7-18-2017

Westover v. Idaho Counties Risk Management Program Respondent's Brief Dckt. 44722

IN THE SUPREME COURT FOR THE STATE OF IDAHO

VAL D. WESTOVER, Plaintiff/Appellant, vs. IDAHO COUNTIES RISK MANAGEMENT PROGRAM (ICRMP), Defendant/Respondent.	Supreme Court Case No. 44722 Ada County District Court Case No. CV-2016-195 RESPONDENT'S BRIEF

RESPONDENT IDAHO COUNTY RISK MANAGEMENT PROGRAM'S BRIEF

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

THE HONORABLE MITCHELL BROWN, PRESIDING DISTRICT JUDGE

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

I.
STATEMENT OF THE CASE

A. Nature of the Case.

The plaintiff's complaint seeks declaratory judgment. The complaint alleges that I.C. § 12-117 prohibits insurance companies, such as Idaho Counties Risk Management Program ("ICRMP"), from selling casualty insurance to governmental entities which provides coverage for claims where a local government could be assessed discretionary attorneys' fees under I.C. § 12-117. ***See*** R, p. 7 (Complaint ¶ 8-13). The complaint asks the trial court to declare ICRMP is an illegal entity and, that providing a defense to its insureds in cases where the governmental entity could be assessed attorneys' fees under I.C. § 12-117, is illegal. R, p. 9.

B. Course of Proceedings

The Westover complaint was filed June 3, 2016. R, p. 5. On June 27, 2016, ICRMP filed its answer. R, p. 14. Thereafter, on June 24, 2016, Westover served written discovery which included interrogatories, requests for production of documents, and requests for admission. R, p. 272. ICRMP provided answers to the requests for admission and filed a motion for protective order asking the court to delay further discovery until the legal issues of standing and statutory construction were resolved. ***See*** R, p. 33-36. ICRMP filed its motion for summary judgment on August 22, 2016. R, p. 52. On September 14, 2016, Westover filed a memorandum in opposition to ICRMP's motion for summary judgment and, in support of its own motion to compel. R, p. 186-200. However, Westover did not file an actual motion to compel. Tr, p. 8:11-14. Oral arguments were scheduled for September 29, 2016. R, p. 183-184. At the hearing the district court heard arguments relating to Westover's motion to compel and ICRMP's motion for protective order. Tr, p. 5:20 – p. 20:5. The court advised the parties it would take the two discovery motions under advisement. Tr, p. 20:8-11.

The court also ruled that although Westover had failed to seek relief under I.R.C.P. 56(d), to the extent the motion to compel could be considered as seeking relief under the rule, the requirements of Rule 56(d) had not been met and, for that reason, the court would not delay hearing the merits of the ICRMP motion for summary judgment. Tr, p. 20:12-25.

At the conclusion of the hearing, the court announced it would grant ICRMP's motion for summary judgment. Tr, p. 54:6 – p. 55:15. On November 14, 2016, the court issued its Memorandum Decision and Order on ICRMP's Motion for Summary Judgment. R, p. 232-241. The written opinion explained the court's earlier decision to grant ICRMP's motion for summary judgment. The order also addressed Westover's motion to compel and, his failure to meet the requirements of I.R.C.P. 56(d). R, p. 232.

Final judgment was entered November 15, 2016. R, p. 242. Westover filed his notice of appeal on December 13, 2016. R, p. 263.

C. Statement of Facts

On July 30, 2015, Val and LaRee Westover filed a complaint against the Franklin County Assessor, Jase Cundick. ***See*** R, p. 5 (Complaint ¶ 3); R, p. 8-165. At the time the lawsuit was filed, Franklin County had purchased casualty insurance from ICRMP. ***Id.*** (Complaint ¶ 6-7); R, p. 3 (Boice Aff. ¶ 2). ICRMP is a reciprocal insurance company that conducts business in the State of Idaho pursuant to a certificate of authority issued by the Idaho Department of Insurance. R, p. 69 (Siehl Aff. ¶ 3-4). Like all insurance companies doing business in the state, ICRMP is regulated by the Idaho Department of Insurance. R, p. 69. ICRMP, as well as other insurance companies, offers casualty policies to governmental entities and municipalities such as Franklin County. R, p. 69-70 (Siehl Aff. ¶ 5-6).

