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Advanced Med. v. Imaging Center of Idaho Appellant's Brief Dckt. 39753

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ADVANCED MEDICAL DIAGNOSTICS,)
LLC, a Delaware limited liability company,)

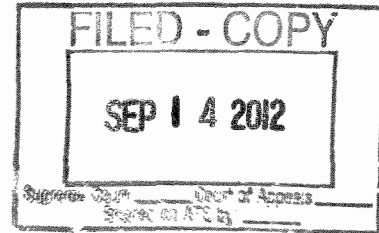
Plaintiff/Appellant,)

v.)

IMAGING CENTER OF IDAHO, LLC,)
an Idaho limited liability company.)

Defendant/Respondent.)

Docket No. 39753-2012



APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District of
The State of Idaho, in and for the County of Canyon

Honorable Juneal C. Kerrick

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STATEMENT OF THE CASE

Nature of Case: Plaintiff Advanced Medical Diagnostics (“AMD”) is in the business of providing physician education, marketing, advertising and consulting services to imaging businesses providing medical services to physicians. Defendant/counterclaimant Imaging Center of Idaho, (“ICI”) is a diagnostic imaging center located in Caldwell, Idaho.

Plaintiff AMD entered into a written agreement with defendant ICI to provide services to ICI to develop and grow its imaging business with area physicians. Under the agreement, the fees owed to AMD were based, in main, on the number of computed tomographic (“CT”) exams and magnetic resonance imaging (“MRI”) exams completed per month.

It is undisputed that in December 2009, defendant ICI stopped paying plaintiff AMD pursuant to their written agreement. Plaintiff brought suit against defendant ICI for breach of contract and unjust enrichment. ICI counterclaimed alleging that AMD breached the contract by making “an unreasonable site recommendation” (R., pp. 36, 60).

Proceedings and Disposition Below: Subsequent to filing the complaint, plaintiff filed an amended complaint (R., pp. 42-27) adding a count for reformation based upon mutual mistake. In response, defendant ICI denied the material allegations of the amended complaint and again counterclaimed alleging that AMD made “an unreasonable site recommendation” (respecting equipment acquisition) costing ICI in excess of \$88,000. Unlike ICI’s first counterclaim, this pleading contained a second count alleging that AMD fraudulently misrepresented to ICI what ICI’s future revenue would be. (R., pp. 54-62).

Prior to trial, defendant/counterclaimant ICI abandoned Count I of its counterclaim alleging unreasonable conduct by AMD, and that issue was not submitted to the jury.

The jury returned a unanimous verdict, answering the questions contained on the Special Verdict Form (R., pp.68-71) as follows:

<u>Question No.</u>	<u>Answer</u>
(1) Did the defendant breach the contract between the plaintiff and the defendant? . . .	Yes
(2) Did the defendant prove the affirmative defense mutual mistake? . . .	Yes
(3) Did the defendant prove the affirmative defense of fraud? . . .	No
(4) [Amount of plaintiff's contract damages]	[Not applicable. See Answer No. 2]
(5) Did the plaintiff prove that the defendant was unjustly enriched? . . .	No
(6) [Amount of plaintiff's unjust enrichment damages]	[Not applicable. See Answer No. 5]
(7) Did the defendant prove by clear and convincing evidence that it was damaged by the intentional misrepresentation on the part of plaintiff? . . .	Yes
(8) We assess the defendant's damages as follows:	\$00.0 . . .

R., pp. 68-71 (bracketed material explanatory).

Following the entry of the jury verdict, the defendant filed a timely memorandum of costs and fees (R., pp. 81-136), and plaintiff filed a timely motion to disallow costs and fees with a supporting memorandum (R., pp. 139-143). Thereafter, the district court ruled that defendant ICI was the prevailing party and awarded costs in the amount of \$6970.67 and attorney fees in the amount of \$125,942,50 pursuant to Idaho Code §12-120(3) (R., pp. 152-159). Plaintiff filed a timely motion for reconsideration (R., pp. 160-162) which motion was denied (R., pp. 188-194).

