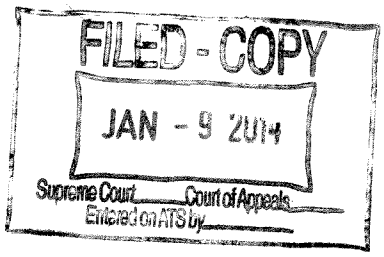
1-9-2014

Idaho Military Historical Society v. Maslen Supplement's Respondent's Brief Dckt. 39909

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO MILITARY HISTORICAL SOCIETY, INC. Plaintiff/Counterdefendant/Respondent	)	DOCKET No. 39909-2012
vs.	)	
HOLBROOK MASLEN, an individual; AEROPLANES OVER IDAHO, INC., an Idaho corporation; DOES I-V; and ABC CORPORATIONS I-V, Defendants/Counterclaimants/Appellants.	)	



RESPONDENT'S SUPPLEMENTAL BRIEF

Response to Appeal from District Court of the Third Judicial District for Canyon County
Honorable Juneal C. Kerrick, District Judge presiding

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I
INTRODUCTION

Oral argument on this appeal was held on December 11, 2013. Thereafter, on December 12, 2013, this Court requested supplemental briefing from the parties on three questions of law. Those three questions are as follows:

1) Should the Court's holding in *Nampa & Meridian Irr. Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 524-25, 20 P.3d 702, 708-09 (2001) ("If there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation") be overturned or amended?
2) Should this Court look to the gravamen of the cause of the action in determining attorney's fees?
3) Should I.R.C.P. 54(E)(1) be amended to be consistent with the plain meaning of Idaho Code § 12-121?

Each of these three questions is addressed below. However, a thorough review of the applicable legal precedents leads Idaho Military Historical Society to conclude that this Court should re-affirm that an award of attorney's fees under Idaho Code § 12-121 is left to the sound discretion of the court.

II
ARGUMENT

A. SHOULD THE COURT'S HOLDING IN *NAMPA & MERIDIAN IRR. DIST. V. WASHINGTON FED. SAV.*, 135 IDAHO 518, 524-25, 20 P.3D 702, 708-09 (2001) ("IF THERE IS A LEGITIMATE, TRIABLE ISSUE OF FACT, ATTORNEY FEES MAY NOT BE AWARDED UNDER I.C. § 12-121 EVEN THOUGH THE LOSING PARTY HAS ASSERTED FACTUAL OR LEGAL CLAIMS THAT ARE FRIVOLOUS, UNREASONABLE, OR WITHOUT FOUNDATION") BE OVERTURNED OR AMENDED?

Short Answer: the Court's single sentence from *Nampa & Meridian Irr. Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 524-25, 20 P.3d 702, 708-09 (2001), read in context, confirms the long

standing precedent that the decision to grant an award of attorney's fees under I.C. § 12-121 rests in the sound discretion of the trial court.

The single sentence of *Nampa & Meridian Irr. Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 524-25, 20 P.3d 702, 708-09 (2001), which Mr. Maslen seeks to rely on to contest the District Court's award of attorney's fees under I.C. § 12-121 ("if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation") must be read in context:

> This Court has held that an award of attorney fees under I.C. § 12-121 is not a matter of right, and is appropriate only when the Court, **in its discretion**, "is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Owner-Operator Ind. Drivers Assoc. v. Idaho Public Util. Comm'n,* 125 Idaho 401, 408, 871 P.2d 818, 825 (1994). **When deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account.** Thus, if there is a legitimate, triable issue of fact, attorney fees **may** not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. *See Turner v. Willis,* 119 Idaho 1023, 812 P.2d 737 (1991). **The award of attorney fees rests in the sound discretion of the trial court** and the burden is on the person disputing the award to show an abuse of discretion. *See Anderson v. Ethington,* 103 Idaho 658, 651 P.2d 923 (1982). In determining whether the trial court has abused its discretion, we again turn to the three-factor test articulated in *Sun Valley Shopping Center, Inc. v. Idaho Power Co.,* 119 Idaho at 94, 803 P.2d at 1000.
>
> Here, the district court **expressly recognized in its order awarding costs that it had the discretion to award fees.** The court additionally noted that although NMID asserted several factual issues that were without foundation, there remained triable issues of fact concerning the effect Washington Federal's sidewalk and proposed fence on NMID's use of the easement. Washington Federal presents no evidence that the district court's decision was not reached by the exercise of reason. Accordingly, this Court upholds the district court's

> decision denying attorney fees at trial. For the same reason, we decline to award attorney fees on appeal.
>
> *Nampa & Meridian Irr. Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 524-25, 20 P.3d 702, 708-09 (2001) (Emphasis added).

