

Uldaho Law

Digital Commons @ Uldaho Law

Idaho Supreme Court Records & Briefs, All

Idaho Supreme Court Records & Briefs

5-10-2018

Greenwald v. Western Surety Company Respondent's Brief Dckt. 45404

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/
idaho_supreme_court_record_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

Recommended Citation

"Greenwald v. Western Surety Company Respondent's Brief Dckt. 45404" (2018). *Idaho Supreme Court Records & Briefs, All*. 7223.

https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/7223

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

Supreme Court Case Number : 4540417
Bonneville County District Court Number: CV-2015-5972

**BRENT H. GREENWALD dba GREENWALD NEUROSURGICAL, PC an
Idaho Corporation,**

PLAINTIFF-RESPONDENT-CROSS APPELLANT

vs.

WESTERN SURETY COMPANY,

DEFENDANT-APPELLANT-CROSS RESPONDENT

Appeal from the District Court of the Seventh Judicial District of the State of Idaho,
in and for Bonneville County
Hon. Joel E. Tingey, District Judge

PLAINTIFF-RESPONDENT-CROSS APPELLANT'S BRIEF

Larren K. Covert
Swafford Law, PC
655 S. Woodruff Ave.
Idaho Falls, ID 83401
Attorneys for the Defendant

Joshua S. Evett
Elam & Burke, PA
PO Box 1539
Boise, ID 83701
Attorneys for the Plaintiff

TABLE OF CONTENTS

Table of Cases and Authorities2

Issues Presented on Appeal3

Attorney Fees on Appeal4

Statement of the Facts5

Argument11

 A. The District Court’s Granting Summary Judgment for the Plaintiff11

 1. “There was Ample Evidence that Udy Took \$140,095.00 from Allagash
 Realty”12

 2. “There was Ample Evidence that Udy Did Not Use Greenwald Neurosurgical
 Money to Pay Dr. Greenwald’s Personal Credit Cards”14

 3. “The District Court’s Conclusions Were Not Supported By The Record10

 B. Mr. Udy’s Status of Employee Under the Bond12

 CROSS APPEAL

 A. The District Court Erred in Granting Summary Judgment on Defendant’s Motion and
 Reconsideration21

 B. The District Court Erred in Not Awarding the Full Attorney Fees and Costs to
 Plaintiff 24

Certificate of Service26

Cases

A&J Const. Co. v. Wood
141 Idaho 682, 116 P.3d 12 (2005)..... 18

Armstrong v. Farmers Insurance Co. of Idaho
147 Idaho 67, 205 P.3d 1203 (2009)..... 21

Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.
141 Idaho 716, 117 P.3d 130 25

Farm Bureau Mutual Insurance Co. of Idaho v. Schrock
150 Idaho 817, 252 P.3d 98 (2010)11

Gearhart v. Mutual of Enumclaw Ins. Co.
160 Idaho 666, 378 P.3d 454 (2016)22, 23

Independence Lead Mines Co. v. Hecla Mining Co.
143 Idaho 22, 137 P.3d 409 (2006)21

McGrew v. McGrew
139 Idaho 551, 82 P.3d 833 (2003)..... 4

Medical Recovery Services, LLC v. Neumeier
____ Idaho _____, 415 P.3d 372 (2018)..... 11

Robertson Supply Inc. v. Nicholls
131 Idaho 99, 952 P.2d 914 (Ct.App. 1998)..... 18

Sanders v. Kuna Joint School District
125 Idaho 872, 876 P.2d 154 (Ct.App. 1994)..... 11

Shawver v. Huckleberry Estates, LLC
140 Idaho 354, 93 P.3d 685 (2004)..... 21

Trilogy Network Sys. Inc. v. Johnson
144 Idaho 844, 172 P.3d 1119 (2007)..... 24

Statutes

Idaho Code Ann. § 12-121 4

Idaho Code Ann. §41-1839..... 4

Idaho Code Ann. §30-21-803 22

Rules

I.A.R. 40.....4

I.A.R. 414

I.R.C.P. 5611

ISSUES PRESENTED ON APPEAL BY WESTERN SURETY COMPANY

1. Did the District Court properly grant summary judgment on the grounds that there was no disputed issue of fact that Udy had stolen in excess of \$100,000.00 from Greenwald Neurosurgical?
2. Did District Court properly find that Udy fit the bond's definition of an employee of the insured, Greenwald Neurosurgical?