As an elected official of Franklin County, Mr. Cundick, in his individual and official capacities, was an insured under the ICRMP policy. ***See*** R, p. 73 (Boice Aff. ¶ 3, Ex. 1). Consistent with the terms of the insurance policy, ICRMP provided Franklin County and Mr. Cundick a defense. ICRMP hired the law firm of Naylor & Hales to represent its insureds. ***Id.***

The Franklin County defendants answered the Westover complaint and prepared a motion for summary judgment. R, p. 73 (Boice Aff. ¶, Ex. 3). The county also attended a court ordered mediation. R, p. 73 (Boice Aff. ¶ 4-5). The parties did not reach a settlement at mediation. R, p. 73 (Boice Aff. ¶ 4). Thereafter, Franklin County's motion for summary judgment was heard by the district court and granted. R, p. 73 (Boice Aff. ¶ 5). That case was appealed and affirmed by this court. ***See Westover v. Cundick***, 161 Idaho 933, 393 P.3d 593 (2017).

II.
ADDITIONAL ISSUES ON APPEAL

1. Whether the district court's ruling should be affirmed on the alternative grounds that I.C. § 12-117 does not restrict the ability of ICRMP, or any other insurance company, from selling casualty insurance to governmental entities such as Franklin County?

2. Whether the argument that I.C. § 12-117 restricts an insurance company's ability to sell casualty insurance which provides coverage for claims which could potentially expose the government to discretionary attorneys' fees is inconsistent with the provisions of the Idaho Tort Claim Act which authorizes governmental entities to purchase casualty insurance for itself and, its employees?

3. Whether the arguments advanced by Westover on appeal are frivolous thereby entitling ICRMP to an award of attorneys' fees.

III.
ARGUMENT

A. Westover Lacks Standing to Challenge ICRMP's Decision to Defend the Lawsuit Against Its Insured.

The district court granted the ICRMP motion for summary judgment concluding Mr. Westover lacked standing to challenge the ability of ICRMP to sell casualty insurance to Franklin County or, question how ICRMP fulfilled its contractual obligations to its insureds', Franklin County and the Franklin County Assessor. R, p. 237-240. The court relied upon the direct action rule described in ***Graham v. State Farm Mutual Auto Ins. Co.***, 138 Idaho 611, 613, 67 P.3d 90, 92 (2003) as applied in ***Brooksby v. GEICO Ins. Co.***, 153 Idaho 546, 286 P.3d 182 (2012). R, p. 238-240.

Westover argues the district court erred as he possessed standing under the Declaratory Judgment Act found at I.C. § 10-1202. He argues the statute allowed him to ask the court to utilize I.C. § 12-117 as a basis to prevent governmental entities from purchasing casualty insurance which could provide coverage for a discretionary attorney fee award. ***See*** Appellant's Brief, p. 24-26. This argument fails to consider the long-established requirements of standing and, ignores this court's prior ruling in ***Brooksby v. GEICO Ins. Co.,*** *supra.*

A fundamental tenant of American jurisprudence is the proposition that a person wishing to invoke a court's jurisdiction have standing. ***Van Valkenburgh v. Citizens for Term Limits***, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000). "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." ***Miles v. Idaho Power Co.***, 116 Idaho 635, 641, 778 P.3d 757, 763 (1989). "While the authority to render a declaratory judgment is bestowed by statute [Declaratory Judgment Act; I.C. § 10-1202] that authority to declare rights, statuses, or other legal relations is circumscribed by the rule that 'a declaratory judgment can only be

rendered in a case where an actual or justiciable controversy exists.' ***Harris v. Cassia County***, 106 Idaho 513, 516, 681 P.2d 988, 991 (1994)." ***See Student Loan Fund, Inc. of Idaho, Inc. v. Payette County***, 125 Idaho 824, 826, 875 P.2d 236, 238 (1994). To satisfy the case or controversy requirement, Westover "must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." ***Miles***, 116 Idaho at 641 (emphasis in original).

Applying these standards, to establish standing Mr. Westover's complaint must allege an "actual justiciable controversy" between himself and ICRMP. This requires him to demonstrate the actions of ICRMP caused him to suffer an injury in fact. ***See Troutner v. Kempthorne***, 142 Idaho 389, 392, 128 P.3d 926, 929 (2006) (the alleged injury must be to the litigant whose standing is at issue). The district court concluded this is a requirement Westover could not meet.