The plain language of *Nampa & Meridian Irr. Dist.* itself undercuts Mr. Maslen's argument. This Court recognized that, despite the existence of factual issues "concerning the effect Washington Federal's sidewalk and proposed fence on NMID's use of the easement," the District Court in *Nampa & Meridian Irr. Dist.* "had the discretion" to make an award of attorney's fees to the prevailing party pursuant to I.C. § 12-121. Presumably, this is why the Court in *Nampa & Meridian Irr. Dist.* used the permissive "may not" as opposed to the mandatory "shall not."[1]

Mr. Maslen's contention that a single factual issue warranting a trial should preclude any court from making an award under I.C. § 12-121 seeks to improperly constrain the discretion of district courts, the discretion of this Court, and would encourage delay and obfuscation that could overwhelm our already strained judicial system. Following the holding in *Nampa & Meridian Irr. Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 524-25, 20 P.3d 702, 708-09 (2001), this Court made an award of attorney's fees on appeal under I.C. § 12-121, despite the existence of triable issues of fact below.

> Costco claims on appeal that the award of compensatory damages was excessive in light of the fact that Vendelin's medical costs amounted to less than $17,000. Costco also points to the evidence that established that Vendelin had a twenty-five year history of back problems and her doctor testified that fifty percent of the

[1] To the extent the Court's use of the phrase "may not" in the single sentence of *Nampa & Meridian Irr. Dist.* Mr. Maslen relies on 1) is not to be read in context, 2) was intended to be a mandatory prohibition on making an award under I.C. § 12-121 in certain situations, and 3) to the extent this phraseology has not already been clarified by subsequent rulings of this Court, then the Court may seek to clarify the single sentence from *Nampa & Meridian Irr. Dist.* by adding "may or may not" to re-affirm the discretion afforded to the Courts.

> current back pain should be attributed to her preexisting condition. Thus, Costco claims that there was no basis for the jury to award $161,058.44 in consequential damages.
>
> *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 431, 95 P.3d 34, 49 (2004).
>
> When deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. Thus, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12–121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings,* 135 Idaho 518, 524–25, 20 P.3d 702, 708–09 (2001). Where the issues raised on appeal involve well-settled principles of law, the appeal is frivolous and without foundation. *See Blaser v. Cameron,* 121 Idaho 1012, 1018, 829 P.2d 1361, 1367 (Ct. App. 1991).
>
> Many of Costco's arguments on appeal challenge the district court's decision to submit the issue of punitive damages to the jury. These decisions were discretionary and supported by substantial evidence contained in the record. Costco has not presented evidence which undermines the sufficiency of this evidence or requires a reversal of the district court's decision in this regard. Additionally, Costco's challenges to the filing of the amended complaint and the reliance of Vendelin's expert upon the accident summary are not supported by the facts and have no basis in the law. Finally, Costco raises many issues, which were not raised before the district court, and thus, were not properly before this Court on appeal. Accordingly, Costco's appeal was unreasonable, and Vendelin is entitled to recover attorney fees pursuant to I.C. § 12–121.
>
> *Vendelin v. Costco Wholesale Corp.* at 434.

In *Vendelin*, this Court recognized there was a factual issue at trial, i.e. the amount of compensatory damages. Yet this Court made an award of fees on appeal under I.C. § 12-121 and cited *Nampa & Meridian Irr. Dist.* as guiding authority. This comports with the plain reading (in context) of *Nampa & Meridian Irr. Dist.* that the award of fees under I.C. § 12-121 is discretionary (for all courts) and that the entire course of litigation should be reviewed.