ISSUES PRESENTED ON APPEAL BY BRENT GREENWALD dba

GREENWALD NEUROSURGICAL, PC

1. The District Court Erred in Granting Summary Judgment on Defendant's Motion and Reconsideration.
2. The District Court Erred in Not Awarding the Full Amount of Attorney Fees and Costs to Plaintiff.
3. Attorney Fees on appeal.

ATTORNEY FEES AND COSTS ON APPEAL

Plaintiff seeks an award of attorney fees and costs on appeal pursuant to Idaho Appellate Rules 40 and 41, and Idaho Code §§ 12-121, 41-1839. I.A.R. 40 grants a prevailing party costs on appeal and defines what costs are allowed. I.A.R. 41 provides for the procedural avenue for requesting an award of attorney fees, but is not the basis for the award. An award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). I.C. §41-1839 allows for an award of attorney fees against insurers in an amount the court shall adjudge reasonable in such action.

Plaintiff seeks an award pursuant to I.C. §12-121 as the appeal in this matter presented no viable issues on appeal other than to ask for a reversal. The appeal brief by Defendant contains several misstatements of the record in an attempt to confuse the record and the status of the case below. Simply asking the Court to revisit the District Court's determinations is not a viable appeal.

I.C. §41-1839 states that attorney fees are awardable when a recovery has been made and the amount the person was justly due was not paid by the insurer timely. In this matter, the insurer did not pay the amounts due timely and Plaintiff has recovered against the Defendant. Attorney fees on appeal should be awarded.

STATEMENT OF THE FACTS

Brent H. Greenwald is a neurosurgeon practicing in Idaho Falls, Idaho. His business was incorporated on January 8, 2001 under the name of Greenwald Neurosurgical P.C. R.pp.78-81.

Plaintiff applied for a Surety Bond, “dishonesty bond” through Alpine Insurance Agency of Idaho Falls, an agent for the Defendant. R.p.83. Plaintiff applied for the bond for the purpose of covering any dishonest actions by his employees. R.p.91. The application was not through Greenwald Neurosurgical, PA, as the policy was intended to be purchased in his individual name for all of his professional and business activities. R.p.92. The “Dishonesty Bond Application” was not filled out by Brent Greenwald, not signed by him and he did not see the document until October 28, 2016, nearly 14 years after obtaining the bond. R.p.92. The application was completed by Alpine Insurance Agency.

The Surety Bond was issued to **Brent H. Greenwald dba Greenwald Neurosurgical** on November 12, 2002. R.pp.85-86. The title of the dishonesty bond is set forth in enlarged bold letters as follows:

**WESTERN SURETY COMPANY
DISHONESTY BOND
(FOR ANY TYPE OF BUSINESS)**

The language of the bond describes unrestricted coverage in paragraph 1, states:

Agrees to indemnify Brent H. Greenwald dba Greenwald Neurosurgical (the insured) against **any loss of money or other property which the Insured shall sustain or for which the Insured shall incur liability to any Customer or Subscriber of the Insured though fraudulent or dishonest act or acts committed by an Employee or Employees** of the insured acting alone or in Collusion with others, the amount of indemnify on each of such employees being \$100,000.00. (emphasis added) R.p.85.

Fraudulent or dishonest act is defined in the Surety Bond, Section 5, as: “an act which is punishable under the criminal code in the jurisdiction within which act occurred for which

employee is tried and convicted by a court of proper jurisdiction.” R.p.85.

