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Bridge Tower Dental, P.A. v. Meridian Computer Center, Inc. Clerk's Record v. 2 Dckt. 37931

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IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

BRIDGE TOWER DENTAL, P.A.,
PLAINTIFF-APPELLANT,

vs.

MERIDIAN COMPUTER CENTER, INC.,
DEFENDANT-RESPONDENT.

*Appealed from the District Court of the Fourth Judicial
District of the State of Idaho, in and for ADA County*

Hon D. DUFF MCKEE, District Judge

SHELLY C. SHANNAHAN

Attorney for Appellant

JOE BORTON

Attorney for Respondent

VOLUME II

COPY

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Supreme Court _____ Court of Appeals _____
Entered on AFS by _____

37931

TABLE OF CONTENTS.....PAGE NO.

VOLUME I

REGISTER OF ACTIONS3

COMPLAINT AND DEMAND FOR JURY TRIAL, FILED JULY 16, 20079

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL, FILED
DECEMBER 31, 2007.....29

ANSWER TO FIRST AMENDED COMPLAINT, FILED JANUARY 22, 200847

ANSWER TO PLAINTIFF’S FIRST AMENDED COMPLAINT, FILED
FEBRUARY 15, 200853

DEFENDANT MERIDIAN COMPUTER CENTER, INC.’S PROPOSED JURY
INSTRUCTIONS, FILED APRIL 12, 2010.....60

PLAINTIFF’S PROPOSED JURY INSTRUCTIONS, FILED APRIL 12, 2010.....83

MEMORANDUM DECISION AND ORDER, FILED APRIL 20, 2010.....115

PLAINTIFF’S FIRST SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS, FILED
APRIL 23, 2010.....118

JURY INSTRUCTIONS, FILED APRIL 27, 2010.....125

VERDICT, FILED APRIL 27, 2010144

DEFENDANT MERIDIAN COMPUTER CENTER, INC.’S MOTION FOR ATTORNEY’S
FEES AND COSTS, FILED MAY 11, 2010145

AFFIDAVIT OF JOSEPH W. BORTON IN SUPPORT OF DEFENDANT MERIDIAN
COMPUTER CENTER, INC.’S MOTION FOR ATTORNEY’S FEES AND COSTS,
FILED MAY 11, 2010.....147

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE
ALTERNATIVE, MOTION FOR NEW TRIAL, FILED MAY 11, 2010177

AFFIDAVIT OF SHELLY C. SHANNAHAN IN SUPPORT OF PLAINTIFF’S MOTION FOR
JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE,
MOTION FOR NEW TRIAL, FILED JUNE 8, 2010.....179

TABLE OF CONTENTS.....PAGE NO.

MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, MOTION FOR
A NEW TRIAL, FILED JUNE 8, 2010.....193

VOLUME II

PLAINTIFF’S OBJECTION TO DEFENDANT MERIDIAN COMPUTER CENTER’S
MOTION FOR ATTORNEY’S FEES AND COSTS, FILED JUNE 16, 2010205

MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, MOTION FOR
A NEW TRIAL, FILED JUNE 17, 2010.....213

DEFENDANT MERIDIAN COMPUTER CENTER, INC.’S REBUTTAL MEMORANDUM
IN SUPPORT OF ITS REQUEST FOR FEES AND COSTS, FILED
JUNE 21, 2010.....221

SUPPLEMENTAL AFFIDAVIT OF JOSEPH W. BORTON IN SUPPORT OF DEFENDANT
MERIDIAN COMPUTER CENTER, INC.’S MOTION FOR ATTORNEY’S FEES
AND COSTS, FILED JUNE 21, 2010225

JUDGMENT, FILED JULY 8, 2010.....231

ORDER ALLOWING ATTORNEY FEES AND AWARDING COSTS, FILED
JULY 8, 2010.....233

ORDER DENYING POST TRIAL MOTIONS, FILED JULY 8, 2010237

NOTICE OF APPEAL, FILED AUGUST 2, 2010241

REQUEST FOR ADDITIONAL MATERIAL, FILED AUGUST 16, 2010.....245

NOTICE OF TRANSCRIPT LODGED, FILED NOVEMBER 29, 2010247

CERTIFICATE OF EXHIBITS.....248

CERTIFICATE OF SERVICE250

CERTIFICATE OF RECORD.....251

INDEX TO THE CLERK’S RECORD.....PAGE NO.

AFFIDAVIT OF JOSEPH W. BORTON IN SUPPORT OF DEFENDANT MERIDIAN
COMPUTER CENTER, INC.’S MOTION FOR ATTORNEY’S FEES AND COSTS,
FILED MAY 11, 2010.....147

AFFIDAVIT OF SHELLY C. SHANNAHAN IN SUPPORT OF PLAINTIFF’S MOTION FOR
JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE,
MOTION FOR NEW TRIAL, FILED JUNE 8, 2010.....179

ANSWER TO FIRST AMENDED COMPLAINT, FILED JANUARY 22, 200847

ANSWER TO PLAINTIFF’S FIRST AMENDED COMPLAINT, FILED
FEBRUARY 15, 200853

CERTIFICATE OF EXHIBITS.....248

CERTIFICATE OF RECORD.....251

CERTIFICATE OF SERVICE250

COMPLAINT AND DEMAND FOR JURY TRIAL, FILED JULY 16, 20079

DEFENDANT MERIDIAN COMPUTER CENTER, INC.’S MOTION FOR ATTORNEY’S
FEES AND COSTS, FILED MAY 11, 2010145

DEFENDANT MERIDIAN COMPUTER CENTER, INC.’S PROPOSED JURY
INSTRUCTIONS, FILED APRIL 12, 2010.....60

DEFENDANT MERIDIAN COMPUTER CENTER, INC.’S REBUTTAL MEMORANDUM
IN SUPPORT OF ITS REQUEST FOR FEES AND COSTS, FILED
JUNE 21, 2010.....221

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL, FILED
DECEMBER 31, 2007.....29

JUDGMENT, FILED JULY 8, 2010231

JURY INSTRUCTIONS, FILED APRIL 27, 2010.....125

MEMORANDUM DECISION AND ORDER, FILED APRIL 20, 2010.....115

MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, MOTION FOR
A NEW TRIAL, FILED JUNE 17, 2010.....213

INDEX TO THE CLERK'S RECORD.....	PAGE NO.
MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL, FILED JUNE 8, 2010.....	193
MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, FILED MAY 11, 2010	177
NOTICE OF APPEAL, FILED AUGUST 2, 2010	241
NOTICE OF TRANSCRIPT LODGED, FILED NOVEMBER 29, 2010	247
ORDER ALLOWING ATTORNEY FEES AND AWARDING COSTS, FILED JULY 8, 2010.....	233
ORDER DENYING POST TRIAL MOTIONS, FILED JULY 8, 2010	237
PLAINTIFF'S FIRST SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS, FILED APRIL 23, 2010	118
PLAINTIFF'S OBJECTION TO DEFENDANT MERIDIAN COMPUTER CENTER'S MOTION FOR ATTORNEY'S FEES AND COSTS, FILED JUNE 16, 2010	205
PLAINTIFF'S PROPOSED JURY INSTRUCTIONS, FILED APRIL 12, 2010.....	83
REGISTER OF ACTIONS	3
REQUEST FOR ADDITIONAL MATERIAL, FILED AUGUST 16, 2010.....	245
SUPPLEMENTAL AFFIDAVIT OF JOSEPH W. BORTON IN SUPPORT OF DEFENDANT MERIDIAN COMPUTER CENTER, INC.'S MOTION FOR ATTORNEY'S FEES AND COSTS, FILED JUNE 21, 2010	225
VERDICT, FILED APRIL 27, 2010	144

NO. _____
A.M. 10:20 FILED P.M.

JUN 16 2010

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff,

v.

AL COLSON dba I. T. WORKS, and
MERIDIAN COMPUTER CENTER,
INC., an Idaho corporation,

Defendants.