In its initial order on fees the district court concluded:

Here the court determines that ICI is the prevailing party, for purposes of an award of costs pursuant to I.R.C.P. 54(d)(1) and attorney fees pursuant to I.R.C.P. 54(e)(1) and Idaho Code section 12-120(3). ICI prevailed on the primary issue in this litigation: Whether ICI is liable for damages for breach of the parties' agreement for the provision of physician education and marketing services. Furthermore, since the claims arise out of the same transaction, the court concludes that it would be improper to analyze the prevailing party issue on a claim-by-claim basis, rather than the overall result obtained in the action as a whole.

R., pp. 155, 156.

In its order denying reconsideration, the district court opined that since it rejected AMD's assertion that there was no prevailing party there is "no basis for requiring ICI to apportion its costs fees" (R., p. 191).

Statement of Facts: The primary purpose of the agreement between AMD and ICI was to grow ICI's imaging business. As recited in the agreement:

Whereas, AMD and ICI desire to enter into this Agreement whereby AMD and ICI will work together to optimize the number and quality of diagnostic imaging studies, specifically CT and MR exams, performed by ICI, to increase ICI's notoriety within its communities, and to improve ICI's patient care.

R., p. 15.

ICI alleged in both its initial counterclaim (Count I) that AMD was "to make all necessary and/or recommended site preparations" (R., pp. 35, 59) but made "unreasonable" recommendations. In its counterclaim to AMD's amended complaint, ICI re-alleged Count I and added Count II, alleging that AMD fraudulently misrepresented ICI's future revenue. (R., pp. 60, 61). Just prior to trial, ICI abandoned Count I (R., pp. 137, 138), which alleged AMD's "unreasonable" conduct

breached the agreement.

Because the appellate issues focus on the entitlement to attorney fees and the existence, or not, of a prevailing party, these issues are resolved, in the main, by reference to the Amended Complaint (to which the parties' agreement is attached) (R., pp. 42-47), the Amended Answer and Counterclaim (R., p. 54-62) and the Special Verdict (68-71). A detailed examination of the facts is rendered unnecessary because the attorney fees award is based upon Idaho Code §12-120(3), i.e. the undisputed existence of a commercial transaction, and not Idaho Code §12-121 and Rule 54(e)(1), i.e., a frivolous prosecution or defense.

Plaintiff AMD sought damages well into six figures for ICI's breach of contract (R., p. 44). In its Counterclaim, defendant ICI claimed that AMD breached the contract by making an "unreasonable" recommendation that ICI purchase a piece of diagnostic equipment for \$88,658.40 for which "insurance companies in Idaho do not cover the costs associated with this equipment" (Count I, R., pp. 36, 60). Respecting ICI's fraud allegations (Count II, R., pp. 60, 61), the Counterclaim does not quantify the damages arising from the allegedly fraudulent misrepresentation of ICI's future revenue.

ISSUES PRESENTED ON APPEAL

1. Whether defendant/counterclaimant ICI can be designated as the "prevailing party" for the purpose of an attorney fee award in view of ICI's abandonment of its contract claim and the following aspects of the jury verdict: (1) the finding that ICI was in breach of contract; (2) ICI's failure to prove that AMD committed fraud as a defense to ICI's breach of contract; and (3) that ICI was not entitled to monetary damages.

2. Whether the district court erred by (1) failing to act in accordance with the applicable

legal standards for determination of the “prevailing party” and (2) by failing to reach its determination by an exercise of reason.

3. Whether, assuming ICI to be a prevailing party, ICI’s claim for attorney fees should be denied because of its failure to isolate the fees attributable to its successful claim results from the fees attributable to unsuccessful claim results.

4. Whether, assuming ICI to be a prevailing party, it was incumbent upon the district court to apportion attorney fees as to each claim which defendant/counterclaimant ICI successfully prosecuted or defended and which claim carried with it an attorney fee entitlement.

5. Whether attorney fees on appeal are appropriately awarded to the party or parties on appeal related to the claims upon which each such party or parties prevail pursuant to Idaho Code § 12-120(3).