In ***Brooksby v. GEICO Ins. Co.***, 153 Idaho 546, 286 P.3d 182 (2012), this Court reaffirmed the long established no-direct action rule stating:

> We have repeatedly reaffirmed the no-direct action rule: "absent a contractual or statutory provision authorizing the action, an insurance carrier cannot be sued directly and cannot be joined as a party defendant" ***Graham v. State Farm Mutual Auto Ins. Co.***, 138 Idaho 611, 613, 67 P.3d 90, 92 (2003) (quoting ***Pocatello Ind. Park Co. v. Steel West, Inc.***, 101 Idaho 783, 791, 621 P.2d 399, 407 (1980); accord ***Hartman v. United Heritage Prop. & Cas. Co.***, 141 Idaho 193, 199, 108 P.3d 340, 346 (2005); ***Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co. of Idaho***, 132 Idaho 318, 322, 971 P.2d 1142, 1146 (1998); ***Downing v. Travelers Ins. Co.***, 107 Idaho 511, 514, 691 P.2d 375, 378 (1984). The basis for this rule is that an insurance policy is "a matter of contract between the insurer and the insured," and a third-party "allegedly injured by the insured is not a party to the insurance contract and has no rights under it." ***Hartman***, 141 Idaho at 199, 108 P.3d at 346.

See 153 Idaho at 548.

The court found that, consistent with the no-direct action rule, Ms. Brooksby had no contractual rights under the insurance policy purchased by her father, and, "no rights against or relationship with GEICO whatsoever." ***See*** 153 Idaho at 548. For that reason, the insurer's decisions regarding how the insurance policy would be interpreted or, how it interacted with its insured "was not an injury in fact, and she had no standing to contest GEICO's decision." ***Id.*** In other words, GEICO did not owe Ms. Brooksby any legal duties in tort or contract arising from how it discharged its contractual obligations to its insured. For that reason, the plaintiff could not establish a justiciable case or controversy between herself and the insurance company. Her personal injuries were caused by the alleged negligence of the driver of the vehicle in which she was a passenger. GEICO's actions did not diminish her claims against the responsible driver and, for that reason, she lacked standing to pursue her claims against the insurance company.

The fact the Declaratory Judgment Act contains language which allows "any person interested under ... a contract, or whose rights, status, or other legal relations are affected by a ... contract" to seek a declaration of rights thereunder, does not create standing to pursue the claims alleged in the Westover complaint. In ***Brooksby,*** this Court rejected a similar argument by recognizing that standing focuses upon the parties seeking relief rather than the issues they seek to have adjudicated. ***See*** 153 Idaho at 549. Because the Declaratory Judgment Act "does not create any new rights, statuses, or legal relations" and Brooksby had no rights or legal relationship with the insurer, there were no justiciable claims between herself and the insurance company which could be adjudicated under the Act. ***See*** 153 Idaho at 548 (emphasis in original).

In this case, the district court recognized these flaws and correctly dismissed Westover's complaint. Lacking in the record, or in the Westover briefing, is any evidence or argument suggesting Mr. Westover possessed any legal rights under the insurance policy ICRMP sold to

Franklin County. In fact, Westover does not suggest he was owed any benefits or possessed any rights under the ICRMP policy. Westover does not allege ICRMP engaged in tortious activity which caused him to suffer personal injuries. Instead, he challenges ICRMP's ability to sell casualty insurance to a local government, such as Franklin County. He speculates that if Franklin County was not insured and, did not have the benefit of a defense provided by an insurance company, it would not have been motivated to defend the ***Westover v. Cundick*** lawsuit. ***See*** Appellants Brief, p. 29, 35-36.

Westover's arguments highlight his lack of standing. The fact ICRMP hired an attorney to represent its insured did not prejudice any claim Westover may have possessed against Franklin County or, the Franklin County Assessor. ICRMP's involvement in that litigation was limited to hiring an attorney to represent its insured. R, p. 73. In this case, during the summary judgment hearing, the district court asked counsel why he was suing ICRMP if the injury Westover had sought in the original lawsuit was caused by the Franklin County Assessor. Tr, p. 50, L. 1-16. Counsel responded:

> THE COURT: How does that statute affect ICRMP? Even if I give credence to all of your arguments that you just made, what does it – it directs Franklin County to do things. It doesn't direct ICRMP to do anything.
>
> MR. ATKIN: It doesn't direct Franklin County. It's a direction from the court.
>
> THE COURT: A direction to the political entity from where the costs will be paid.
>
> MR. ATKIN: It is simply a statute that says that those costs have to be paid out of the local budget.
>
> THE COURT: So what is your gripe with ICRMP?
>
> MR. ATKIN: Well the ICRMP is that –

> THE COURT: They did what they were asked to do and what they believed they contracted to do.
>
> MR. ATKIN: And what they did and the contract that they entered into resulted in the assessor not taking a reasonable approach.

