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Doble v. Interstate Amusements, Inc. Respondent's Brief Dckt. 42744

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IN THE SUPREME COURT OF THE STATE OF IDAHO

H. PETER DOBLE II, M.D., an)
individual residing in the state of Idaho,)
)
Plaintiff-Appellant,)
v.)
)
INTERSTATE AMUSEMENTS, INC.,)
an Idaho corporation,)
)
Defendant-Respondent,)
and)
)
DOES 1–50, inclusive,)
)
Defendants.)
)

Supreme Court Docket No. 42744-2014
Twin Falls County District Court Case No.
CV-2014-1419

RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho,
in and for the County of Twin Falls

Honorable Randy J. Stoker, District Judge, Presiding

ATTORNEY FOR APPELLANT
Angelo L. Rosa (ISB #7546)
MARSH ROSA LLP
P.O. Box 1605
Boise, Idaho 83701

ATTORNEY FOR RESPONDENT
David W. Gadd (ISB #7605)
WORST, FITZGERALD & STOVER, PLLC
P.O. Box 1428
Twin Falls, Idaho 83303-1428

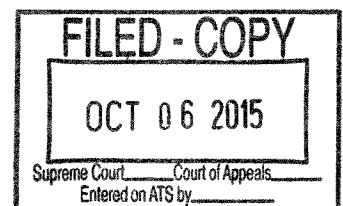


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I. STATEMENT OF CASE

A. NATURE OF THE CASE

This is an appeal of the trial court’s decision to award attorney’s fees against the plaintiff under Idaho Code § 12-121 based upon its finding that the plaintiff brought and pursued his action against the defendant frivolously and unreasonably. In his Complaint for Damages, the plaintiff alleged that the defendant’s issuance and use of paper vouchers—each of which bore a date upon which the voucher expired—violated the Idaho Consumer Protection Act. However, as the trial court noted, the plaintiff failed to provide any facts or legal argument that were based upon the provisions of the Act, electing instead to rely almost exclusively upon the statutes of other jurisdictions.

B. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

At the times relevant to this action, the defendant, Interstate Amusements, Inc. (“Interstate”), was the owner and operator of a number of movie theaters in the Magic Valley region. R Vol. I, p. 47. As part of its business, Interstate marketed and sold vouchers, or gift certificates, denominated as “Cinema Cash.” *Id.* Issued in paper form only, Cinema Cash was printed in \$1.00 increments and could be used solely toward the price of admission to movies shown at and concessions sold in Interstate’s various theater locations. *Id.* Prominently displayed on the face of each Cinema Cash voucher is an expiration date, which provides the date by which the voucher must be redeemed. *Id.*

In approximately mid-December 2013, the plaintiff in this action, H. Peter Doble II, M.D. (“Doble”), attempted to redeem a Cinema Cash voucher that had expired nearly twelve months

prior. *Id.* at pp. 52, 102. When Doble attempted to redeem the expired voucher, the ticket booth employee informed Doble that Interstate would be unable to accept the voucher due to the fact that it had expired. *Id.* at p. 102. Despite Doble's efforts to persuade the employee to accept the expired voucher, the employee ultimately did not. *Id.* at p. 103.

Doble initiated this action by filing a Complaint for Damages on March 28, 2014, wherein he alleged three separate causes of action. R Vol. I, pp. 8–14. The first and second causes of action each allege violations of the Idaho Consumer Protection Act, Idaho Code § 48-601 *et seq.* (the “Act”) and seek both money damages and injunctive relief. *Id.* Doble's third cause of action seeks declaratory relief pursuant to Idaho Code § 10–1201 *et seq.* *Id.* The Complaint for Damages also states an intention to seek class certification, though such certification was never pursued. *Id.* at pp. 11, 180. Additionally, Doble included in his prayer for relief a claim of punitive damages, despite his neither requesting nor receiving leave from the trial court to seek such damages. *Id.* at pp. 15, 180.