Under Mr. Maslen's reading of *Nampa & Meridian Irrigation Dist.*, this Court should have been prohibited from making an award under I.C. § 12-121 in *Vendelin* since there was a "legitimate, triable issue of fact" at trial. Under Mr. Maslen's reading of *Nampa & Meridian Irrigation Dist.* the single triable issue of fact in *Vendelin* would have served as *carte blanche* for a party to engage in frivolous conduct for the entire course of the litigation, including on appeal. Under Mr. Maslen's reading of *Nampa & Meridian Irrigation Dist.*, should a party ask for damages of $100,000 at trial and only receive an award $99,999.99, that single penny of reduction would constitute a triable issue of fact. Under Mr. Maslen's reading of *Nampa & Meridian Irrigation Dist.*, in such a case there would be no "prevailing party" under I.R.C.P. 54(d)(1)(B) since the Defendant successfully avoided a penny of liability. Under Mr. Maslen's reading of *Nampa & Meridian Irrigation Dist.*, a court would be prohibited from making an award of attorney's fees under I.C. § 12-121 even had the Defendant committed perjury, wrongfully absconded with property for years, filed frivolous counterclaims, and convinced his attorney to violate Idaho Rule of Professional Conduct 3.2 (duty to expedite litigation). Under Mr. Maslen's reading of *Nampa & Meridian Irrigation Dist.* no court, including this Court, sitting in an appellate capacity could ever make an award of fees under I.C. § 12-121 due to the single penny that was successfully disputed by the obstructive defendant.

Here, the District Court took "the entire course of litigation into account" when making its award of fees under § 12-121.

> However, where "as in this case there are multiple claims and multiple defenses, it is not appropriate to segregate those claims and defenses to determine which were or were not frivolously defended or pursued. The total defense of a party's

> proceedings must be unreasonable or frivolous." *Magic Valley Radiology Associates v. Professional Business Services, Inc.*, 119 Idaho 558, 563, 808 P.2d 1303, 1308 (1991)....
>
> First, Defendants misapprehend the court's statement. As noted previously, before making the above statement, the court set forth the standards applicable to an award of attorney fees pursuant to Idaho Code Section 12-121. The court then added the above statement because Defendants' entire defense (and AOI's counterclaim) was based on the assertion that Plaintiff did not have an immediate right to possession of the aircraft (and that Defendants had such a right) because one or both of the Defendants had a valid possessory lien on the aircraft. As the court noted in its Findings of Fact, Conclusions of Law and Order, entered July 7, 2011, and the December 28, 2011 Order, Defendants adduced no evidence at trial supporting the existence of such a lien.[Fn1] Accordingly, the court determined that Defendants' defense of the entire litigation was unreasonable and without foundation.
>
> Second, Defendants incorrectly refer to factual issues on individual claims asserted by Plaintiff in this litigation. As noted above, where there are multiple claims and multiple defenses, it is not appropriate to segregate those claims and defenses to determine which were or were not frivolously defended or pursued. Instead, as the court has done in this case, the focus must be on the entire litigation and the entire defense to the litigation.
>
> *Fn 1:* Defendants also incorrectly rely on the fact that Plaintiff failed to prevail on several motions for summary judgment for the proposition that "the Court ... found legitimate triable issues of fact in this case." Plaintiff's failure to prevail on the dispositive motions was the result of its failure to establish, on the evidence Plaintiff adduced, that it was entitled to judgment as a matter of law. The court did not make any absolute determination that Defendants' claim to a right to possession of the aircraft was reasonable or supported by the evidence.
>
> *Order on Defendants' Motion for Reconsideration Attorney Fees* at 4-6. R. Vol. IV, pp. 604-611.

The District Court's reasoning herein comports with the discretion exercised by other courts engaging in a prevailing party analysis in making an award of attorney's fees under I.R.C.P. 54(d)(1)(B) and I.C. § 12-120. *See Eighteen Mile Ranch, LLC v. Nord Excavating & Paving,*

Inc., 141 Idaho 716, 117 P.3d 130 (2005) (prevailing party on counterclaim despite only being awarded 1/10 of claimed damages); *Nguyen v. Bui*, 146 Idaho 187, 193, 191 P.3d 1107, 1113 (2008); *Lickley v. Max Herbold, Inc.*, 133 Idaho 209, 984 P.2d 697 (1999) (fee award allowed pursuant to I.C. § 12-120(3) where plaintiff only recovered less than half of damages sought where he prevailed on greatest issue in the case).

Idaho Military Historical Society urges this Court to uphold the proper exercise of discretion of the Trial Court herein, and affirm the continued discretion afforded to courts when making an award of fees under I.C. § 12-121.

B. SHOULD THIS COURT LOOK TO THE GRAVAMEN OF THE CAUSE OF THE ACTION IN DETERMINING ATTORNEY'S FEES?

Short Answer: Yes.

This Court and the trial court should look at the gravamen of the cause of the action in determining an award of attorney's fees. This comports with the plain language of I.C. § 12-121 which provides the court with the discretion to "award reasonable attorney's fees to the prevailing party or parties." Likewise, looking to the gravamen of the cause of action when making an award under I.C. § 12-121, fits within the existing structure of the Idaho Rules of Civil Procedure utilized when making an award of fees and costs under other statutory provisions such as I.C. § 12-120.