Case No. CV OC 0712775

**PLAINTIFF'S OBJECTION TO
DEFENDANT MERIDIAN COMPUTER
CENTER'S MOTION FOR ATTORNEY'S
FEES AND COSTS**

Plaintiff Bridge Tower Dental, P.A., ("Plaintiff" or "Bridge Tower"), by and through its attorneys of record, Perkins Coie LLP, submits the following Objection to Defendant's Motion for Attorney's Fees and Costs.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. On April 27, 2010, the jury returned a general verdict form in favor of Defendant Meridian Computer Center, Inc. ("MCC").
2. On May 17, 2010, counsel for Plaintiff Bridge Tower received a copy of "Defendant's Motion for Attorney's Fees and Costs" in addition to the affidavit of Joseph

13

Borton in support of said Motion for Attorney's Fees and Costs. The Motion states that it was served via U.S. Mail on May 10, 2010. However, it was not received until May 17, 2010, and it was not filed with the Court until May 11, 2010. No other supporting documents were served upon counsel or filed in support of MCC's Motion for Attorney's Fees and Costs.

3. MCC's Motion for Attorney's Fees and Costs consists of four paragraphs and simply states that MCC is moving the Court for an order awarding Defendant its attorney's fees and costs incurred pursuant to Idaho Rule of Civil Procedure 54 and Idaho Code § 12-120(3).

4. In the Affidavit of Joseph Borton filed in support of the Motion for Attorney's Fees and Costs, attached are invoices of prior counsel for MCC, Mr. John Prior, along with five invoices generated from Borton Law Offices. Mr. Borton states in his affidavit that his client incurred attorney's fees of \$25,170.00 from Borton Law Offices; plus \$5,469.50 from the Law offices of John Prior; plus \$1,975 from paralegal Charise McLain, who works for Mr. Borton.

5. Although MCC's Motion is one for costs and fees, there is not a breakdown of costs incurred pursuant to Rule 54(d)(1)(C) or 54(d)(1)(D) of the Idaho Rules of Civil Procedure.

As set forth below, MCC's Motion for Attorney's Fees and Costs and the Affidavit of Mr. Borton in support does not comply with the requirements of Rule 54(d) and should therefore be denied. Moreover, Plaintiff Bridge Tower Dental brought claims for both negligence and breach of contract in its First Amended Complaint. The theories of negligence and contract were both presented to the jury in the form of jury instructions. As

set forth below, MCC is not entitled to recovery of costs because the gravamen of this action was to recover for damage to property, and recovery for attorney's fees is not allowed under Idaho Code § 12-120(3). In addition, there is no way to identify which fees were incurred by MCC on the negligence and contract claims because MCC failed to properly itemize its fees.

II. ARGUMENT

A. MCC's Motion for Attorney's Fees and Costs does not Comply with I.R.C.P. 54(d)(5) and Should be Denied.

I.R.C.P. 54(d)(5) states that "at any time after the verdict of the jury or decision of the court any party who claims costs may file and serve on adverse parties a memorandum of costs itemizing each claimed expense. . .*Id.*, emphasis added. The Rule further provides that "such memorandum must state that to the best of the parties' knowledge and belief the items are correct and that the costs claimed are in compliance with this rule. Failure to file such memorandum of costs within the period prescribed by this rule shall be a waiver of the right of costs." *Id.* In addition, I.R.C.P. 54(e)(5) states that attorneys fees, when allowed by statute or contract, shall be deemed as costs in any actions and processed in the same manner. Rule 54(e)(5) further requires an affidavit of the attorney stating the basis and method of computation of the attorney fees claimed.

MCC's Motion for Attorney's Fees and Costs purports or appears to be an effort to obtain costs and fees under Rule 54(d), although it does not comply with the requirements of the Rule. First, the pleading is entitled Motion for Costs and Fees while the Rule plainly states that a "memorandum of costs" shall be filed. Nowhere in the Motion for Costs and Fees filed by MCC, nor in the Affidavit of Mr. Borton, does it state that to the best of MCC's knowledge and belief, the items requested are in compliance with the Rule. In addition, the

invoices from John Prior are not properly authenticated and there is no statement by MCC or its counsel that these fees were reasonably incurred by MCC.

B. MCC has Failed to Properly Itemize its Fees.

Rule 54(d)(5) requires that a party who claims costs "may file and serve on adverse parties a memorandum of costs, *itemizing* each claimed expense. . . ." *Id.*, emphasis added. In *Hackett v. Streeter*, 109 Idaho 261, 264, 706 P.2d 1372, 1375 (Ct. App. 1985), the Court of Appeals affirmed the trial court's denial of an award of fees to the prevailing party on the grounds that the requesting party failed to provide any information to the trial court to allow it to consider the factors in Rule 54(e)(3), beyond "the hourly rate and amount of time expended by . . . counsel." The court further stated that "[w]e believe it is incumbent upon a party seeking attorney fees to present sufficient information for the court to consider factors as they specifically relate to the *prevailing* party or parties seeking fees." *Id.*, citing, *Valley Inland Pacific Constructors, Inc. v. Clackamas Water Dist. No. 2*, 603 P.2d 1381 (Or. App. 1979) (trial court refused to allow attorney fees to party when no attempt was made to segregate attorney fees incurred in defending against negligence claims and other claims.)

The invoices submitted by Borton Law Offices do not contain sufficient detail to warrant an award of fees. Moreover, the Affidavit of Mr. Borton does not properly authenticate Mr. Prior's fees, nor is there any statements or other information that would allow the Court to consider the factors found in I.R.C.P. 54(e)(3). As such, the motion should be denied.

C. MCC is not entitled to recovery of costs as a matter of right or discretionary costs.

Rule 54(d) requires MCC to itemize its costs and set forth the type of costs being requested so that they can be analyzed under Rule 54(d)(1)(C) and 54(d)(1)(D) as either costs as a matter of right or discretionary costs. MCC's Motion for Attorney's Fees and Costs does not contain such a breakdown of costs which would allow Bridge Tower to ascertain which costs MCC may be allowed to recover as costs as a matter of right under I.R.C.P.

54(d)(1)(C). MCC has submitted bills from Borton Law Offices, PLLC and the Law Office of John Prior which do not contain an appropriate breakdown of costs sufficient for Bridge Tower to reasonably respond under Rule 54(d)(1). MCC has submitted two invoices from M&M Court Reporting Service for \$419.50 and \$324.19. However, nowhere in Mr. Borton's affidavit does he state that these costs were reasonably incurred or any explanation of these costs. Thus, all requests for costs should be denied.

D. MCC is not Entitled to Recover Attorney's Fees Because It Is Not One To Recover On A Contract For the Purchase And Sale of Goods and The Gravamen of The Action Is Not A Commercial Transaction.

MCC has requested fees under section 12-120(3) of the Idaho Code, stating that the case involved a bailment contract and commercial transaction. However, as stated below, MCC cannot recover fees on a bailment contract because it is not a contract for the purchase and sale of goods.

As stated, Bridge Tower's First Amended Complaint contained claims for negligence and breach of contract against MCC arising out of damage done by MCC to property owned by Bridge Tower, namely its hard drive. At trial, counsel for Bridge Tower argued that MCC was negligent and failed to exercise due care in handling Bridge Tower's property.

Moreover, it was undisputed at trial that this case was one of bailment as MCC took possession of Bridge Tower's property as a bailee and returned the property damaged. This is further explained in the memorandum in support of Bridge Tower Dental's Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for New Trial, filed May 11, 2010, which is hereby incorporated by reference. Bridge Tower also submitted jury instructions on the theory of negligent bailment. (See Plaintiff's Proposed Jury Instructions Nos. 8 & 9, Ex. B to Affidavit of Shelly C. Shannahan in Support of Plaintiff's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial).