On May 12, 2014, following the initiation of written discovery, Interstate filed a Motion for Summary Judgment. R Vol. I, p. 37. Doble responded by filing Plaintiff's Response to Defendant Interstate Amusement, Inc.'s Motion for Summary Judgment and Cross-motion for Summary Judgment on May 22, 2014. *Id.* at p. 89. In the section of his memorandum supporting his cross-motion, Doble argued that he was entitled to summary judgment on his three causes of action based not upon Idaho law, but rather upon various statutes enacted by the legislatures of eight other states, which specifically and expressly prohibit the expiration of gift certificates. *Id.* at pp. 94–96. Notwithstanding the substantial and material differences between those statutes and

the Act, Doble contended that the trial court should interpret the Act to proscribe the use of gift vouchers bearing expiration dates Idaho. *Id.*

The Act itself is referenced only four (4) times in Doble’s argument in support of his cross-motion:

- “First, not only is this the sort of nonsensical business practice that the Act was intended to prevent, the laws of other sister jurisdictions also address this issue.” R Vol. I, p. 94.
- “Accordingly, the laws of sister-jurisdictions provide this Court with an excellent frame of reference with which to render a ruling on the applicability of the Act to the facts of the present case.” *Id.* at p. 95
- “Second, the facts identified in Section II, supra, create a clear statement of undisputed facts to which this Court must apply the law, using both the existing Act and the other sources of legal authority available to this Court.” *Id.*
- “Converting currency into ‘cash’ that can only be used in one business and only for a dictated period of time is an unfair abbreviation of the use of that cash and is, within the context of the Act, an unlawful business practice.” *Id.* at p. 96.

Doble did not provide any explanation or analysis as to why the expiration of Cinema Cash was unlawful under the Act. *See id.* at pp. 89–97.

At the hearing on the parties’ respective motions for summary judgment, the trial court orally granted Interstate’s motion for summary judgment and denied Doble’s cross-motion.¹ Tr Vol. I, pp. 27–28. Shortly thereafter, the trial court entered a Judgment dismissing Doble’s

¹ It is unclear from the evidence in the record whether Doble purchased the voucher at issue or acquired it as a gift or promotional item. *See* Tr Vol. I, p. 24, L. 10–17. However, based upon the serial number on the voucher, Interstate was able to determine that the voucher was issued during the latter half of 2010. R Vol. I, p. 47–48. However, the trial court accepted an offer of proof from Doble’s counsel that Doble had, in fact, purchased the voucher and assumed that fact to be true for purposes of summary judgment. Tr Vol. I, p. 24, L. 9–17.

claims with prejudice. R Vol. I, p. 139. Doble has not appealed the trial court's decision to grant summary judgment in Interstate's favor or the entry of the Judgment.

Interstate subsequently filed a Memorandum of Attorney's Fees and Costs, whereby it sought an award of attorney's fees pursuant to, among other statutes, Idaho Code § 12-121. *Id.* at p. 141. Doble filed an objection to Interstate's Memorandum, arguing that an award of attorney's fees under Idaho Code § 12-121 would be improper and that the amount of fees sought by Interstate was unreasonable. *Id.* at pp. 149–50. At the hearing on Doble's objection, the parties stipulated to submit the issue to the trial court without oral argument, whereupon the trial court took the matter under advisement. Tr Vol. I, pp. 31–32, 34.

On October 14, 2014, the trial court issued its Memorandum Opinion Re Defendant's Claim for Costs and Attorney Fees, wherein the court awarded Interstate's attorney's fees under Idaho Code § 12-121 in the amount of \$7,972.50. R Vol. I, pp. 173–82. In reaching its decision, the trial court noted that

the entire premise of [Doble's] claim is based upon statutes of other states which have placed restrictions on gift certificates. Idaho has no such legislative enactments. Nor does Idaho have any case law from which a credible argument could be made to permit this cause of action. This case was premised upon the Idaho Consumer Protection Act. That Act lists a considerable number of examples of statutory violations, however, none of them cover the conduct alleged in this case. Thus, Plaintiff was required to prove that the Cinema Cash program would "outrage or offend the public conscience." I.C. § 48-603C(2)(d). Yet no evidence or credible argument supported that claim.

Id. at p. 180. Recognizing that misrepresentation is the heart of consumer protection violations, the trial court also found that Doble "failed to offer **any** evidence of misrepresentation of the

program to the public. To the contrary, the evidence suggests that the Cinema Cash vouchers clearly advised voucher holders of the expiration date.” *Id.* at p. 179 (emphasis in original).

