the circumstances of the case drove the fees.**

Record at 159-60 (emphasis added). In the case *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, *supra*, this Court faced a similar circumstance with the District Court in an award of attorney fees. In that District Court's decision on the motion to reconsider, it stated:

> Each of the parties in this case contributed to the misunderstandings that led to this litigation by the manner in which they did business. Their contractual obligations were haphazardly entered into with poor communication and understanding between them. The Defendants inadequately performed their contractual obligations. Shelbys were overcritical of the Defendant's performance. The parties' uncooperative attitudes continued into this case making it difficult, if not impossible, for them to settle their disputes without a trial. The parties are jointly responsible for the filing and continuation of this action.

141 Idaho at 720. The Appellants contended that the District Court "used language that could be interpreted as a message that its sense of justice might be at issue." *Id*. This Court found that, "The above-quoted language does convey such an impression. It is improper to allow such considerations to play a part in determining who prevailed. The Court "may not use the award or denial of attorney fees to vindicate his sense of justice beyond the judgment rendered on the underlying dispute between the parties." *Id*. (citing *Evans v. Sawtooth Partners*, 111 Idaho 381, 387, 723 P.2d 925, 931 (Ct. App. 1986).

In the present case, it seems that the District Court used the award of an extremely high, excessive and unreasonable amount of attorney fees, in a case which reasonably required only

one-quarter of the amount of time and labor expended by the Appellees, as a way to vindicate her sense of justice beyond the judgment rendered on the underlying action for declaratory relief. Consequently, this is an additional example of an abuse of discretion and that the case should be reversed and remanded.

3. The Award Of Discretionary Costs In The Amount Of $5,665 Was An Abuse Of Discretion And Should Be Reversed

In response to Dr. Bushi's opening argument that it was reversible legal error to award discretionary costs for what the District Court perceived as expert witness fees in the amount of $5,665, the Appellees present nothing more than a recitation of what the District Court provided in its Order granting the discretionary costs. *See* Respondents' Brief at 38-40 and *compare* to Record at 161-62. The Appellees do not refute Dr. Bushi's argument that the Appellees' accountant's claimed costs were not "necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party," and that the nature of the case itself is not "exceptional." *See* 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). Moreover, the Appellees have not, and cannot, rebuff the fact that Mr. Rasmussen was not used or utilized as an expert witness in connection with the motion for summary judgment. Before the lawsuit was even commenced, Mr. Rasmussen had already done the mathematical calculation for Dr. Bushi's dissociated membership interest in the company, and in his affidavit in support of the motion, he merely factually described how he arrived at his figure. *See* Record, Exh. 16, Exh. 4. *Cf.* the authority cited and relied upon by the District Court for an award of discretionary costs for the expense of expert witness. Record at 162 (citing *Wooley Trust*¸ 133 Idaho at 187, 983 P.2d at 841;

Zimmerman v. Volkswagen of America, Inc., 128 Idaho 851, 858, 920 P.2d 67, 74 (1996); *Beale v. Speck*, 127 Idaho 521, 537, 903 P.2d 110, 126 (Ct. App. 1985); *Bodine v. Bodine*, 114 Idaho 163, 167-68, 754 P.2d 1200, 1204-05 (Ct. App. 1988) (affirming an award to an expert accountant whose testimony was relied upon by the trial court in a divorce action). It was an abuse of discretion by the District Court to characterize Mr. Rasmussen's involvement as an expert witness whose testimony was necessary and exceptional. The District Court's grant of discretionary costs to the Appellees in the amount of $5,665 should be reversed.

D. Appellees' Request For An Award Of Attorney Fees On Appeal Should Be Denied

For each of the reasons advanced by Dr. Bushi in his Opening Brief and in this Reply Brief, this Court should reverse and remand the case for further proceedings before the District Court. Hence, the Appellees will not have prevailed on appeal and their request for attorney fees should be denied. Additionally, the Appellees rely upon the case *Nanny v. Linella, Inc.*, 130 Idaho 477, 482 (Ct. App. 1997). The *Nanny* case is readily distinguished, both on its facts and in the applicable law. In *Nanny*, the party attempting to object to the memorandum of costs and attorney fees never filed a supporting memorandum and did not provide the court with the legal basis of the objection and the relief sought. *See id*. Moreover, the Court of Appeals provided that Nanny was, "entitled to recover attorney fees incurred on appeal pursuant to I.C. § 12-120(3), which mandates an award of fees to the prevailing party in any civil action to recover on a contract relating to the *purchase of goods*." (emphasis added). In the instant case, Dr. Bushi did file a written memorandum supporting his objections to the Memorandum of Attorney Fees and stating with particularity the legal grounds and the relief sought. Appellees' request for attorney fees on appeal should be denied.

III.
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 2nd day of September, 2008.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By /s/ Steven F. Schossberger
Steven F. Schossberger
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _2nd_ day of September, 2008, I caused to be served a true copy of the foregoing APPELLANT'S REPLY BRIEF by the method indicated below, and addressed to each of the following:

Forrest R. Goodrum MUNTHER GOODRUM SPERRY, CHARTERED The Mallard Building #350 1161 W. River Street Boise, ID 83702 [Attorneys for Defendants-Respondents]	__X__ U.S. Mail, Postage Prepaid _____ Hand Delivered _____ Overnight Mail _____ Telecopy
C. Tom Arkoosh CAPITOL LAW GROUP, PLLC 301 Main Street P.O. Box 32 Gooding, ID 83330 [Attorneys for Defendants-Respondents]	__X__ U.S. Mail, Postage Prepaid _____ Hand Delivered _____ Overnight Mail _____ Telecopy

/s/ Steven F. Schossberger
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