> (B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may

> apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.
>
> I.R.C.P. 54(d)(1)(B). *See also Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 117 P.3d 130 (2005); *Nguyen v. Bui*, 146 Idaho 187, 193, 191 P.3d 1107, 1113 (2008); *Lickley v. Max Herbold, Inc.*, 133 Idaho 209 (1999)

Here, the Trial Court considered all the claims and issues involved in the litigation and found that Mr. Malsen did not have a good faith basis in the bulk of the legal and factual positions he took.

Mr. Maslen's counsel's argument at the December 11, 2013 hearing, that there was no prevailing party in this case, focused on IMHS's counsel's back-of-the-envelope damage calculations from IMHS's *Post-Trial Brief*. It is important to remember that this calculation was based on Mr. Maslen's own testimony (as a self-described expert witness in airplanes; *see* Court Trial Day 3, p. 717) and was intended to demonstrate to the Court that there was a methodology the Court could utilize in making an award of damages. R. Vol. III, pp. 366, 375; Supp. R., p. 31. Despite Mr. Maslen's counsel's contentions, nowhere did IMHS ask for an award of $800,000 in damages. *Id.* Rather it was suggested that Mr. Maslen's own expert testimony regarding the fair market 40 hour weekly rental value of a PT-23 could provide a means of awarding approximately $100,000 in damages. Indeed, the Court found that possession of the PT-23 did provide some value to Defendants, namely keeping Mr. Maslen's museum status valid. R. Vol. III, pp.348, 367. Despite the Trial Court's findings that IMHS proved the elements of their tort based claims related to Mr. Maslen's wrongful actions, as well as holding

that "the evidence supports a finding that IMHS was deprived of the use of the aircraft for a substantial time," the Trial Court simply elected not to award any damages to Plaintiffs. R. Vol. III, p. 376-380.

The trial court's denial of damages on IMHS's tort-based claims arose out of IMHS's inability to prove damages for the loss of the opportunity to statically display a historic airplane and the special damages of attorney's fees for slander of title, wherein IMHS was provided *pro bono* representation, with any level of mathematical certainty. *Id.* The entire exchange giving rise to Plaintiff's back-of-the-envelope calculation, as well as the pleadings related to it, took up a negligible amount of time in the litigation and arose entirely out of the discovery that Mr. Maslen had been joyriding in IMHS's historic World War II era airplane and was doing so with inadequate insurance. R. Vol. I, p. 83. Plaintiffs were ultimately only awarded approximately half of their attorney's fees. *See* R. Vol. IV, p. 438 ¶ 17 (claimed fees for lead counsel J. Kahle Becker of $90,690.00), R. Vol. III, p. 427 ¶ 15 (claimed fees for trial counsel Jon M. Steele of $35,400.00) and compare to fee award of $73,675.00 in Amended Judgment. R. Vol. IV, p. 578.

Mr. Maslen's counsel's contention at oral argument that "title was never in dispute" is inaccurate and contrary to the holding of the trial court as well as Mr. Maslen's own sworn testimony. *See* R. Vol. III, p. 369, R. Vol. IV p. 533; Court Trial Day 3, p. 696. Similarly, Mr. Maslen's counsel's represented at oral argument on December 11, 2013 that Mr. Maslen was not informed of the transfer of title from Idaho Aviation Hall of Fame to IMHS for almost 9 months. The trial Court made specific findings contrary to this assertion. R. Vol. III, pp.341, 354-355, 374.

The gravamen of this lawsuit was to obtain possession of and quiet title to the PT-23 so that it could be displayed to the public by its rightful owner in a legitimate museum. The greatest evidence of this is the original Complaint (R. Vol. I, pp. 12-18), the First Amended Complaint (R. Vol. I, pp. 19-47), and the two I.R.C.P. 68 Offers of Judgment that were made by IMHS prior to trial; each of which would have obviated the need for an award of attorney's fees against Mr. Maslen. *See* R. Vol. IV, pp. 502-505.