Tr, p. 50, L. 19- p. 51, L. 10

The fact ICRMP fulfilled its contractual obligations to its insured by providing a defense in the ***Westover v. Cundick*** litigation did not cause Mr. Westover to suffer an injury in fact. Much like the insurance company's decision to deny coverage in ***Brooksby v. GEICO***, ICRMP's decision to mount what turned out to be a successful defense did not create a justiciable controversy between ICRMP and Mr. Westover. For that reason, the district court's ruling granting ICRMP's motion for summary judgment should be affirmed.

B. Interpretation of I.C. § 12-117.

In the complaint and in his opening brief, Westover argues the language in I.C. § 12-117(3) should be interpreted to prohibit state or local governments from purchasing casualty insurance which could provide coverage for discretionary fee awards assessed pursuant to the statute. ***See*** R, p. 7-9; Appellants Brief, p. 26-30. He relies upon language in I.C. § 12-117(3) which states "[e]xpenses awarded against a state agency or political subdivision pursuant to this section shall be paid from funds in the regular operating budget of the state agency or political subdivision."

The district court rejected the plaintiff's statutory interpretation concluding § 12-117 was not intended to restrict local governments from purchasing casualty insurance. The court ruled the statute is intended to expose plaintiffs and defendants to attorneys' fees when they engage in frivolous litigation. Tr, p. 53, L. 11-17. The court further ruled Franklin County was never exposed to attorneys' fees in the ***Cundick v. Franklin County*** case as its defense was not frivolous. Tr, p. 53,

L. 17-22. These findings caused the court to conclude § 12-117 had no application to the present litigation as Mr. Westover's arguments were inconsistent with accepted rules of statutory construction. ***See*** Tr, p. 53, L. 23- p. 54, L. 5, ***see also*** R, p. 240, n. 7.

1. Idaho Code § 12-117 Did Not Apply to the Claims Alleged in the *Westover v. Cundick* Lawsuit.

The ***Westover v. Cundick*** lawsuit alleged slander of title and intentional interference with economic advantages. ***See*** R, p. 161-164. Because the slander of title and, the interference with prospective economic advantage claims described allegedly tortious misconduct on the part of the Franklin County Assessor and/or Franklin County, ICRMP determined a defense was owed. ***See*** R, p. 73, ¶ 3.

The fact the liability complaint alleged tortious actions is dispositive of the question of whether I.C. § 12-117 had any application in the ***Westover v. Cundick*** litigation. The tort claims alleged against the Franklin County Assessor and Franklin County were subject to the Idaho Tort Claims Act ("ITCA"). In ***Athay v. Stacey***, 146 Idaho 407, 196 P.3d 325 (2008), this Court ruled the award of attorneys' fees in cases subject to the ITCA was governed exclusively by I.C. § 6-918A. The interplay between I.C. § 12-117 and § 6-918A was again addressed in ***Block v. City of Lewiston***, 156 Idaho 484, 328 P.3d 464 (2014) where the court held "Idaho Code § 6-918A is the exclusive means to award attorneys' fees in cases governed by the ITCA". ***See*** 156 Idaho at 490.

In this case, consistent with the holdings in ***Athay v. Stacey***, and ***Block v. City of Lewiston***, the exclusive basis for awarding attorneys' fees in the ***Cundick v. Franklin County*** case was I.C. § 6-918A, not I.C. § 12-117. Accordingly, the district court correctly ruled that § 12-117 could not have exposed Franklin County to attorneys' fees and, for that reason alone, could not be interpreted

to prohibit Franklin County from relying upon the defense and indemnity provisions of the casualty policy it had purchased from ICRMP.