ARGUMENT

Standard of Review: (1) The determination of a prevailing party or parties is

subject to the abuse of discretion standard: According to a 2009 Supreme Court decision:

A court’s determination of prevailing party status will not be disturbed absent an abuse of discretion. *Shore v. Peterson*, 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009). When examining whether a trial court abused its discretion, this Court considers whether the court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of this discretion and consistently within the applicable legal standards; and (3) reached its decision by an exercise of reason. *Id.* “A determination on prevailing parties is committed to the discretion of the trial court.” *Id.* at 914, 204 P.3d at 1125. “Only in rare cases has this Court or the Court of Appeals reversed a trial court’s determination of which party prevailed.” *Id.*

Crump v. Bromley, 148 Idaho 172, 173, 219 P.3d 1188 (2009).

(2) The apportionment issue may be subject to the abuse of discretion standard: In *Schroeder v. Partin*, 151 Idaho 471, 259 P.3d 617 (2011), the Court ruled that district court “had a duty to apportion to each of the parties only the attorney fees related to the claims upon which each party prevailed”. *Id.*, 151 Idaho at 478. Failure to do so, the Court ruled, was an abuse of discretion. *Id.*, 151 Idaho at 479.

(3) Alternatively, it may be argued that failure to apportion in appropriate circumstances is subject to free review: In addition to the discretionary exercise of identifying the “prevailing party”, Rule 54(d)(1)(B) requires that an apportionment occur that is consistent with the claims and “resultant judgment or judgments obtained”. In *Schroeder v. Partin*, 151 Idaho 471, 259 P.3d 617 (2011), the Court opined that the district court has a “duty” to undertake apportionment where each side has only partially prevailed. *Id.*, 151 Idaho at 478. Outside the judicial context, the existence of a duty is a question of law over which the appellate courts exercise free review. *Jones v. Starnes*, 150 Idaho 257, 260, 245 P.3d 1009 (2011). Given the “duty” articulated in *Schroeder*, it may be argued that whether the district court here has complied with that duty is subject to free review.

Summary of Argument: (1) There is no prevailing party in this case: Of the eight questions to the jury, defendant ICI prevailed on only three: (1) the existence of mutual mistake, (2) that AMD was not unjustly enriched, and (3) that plaintiff AMD made intentional misrepresentations. However, the jury was required to reach the mutual mistake issue because they found ICI was in breach of contract. Although they found that AMD made intentional misrepresentation, the jury specifically found that fraud was not a defense to ICI’s breach of contract.

As to those misrepresentations, it found that ICI sustained zero damages. More to the point, neither AMD nor ICI prevailed on their claims for monetary damages.

Finally, prior to trial, defendant/counterclaimant ICI abandoned Count I of the counterclaim which sought contract damages (Tr., pp. 137, 138).

(2) The district court abused its discretion in identifying ICI as the prevailing party:

In assessing whether the district court abused its discretion in finding defendant ICI to be the prevailing party, this Court must consider whether the district court acted consistently with the legal standard applicable to a determination of whether there was a prevailing party. *Shore v Peterson*, 146 Idaho 903, 915, 204 P.3d 1114 (2009). In applying the legal standard respecting ascertainment of a prevailing party, the district court is to consider the following: (a) the final judgment obtained in relation to the relief sought; (b) whether there were multiple claims between the parties; and (c) the extent to which each of the parties prevailed on their claims. *Chadderdon v. King*, 104 Idaho 406, 411, 659 P.2d 160 (App. 1983), cited in *Nguyen v. Bui*, 146 Idaho 187, 192, 191 P.3d 1107 (App. 2008).

The district court's decisions (R., pp. 152 - 159; pp. 188 - 193), although recognizing its discretionary latitude, failed to undertake an analysis covering points (a), (b), and (c) above.

(3) Defendant ICI's failure to segregate fees should result in denial of claimed fees.

Assuming ICI is deemed the prevailing party, its memorandum of costs failed to isolate fees attributable to the successful prosecution or defense of claims from those fees attributable to unsuccessful matters, i.e., ICI's breach of contract; its failure to prosecute AMD's breach of contract; ICI's unsuccessful invocation of fraud as a defense; and failure to obtain a money judgment on its fraud claim. Under this circumstance, ICI's attorney fee claim should be denied. *Brooks v. Gigray*

Ranches, 128 Idaho 72, 78, 901 P.2d 744 (1966).