In *T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 642 P.2d 70 (Ct. App. 1982), the Idaho Court of Appeals stated that in a negligence action by a bailor against a bailee to recover damages, the bailor's underlying cause of action was grounded in negligence, not in contract, even though a bailment agreement was involved in the case. Likewise, in *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 682 P.2d 640 (Ct. App. 1984), later proceeding 115 Idaho 281, 766 P.2d 751 (1988), the court held that even though a contract existed between the parties, the action brought was not one to recover on the contract, but to recover damages for breach of another legal duty, namely the duty to exercise reasonable care in installing the goods. Accordingly, the *Chenery* court held that the gravamen of the action was negligence and the prevailing party was not entitled to attorney's fees. In *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 792 P.2d 345 (1990), the Court stated that attorney's fees are not warranted every time a commercial transaction is remotely connected with a case. Rather, the test is whether the commercial transaction is integral to the claim and constitutes the basis upon which the party is attempting to recover.

Thus, because the gravamen of this action was to recover for damages related to property damage and the failure of MCC to exercise due care in the handling of Bridge Tower's property and to return the bailed goods undamaged, it was not an action to recover on a contract related to the purchase and sale of goods. *Id.* In addition, the gravamen of this lawsuit was not a commercial transaction and therefore fees must be denied under Idaho Code § 12-120(3).

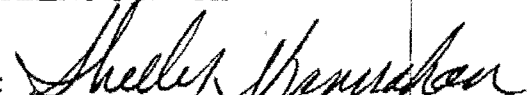
III. CONCLUSION

MCC's motion for attorney's fees and costs does not comply with Rule 54(d) or Rule 54(e). There is no statement or certification by counsel that the costs were reasonably incurred, nor is there sufficient information for the Court to make a finding under the factors required under I.R.C.P. 54(e)(3). Finally, the gravamen of Bridge Tower's lawsuit was to recover for damages related to the destruction of its property by MCC while in MCC's care as a bailee. Thus, a commercial transaction is not at the heart of this lawsuit and the request for fees should be denied.

DATED: June 15, 2010

PERKINS COIE LLP

By:

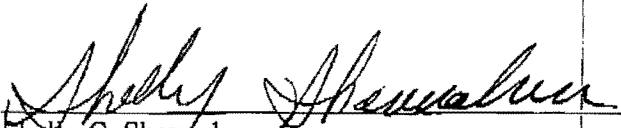

Shelly C. Shanahan, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, certify that on June 15, 2010, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Joseph W. Borton
BORTON LAW OFFICES
2537 W. State St., #110
Boise, ID 83702

Hand Delivery	_____
U.S. Mail	_____
Facsimile	<u> X </u>
Overnight Mail	_____


Shelly C. Shanahan

NO. _____
FILED _____
A.M. _____ P.M. **2:21**

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JUN 17 2010

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By KATHY J. BIEHL
DEPUTY

Attorneys for Defendant Meridian Computer Center, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BRIDGE TOWER DENTAL, PA.,

Plaintiff,

v.

MERIDIAN COMPUTER CENTER, INC.,
an Idaho Corporation.

Defendants.

Case No.: CVOC-0712775

**MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT OR IN
THE ALTERNATIVE, MOTION FOR NEW
TRIAL**

COMES NOW Defendant Meridian Computer Center, Inc., by and through its counsel of record Joseph W. Borton of the firm Borton Law Offices, and submits this Memorandum in Opposition to Plaintiff's Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for New Trial. On April 27, 2010, at the completion of a four day jury trial regarding a commercial transaction between the parties, a verdict was returned in favor of Defendant Meridian Computer Center. On May 11, 2010 Plaintiff filed a Motion for a Judgment Notwithstanding the Verdict ('JNOV') or in the alternative for a New Trial. The Motion was filed without any supporting affidavit (required to be filed with the Motion per IRCP 59(c).) Plaintiff's "Memorandum in

KB

Support" of its Motion was then filed June 8, two weeks after the expiration of the 14 day deadline referenced in Plaintiff's motion and IRCP 7(b)(3).

For the reasons set forth within this response and the trial record before the Court Plaintiff's Motion should be DENIED.

FACTUAL BACKGROUND

Many items of "factual" background in Plaintiff's Memorandum are disputed now as they were at trial. For example, allegation No 7 was disputed at trial; Mr. Patten testified he did not try to salvage data on the drive but that he repaired the drive per the warranty. Allegations No 12 and 13 were also in dispute. There was evidence presented at trial about the industry standard practice - and Meridian Computer Center's practice - and who is responsible for backing up and protecting their data (the customer) and evidence that Mr. Patten had discussed with Bridgetower's agent (Mr. Al Colson) on many occasions this obligation. The jury also heard evidence from Mr. Patten that his conduct in serving Bridgetower's computer met the reasonable and universally accepted industry standard of care regarding client data and hard drive repairs.

With further aid from Plaintiff's cross examination of Mr. Patten and reference to him as an "expert" in computer repair the jury heard evidence of Mr. Patten's extensive experience with hardware, further bolstered by his web site, and his company's history handling hard drive repairs and experience with industry standards.

It is also disputed that the Court's instructions on bailment set forth in Instruction No 8 and No 9 were anything but clear renditions of the law in Idaho pertinent to Plaintiff's claims at trial.

THE JNOV REQUEST SHOULD BE DENIED

Plaintiff's requests a Judgment Notwithstanding The Verdict ("j.n.o.v.") pursuant to Idaho rule of civil procedure 50(b), based upon the false premise that there was insufficient evidence for the jury to make its finding in favor of the Defendant. This basis for relief is without merit and should be denied.

In Idaho it is well settled that the moving party (Bridgetower) seeking a JNOV is deemed to admit that truth of all adverse evidence and all inferences that can be drawn from any such evidence at trial. Furthermore, the trial court may not weigh the evidence, assess the credibility of the witnesses or make its own factual findings and compare them to those of the jury. It is not necessary that the evidence be of such quantity that reasonable minds must conclude the verdict was proper, only that they *could* conclude it was proper, and all such evidence should be construed in a light most favorable to Meridian Computer Center, Inc. See., *Mann v Safeway Stores, Inc.*, 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974)., *Carlson v. Stanger.*, 146 Idaho 642, 200 P.3d 1191 (2009), *Highland Enterprises Inc. v Barker*, 133 Idaho 330, 986 P.2d 996 (1999).

There was ample evidence presented at trial upon which the jury could reasonably believe that Meridian Computer Center exercised reasonable care in its commercial transaction with Bridgetower and that it met its burden properly set forth in the Court's Jury Instruction Nos 8 and 9. For example, there was specific testimony from Mr. Patten concerning his standard industry practice in dealing specifically with Bridgetower Dental's admitted "agent" Mr. Al Colson, who had been under contract to back up Plaintiff's data. Mr. Patten testified that he and Mr. Colson prior to the

Bridgetower matter for a number of years agreed and understood the industry-accepted process Mr. Patten used in serving hard drives. There was testimony that Mr. Colson, on behalf of Bridgetower Dental, was made aware of it and accepted that industry standard practice on behalf of Bridgetower. Mr. Patten also explained in detail the technical basis for this industry standard, likening hard drive repair work to trying to fly a 747 six inches off the ground; it is the one moving part within the computer and susceptible to a variety of integrity risks such as software corruption, static electricity, power surges and other items over which a technician has no control. The testimony on these points was in detail and thorough. Plaintiff did not call any expert witness to refute this testimony or industry standard. Defendant's presentation of this industry standard, and Defendant's express discussion and acceptance of it with Plaintiff's agent, was properly presented to the jury as relevant to the jury's analysis of Defendant's conduct.

Any such custom of the community in general, or of other persons under like circumstances, is always a factor to be taken into account in determining whether the actor has been negligent. ... If the actor does what others do under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct; and if he does not do what others do there is a possible inference that he is not so conforming.

On the same basis, evidence of the past practices of the parties to the action in dealing with each other is admissible, and relevant, as indicating an understood standard of conduct, or the reasonable expectation of each party as to what the other will do.