In accordance with its memorandum opinion, the trial court entered an Amended Judgment on October 17, 2014, which provided, in pertinent part, that “[t]he defendant, Interstate Amusements, Inc., shall recover from the plaintiff costs in the amount of \$320.44 and attorney’s fees in the amount of \$7,972.50, for a total of \$8,292.94.” *Id.* at p. 184.

Three days later, Doble’s counsel sent an email to Interstate’s counsel, wherein he stated, “My client wishes to pay the judgment off in 12 equal monthly installments. . . . If your client is willing to proceed forward with this payment plan, I will draw up a very brief confirming letter that can be countersigned. This offer will remain open until 5:00 p.m. Mountain Time this coming Friday, 24 October 2014.” *Id.* at p. 199. Prior to Interstate’s counsel’s receipt of this email, Interstate had not solicited or made any offers to accept payments on the Amended Judgment, nor had Interstate taken any action to enforce the Amended Judgment. *Id.* at pp. 238–39, ¶ 2. Interstate’s counsel responded the following day, stating that Interstate was willing to accept payments over six months, rather than twelve months, and, provided payments were made on time, would forego any collection efforts. *Id.* at p. 200. On November 5, 2014, Doble’s counsel advised that his client “might be able to do 9 months, but no less.” *Id.* at p. 201. Interstate accepted this schedule, with the first payment due November 10, 2014, and prepared a letter confirming the same pursuant to Doble’s counsel’s request. *Id.* at pp. 202–06.

In accordance with the parties’ agreement, Interstate did not take any action to execute on the Amended Judgment. *Id.* at p. 240. Unfortunately, however, Doble did not make the first

payment as scheduled, and on November 13, 2014, Interstate’s counsel sent Doble’s counsel an email asking when payment may be expected. R Vol. I, pp. 197, 208. After receiving no response, Interstate’s counsel followed up again with Doble’s counsel on November 19, 2014, stating that if payment was not received by November 24, 2014, along with written assurances that all future payments would be timely made, then Interstate would proceed with collection efforts. *Id.* at p. 208. Doble’s counsel responded later that day, “ask[ing] for continued patience” and representing that he had “forwarded [Interstate’s counsel’s] message to [Doble] with instructions to make the first payment.” *Id.* at p. 209. However, instead of making the promised payment by November 24, 2014, Doble filed a Notice of Appeal.

II. ADDITIONAL ISSUES ON APPEAL

- A. Whether Doble waived his right to appeal by voluntarily initiating negotiations concerning, and ultimately agreeing to, a payment schedule relative to the judgment amount.
- B. Whether Interstate is entitled to attorney fees on appeal under Idaho Code § 12-121.

III. STANDARD OF REVIEW

The Idaho Supreme Court reviews a trial court’s award of attorney fees under Idaho Code § 12-121 under an abuse-of-discretion standard. *Rae v. Bunce*, 145 Idaho 798, 805, 186 P.3d 654, 661 (2008).

IV. ARGUMENT

- A. DOBLE WAIVED HIS RIGHT TO APPEAL BY VOLUNTARILY INITIATING NEGOTIATIONS, AND ULTIMATELY AGREEING TO, A PAYMENT SCHEDULE RELATIVE TO THE AMOUNT OF THE AMENDED JUDGMENT.

Preliminary to the issue of whether the trial court abused its discretion is the issue of whether Doble has waived his right to appeal this matter. Interstate respectfully submits that he has by virtue of his voluntary agreement to pay the amount of the Amended Judgment over a period of nine (9) months. “It is a matter of law that a party who does ‘anything which savors of acquiescence in a judgment cuts off the right of appellate review.’” *People ex rel. Neilson v. Wilkins*, 101 Idaho 394, 396, 614 P.2d 417, 419 (1980) (quoting *Iseman v. Kansas Gas & Elec. Co.*, 567 P.2d 856, 862 (Kan. 1977)). “The doctrine of acquiescence is based on the inconsistency between accepting [the] burden from a judgment while appealing the judgment itself.” *Almack v. Steeley*, 230 P.3d 452, 456 (Kans. 2010).