An employee is defined by the Surety Bond Section 4, as: “one or more of the natural persons (except directors or trustees of the Insured, if a corporation, who are not also officers or employees thereof in some other capacity) while in the regular service of the Insured in the ordinary course of the Insured’s business during the term on this bond, and whom the Insured compensates by salary, or wages and has the right to govern and direct in the performance of such service, and who are engaged in such service within any of the States of the United States of America, or within the District of Columbia, Puerto Rico, the Virgin Islands, or elsewhere for a limited period, but not to mean brokers, factors, commission merchants, consignees, contractors, or other agents or representatives of the same general character.” R.p.85.

The premiums for the surety bond were paid annually from October, 2002, to the date of loss described hereafter. The premiums were approximately \$1,000.00 to \$1,200.00 per year during the twelve (12) year period. Each year a new bond was issued by the Defendant without modification as to the Insured.

Matthew Udy was initially employed by Plaintiff on December 8, 2009. R.p.93. Matthew Udy was an employee of Greenwald Neurosurgical during the existence of the Surety Bonds. *Id.* Mr. Udy was hired to handle the finances for Plaintiff, and in this capacity had access to personal private financial information pertaining to Plaintiff. R.p.93. Mr. Udy kept financial records for all income and expenses, credit card accounts, and was responsible to pay creditors of Dr. Greenwald, for the surgical center, and his investments including Allagash Realty. R.pp.93-94

In September of 2013, office staff learned of a possible unauthorized credit card charge by Mr. Udy, after being contacted by a local retailer. R.p.94. Mr. Udy ultimately admitted unauthorized use of credit cards and accounts in the amount of \$273,000.00. R.pp.94, 491-494.

Mr. Udy was immediately discharged on September 11, 2013. R.p.94. A financial analysis was conducted immediately by Troy Clayton, CPA. *Id.*

The financial audit disclosed extensive dishonesty by Mr. Udy, including the discovery that Mr. Udy had stolen the personal private, personal information of Dr. Greenwald, and had actually applied for a credit card in Dr. Greenwald's name. R.pp.94-95. Mr. Udy used this fraudulent credit card for numerous charges, and paid for them through a scheme of transfers between several accounts, with the funds originating from accounts for Greenwald Neurosurgical. *Id.*

Dr. Greenwald sought reimbursement through the various credit card companies, as well as Western Surety, Defendant in this action. A proof of loss was submitted on January 22, 2014, at the completion of the financial analysis. R.p.90. Based on the analysis, the claimed amount of loss was \$347,395.00. *Id.*

Constant communication was given to Western Surety by Dr. Greenwald, his CPA Troy Clayton, as well as counsel for Plaintiff. Defendant, pursuant to the policy, insisted that recovery was impossible until Mr. Udy was duly convicted in a court of law. R.p.467.

Mr. Udy was ultimately convicted in the United States District Court of Idaho, and sentenced to a period of incarceration. Mr. Udy's conviction was based upon his dishonest acts and theft from Greenwald Neurosurgical and there was never presented any issue about the sufficiency of the criminal conviction by the Defendant. R.p.166. Immediately after conviction, Defendant was duly notified and provided verification. *Id.*

Soon after conviction, further demand was made in reliance upon earlier communications that the conviction was a condition precedent. *Id.* Defendant thereafter retained legal counsel, where the existing disputes arose resulting in the filing of the Complaint in this matter.

Defendant was provided an itemization of damages with all source documentation and explanation including bank and credit card records. R.pp. 463-676. This documentation included both summaries of amounts taken as well as the full bank and credit card records. *Id.*

After extensive communications, Mr. Udy's criminal case and attempts to have Defendant cover the losses, Plaintiff filed the Complaint on November 5, 2105. R.pp.12-19.

Defendant answered the Complaint on December 8, 2015. R. pp. 20-26.