Restatement (Second) of Torts 295 A (1965)

The jury also heard evidence of Plaintiff's own obligations (through its agent Al Colson) to back up and store its data off-site on a regular basis, and that Plaintiff had paid Mr. Colson to maintain its data pursuant to a written contract. The jury heard evidence from the Plaintiff and Mr. Colson that this obligation of Mr. Colson was not

waived or terminated, and undisputed evidence of the intervening cause being Mr. Colson's failure to back up this data despite his contract to do so, all of which the jury could conclude was the cause of any actual data loss for Plaintiff. Mr. Colson failed to exercise due care in the maintenance of the data at issue which the jury could properly attribute to Bridgetower.

While Plaintiff may not agree with this evidence admitted at trial, it was nonetheless evidence presented to the jury during the four day trial which the jury ultimately accepted in rendering its verdict in favor of Meridian Computer Center, Inc. As the moving party seeking a j.n.o.v Bridgetower is deemed to admit the truth of all of this adverse evidence, and all inferences that can legitimately be drawn from any such evidence at trial. Based upon the evidence presented at trial Plaintiff's Motion for j.n.o.v. must be denied.

THE NEW TRIAL REQUEST SHOULD BE DENIED

Plaintiff also requests a motion for a new trial, made pursuant to IRCP 59(a)(7) based upon the false premise that the Court made an error of law in its jury instructions No 8 and 9. This request is also without merit and should be denied.

When a motion for a new trial is based on the ground of insufficient evidence to justify the verdict, the trial court must weigh the evidence presented at trial and grant the motion only if the verdict is not in accord with its assessment of the clear weight of the evidence. *Lanham v Idaho Power Co.*, 130 Idaho 486, 498, 943 P.2d 912, 924 (1997). A new trial may not be granted unless two separate findings are made: first, that the verdict is against the clear weight of the evidence and that the ends of justice would be served by vacating the verdict. Second, the court must also conclude that a retrial would

produce a different result. If either (or both) are lacking the motion must be denied. *Id.* See also., *Heitz v. Carroll*, 117 Idaho 373, 788 P.2d 188 (1990). *Carlson v Stanger*, 146 Idaho 642, 200, P.3d 1191 (2008).

The two jury instructions at issue cite the law properly for Plaintiff's two bailment theories; contract bailment (No 8) and negligent bailment (No. 9). Both instructions specifically state that if property is lost or damaged the burden of proof is on the Defendant to show it acted with due care or a higher degree of care. The two instructions in question each raise the burden elements cited by Plaintiff in their Motion and Idaho case law. Plaintiff's allegation that the jury was not instructed on the burden placed upon Meridian Computers is simply wrong. Each instruction states, in pertinent part, the following:

If the property is lost or damaged while in the custodian's care, it is liable to the owner unless it can prove it acted with a high degree of care carrying out its duty. In this case, that means that if you find there was an express agreement for the care of the data, **the burden of proof is on Meridian Computer Center** to prove it acted with a high degree of care; if it does not sustain this burden, your verdict should be for the plaintiff.

Jury Instruction No 8 (emphasis added)

If the property is lost or damaged while in the custodian's care, the custodian is liable to the owner unless it can prove it acted reasonably. In this case, that means that if you find there was not an express agreement for the care of the data, **the burden of proof is on Meridian Computer Center** to prove it acted reasonably under the circumstances; if it does not sustain this burden, your verdict should be for the plaintiff.

Jury Instruction No 9 (emphasis added)

This standard and burden shifting cited by the Court in Instructions No 8 and No 9 is consistent with the law in Idaho cited by Plaintiff and Defendant at trial and in the

present Motion. See., *Law v. Park Price Co.*, 95 Idaho 91, 503 P.2d 291 (1972), *Quinto v Millwood Forest Products Inc.*, 130 Idaho 162, 938 P.2d 189 (Ct App 1997).

Finally, this Court cannot make the required finding (and Plaintiff does not even allege that it can) that a new trial would produce a different result. In addition to the evidence offered to support Meridian Computer's reasonable conduct there was also undisputed evidence which imputed Mr. Colson's obvious failure to exercise due care upon the Plaintiff as its agent, a failure which would preclude the Plaintiff from recovery. The one party responsible other than the Plaintiff was Mr. Al Colson, who was sued and settled his claim with Plaintiff to Plaintiff's satisfaction on the eve of trial. Based upon the record before this Court the "clear weight of the evidence" does not support granting a new trial, nor would a new trial produce a different result.

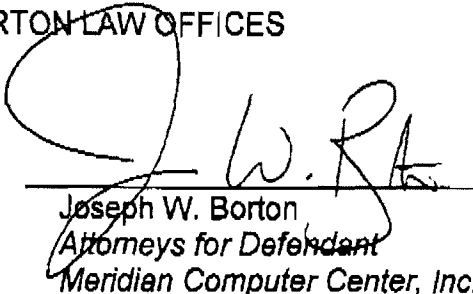
CONCLUSION

Accordingly, Defendant Meridian Computer Center, Inc. requests that this Court DENY Plaintiff's Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for New Trial, and award attorney fees and costs to the Defendant Meridian Computer Center, Inc.

DATED this 16th day of June, 2010.

BORTON LAW OFFICES

By

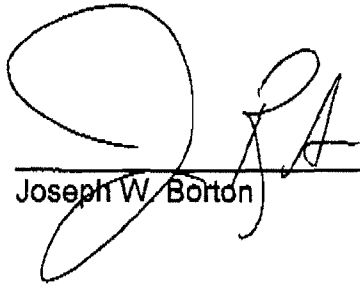

Joseph W. Borton
Attorneys for Defendant
Meridian Computer Center, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ^{17th} day of June, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Shelly C. Shannahan
PERKINS COIE, LLP
251 E Front St Suite 400
Boise, Idaho 83702-7310
Fax: 343-3232

- U.S. Mail
- Facsimile
- Overnight Mail
- Hand Delivery



Joseph W. Borton

NO. FILED
A.M. 10:30 P.M.

Joe Borton (ISB No. 5552)
BORTON LAW OFFICES
1310 N. Main Street
Meridian, Idaho 83642
(208) 908-4415

JUN 21 2010

J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

Attorneys for Defendant Meridian Computer Center, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BRIDGE TOWER DENTAL, PA.,

Plaintiff,

v.

MERIDIAN COMPUTER CENTER, INC.,
an Idaho Corporation.

Defendants.

Case No.: CVOC-0712775

**DEFENDANT MERIDIAN COMPUTER
CENTER, INC.'S REBUTTAL
MEMORANDUM IN SUPPORT OF ITS
REQUEST FOR FEES AND COSTS**

COMES NOW Defendant Meridian Computer Center, Inc., by and through its counsel of record Joseph W. Borton of the firm Borton Law Offices, and submits this Rebuttal Memorandum in Support of its request for reimbursement of attorney's fees and costs.

As a preliminary matter the May 11, 2010 Affidavit of Joseph W. Borton complies with IRCP 54 (e)(5) and 54(d). It states the specific method of computation for attorney's fees claimed and that the computations were based upon Mr. Borton's personal knowledge. It also sets forth a specific line-item detail of each individual itemized time entry and each itemized billing statement from which the aggregate total fees claimed is comprised; there is no more detail available.

As for the two costs, both are "itemized" (including the actual invoice) and are recoverable pursuant to IRCP 54(d)(1)(C)(9). (the charges were for the deposition of Al Colson and Jason Patten). Those are the only two costs which Plaintiff seeks reimbursement for, all other charges are attorney's fees allowed by IRCP 54(e)(5) and I.C. §12-120(3).