“Acquiescence occurs when a party voluntarily complies with all or part of a judgment.” *Id.* For example, an appellant was deemed to have acquiesced to a judgment, thereby waiving its right to appeal, when it voluntarily paid the attorney’s fees awarded against it. *Wilkins*, 101 Idaho at 396, 614 P.2d at 419. A judgment creditor who accepted payment of an arbitration award was precluded from appealing the propriety of the award. *Hemphill v. Ford Motor Co.*, 206 P.3d 1, 4 (Kans. Ct. App. 2009). A judgment debtor was held to have acquiesced to the judgment entered against it by simply allowing or permitting the judgment to be satisfied by execution. *Vap v. Diamond Oil Producers, Inc.*, 671 P.2d 1126, 1129 (Kans. Ct. App. 1983); *but see Citifinancial Mortgage Co. v. Clark*, 177 P.3d 986 (Kans. 2008) (noting that the mere failure to stay execution of the judgment by filing a supersedeas bond does not constitute acquiescence).

Following the entry of the Amended Judgment in this case, Doble voluntarily assumed the burden of paying the attorney’s fees and costs awarded against him when he, through

counsel, offered and ultimately agreed to make payments toward the Amended Judgment in exchange for Interstate's agreement to forbear executing on the same. On October 20, 2014, Doble's attorney initiated negotiations in this regard by sending an email to Interstate's counsel, stating, "My client wishes to pay the judgment off in 12 equal monthly installments." R Vol. I, p. 242. Prior to Interstate's counsel's receipt of this email, Interstate had not solicited or made any offers to accept payments on the Amended Judgment, nor had Interstate taken any action to enforce the Amended Judgment. *Id.* at pp. 238–39. After some negotiation, the parties ultimately agreed that Doble would pay the amount of the Amended Judgment over a period of nine months. *Id.* at pp. 243–45. By so doing, Doble voluntarily accepted and assumed the burden of paying the amount of attorney's fees and costs awarded to Interstate by the Amended Judgment.

In accordance with the parties' agreement, Interstate did not take any action to execute on the Amended Judgment. R Vol. I, p. 240. When Doble failed to make timely payment in accordance with the payment schedule, his counsel asked "for some continued patience," stating that he had "forwarded [the] message to [Doble] with instructions to make the first payment." *Id.* at p. 252. By this statement, Doble again acknowledges his agreement to make monthly payments toward the Amended Judgment.

By agreeing to pay the amount of the Amended Judgment over time, Doble voluntarily acquiesced to the Amended Judgment and, in so doing, waived his right to appeal the trial court's award of attorney's fees. This Court should so hold and affirm the trial court's award on that basis. To hold otherwise would deprive Interstate of any remedy for Doble's breach of contract and may encourage future litigants to similarly breach such forbearance agreements.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARDING INTERSTATE ITS ATTORNEY'S FEES UNDER IDAHO CODE § 12-121.

As set forth, above, this Court reviews a decision to award attorney's fees pursuant to Idaho Code § 12-121 under an abuse-of-discretion standard. *Rae v. Bunce*, 145 Idaho 798, 805, 186 P.3d 654, 661 (2008). Absent an abuse of that discretion, the appellate court cannot overturn the trial court's award of attorney's fees. *Camp v. Jiminez*, 107 Idaho 878, 884, 693 P.2d 1080, 1086 (Ct. App. 1984).

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

Roark v. Bentley, 139 Idaho 793, 798, 86 P.3d 507, 512 (2004).

It appears from Appellant's Opening Brief that Doble does not dispute that the trial court correctly perceived the issue of whether to award fees under section 12-121 as one of discretion. Indeed, "This Court has said repeatedly that an award of attorney fees under I.C. § 12-121 is within the broad and sound discretion of the trial court." *Id.* at 797-98, 86 P.3d at 511-12. The trial court expressly acknowledged this standard in its Memorandum Opinion. R Vol. I, p. 170.

Doble also appears to recognize that the trial court was authorized to determine, and did determine, whether Doble brought or pursued claims without having any basis for such claims in law or in fact and, if so, whether to award attorney's fees to Interstate and the amount of such award if it found. Accordingly, there is no contention that the trial court acted within the boundaries of its discretion and consistently with applicable legal standards. Thus, the subject of

this Court's review is whether the trial court reached its decision to award fees against Doble by an exercise of reason.