(4) **Failure to apportion fees:** Assuming that defendant ICI is treated as a prevailing party, the district court had a “duty” to award ICI only those attorney fees related to the claims upon which ICI prevailed. *Schroeder v. Partin*, 151 Idaho 471, 478, 259 P.3d 617, 624 (2011). The district court justified its refusal to apportion on its decision that defendant ICI was the prevailing party.

. . . AMD contended that there was no prevailing party in this action for the purposes of Rule 54. Having rejected that assertion, the court finds no basis for requiring ICI to apportion its costs and fees among different claims in this action.

R., p. 191.

Whatever AMD’s assertion respecting the existence or not of a prevailing party, such unsuccessful assertion should not impact the analysis of apportionment issues respecting any claimed fees, i.e., the district court did not reach its decision by an exercise of reason. *Id.*, 151 Idaho at 478.

**THE DISTRICT COURT ABUSED ITS DISCRETION FINDING THAT
DEFENDANT ICI WAS THE PREVAILING PARTY**

No prevailing party: As noted above, defendant ICI was found in breach of contract but escaped a damage award under the doctrine of mutual mistake. Plaintiff AMD, according to the jury, made an intentional misrepresentation, but the jury did not award ICI damages. That is, each party escaped a damage award. According to a recent Supreme Court decision, this scenario supports the conclusion that “there is no prevailing party”:

The district court determined that Trilogy [plaintiff] had prevailed on the issue of breach and that Johnson [defendant] had prevailed on the issue of damages. It concluded, therefore, that there was no prevailing party pursuant to I.R.C.P. 54(d)(1)(B). . . . Rule 54

directs courts to consider who the prevailing party is in relation to the relief sought by each party . . .

Trilogy Network Systems, Inc. v. Johnson, 144 Idaho 844, 847, 172 P.3d 1119 (2007) (bracketed material explanatory).

In addition to the absence of damages on the misrepresentation claim (Count II), it should be repeated that ICI chose to abandon Count I of its counterclaim against AMD (breach of contract) on the eve of trial.

By contrast, an example of the appellate process identifying a prevailing party notwithstanding an apparent standoff is *Shore v. Peterson*, 146 Idaho 903, 204 P.3d 1114 (2009). In that case, the defendant alleged the affirmative defense of accord and satisfaction and counterclaimed, in the alternative, for conversion. Following trial, the district court found for the defendant on his affirmative defense and against him on the counterclaim for conversion. This Court reversed the district court's decision that there was no prevailing party, reasoning that the counterclaim was not dismissed on the merits. Rather, opined the Court, defendant's successful defense (accord and satisfaction) rendered the counterclaim moot rather than lacking in merit. *Id.* 146 Idaho at 914, 915.

In *Israel v. Leachman*, 139 Idaho 24, 72 P.3d 864 (2003), there were claims and counterclaims as with the case at bench. The district court granted summary judgment to defendant on plaintiffs' claims of rescission and contract damages. At trial, the jury awarded the plaintiffs damages for violation of the Consumer Protection Act. This Court affirmed the district court's finding that there was no prevailing party:

The district court utilized the prevailing party analysis as set forth in I.R.C.P. 54(e) and 54(d)(1)(B) by looking at the multiple claims of

the parties and determining who prevailed on which issues. The district determined that each party prevailed in part and did not prevail in part and decided that each party should bear its own costs and fees. The district court in making this determination did not venture outside the boundaries of its discretion, nor did the court act inconsistently with the legal standards applicable to the award of attorney fees. Further, the decision to require each party to bear its own fees appears to be reached through the exercise of reason.

Id., 139 Idaho at 27.

By way of contrast as discussed more fully below, the district court here did not break down who prevailed and who did not prevail. Rather, the district court declined to engage in any apportionment analysis because she “rejected” AMD’s assertion that there was no prevailing party (R., p. 191).