As this Court recently held, an Offer of Judgment bears on the issue of an award of attorney's fees under Idaho Code § 12-121:

> We again affirm our holdings in *Payne v. Foley,* and *Ross v. Coleman, i.e.,* "that the failure to enter into or conduct settlement negotiations is not a basis for awarding attorney fees **under I.C. § 12-121** and I.R.C.P. 54(e)(1)." *Id.* The language in *Sigdestad v. Gold,* 106 Idaho 693, 682 P.2d 646 (Ct. App. 1984), to the contrary is in error and is expressly disapproved. 116 Idaho 359, 365–66, 775 P.2d 1201, 1207–08 (1989) (emphasis in original). Thus, district courts may not consider settlement negotiations in the attorney fees determination. [Fn 3]
>
> [FN3] This does not mean that district courts may not consider offers of judgment in making the prevailing party determination. While settlement negotiations are best facilitated by confidentiality, offers of judgment pursuant to **I.R.C.P.68 are allowed to have some bearing on the issue.**
>
> *Jorgensen v. Coppedge*, 148 Idaho 536, 542, 224 P.3d 1125, 1131 (2010) (Emphasis added).

Finally, Mr. Maslen's counsel has glossed over the fact that Mr. Maslen was seeking an award of attorney's fees for two attorneys working for approximately three years. R. Vol. I, pp. 114-116. Thus, in addition to prevailing on some of its claims and defeating Mr. Maslen's claims for unjust enrichment and foreclosure of lien; each of which sought damages of $19,150, IMHS also avoided a substantial award of attorney's fees against it. The Court specifically found "[t]here is

no way the Military Historical Society could bear the costs of this litigation." R. Vol. III, p. 368. Thus, an adverse result in this case may very well have threatened the continued existence of IMHS.

This case would have never been filed had Mr. Maslen simply turned over the plane to IMHS when he received notice of the transfer from IAHOF. This case would not have dragged on for years had Mr. Maslen simply accepted either of the two I.R.C.P. 68 Offers of Judgment IMHS made. This case would not have expanded to include additional causes of action had Mr. Maslen not unlawfully flown this historic artifact. At all times, Mr. Maslen's fate was in his hands and he elected to continue with his frivolous litigation in an obstructive manner. The gravamen of the suit was to get possession of and clear title to the PT-23. Mr. Maslen's frivolous actions prevented that from happening for approximately 3 years and he should bear the consequences of the choices he made.

C. SHOULD I.R.C.P. 54(e)(1) BE AMENDED TO BE CONSISTENT WITH THE PLAIN MEANING OF IDAHO CODE § 12-121

Short Answer: No.

The assumptions implicit in Court's question as well as the clear and unambiguous language of Idaho Code § 12-121 obviates the need to delve into issues of statutory construction.

> If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). When this Court must engage in statutory construction because an ambiguity exists, it has the duty to ascertain the legislative intent and give effect to that intent. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001).

State v. Two Jinn, Inc., 38620, 2012 WL 9490834 (Idaho Ct. App. Jan. 24, 2012).

Therefore, the commencement of this analysis must focus on the plain language of Idaho Code § 12-121 which contains no other qualifier on an award of attorney's fees than a party prevail in a civil action.

> 12-121. Attorney's fees. In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

The separation of powers doctrine is expressed in Article II, § 1 of the Idaho Constitution. This provision states:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.
>
> Idaho Constitution Article II, § 1.

With respect to the relationship between the Legislative and Judicial Branches, Idaho Constitution, Article V, § 13 provides:

> The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but **the legislature shall** provide a proper system of appeals, and **regulate by law**, when necessary, the **methods of proceeding in the exercise of their powers of all the courts below the Supreme Court**, so far as the same may be done without conflict with this Constitution...
>
> Idaho Constitution, Article V, § 13 (Emphasis added).

Indeed, this Court has recognized the Legislature's authority to modify the common law.

> "[I]t is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine." *Kirkland v. Blaine County Med. Ctr.*, 134 Idaho 464, 471, 4 P.3d 1115, 1122 (2000).
>
> *Stuart v. State*, 149 Idaho 35, 45, 232 P.3d 813, 823 (2010).

Mr. Maslen has argued "In Idaho, we adhere to the 'American Rule' which requires that the parties bear their own fees absent statutory authorization or a contractual right. *Great Plains Equipment, Inc, v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999) (*citing Idaho Dept. of Law Enforcement v. Kluss*, 125 Idaho 682, 684, 873 P.2d 1336, 1338 (1994))." R. Vol. IV p. 542. A slight modification of the common law "American Rule" is precisely what the legislature has already done with the enactment of I.C. § 12-121.

> The Supreme Court is granted rulemaking power pursuant to Idaho Code § 1-212:
>
> The inherent power of the Supreme Court to make rules governing procedure in all the courts of Idaho is hereby recognized and confirmed.
>
> Idaho Code § 1-212.