In this regard, Doble seeks to focus the Court's attention on a single statement made by the trial court at the hearing on his objection to Interstate's memorandum of costs, namely, "It's memorable because this is a case over \$1." Tr Vol. I, p. 32, L. 13–14. The context of that statement indicates that the trial court was simply notifying counsel that it was familiar with and did not require a full recitation of the facts of this case. However, Doble uses this statement, in isolation, to springboard to the unfounded conclusion that the trial court "minimized the intent behind Dr. Doble's lawsuit, saying in essence that because Interstate was depriving its customer of such a small amount of money, \$1.00 at a time, to complain about such a practice is frivolous by nature." Appellant's Opening Br., p. 7.

In truth, the trial court acknowledged the opposite, noting that "[m]any cases in this country have achieved desirable social goals even though the amount of money at issue may have been considered *de minimis*." R Vol. I, p. 179. The trial court further stated that although this case involved "a nominal money claim . . . , [t]hat factor, in and of itself, is not a reason to award fees under I.C. § 12-121." *Id.* (emphasis in original). The trial court continued, however, stating that "if the litigation is not supported by both law and fact, then a case can be both frivolous and unreasonable. This is such a case." *Id.* at p. 180.

As pled in his Complaint for Damages, Doble's claims are based upon alleged violations of the Idaho Consumer Protection Act, Idaho Code § 48-601 *et seq.* (the "Act"). However, throughout the proceedings before the trial court, Doble made only cursory and conclusory

references to the Act. For example, in his written argument in support of his cross-motion for summary judgment, Doble did not provide any analysis of, quote, or even cite the text of the Act itself. In fact, the Act is referenced only four (4) times in his argument in support of his cross-motion:

- “First, not only is this the sort of nonsensical business practice that the Act was intended to prevent, the laws of other sister jurisdictions also address this issue.” R Vol. I, p. 94.
- “Accordingly, the laws of sister-jurisdictions provide this Court with an excellent frame of reference with which to render a ruling on the applicability of the Act to the facts of the present case.” *Id.* at p. 95
- “Second, the facts identified in Section II, *supra*, create a clear statement of undisputed facts to which this Court must apply the law, using both the existing Act and the other sources of legal authority available to this Court.” *Id.*
- “Converting currency into ‘cash’ that can only be used in one business and only for a dictated period of time is an unfair abbreviation of the use of that cash and is, within the context of the Act, an unlawful business practice.” *Id.* at p. 96.

At no point did Doble provide any explanation, analysis, or argument as to how the facts that he had alleged in his Complaint gave rise to a valid claim against Interstate under the provisions of the Act.

Instead, Doble relied upon “the existence of laws of sister jurisdictions” as the basis for his claim. Doble argued that, in accordance with the precedent authorizing Idaho courts to “consider the decisions of courts in other jurisdictions where statutes containing similar language have been construed,” R. Vol. I, p. 95 (quoting *Matter of Estate of McGurrin*, 113 Idaho 341,

347, 743 P.2d 994, 1000 (Ct. App. 1987)), the trial court should interpret the Act to prohibit the expiration of gift certificates, similar to those prohibitions enacted by legislatures in other states.

While it is indisputable that Idaho courts have considered the decisions of courts in other jurisdictions in the past, such consideration has been limited to “decisions of courts”—not legislatively enacted statutes—and only those decisions “where statutes containing similar language [to the Idaho statute at issue] have been construed.” *McGurrin*, 113 Idaho at 347, 743 P.2d at 1000; *see also State v. Martinez-Gonzalez*, 152 Idaho 775, 784, 275 P.3d 1, 10 (Ct. App. 2012). The trial court appropriately found Doble’s argument unpersuasive, not because it “failed to grasp the legitimacy of Dr. Doble’s claims,” as Doble argues, but because “a consumer protection violation is predicated on a legislative enactment and it is therefore not proper to use foreign legislation to expand the meaning of this law.” R Vol. I, p. 178.

The trial court further noted that

the entire premise of [Doble’s] claim is based upon statutes of other states which have placed restrictions on gift certificates. Idaho has no such legislative enactments. Nor does Idaho have any case law from which a credible argument could be made to permit this cause of action. This case was premised upon the Idaho Consumer Protection Act. That Act lists a considerable number of examples of statutory violations, however, none of them cover the conduct alleged in this case. Thus, Plaintiff was required to prove that the Cinema Cash program would “outrage or offend the public conscience.” I.C. § 48-603C(2)(d). **Yet no evidence or credible argument supported that claim.**

Id. at p. 180 (emphasis added).