Had the district court summarized the breakdown of the jury verdict, it would have appeared as follows:

<u>Issue Resolved</u>	<u>For Plaintiff AMD</u>	<u>For Defendant ICI</u>
ICI contract breach	X	
Mutual mistake		X
Fraud as a contract defense	X	
Unjust enrichment		X
Fraud damages	X	
AMD breach (abandoned by ICI)	X	

In considering the “result of the action . . . in relation to the relief sought”, the clear conclusion is that neither side prevailed. Rule 54(d)(1)(B), I.R.C.P.

The district court abused its discretion in finding that defendant ICI was a prevailing

party: The time-honored criteria for ascertaining whether a trial court abused its discretion is as follows:

When examining whether a trial court abused its discretion, this Court considers whether the trial court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason.

Shore v. Peterson, 146 Idaho at 915.

The district court alluded to these criteria as well as the language of Rule 54(d)(1)(B) that “[t]he trial court . . . may determine that a party prevailed in part and did not prevail in part” and apportion fees accordingly. R., p. 155). However, the district court failed to discuss on which issues ICI prevailed and on which issues it did not prevail. That is, the district court did not rule “consistently with the legal standards applicable to the specific choices available to it”. *Id.*

Rule 54(d)(1)(B), I.R.C.P. directs the trial court to consider three points respecting resolution of the “prevailing party” issue:

In reaching the decision as to whether a party “prevailed,” Rule 54(d)(1)(B) requires the court to consider three areas of inquiry: (a) the final judgment or result obtained in the action in relation to the relief sought by the respective parties; (b) whether there were multiple claims or issues between the parties; and (c) the extent to which each of the parties prevailed on each of the issues or claims.

Chadderdon v. King, 104 Idaho at 406; cited in *Nguyen v. Bui*, 146 Idaho at 192.

In addition to failing to consider the criteria set forth in Rule 54(d)(1)(B) and failing to reach a “no prevailing party” conclusion as was done in *Israel v. Leachman*, the conclusion that the district court did reach was not by “an exercise of reason”.

In fact, AMD never requested an award of costs and/or fees as the

prevailing party in this case. Instead, AMD contended that there was no prevailing party in this action for purposes of Rule 54. Having rejected that assertion, the court finds no basis for requiring ICI to apportion its costs and fees amount different claims at issue in this action.

R., p. 191.

That is, rejection of AMD's assertion that there was no prevailing party does not compel the conclusion that ICI was *the* prevailing party.

Finally, the district court's reliance on *Eighteen Mile Ranch v. Nord Excavating*, 141 Idaho 716, 177 P.3d 130 (2005) is misplaced. In *Eighteen Mile Ranch*, this Court reversed the lower court finding that there was no prevailing party. In that case, the defendant successfully defended against the complaint *and*, unlike ICI here, won a money judgment on its counterclaim.

BECAUSE DEFENDANT ICI ONLY PREVAILED ON THE ISSUES OF MUTUAL MISTAKE AND UNJUST ENRICHMENT, IT IS NOT ENTITLED TO RECOVER THE ENTIRETY OF ITS CLAIMED ATTORNEY FEES

Preliminary note: This section of the Appellant's Brief assumes, without conceding, that defendant ICI is found to be a prevailing party.

Failure to segregate: The district court awarded defendant ICI the entirety of its claimed attorney fees (R., pp., 156, 158) notwithstanding its failure to prevail on the issues of its breach of contract, fraud damages and its abandoned breach of contract claim versus AMD. In its Memorandum of Costs and Fees (R., pp. 81-136), defendant ICI did not segregate the attorney fees respecting its successful claims and defenses from its unsuccessful claims and defenses.

Where a plaintiff pleads multiple claims, some bearing attorney fee entitlement and other claims not so entitled, Idaho law is clear that any fees awarded must be limited to the prosecution or defense of those claims which carry a statutory entitlement to fees. Where the applicant for fees fails to make

such segregation or segregation is not possible, the claim for fees must be denied:

However, the denial of fees here resulted from the fact that the fees attributable to the contract claim could not be separated from the conversion claim, which the district court found outside the scope of I.C. § 12-120(3). The fact that the conversion claim arose out of a commercial transaction is not sufficient to apply I.C. § 12-120(3): “the commercial transaction must be integral to the claim and constitute the basis upon which the party is attempting to recover.”