Specifically, I.C. §12-120(3) allows for a party in a civil suit to recover fees for a dispute arising from a commercial transaction. I.C. §12-120(3) states:

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

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

In interpreting this code provision, the Idaho Supreme Court narrowed the application of this provision to cases where a commercial transaction comprises the "gravamen" of the lawsuit. *Brower v. E.I. DuPont De Nemours and Co.*, 117 Idaho 780, 784, 792 P.2d 345 (1990). Whether a written contract exists or not is not the primary focus but rather whether the claim was based on a commercial transaction. See *Lawrence v. Jones*, 124 Idaho 748, 864 P.2d 194 (Ct.App.1993), citing *Hilt v. Draper*, 122 Idaho 612, 622, 836 P.2d 558, 568 (Ct.App.1992) (the Court holding that it is well-settled in Idaho that one who successfully defends against the enforcement of a contract, when the gravamen of the transaction is a commercial transaction, nevertheless may be entitled to attorney fees even though the court has ruled that no

contract exists or it is unenforceable.) In this case Meridian Computers was hired to repair Plaintiff's *business* computer system; that was the entire basis of their relationship and this lawsuit, this one *commercial* transaction. This bailment contract was thoroughly advocated for by the Plaintiff at trial and clearly falls within the scope of a "commercial transaction" for purposes of attorney fees under I.C. § 12-120(3). Black's Law Dictionary (4th ed.) defines bailment as:

A delivery of goods or personal property, by one person to another, in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and *upon a contract*, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.

See, also, *Loomis v. Imperial Motors, Inc.*, 88 Idaho 74, 78, 396 P.2d 467 (1964); *Fulcher v. State*, 32 Tex.Cr.R. 621, 25 S.W. 625. A party may be entitled to attorney's fees under I.C. § 12-120(3), for successfully defending a bailment contract. See e.g. *Quinto v. Millwood Forest Products, Inc.*, 130 Idaho 162, 938 P.2d 189 (Ct.App.1997). In *Quinto*, while the court remanded this bailment case for a new trial on other grounds, it also held that "attorney fees incurred for this appeal may be taken into account by the trial court in determining the amount of fees which ultimately should be awarded to the prevailing party at the conclusion of the litigation." *Id.*

PRAYER FOR RELIEF

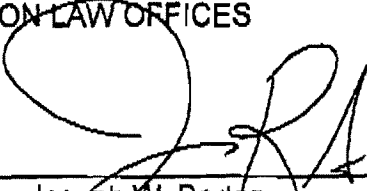
As the gravamen of the lawsuit between the parties was clearly a commercial transaction, wherein Defendant was hired to repair Plaintiff's computer, and as there is no dispute that Defendant was the "prevailing party" in that litigation, the Defendant's attorney's fees and costs should be ordered to be reimbursed to him by the Plaintiff.

Wherefore, Defendant respectfully requests this Court GRANT Defendant's Motion for Attorney's fees and costs.

DATED this 21st day of June, 2010.

BORTON LAW OFFICES

By



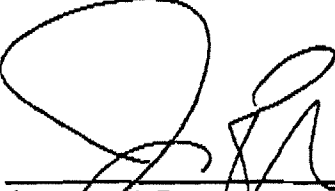
Joseph W. Borton
Attorneys for Defendant
Meridian Computer Center, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of June, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Shelly C. Shannahan
PERKINS COIE, LLP
251 E Front St Suite 400
Boise, Idaho 83702-7310
Fax: 343-3232

- U.S. Mail
- Facsimile
- Overnight Mail
- Hand Delivery



Joseph W. Borton

10:30

Joe Borton [JSB No. 5552]
BORTON LAW OFFICES
1310 N. Main Street
Meridian, Idaho 83642
(208) 908-4415
joe@bortonlawoffices.com

Attorneys for Defendant Meridian Computer Center, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BRIDGE TOWER DENTAL, PA.,

Plaintiff,

v.

MERIDIAN COMPUTER CENTER, INC.,
an Idaho Corporation.

Defendants.

Case No.: CVOC-0712775

**SUPPLEMENTAL AFFIDAVIT OF JOSEPH
W. BORTON IN SUPPORT OF
DEFENDANT MERIDIAN COMPUTER
CENTER, INC.'S MOTION FOR
ATTORNEY'S FEES AND COSTS**

STATE OF IDAHO)
) ss.
County of Ada)

JOSEPH W. BORTON, being duly sworn on oath deposes and states as follows:

1. I am the attorney of record for the Defendant Meridian Computer Center, Inc and make the following statements based upon my own personal knowledge. I am an attorney duly licensed and in good standing with the Idaho State Bar. I have fourteen years' experience litigating hundreds of cases in the fourth judicial district of a similar nature to this matter. All items set forth in this Affidavit, and my affidavit dated

13

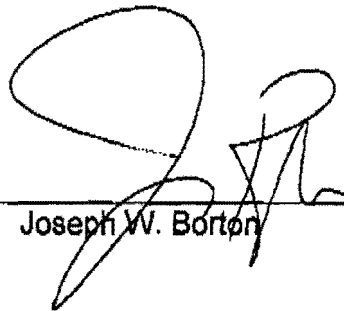
May 10, 2010 in this action, are to the best of my information and belief provided in compliance with IRCP 54.

2. My hourly rate for legal services provided to Defendant is \$200 per hour, which is a reasonable rate given the complexity of the issues and legal expertise required for diligent defense of this matter.

3. This Affidavit and exhibit contain an accurate and complete detail of all attorney's fees incurred by Defendant since the last Affidavit filed May 11 (no new costs are claimed here).

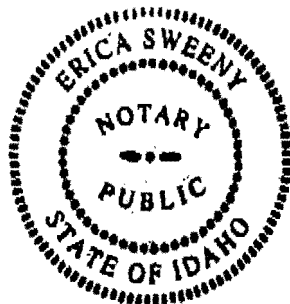
4. The new charges since the last submittal are \$4,333.75, bringing the combined claim for attorney's fees for Borton Law Offices, PLLC to \$31,518.35 all as set forth in detail on Exhibit A attached hereto.


DATED this 21st day of June, 2010.



Joseph W. Borton

SUBSCRIBED and sworn to before me this 21st day of June, 2010.





Notary Public for Idaho
Residing at: Boise, Idaho
My Commission expires: 04/19/2016

Borton Law Offices PLLC

1310 N Main St
Meridian, Idaho 83642

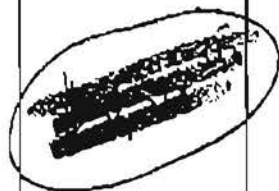
208-808-4415

<h1>Statement</h1>	
Date	6/30/2010

Bill To:
Meridian Computer Center Jason Patten 1580 W 4th St #102 Meridian, Idaho 83642

Due Date	Amount Due	Amount Enc.
7/30/2010	\$24,298.35	

Date	Description	Amount	Balance
12/31/2009	Balance forward		0.00
02/21/2010	INV #1049. Due 03/23/2010.	3,220.00	3,220.00
03/10/2010	INV #1061. Due 04/09/2010.	4,770.00	4,770.00
03/15/2010	PMT from BLO trust acct	-2,500.00	2,270.00
03/19/2010	PMT #14297.	-920.00	1,350.00
03/19/2010	PMT #14316.	-1,300.00	50.00
03/26/2010	INV #1087. Due 04/25/2010.	2,147.50	2,147.50
04/19/2010	INV #1113. Due 05/19/2010.	9,192.50	9,192.50
05/07/2010	INV #1146. Due 06/06/2010.	22,425.00	22,425.00
05/11/2010	PMT	-2,500.00	19,925.00
05/31/2010	INV #1173. Due 06/30/2010.	21,388.75	21,388.75
05/31/2010	INV #FC 42. Due 05/31/2010. Finance Charge	21,428.35	21,428.35
06/21/2010	INV #1194. Due 07/21/2010.	24,298.35	24,298.35



Current	1-30 Days Past Due	31-60 Days Past Due	61-90 Days Past Due	Over 90 Days Past Due	Amount Due
4,333.75	13,272.10	6,692.50	0.00	0.00	\$24,298.35