On October 21, 2016, Defendant filed Defendant's Motion For Summary Judgment. R.pp.27-66. This Summary Judgment sought to dismiss Plaintiff's Complaint on the basis that no proof of damages was provided; Mr. Udy was acting outside his ordinary course of business; and that Plaintiff failed to disclose information in the application for the bond. *Id.*

On November 14, 2016, Plaintiff objected to the summary judgment claiming that the bond covered not just an entity (Greenwald Neurosurgical) but Mr. Greenwald for all business he owned, a full detailing of the damages was provided to Defendant, Mr. Udy was clearly an employee acting in his ordinary work, and that there were no issues with the application. R.pp.67-110.

The District Court heard argument on the Motion for Summary Judgment and entered an Order on November 30, 2016 stating that summary judgment was denied based on an ambiguity in the bond as to who was the insured individual or entity. R.pp.133-134.

Defendant then filed a Motion to Reconsider on December 15, 2016. R.pp.135-144. This Reconsideration claimed that because Greenwald Neurosurgical, PC was the entity that employed Mr. Udy, that was the only possible entity that could recover under the bond and that the name on the bond could only be interpreted as being Greenwald Neurosurgical, PC.

Plaintiff objected to the Reconsideration on December 27, 2016. R.pp.207-215. The Objection noted that the clear language of the bond did not limit the business entities as the bond stated it covered **“ALL TYPES OF BUSINESSES.”** This language was not only on the bond itself but also in the initial welcome letter from the Defendant to the Plaintiff. Additionally the objection noted that Mr. Udy was an employee and that the annual renewals of the bond for 12 years never limited the businesses that were covered.

After hearing argument, the District Court entered its Memorandum Decision and Order relating to the Motion for Reconsideration on January 13, 2017. R. pp. 283-288. In this Order, the District Court ordered that only Greenwald Neurosurgical, PC was the only covered entity under the bond as it was the only entity to employ Mr. Udy, adopting the arguments from Defendant. Additionally, the District Court ordered that “the only remaining issue in this matter is whether the P.C. sustained damages as a result of Udy’s conduct, and if so, the amount of those damages. R.p.287. It must be noted that Defendant has not appealed this decision nor referenced such in any argument or reference to the record.

Based on the Memorandum Decision and Order issued by the District Court, Plaintiff filed a Motion for Summary Judgment on April 25, 2017. R.pp.290-321. This Summary Judgment alleged that there was no triable fact as to the amount of damages sustained by the Plaintiff being less than \$100,000.00, the policy limit; that the loss was the result of Mr. Udy’s actions; and that the Defendant was required to honor the Surety Bond. *Id.*

Defendant objected to the Summary Judgment on May 17, 2017. R. pp. 322-410. The opposition to the Summary Judgment by Defendant was based on its affirmative defenses, alleged contradictions in the evidence and Mr. Udy not being covered as an employee.

The District Court heard argument and analyzed the Summary Judgment, and it issued a Memorandum Decision and Order on June 30, 2017. R.pp. 695-707. The District Court found that there were no triable issues remaining based on the affidavits and documents submitted for Summary Judgment by the Plaintiff and the Defendant failing to supply any responsive affidavits or evidence to create an issue of fact.

Plaintiff requested an award of attorney fees and costs on August 4, 2017, R. pp. 710-722, to which Defendant objected.

The District Court entered its Order on attorney fees on August 28, 2017, granting the Plaintiff's request for fees and costs in part and denying the request in part.

The Defendant filed a Notice of Appeal on August 25, 2017, R.pp.746-752, and an Amended Notice of Appeal on September 15, 2017. R.pp.767-773. Defendant sought an appeal of the Summary Judgment decision and the award of attorney fees to Plaintiff. (The Defendant offered no arguments as to the award of attorney fees in its initial brief and has thereby waived that issue on appeal.)

Plaintiff filed a Notice of Cross-Appeal on September 13, 2017 seeking a review of the Order entered November 30, 2016, the Memorandum Decision and Order on the Reconsideration and the Order on attorney fees. R.pp.763-766.