The district court's ruling is consistent with the ITCA and, § 6-923 which authorizes governmental entities to purchase "necessary liability insurance for themselves and their employees." In light of this language, the argument that I.C. § 12-117 could be interpreted to prohibit or discourage local governments from purchasing casualty insurance would conflict with the plain language of the ITCA and, cannot be accepted. It must be noted the statutory text of § 12-117 does not mention the word insurance or, state that local governments cannot utilize monies from the general fund to purchase casualty insurance in order to protect its employees and, preserve the government's scarce financial resources. ***See*** § B.3, *infra.*

Finally, the language of I.C. § 12-117(3) which Westover relies upon states "expenses awarded ... pursuant to this section shall be paid from funds in the regular operating budget ..." (emphasis added). Because attorneys' fees could not have been awarded under § 12-117, the argument the same statute could then prevent ICRMP from selling the insurance policy that entitled Franklin County to a defense is without merit. Accordingly, the district court's decision granting ICRMP's motion for summary judgment should be affirmed.

2. Franklin County's Defense in the *Westover v. Cundick* Litigation Was Not Frivolous and, For That Reason, Did Not Implicate or Violate I.C. § 12-117.

The second flaw in Westover's argument that I.C. § 12-117 had any application in the ***Westover v. Cundick*** case is the fact that Franklin County's decision to defend rather than negotiate a settlement was not frivolous. Contrary to Mr. Westover's arguments, § 12-117 does not purport to govern a tortfeasor's conduct prior to the time a lawsuit is filed. The plain language of the statute addresses the conduct of litigants during a lawsuit by authorizing the district court to award

attorneys' fees when the legal theories or factual arguments advanced by either the plaintiff or the defendant are found to be frivolous. ***See Employer's Research Management Co. v. Dept. of Insurance***, 143 Idaho 179, 141 P.3d 1048 (2006); ***Ada County v. City of Garden City***, 155 Idaho 914, 318 P.3d 904 (2006).

It is undisputed that Franklin County aggressively defended the ***Westover v. Cundick*** lawsuit. Contrary to the appellant's arguments, the fact the case was not settled at mediation reflects the County's belief it was not liable and, that Westover's demands were excessive in light of the available legal and factual defenses. As recognized by the district court, the fact Franklin County refused to settle and was later granted summary judgment establishes its defense was not frivolous. ***See*** Tr, p. 53, L. 11-22. The fact the summary judgment was affirmed by this Court in ***Westover v. Cundick***, 161 Idaho 933, 393 P.3d 593 (2017) establishes, as a matter of law, that Franklin County's litigation decisions were not frivolous. Because neither Franklin County or the Franklin County Assessor were ever at risk for attorneys' fees under I.C. § 12-117, the statute did not regulate or limit Franklin County's ability to purchase casualty insurance from an insurance company such as ICRMP. Accordingly, the district court's decision granting ICRMP's motion for summary judgment should be affirmed.

3. Westover's Argument that I.C. § 12-117 Prohibits the Sale of Casualty Insurance to Local Governments Violates Accepted Rules of Statutory Construction

The central theme in Westover's appeal is the suggestion that I.C. § 12-117(3) prohibited ICRMP from selling casualty insurance to a local government where that policy could possibly provide indemnity coverage for attorneys' fees awarded pursuant to the statute. This argument requires the court to accept the proposition the first sentence of § 12-117(3) and its reference to fees

being paid from the "regular operating budget" should be interpreted to restrict insurance coverage and, prohibit an insurer from providing a full and aggressive defense to its insured.

The object in interpreting a statute is to "derive the intent of the legislative body that adopted the act." ***Canty v. Idaho State Tax Commission***, 138 Idaho 178, 182, 59 P.3d 983, 987 (2002), quoting ***Payette River Property Owners Ass'n v. Board of Commissioners of Valley County***, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). As this court has previously held, "[b]ecause 'the best guide to legislative intent is the words of the statute itself,' the interpretation of a statute must begin with the literal words of the statute." ***State v. Yzaguirre***, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007); ***see also In Re Permit No. 36-7200***, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992).

Where the statutory language is unambiguous, this Court has stated that it does not construe the statute but simply follows the law as written. ***State v. Yzaguirre***, 144 Idaho at 475. In other words, if the statutory language is unambiguous, "the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction." ***State v. Burnight***, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). A statute is ambiguous when the meaning is so doubtful or obscure that "reasonable minds might be uncertain or disagree as to its meaning." ***Canty***, 138 Idaho at 182; ***see also Hickman v. Lunden***, 78 Idaho 191, 195, 300 P.2d 818, 819 (1956) "[H]owever, ambiguity is not established merely because different possible interpretations are presented to a court. If this were the case, then all statutes that are the subject of litigation could be considered ambiguous .... [A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it." ***Canty***, 138 Idaho at 182.