Brooks v. Gigray Ranches, 128 Idaho 72, 79, 910. P.2d 744 (1996) (emphasis added)¹.

As this Court has held, a fee application is limited to claims which carry a fee entitlement:

This Court has held attorney fees under § 12-120(3) are unavailable when the claim is based on a statutory provision. *Shay v. Cesler*, 132 Idaho 585, 587-89, 977 P.2d 199, 201-03 (1999). However, attorney fees are unavailable under § 12-120(3) for statutory claims only when the statute upon which the claim is brought includes its own attorney fees provision. *Id.* When various statutory and common law claims are separable, a court *should bifurcate the claims and award fees pursuant to § 12-120(3) only on the commercial transaction.*

Willie v. Board of Trustees, 138 Idaho 131, 136, 59 P.3d 302 (2002) (emphasis added)

Rationale for denial of fees: As presented to the district court, ICI did not isolate the fees respecting ICI’s successful claims and defenses from ICI’s unsuccessful claims and defenses. In affirming the district court in *Brooks*, the Court quoted the district’s reasoning for denial of fees where the request made no distinction between the intentional tort (no fees) and breach of contract (fees):

And with regard to conversion it does not fall within the contract and it does not fall within the statutory authority of Idaho Code 12-120(3), so

¹From the standpoint of which transactions fall within the thrall of Idaho Code §12-120(3), *Brooks* may no longer be good law. See *City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009). However, the principle remains viable that an attorney fee claimant must segregate out from his claimed attorney fees those service fees for claims on which he did not prevail as well as claims that carry no fee entitlement.

there would be no attorney fees at all entitled under the conversion. *The Court is unable to determine which attorney fees were used for the conversion and which were used for the contract action.* The Court explains the jury's verdict as they did not find a contract existing at that time between Gigray Ranches and Brooks, so Idaho Code 12-120(3) does not apply nor does [sic] the contractual terms, itself.

Brooks v. Gigray Ranches, 128 Idaho at 77-78 (emphasis added; bracketed material in original)

Although *Brooks* and *Willie* deal with the distinction between claims that do not have statutory fee entitlement from those claims that do, this principle would equally apply to those claims on which the attorney fee applicant prevailed as distinguished from those claims on which he did not prevail. That is, in both categories, the fee applicant must segregate out claims on which the applicant did not prevail as well as those claims which carry no fee entitlement.

Here, defendant ICI made no such distinction. Thus, even if defendant ICI is deemed to be the prevailing party, which is disputed, either the failure or inability to “bifurcate the claims”, as noted in *Willie* and *Brooks*, must cause ICI's claim for fees to fail.

The Court looked at the attorney fees to see if I could distinguish which ones were used on the intentional tort and which ones were used on the defending of the contract. And I was unable by this affidavit to make these findings, so the Court would not grant attorney fees in this particular case on the Memorandum of Costs.

Brooks v. Gigray Farms, 128 Idaho at 77 (quoting with approval the district court decision).

GIVEN THE FAILURE OF ICI TO SEGREGATE OUT ITS UNSUCCESSFUL CLAIMS/DEFENSES IN ITS FEE CLAIM, IT WAS INCUMBENT UPON THE DISTRICT COURT TO REQUIRE SUCH APPORTIONMENT OR, WHERE SUCH APPORTIONMENT WAS NOT MADE, TO DENY THE CLAIM

Where there are multiple prevailing parties, the district court has a duty to apportion fees commensurate with each party's respective successes and failures:

Thus, although the district court has discretion to award costs and fees to both Schroeder and Partin as prevailing parties, *the court had a duty to apportion to each of the parties only the attorney fees related to the claims upon which each party prevailed. Ramco v. H-K Contractors, Inc.*, 118 Idaho 108, 113, 794 P.2d 1381, 1386 (1990) (“the claims should be severed and costs analyzed separately for each.”). The trial court’s decision to award all attorney fees incurred by each party in connection with the litigation, without attempting to apportion those fees based upon the respective claims upon which each party prevailed, was inconsistent with the governing legal standard. Thus, the district court abused its discretion. We vacate the district court’s award of attorney fees and remand for the district court to apportion attorney fees and costs consistent with the requirement of I.R.C.P. 54.