This Court's rulemaking power is limited however.

> The Supreme Court shall prescribe, by general rules, for all the courts of Idaho, the forms of process, writs, pleadings and motions, the manner of service, time for appearance, and the practice and procedure in all actions and proceedings. Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant.
>
> Idaho Code § 1-213.

Likewise, this Court has recognized that the Idaho Constitution limits this Court's authority with respect to the separation of powers between the Judiciary and the Legislative branches.

> "Just as Article II of the Idaho Constitution prohibits the Legislature from usurping powers properly belonging to the judicial department, so does that provision prohibit the judiciary from improperly invading the province of the Legislature." *In re SRBA Case No. 39576,* 128 Idaho 246, 255, 912 P.2d 614, 623 (1995).
>
> *Idaho Sch. For Equal Educ. Opportunity v. State*, 140 Idaho 586, 597, 97 P.3d 453, 464 (2004).

It is through this lens that IRCP 54(e)(1) must be viewed.

> Idaho Rules of Civil Procedure Rule 54(e)(1). Attorney Fees.
>
> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

This Court may find guidance in the analysis typically reserved for determining the validity of administrative rules under an enabling statute.

> It is fundamental that the judiciary has the ultimate responsibility to construe legislative language to determine the law. *J.R. Simplot Co. v. Tax Com'n,* 120 Idaho 849, 853, 820 P.2d 1206, 1210 (1991) (citing *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60, 73 (1803)) (citations omitted). This principle extends to our review of administrative rules, and it is this Court's responsibility to determine the validity of the rule. "[A]dministrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing statutory law, and which are not reasonably related to the purposes of the enabling legislation." *Holly Care Center v. State, Dept. of Employment,* 110 Idaho 76, 78, 714 P.2d 45, 47 (1986) (citations omitted). This Court has established a four-prong test for determining the appropriate level of deference to be given to an agency

> construction of a statute. *J.R. Simplot Co. v. Tax Com'n*, 120 Idaho 849, 820 P.2d 1206 (1991). First, we must determine if the agency has been entrusted with the responsibility to administer the statute at issue. *Id.* at 862, 820 P.2d at 1219. Second, the agency's statutory construction must be reasonable. *Id.* Third, we must determine whether the statutory language at issue does not expressly treat the precise question at issue. *Id.* Finally, we must ask whether any of the rationales underlying the rule of deference are present. *Id.* If the four-prong test is met, then courts must give "considerable weight" to the agency's interpretation of the statute. *Id.*
>
> *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001).

This Court has been entrusted with the responsibility to administer I.C. § 12-121 under Idaho Code §§ 1-212 and 1-213. The plain language of IRCP 54(e)(1) aligns with the language of I.C. § 12-121 and reasonably seeks to discourage frivolous conduct of litigants. Likewise, IRCP 54(e)(1) does not abridge the rights of any litigant in violation of Idaho Code § 1-213 by discouraging frivolous conduct in a statutorily authorized manner. I.C. § 12-121 does not specifically treat the precise question at issue – how best to deter frivolous litigation – and thus the Court was free to enact IRCP 54(e)(1). The fourth prong regarding the rule of deference may be inapplicable to a Court's analysis of its own rules; however, the underlying rationales support the Court's upholding of IRCP 54(e)(1).

> There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation.
>
> *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010).

It would appear that the legislature has acquiesced to this Court's enactment of IRCP 54(e)(1) and this Court logically has expertise in the interpretation of a rule governing the conduct of

litigants. An additional step in the analysis this court should undertake in scrutinizing its own rules focuses on the separation of powers provisions of Idaho Constitution, Article V, § 13. There does not appear to be any Constitutional defects with IRCP 54(e)(1).

A judicial enactment which removes or unreasonably limits the discretion of the trial court may run afoul of the second prong of *Mason v. Donnelly Club* test. Therefore, this Court need only reaffirm the ability of trial courts to exercise their discretion when making an award under I.C. § 12-121 for frivolous conduct.

III
CONCLUSION

IMHS respectfully asks this court to affirm the award of fees made herein and reaffirm the discretion afforded to our courts when making an award of fees under I.C. § 12-121.

DATED this 9 day of January 2014.

J. KAHLE BECKER
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7 day of January 2014, a true and correct copy of the foregoing **RESPONDENT'S SUPPLEMENTAL BRIEF** was served upon opposing counsel as follows:

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