Lacking in the statutory text of I.C. § 12-117 and, particularly, § 12-117(3), is any mention of insurance. In ***Wright v. Ada County,*** 160 Idaho 491, 376 P.3d 58 (2016), this Court refused to

interpret the language in the state whistleblower statute (I.C. § 6-2104) to require investigations that were not included in the statutory text reasoning that such an expansive interpretation:

> [W]ould essentially constitute revising the statute to add the "waste and violations of a law, rule or regulation" language that was omitted from that subsection, albeit possibly inadvertently. This Court has recognized that it does not have the authority to do so, as the legislative power is vested in the senate and house of representatives, Idaho Const. article III, § 1, not in this Court.

See 160 Idaho at 498.

Westover asks this Court to interpret a statute that, by its plain language, was intended to provide a trial court the discretion to sanction parties who engage in frivolous litigation, to prohibit the sale of casualty insurance which could provide indemnity coverage for discretionary fee awards. As indicated above, the statute does not mention the word insurance or, purport to prevent a local government from purchasing insurance which would provide legal representation and possible indemnity coverage to itself and/or its employees. Appellant's argument requires the Court to insert language into § 12-117 the Legislature either inadvertently or intentionally omitted. Consistent with the holding in ***Wright v. Ada County***, Westover's suggested interpretation should not be accepted.

Additionally, Westover's interpretation cannot be reconciled with I. C. §§ 6-923 – 925 which specifically authorizes political subdivisions to purchase "the necessary liability insurance for themselves and their employees." ***See*** I.C. § 6-923. If one accepts Westover's suggested interpretation of I.C. § 12-117, the statute is dealing with the same subject matter as §§ 6-923 – 925. For that reason, the statutes are *in pari materia*, with one another.

The rule of *in pari materia* is a "canon of statutory construction" used to effectuate legislative intent. ***City of Sandpoint v. Sandpoint Independent Highway District***, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003). The rule requires courts to construe statutes relating to the same subject matter

together. ***Id.*** For that reason, when construing I.C. § 12-117 and §§ 6-923 – 925, the Court must give every word, clause and sentence effect, if possible. ***See In Re Permit No. 36-7200***, 121 Idaho at 822. Additionally, implied repeals are disfavored. ***See Callies v. O'Neal***, 147 Idaho 841, 848, 216 P.3d 130, 136 (2009).

Westover's interpretation of § 12-117 cannot be reconciled with the unambiguous language in I.C. §§ 6-923 – 925 which clearly authorizes local governments to purchase casualty insurance. Accepting the argument that ICRMP was prevented from selling insurance to Franklin County would require this Court to repeal or modify the plain language in §§ 6-923 – 925. Such an interpretation would be inconsistent with established rules of statutory construction and, should not be accepted.

The more logical and appropriate interpretation is to recognize the language in the I.C. § 12-117(3) creates a mechanism where local governments, such as Franklin County, are able to pay uninsured attorney fee awards. Through the statute, the Legislature recognized that when a court awards attorneys' fees against a governmental entity, it is likely the existing operating budget will not include a line item for the payment of discretionary attorney fee awards. The statute allows the entity to treat the award as a claim governed by the provisions of Title 6, Chapter 9, which can then be paid through a special levy. [1] Rather than restricting the government's ability to protect its financial resources by purchasing insurance, the statute was intended to provide a mechanism for paying unbudgeted claims, if they arise.

For the reasons outlined above, the plaintiff's interpretation of I.C. § 12-117 is inconsistent with accepted rules of statutory construction and, should not be accepted. The district court ruling granting ICRMP's motion for summary judgment should be affirmed.

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[1] In the event no funds are available and the political subdivision has failed to purchase casualty insurance or create a comprehensive liability plan, I.C. § 6-928 authorizes the government to levy and collect a property tax to pay a claim.

C. The District Court Did Not Abuse Its Discretion by Ruling Upon the ICRMP Motion for Summary Judgment Prior to Allowing the Plaintiff to Conduct Further Discovery.

Westover argues he was denied due process when the district court denied his request to conduct discovery prior to considering the ICRMP motion for summary judgment. This argument is not supported by the record and, is inconsistent with I.R.C.P. 56(d).