Schroeder v. Partin, 151 Idaho at 478, 479. See also *Willie v. Board of Trustees*, 138 Idaho at 136 (“a court should bifurcate the claims . . .”) (emphasis added).

This holding is consistent with Rule 54(d)(1)(B) which states in pertinent part:

. . . The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding *may apportion the costs between and among the parties in a fair and equitable manner* after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Id. (emphasis added).

As noted above, the district court awarded defendant ICI the entirety of its claimed fees, including fees respecting claims on which it did not prevail, i.e., ICI’s breach of contract, absence of AMD fraud damages and ICI’s abandonment of its claim against AMD for breach of contract. Accordingly, under the authority of *Schroeder*, the district court either breached its duty or abused its discretion in awarding defendant ICI the entirety of its claimed attorney fees without apportionment.

UNDER THOSE SAME AUTHORITIES HOLDING THAT DEFENDANT ICI IS NOT THE PREVAILING PARTY OR, ALTERNATIVELY, THAT ICI HAS PREVAILED ONLY IN PART, ICI IS NOT ENTITLED TO AN AWARD OF COSTS

Plaintiff AMD incorporates the authorities cited above for the proposition that defendant ICI

is not the prevailing party in this matter and, hence, is not entitled to the costs awarded by the district court (R., p. 156). Alternatively, citing the above authorities, ICI's claimed costs must be apportioned based upon those claims on which it prevailed and those claims on which it did not prevail.

IN THE EVENT PLAINTIFF AMD IS THE PREVAILING PARTY ON THIS APPEAL, IT IS ENTITLED TO ATTORNEY FEES PURSUANT TO IDAHO CODE, § 12-120(3)

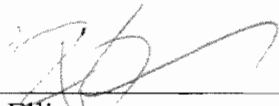
When the issue on appeal concerns the entitlement to attorney fees on a litigated commercial transaction, Idaho Code § 12-120(3) is applicable. *Eighteen Mile Ranch v. Nord Excavating & Paving*, 141 Idaho 716, 721, 117 P.3d 130 (2005). In the event plaintiff AMD prevails on appeal, it is entitled to an award of attorney fees.

CONCLUSION

In view of the fact that defendant ICI prevailed on less than a majority of the questions on the jury verdict, neither it nor AMD is a prevailing party in this case. Accordingly, it was an abuse of discretion for the district to conclude that ICI was the prevailing party. As an additional basis for vacating the award of fees to ICI, ICI failed to submit a memorandum of costs and fees which apportioned the claimed fees and costs, winnowing out those fees/costs expended on issues on which ICI did not prevail. Alternatively, it was incumbent upon the district court, absent an apportionment by ICI, to apportion fees based upon which party prevailed and which party did not prevail as to each issue. Because ICI's memorandum of fees was not subject to apportionment given its lack of issue-by-issue particularity, ICI's claim for fees and costs should be denied.

In the event AMD prevails on this appeal involving a commercial transaction, it is entitled to attorney fees on appeal pursuant to Idaho Code § 12-120(3).

RESPECTFULLY SUBMITTED this 14th day of September, 2012.



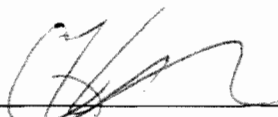
Allen B. Ellis
Attorney for plaintiff/appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 14th day of September, 2012, I caused to be served two true and correct copies of the foregoing document by the method indicated below, and addressed to the following:

Jeffrey R. Townsend
Townsend Law, P.C.
3006 E. Goldstone Dr., Ste. 120
Meridian, Idaho 83642

U.S. Mail, postage prepaid
 Hand delivery
 Overnight delivery
 Facsimile (350-7311)



Allen B. Ellis