000227
EXHIBIT A

BORTON LAW OFFICES PLLC

1310 N Main St.
Meridian, Idaho 83642
208-908-4415

INVOICE

Bill To:

Meridian Computer Center
Jason Patten
1580 W 4th St #102
Meridian, Idaho 83642

Date	Invoice #
6/21/2010	1194

Work Completed	Time	Description of Services	Rate	Amount
Draft Documents	2.5	review and research briefing from BTD on new trial request	200.00	500.00
Draft Documents	5.75	response briefing to Motion for JNOV and New trial	200.00	1,150.00
Draft Documents	3	Continued briefing and edits on draft; complete JNOV doc	200.00	600.00
Draft Documents	0.6	response to Motion to enlarge time for fee objection	200.00	120.00
Draft Documents	2.5	rebuttal briefing on claim for atty fee recovery	200.00	500.00
<i>Thank you for your business!</i>			TOTAL:	\$2870.00 28

BORTON LAW OFFICES PLLC

1310 N Main St.
Meridian, Idaho 83642
208-908-4415

INVOICE

Bill To:

Meridian Computer Center
Jason Patten
1580 W 4th St #102
Meridian, Idaho 83642

Date	Invoice #
5/31/2010	1173

Work Completed	Time	Description of Services	Rate	Amount
review documents	0.4	Plaintiff's Motion for new trial; forward all to client	200.00	80.00
email data to client	0.2		200.00	40.00
Draft Documents	0.5	Amended notice of hearing for fees claim	200.00	100.00
C.M.	0.75	research JNOV caselaw and framework for response	125.00	93.75
research	1.25	New trial motion response outline	200.00	250.00
research	4.5	cont research and response to Def Motion for new trial and JNOV hearing	200.00	900.00
<i>Thank you for your business!</i>			TOTAL:	\$1463.75

000229

Borton Law Offices PLLC

2537 W State St #110

Boise, ID 83702

Finance Charge

Date	Invoice #
5/31/2010	FC 42

Bill To
Meridian Computer Center Jason Patten 1580 W 4th St #102 Meridian, Idaho 83642

Terms

Description	Amount
Finance Charges on Overdue Balance Invoice #1113 for 6,692.50 on 04/19/2010	39.60

Total	\$39.60
Payments/Credits	\$0.00
Balance Due	000330

NO. FILED
A.M. 10:00 P.M.

JUL 08 2010
J. DAVID N. WASSER, Clerk
By [Signature]
DEPUTY

RECEIVED
MAY 03 2010
Ada County Clerk

Joe Borton [ISB No. 5552]
BORTON LAW OFFICES
1310 N. Main Street
Meridian, Idaho 83642
(208) 908-4415

Attorneys for Defendant Meridian Computer Center, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BRIDGE TOWER DENTAL, PA.,

Plaintiff,

v.

MERIDIAN COMPUTER CENTER, INC.,
an Idaho Corporation.

Defendants.

Case No.: CVOC-0712775

JUDGMENT


This matter having come before the Court pursuant to the completion of a jury trial which was held April 22-27 2010, and the jury having returned a verdict in favor of the Defendant, and having been fully advised in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered in favor of DEFENDANT Meridian Computer Center, Inc, and that Plaintiff's Complaint is dismissed with prejudice.

M

JUDGMENT

DATED this 7th July day of ~~May~~, 2010.


~~Honorable Richard Greenwood~~
Sr District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th July day of ~~May~~ 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

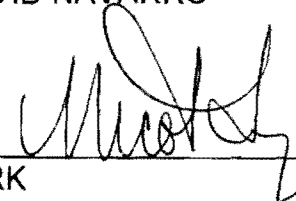
Joe Borton
Borton Law Offices
1310 N. Main Street
Meridian, ID 83642

- U.S. Mail
- Facsimile
- Overnight Mail
- Hand Delivery

Shelly C. Shanahan
PERKINS COIE, LLP
251 E Front St Suite 400
Boise, Idaho 83702-7310

- U.S. Mail
- Facsimile
- Overnight Mail
- Hand Delivery

J DAVID NAVARRO


CLERK

JUL 08 2010
J. DAVID DUNN, Clerk
By _____
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.

Plaintiff,

v.

MERIDIAN COMPUTER CENTER, INC.

Defendant.

Case No. CV OC 07 12775

ORDER
ALLOWING ATTORNEY FEES
AND AWARDING COSTS

The jury awarded a defense verdict, and defendant now moves for attorney fees under I.C. § 12-120(3) together with costs under IRCP 54(d).

Costs

Defendant is the prevailing party, and is entitled to its costs as a matter of right under IRCP 54(d). Deposition costs are allowed under the rule, and are adequately supported in the materials submitted. No other costs were claimed, other than the costs of depositions.

Costs in the amount of \$743.69 are allowed.

000233

MS

Attorney Fees

The gravamen of this action sounds in contract, for the alleged breach of an express contract to protect the data on plaintiff's hard drives. There is no dispute that there was a contractual relationship between plaintiff and defendant to service plaintiff's computer equipment. This relationship was a commercial transaction. The plaintiff is a professional dental clinic. The defendant is a computer repair center. An additional defendant that settled out prior to trial was the computer consultant of plaintiff. As such, the alleged contract would have been a commercial transaction for services, which entitled the prevailing party to attorney fees under I.C. § 12-120(3). Plaintiff alleged as much in the complaint filed herein.

That the plaintiff included additional counts to the complaint sounding in negligence does not change the analysis. Even under the negligence theories, the duty – if one existed – arose in contract. While it appears that the jury concluded that the duty that did exist did not extend to the protection of the data on the hard drives, nevertheless the overriding action was commercial in nature, entitling defendant to an award of attorney fees.

In support of his claim, defense counsel submitted his personal affidavits and attached copies of each invoice sent to defendant during the course of the litigation. The total is \$27,145.00. The invoices detail exactly the hours logged and the rate charged, and in terse descriptions, the services performed. It appears that the amounts alleged were actually charged to the defendant. By affidavit, counsel stated on personal knowledge that the fees were necessarily incurred in connection with the case.

000234

Upon my review, and taking into account the factors of Rule 54(e)(3) IRCP, being primarily the time and labor required, the skill and experience of the handling attorney, the prevailing charges for like work, and the amount involved and the result attained, I find and conclude that the claim of the Borton law firm is supported, is reasonable in amount, and ought to be allowed as the attorney fees in this case. (I have considered the remaining elements of Rule 54(e)(3) but determined they are not apropos to this case.)

In addition to fees for the Borton firm, counsel submitted invoices from a previous attorney, from a different law firm. However, there is no averment by counsel on personal knowledge that these fees were reasonable, necessarily incurred or necessary to the litigation. There was no affidavit from the first attorney. The foundation for an award of attorney fees to the first attorney is insufficient, and I decline to consider the additional claim.

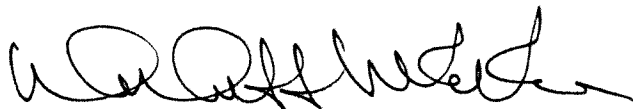
Attorney fees for the services of the Borton firm, in the amount of \$27,145.00 are awarded to the defendant.

Conclusion and Order

For reasons stated, the defendant Meridian Computer Center, Inc. is awarded its costs in the amount of \$743.69 and its attorney fees in the amount of \$27,145.00, for a total of \$27,888.69, against the plaintiff Bridge Tower Dental, P.A.

It is so ordered.

Dated this 7th day of July, 2010.



Sr. Judge D. Duff McKee

CERTIFICATE OF MAILING


I hereby certify that on this 8th day of July, 2010, I mailed (served) a true and correct

copy of the within instrument to:

SHELLY SHANNAHAN
PERKINS COIE, LLP
POST OFFICE BOX 737
BOISE IDAHO 83701-0737

JOSEPH BORTON
BORTON LAW OFFICE
2537 W. STATE STREET #110
BOISE IDAHO 83702

J. DAVID NAVARRO
Clerk of the District Court

By: 
Deputy Court Clerk

000236

JUL 08 2010
By J. DAVID NAVARRO, Clerk
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.