After Westover served his first set of interrogatories, requests for production and requests for admissions, ICRMP responded by answering the requests for admission and, seeking a protective order. ***See*** R, p. 31; p. 189-192; Tr p. 9:15-11:22. The motion for protective order was filed July 21, 2016. R, p. 33. Westover never responded. R, p. 2. Thirty days later, on August 22, 2016, ICRMP filed its motion for summary judgment. R, p. 2 and p. 52. Westover did not file affidavits opposing the ICRMP motion and, for that reason, did not create an issue of fact. R, p. 3. Instead, Westover filed a memorandum opposing the motion for summary judgment and, asking the court to grant a motion to compel. R, p. 186 – 200. Westover did not file an actual motion to compel. R, p. 2; Tr, p. 8:11-14.

At the September 29, 2016 hearing, the district court acknowledged the ICRMP motion for protective order and the Westover response brief that appeared to seek a motion to compel. Tr, p. 5, L. 3-23. The court directed counsel to cure the defect in the record by filing a motion to compel at the conclusion of the hearing. Tr, p. 8, L. 11-14.

The court then asked counsel if he was seeking additional time to conduct discovery. Tr, p. 4:15-17; 7:23-8:7. It treated the motion to compel as a request for a continuance under I.R.C.P. 56(d). Although Westover had not submitted an affidavit as required by the rule, Counsel was asked to describe specific items, materials, or documents he felt would be responsive to his discovery requests that he believed could then be used to oppose the ICRMP summary judgment motion. Tr, p.

7, L. 16-20. Counsel recited general discovery standards arguing the ICRMP objections and responses were inadequate. Tr, p. 8:15 – p. 11:14. This caused the court to question how the information Westover was seeking would be relevant to the legal issues raised in the ICRMP motion surrounding his client's lack of standing and, how the relevant statutes should be interpreted. Tr, p. 11, L. 15-22; p. 12, L. 5-19; p. 13, L. 19 – p. 14, L. 4. The court then stated it would take the motion for protective order as well as the motion to compel under advisement. However, the court refused to delay considering the motion for summary judgment by stating:

> To the extent that there has been a request under Rule 56(d) to delay this hearing on the summary judgment, I don't feel that the requirements of 56(d) have been met. There has been no affidavit or declaration filed by the plaintiff in this matter, nor has a showing been made under the case law that has interpreted that statute that there's been an affirmative showing by the plaintiff what it would need that would be discoverable in order to oppose or put into place into the record on the summary judgment issues. Therefore, the court feels that there has been no proper showing either substantively or procedurally under 56(d) for the court not to hear the summary judgment motion that has been filed and pursued by ICRMP in this matter.

See Tr, p. 20, L. 12-25.

A district court's decision to grant or deny a continuance under I.R.C.P. 56(d) is reviewed for an abuse of discretion. ***See Boise Mode, LLC v. Donahoe Pace & Partners, Ltd.***, 154 Idaho 99, 294 P.3d 1111 (2013). This Court has explained that when seeking a continuance under Rule 56(d) or its predecessor, I.R.C.P. 56(f), the moving party:

> Must 'do so *in good faith*' by affirmatively demonstrating why he cannot respond to a movant's affidavits ... and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.

See 154 Idaho at 104, *citing* ***Jenkins v. Boise Cascade Corp.***, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005).

In ***Jenkins v. Boise Cascade Corp.***, *supra,* the plaintiff requested additional time to respond to a motion for summary judgment informing the court that written discovery and depositions were pending which he believed would produce additional documents and testimony to support the plaintiff's theories and, that he required the opportunity to review the defendant's responses and testimony in order to thoroughly respond to the defendant's motion. ***See*** 141 Idaho at 238. This Court ruled the district court did not abuse its discretion by denying a continuance because counsel's affidavit did not specify what discovery was needed to respond to the outstanding motion and, did not set forth how the evidence plaintiff expected to gather through further discovery would create disputed issues of fact which would defeat the defendant's summary judgment motion. ***Id.*** at 239.

In this case, the district court correctly denied the plaintiff's motion. Arguably, the court could have summarily refused to consider Westover's request for a continuance as he had never filed a formal motion under Rule 56(d) and, had made no attempt to provide a factual record required by the rule. ***See*** Tr, 4:15 – 5:19. Exercising its discretion, the district court allowed counsel the opportunity to provide that information at the September 29, 2016 hearing. Tr, 11:15 – 17:20. Counsel failed to describe what evidence he believed additional discovery would develop and, most important, how that evidence would create an issue of material fact that would defeat the ICRMP motion.