Noting that misrepresentation is the heart of consumer protection violations, the trial court also found that Doble “failed to offer **any** evidence of misrepresentation of the program to the public. To the contrary, the evidence suggests that the Cinema Cash vouchers clearly advised

voucher holders of the expiration date.” *Id.* at p. 179 (emphasis in original). Doble failed to provide any evidence that would support a claim under the Act, electing instead to rely upon the laws of other jurisdictions, despite the clear and basic “rule, universally reiterated,” that “no law, statute, or otherwise has any force or effect of its own beyond the limits of the sovereignty from which its authority is derived.” *Ore-Ida Potato Products, Inc. v. United Pac. Ins. Co.*, 87 Idaho 185, 194, 392 P.2d 191, 196 (1964) (citing 15 C.J.S. Conflict of Laws § 3, p. 833 (1939)).

The trial court also found that Doble’s tactics of pleading an intention of maintaining a class action, but failing to pursue certification, and pleading a claim of punitive damages, despite the clear statutory requirement that a party first obtain leave of the court, “could be construed as constituting harassment, and they are also certainly within the definition of frivolous conduct contemplated by the statute.” R Vol. I, p. 180. Based upon the entirety of the record before it, the trial court found that it was “left with the abiding belief that this action was brought frivolously, unreasonably, and without foundation” and that attorney’s fees under Idaho Code § 12-121 were appropriate.

As outlined, above, and as demonstrated in its written opinion, the trial court did not reach its decision to award attorney’s fees arbitrarily or whimsically. Rather, it considered carefully the claims pled by Doble, the evidence submitted by the parties, and the legal arguments and authority cited by counsel. The trial court’s memorandum reflects a thoughtful and reasoned approach to the issue of whether to award attorney’s fees, and it cannot be said that the trial court abused its discretion by awarding attorney’s fees to Interstate. Accordingly, this Court should affirm the trial court’s decision in this regard.

C. INTERSTATE IS ENTITLED TO AN AWARD OF ITS ATTORNEY'S FEES ON APPEAL PURSUANT TO IDAHO CODE § 12-121.

Pursuant to Idaho Appellate Rules 35(b)(5) and 41, Interstate respectfully requests an award of its reasonable attorney's fees on appeal under Idaho Code § 12-121. This Court has held that attorney's fees under section 12-121 are appropriate when a party "ask[s] [the Court] to second-guess the district court's exercise of discretion without presenting any reasoned argument from which [the Court] could conclude that the district court abused its discretion" *Lower Payette Ditch Co. v. Harvey*, 152 Idaho 291, 297, 271 P.3d 689, 695 (2012).

As demonstrated by Interstate's argument, above, and by a reading of Appellant's Opening Brief, Doble has failed to present any rational argument to support its contention that the trial court abused its discretion by awarding Interstate its attorney's fees. Indeed, much of Appellant's Opening Brief is spent arguing, in effect, that the trial court erred in granting summary judgment by failing to give deference to the statutes of other states, an issue that is not before this Court on appeal. Doble failed to present any evidence or authority to support his claims and arguments below, and he has failed to do so again on appeal. Therefore, Interstate respectfully submits that it is entitled to an award of its attorney's fees pursuant to Idaho Code § 12-121.


V. CONCLUSION

For the reasons set forth, above, Interstate respectfully requests that this Court affirm the trial court's award of attorney's fees on the grounds that Doble has waived his right to appeal the issue and that the trial court did not abuse its discretion in determining an award of attorney's

fees was appropriate under Idaho Code § 12-121. Additionally, Interstate requests that this Court award Interstate its attorney's fees incurred in connection with this appeal.

DATED this 6th day of October, 2015.

WORST, FITZGERALD & STOVER, PLLC


By:  _____
David W. Gadd
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 2015, I caused a true and correct copy of the foregoing RESPONDENT'S BRIEF to be served by the method indicated below, and addressed to the following:

Angelo L. Rosa
MARSH ROSA LLP
P.O. Box 1605
Boise, ID 83701
Attorney for Plaintiff/Appellant

- U.S. Mail
- Overnight Mail
- Facsimile: (801) 415-1773
- Electronic Mail: *arosa@marshrosa.com*



David W. Gadd