Plaintiff,

v.

MERIDIAN COMPUTER CENTER, INC.

Defendant.

Case No. CV OC 07 12775

ORDER DENYING
POST TRIAL MOTIONS

Plaintiff moves for a J.N.O.V. under I.R.C.P. 50(b), or in the alternative for a new trial under I.R.C.P. 59(a), contending the defendant did not produce any evidence to rebut its admitted mistakes in erasing the data on plaintiff's hard drive. Plaintiff contends that the "property" entrusted to the defendant consisted of the data encoded on the hard drive, and that there was either a direct contract with the defendant to protect this data which was breached by the defendant, or there was negligence, when the data was inadvertently erased. The theories addressed at trial and contained in the instructions presented the issue as one of bailment, either in contract or negligence.

Plaintiff contended that there was an express agreement for defendant to protect the data on the hard drive. Defendant contended no such express agreement existed.

000237

Although it was conflicting, there was ample evidence for the jury to conclude that there was no express agreement for the defendant to protect plaintiff's data on the hard drive.

Under the theory of negligence, the issue becomes what was the property bailed? Plaintiff contends that it was still the data – even without an express agreement – and that the negligence theories should still prevail given the defendant's admitted error in erasing the data. However, without an express and specific agreement to protect the data, there was ample evidence for the jury to conclude that the scope of bailment was much broader, extending only to the computer equipment as a whole, but not necessarily including the intangible data, and that the bailee's duty was satisfied by safeguarding the computer equipment as a whole.

The scope of the bailment and the issue of care were for the jury. The defendant was not an insurer, and absent an express agreement to protect the data, it owed only a duty of reasonable care to that property left in its care. Defendant was performing necessary maintenance or repair on the hard drives, and a predicted complication of such work is that data on the hard drives might be lost. Plaintiff's consultant testified that he was well aware of this known risk. Customers are routinely cautioned to back up their data as the repair facility could not be responsible for lost data. The defendant's owner testified that he did not intend to be responsible for plaintiff's data. There was ample evidence for the jury to conclude that the computer equipment was the subject of the bailment, which did not include the intangibles such as data on the hard drives. In such case, there was sufficient evidence for the jury to conclude that defendant's overall care of plaintiff's equipment as a whole met the requisite standard of care, notwithstanding his mistake in erasing the data from the hard drive.

I have re-examined the instructions, and find plaintiff's objections to the instructions without merit. The two instructions that are challenged correctly state the elements of bailment, one from the standpoint of contract and one under the theory of negligence. Both instructions place the burden of proof on the plaintiff to prove the existence of the bailment. If established, both instructions place burden of proof on the defendant as the bailee to prove that the bailee acted with the requisite degree of care -- whether under contract or in negligence. As discussed above, the evidence, albeit conflicting, was sufficient for the jury to conclude that defendant met this burden. There was sufficient evidence to support the jury's verdict and there is no basis now to disturb it.

Plaintiff's motions for J.N.O.V. and for new trial are denied.

It is so ordered.

Dated this 7th day of July 2010.



Sr. Judge D. Duff McKee

CERTIFICATE OF MAILING

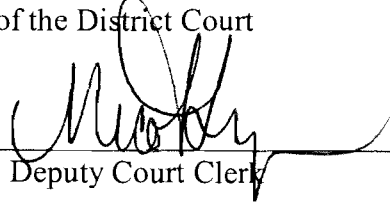
I hereby certify that on this 8th day of July, 2010, I mailed (served) a true and correct copy of the within instrument to:

SHELLY SHANNAHAN
PERKINS COIE, LLP
POST OFFICE BOX 737
BOISE IDAHO 83701-0737

JOSEPH BORTON
BORTON LAW OFFICE
2537 W. STATE STREET #110
BOISE IDAHO 83702

J. DAVID NAVARRO
Clerk of the District Court

By: _____


Deputy Court Clerk

000240

ORIGINAL

FILED
P.M. 443

AUG 02 2010

J. L. NAVARRO, Clerk
By L. AMES
DEPUTY

Shelly C. Shannahan, Bar No. 5374
Cynthia L. Yee Wallace, Bar No. 6793
PERKINS COIE LLP
1111 West Jefferson Street, Suite 500
P.O. Box 737
Boise, Idaho 83701-0737
Telephone: 208.343.3434
Facsimile: 208.343.3232

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff/Appellant,

v.

MERIDIAN COMPUTER CENTER,
INC., an Idaho corporation,

Defendant/Respondent.

Case No. CV OC 0712775

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, MERIDIAN COMPUTER CENTER, INC.,
AND ITS ATTORNEYS, BORTON LAW OFFICES, 2537 WEST STATE STREET,
#110, BOISE, IDAHO 83702, AND THE CLERK OF THE ABOVE ENTITLED
COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant Bridge Tower Dental, P.A., by and through its
counsel of record, Perkins Coie LLP, appeal against the above-named Respondent to the
Idaho Supreme Court from the District Court's July 8, 2010 Order Denying Post Trial
Motions and July 8, 2010 Order Allowing Attorney Fees and Awarding Costs, and the
Judgment entered on July 8, 2010.

2. Appellant has a right to appeal to the Idaho Supreme Court on the grounds that the orders and judgment described in paragraph 1 above, are appealable pursuant to I.A.R. 11(a)(1).

3. Following is a preliminary statement of the issues on appeal which Appellant intends to assert. This list of issues shall not prevent the Appellant from asserting other issues on appeal:

(A) Did the District Court err in denying Plaintiff's Motion for Judgment Notwithstanding the Verdict or, in the alternative, for a New Trial?

(B) Did the District Court err in awarding attorney's fees to Defendant Meridian Computer Center, Inc.?

(C) Did the District Court err in denying Plaintiff's request to instruct the Jury on negligent bailment and the presumptions afforded the Plaintiff for a negligent bailment claim?

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

5. Appellant requests preparation of the following portions of the reporter's transcript:

(A) Trial testimony of Jason Patten on April 23, 2010 and April 26, 2010; and

(B) Jury Instruction Conference on April 26, 2010.

6. Appellant requests the following documents be included in the clerk's record:

(A) 04/12/2010 Defendant Meridian Computer Center, Inc.'s Proposed Jury Instructions;

(B) 04/12/2010 Plaintiff's Proposed Jury Instructions;

(C) 04/23/2010 Plaintiff's First Supplement Proposed Jury Instructions;

- (D) 04/27/2010 Jury Instructions Filed;
- (E) 04/27/2010 Verdict Form;
- (F) 05/11/2010 Defendant Meridian Computer Company's Motion for Attorney

Fee's and Costs;

- (G) 05/11/2010 Affidavit in Support of Motion;
- (H) 05/11/2010 Motion for Judgment Notwithstanding the Verdict or in the

Alternative, Motion for New Trial;

- (I) 06/08/10 Affidavit of Shelly C. Shannahan;
- (J) 06/08/2010 Memorandum in Support of Plaintiff's Motion for Judgment

Notwithstanding the Verdict or in the Alternative, Motion for New Trial;

- (K) 06/16/2010 Objection to Motion for Fees and Costs;
- (L) 06/17/2010 Memorandum in Opposition for Judgment;
- (M) 06/21/2010 Memorandum in Support of Request of Costs and Fees;
- (N) 06/21/2010 Supplemental Affidavit of Joseph Borton;
- (O) 07/08/2010 Judgment;
- (P) 07/08/2010 Order Allowing Attorney Fees and Awarding Costs; and
- (Q) 07/08/2010 Order Denying Post Trial Motions.