The "control of discovery is an area within the discretion of the trial court." ***Vaught v. Dairyland Ins. Co.***, 131 Idaho 357, 360, 956 P.2d 674, 677 (1998). Accordingly, a trial court's decision to grant or deny a motion to compel will be reversed only when there has been a clear abuse of discretion. ***Doe v. Shoshone Bannock Tribes***, 159 Idaho 741, 745, 367 P.3d 136, 140 (2016). Idaho Rule of Civil Procedure 26(c) allows a trial court to fashion orders which may prohibit

discovery or, allow discovery under specified terms and conditions. In this case, ICRMP asked the trial court to delay discovery until it considered the purely legal issues surrounding Mr. Westover's standing and, whether I.C. § 12-117 could be interpreted to prevent an insurance company from selling casualty insurance to a local government such as Franklin County. Tr, p. 18, L. 8 – p. 19, L. 11. The district court correctly viewed the decision to continue the summary judgment hearing as an issue of discretion, acted within the boundaries of its discretion and, in a manner which was consistent with applicable legal standards. ***See Kirk v. Ford Motor Co.***, 141 Idaho 697, 701, 116 P.3d 27, 31 (2005). For that reason, the trial court's decision to hear the merits of the ICRMP motion for summary judgment prior to allowing the plaintiff to engage in irrelevant discovery should be affirmed.

IV.
BECAUSE WESTOVER'S APPEAL IS FRIVILOUS, ICRMP IS ENTITLED TO ITS ATTORNEYS' FEES

Idaho Code § 12-121 and Idaho Appellate Rule 41(a) allows ICRMP to seek attorneys' fees associated with its defense of this appeal. Attorneys' fees are awarded to the prevailing party where the appeal "was brought, pursued, or defended frivolously, unreasonably or without foundation" ***See American Semiconductor, Inc. v. Sage Silicon Solutions, LLC***, 162 Idaho 119, ___, 395 P.3d 338, 346 (2017), *citing* ***McGrew v. McGrew***, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003); ***Benz v. D.L. Evans Bank***, 152 Idaho 215, 231-32, 268 P.3d 1167, 1183-84 (2012). In this case, ICRMP is entitled to its attorneys' fees as the arguments advanced by Westover on appeal were without foundation and, for that reason, were pursued frivolously.

Idaho Code § 12-117 cannot be interpreted to prevent a private insurance company from selling casualty insurance to a local government which could, under certain circumstances, provide coverage for attorneys' fees assessed against its insured. As outlined above, the Idaho Tort Claims

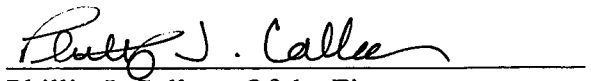
Act, at I.C. § 6-923, unambiguously authorizes governmental entities to purchase casualty insurance. The statute does not attempt to limit the specific coverages the government can purchase. Additionally, because I.C. § 6-618A was the exclusive basis for awarding attorneys' fees against Franklin County in the ***Westover v. Cundick*** litigation, I.C. § 12-117 was never applicable to that dispute. For these reasons, Mr. Westover lacked standing to sue ICRMP surrounding any decisions it may have made concerning its contractual obligations to its insureds. This Court, in ***Brooksby v. GEICO Ins. Co.***, 153 Idaho 546, 286 P.3d 182 (2012) rejected the argument that the declaratory judgment statute, I.C. § 10-1202, could be utilized to create standing in a case such as the one pursued by Westover against ICRMP. ***See*** 153 Idaho at 548. In his appellate briefing, Westover fails to provide any argument which would distinguish this Court's holdings in ***Brooksby*** which have not already been addressed and rejected. Accordingly, this Court should find that Westover's appeal is frivolously and, for that reason, award ICRMP its reasonable attorneys' fees and costs incurred in the defense of this appeal.

V.
CONCLUSION

For the reasons outlined above, the district court's ruling granting ICRMP's motion for summary judgment should be affirmed. Additionally, ICRMP should be awarded its costs and attorneys' fees on appeal.

RESPECTFULLY SUBMITTED this 18 day of July, 2017.

ANDERSON, JULIAN & HULL LLP

By 
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Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of July, 2017, I served a true and correct copy of the foregoing RESPONDENTS' BRIEF by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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