7. The undersigned hereby certifies:

- (A) That a copy of this Notice of Appeal has been served on each reporter of

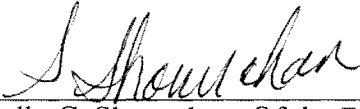
whom a transcript has been requested as named below at the address set out below:

Tauna Tonks
c/o M & M Court Reporting Services
421 W Franklin St.
Boise, ID 83702

- (B) That the reporter has been paid the estimated fee for preparation of the reporter's transcript as set forth above;
- (C) That the estimated fee for preparation of the clerk's record has been paid;
- (D) That the appellate filing fee has been paid; and,
- (E) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED: August 2, 2010

PERKINS COIE LLP

By: 
 Shelly C. Shannahan, Of the Firm
 Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

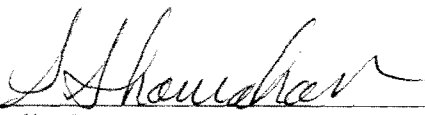
I, the undersigned, certify that on August 2, 2010, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Joseph W. Borton
 BORTON LAW OFFICES
 2537 W. State St., #110
 Boise, ID 83702

Hand Delivery _____
 U.S. Mail X
 Facsimile _____
 Overnight Mail _____

Tauna Tonks
 c/o M & M Court Reporting Services
 421 W Franklin St.
 Boise, ID 83702

Hand Delivery _____
 U.S. Mail X
 Facsimile _____
 Overnight Mail _____


 Shelly C. Shannahan

AUG 16 2010

J. DAVID NAVARRO, Clerk
D. G. GIBBEN
DEPUTY

Joe Borton [ISB No. 5552]
BORTON LAW OFFICES
1310 N. Main Street
Meridian, Idaho 83642
(208) 908-4415
joe@bortonlawoffices.com

Attorneys for Defendant/Respondent Meridian Computer Center, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BRIDGE TOWER DENTAL, PA.,

Plaintiff/Appellant,

v.

MERIDIAN COMPUTER CENTER, INC.,
an Idaho Corporation.

Defendant/Respondent.

Case No.: CVOC-0712775

Supreme Court No. 37931

REQUEST FOR ADDITIONAL MATERIAL

TO THE ABOVE-NAMED APPELLANT AND ITS ATTORNEYS OF RECORD AND THE
CLERK OF THE ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN, that the Respondent in the above entitled
proceeding hereby requests pursuant to Rule 19, I.A.R.

1. The inclusion of the following material in the reporter's transcript or the Clerk's
record in addition to that required to be included by the I.A.R. and the notice
of appeal. Any additional transcript is to be provided in electronic format.

a. Reporter's Transcript: The testimony of witness Al Colson April 23,
2010 and April 24, 2010.

2. Additional Documents pursuant to IAR 19(c)

a. Final Jury Instructions provided to the jury by the Court April 27, 2010.

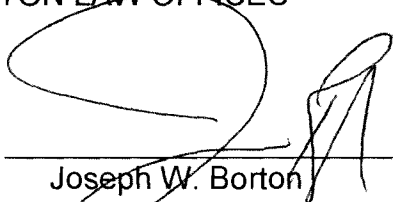
b. Defendant's Memorandum in Opposition to Plaintiff's Motion for JNOV and new trial dated June 17, 2010.

I certify that a copy of this request was served upon the Clerk of the district court and upon all parties required to be served pursuant to I.A.R. 20, and that the estimated fee for preparation of the reporter's transcript and clerk's record has been paid.

DATED this 16th day of August, 2010.

BORTON LAW OFFICES

By



Joseph W. Borton
*Attorneys for Defendant/Respondent
Meridian Computer Center, Inc.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of August, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Shelly C. Shannahan
PERKINS COIE, LLP
251 E Front St Suite 400
Boise, Idaho 83702-7310
Fax: 343-3232

- U.S. Mail
- Facsimile
- Overnight Mail
- Hand Delivery

Tauna Tonks
c/o M&M Court Reporting Services
421 W. Franklin St.
Boise, ID 83702

- U.S. Mail
- Facsimile
- Overnight Mail
- Hand Delivery



Joseph W. Borton

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To: Stephen W. Kenyon and Brad Thies
Fax: 334-2616 287-6919

NOV 29 2010

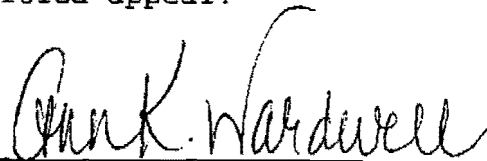
J. DAVID NAVARRO, Clerk
By BRADLEY J. THIES
DEPUTY

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIDGE TOWER DENTAL, P.A.,)	Docket No. 37931-2010
)	
Plaintiff-Appellant,)	
vs.)	
MERIDIAN COMPUTER CENTER, INC.,)	
Defendant-Respondent.)	
_____)	

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on November 16, 2010, the 223-page transcript of requested portion of the trial of Ada County Case No. CV OC 0712775 was lodged with the District Court Clerk of Ada County in the Fourth Judicial District in conjunction with the above-entitled appeal.



ANN K. WARDWELL
M&M COURT REPORTING
SERVICE, INC.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff-Appellant,

vs.

MERIDIAN COMPUTER CENTER, INC.,

Defendant-Respondent.

Supreme Court Case No. 37931

CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

That the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court on Appeal. It should be noted, however, that the following exhibits will be retained at the District Court clerk's office and will be made available upon request.

1. Defendant's Exhibit A – Sony Tape Back Up Drive
2. Defendant's Exhibit B – Sony Back Up Tape
3. Defendant's Exhibit C – Sony Back Up Tape

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 6th day of October, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE OF EXHIBITS

00248

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE D. DUFF MCKEE
CLERK: KATHY JOHNSON
CT REPTR: LESLIE ANDERSON

BRIDGE TOWER DENTAL,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CVOC07.12775
)	
AL COLSON, ETAL.,)	
)	<i>Amended</i>
)	EXHIBIT LIST
Defendants.)	

Counsel for Plaintiff: Shelly Shannahan
Counsel for Defendant: Joseph Borton

PLAINTIFF'S EXHIBITS

1. Monthly Service Contract	4/22/10	Admitted
2. Equipment/Support Bid	4/22/10	Admitted
4. Ltr to Plaintiff to Deft 11/11/05	4/22/10	Admitted
6. Ltr to Plaintiff to Deft 8/19/06	4/23/10	Admitted
8. Series of invoices from Deft.	4/22/10	Admitted
10. Account History Ledger (example)	4/23/10	Admitted
23. Individual Product Summary	4/26/10	Admitted
24. Individual Product Summary	4/26/10	Admitted
27. Mission Statement of MCC	4/26/10	Admitted
29. User Manual Cover & Pg 8	4/26/10	Admitted

Deposition of Meridian Computer Center

DEFENDANT'S EXHIBITS

A. Sony Tape Back Up Drive (Illustrated Purposes)	4/26/10	Admitted
B. Sony Back Up Tape (Illustrated Purposes)	4/26/10	Admitted
C. Sony Back Up Tape (Illustrated Purposes)	4/26/10	Admitted
D. MCC Warranty, Terms and Conditions	4/26/10	Admitted

Deposition of Bridge Tower Dental

THE DEPOSITION(S) IN THIS CASE HAVE BEEN STORED WITH THE EXHIBITS FOR CONVENIENCE, BUT HAVE NOT BEEN OFFERED OR ADMITTED AS EXHIBIT(S).

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff-Appellant,

vs.

MERIDIAN COMPUTER CENTER, INC.,

Defendant-Respondent.

Supreme Court Case No. 37931

CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

SHELLY C. SHANNAHAN

ATTORNEY FOR APPELLANT

BOISE, IDAHO

JOE BORTON

ATTORNEY FOR RESPONDENT

MERIDIAN, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: NOV 29 2010

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE OF SERVICE

00250

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff-Appellant,

vs.

MERIDIAN COMPUTER CENTER, INC.,

Defendant-Respondent.

Supreme Court Case No. 37931

CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 2nd day of August, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE TO RECORD

00251