ARGUMENT

A. The District Court's Granting Summary Judgment for the Plaintiff.

The District Court properly granted Plaintiff's Motion for Summary Judgment.

On appeal, the Supreme Court reviews a grant of summary judgment under the same standard used by the court. *Medical Recovery Services, LLC v. Neumeier*, ___ Idaho ____, 415 P.3d 372 (Idaho 2018). On summary judgment, the moving party has the burden of demonstrating that there is no genuine issue of material fact. Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Farm Bureau Mutual Insurance Co. of Idaho v. Schrock*, 150 Idaho 817, 252 P.3d 98, 2010.

Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders v. Kuna Joint School District*, 125 Idaho 872, 874, 876 P.2d 154, 156. (Ct. App. 1994)

The initial summary judgment granted by the District Court was in the January 13, 2017, Memorandum Decision and Order on the Motion to Reconsider. In that Order the District Court granted the Reconsideration on the Defendant's Motion for Summary Judgment in part. The District Court held that the only entity entitled to recovery was Greenwald Neurosurgical, PC and further stated and ruled, "Accordingly, the remaining issue in this matter is whether the P.C. [Greenwald Neurosurgical] sustained damages as a result of Udy's conduct, and if so, the amount of those damages." R.p.287. Defendant failed to address this determination on appeal

and, therefore, the only remaining issue for determination in this matter and now on appeal is the damages sustained by Greenwald Neurosurgical.

Plaintiff's Motion for Summary Judgment included additional affidavits of Troy Clayton and Janeene Ditmore. These affidavits provided further information tracing the funds taken by Mr. Udy, showing that Greenwald Neurosurgical, PC was damaged. The Summary Judgment set forth all of the damages of the PC and that the PC was the source of all the funds taken by Mr. Udy. These included \$140,095.00 transferred funds to Allagash, \$21,301.52 of property tax money stolen, and \$130,091.20 fraudulently transferred to cover credit card expenses. R.pp.309-321.

The District Court noted that the Defendant provided no affidavits or evidence to rebut the accounting of damages to the PC. R.p.705. Defendant only sought to state that "previous disclosures contradict the PC's new affidavits." *Id.* The District Court found that this was not what the evidence showed and that Defendant did not meet its burden of proof on summary judgment. *Id.*

On appeal, Defendant claims 1. Udy took \$140,095.00 from Allagash only; 2. The personal credit cards were not paid by Udy with PC money and the conclusions of the District Court were not supported by the record. Each of these contentions are incorrect and do not reflect the findings of the District Court.

1. "There Was Ample Evidence that Udy Took \$140,095.00 from Allagash Realty"

The Defendant first seeks to show that the District Court erred in granting summary judgment because the evidence showed that Mr. Udy took money from Allagash Realty. The facts of the case clearly show that Mr. Udy did in fact take \$140,095.00 from Allagash Realty.

This was shown by the fraudulent Allagash account and the funds that Mr. Udy deposited into that account from the rental incomes. This was and remains a non-issue. The issue before the District Court and on appeal is not the Allagash rents stolen by Mr. Udy, but rather the funds stolen from Greenwald Neurosurgical.

Defendant attempts to confuse issues and misquote statements in the record to make questions of fact where none exists. The Defendant claims that the withdraws made by Clayton at the request of Mr. Udy were never deposited to the “fraudulent” Allagash bank account. *Appellant’s Brief p. 20*. This statement is correct, the amounts withdrawn from the PC accounts were not put into the “fraudulent” Allagash account but into the actual, valid Allagash account to replace the stolen rents that should have gone to the account. R.p.311. The Affidavit of Janeene Ditmore states, “I would check the valid bank accounts and observe the inadequate balance to pay the expenses requested as being due. As a result, I withdrew amount requested by Mr. Udy from Greenwald Neurosurgical accounts, and deposited the requested amount into the valid checking accounts to enable expenses to be paid.” *Id.* (This actual language from the record is very different from the claimed quote from the Defendant’s brief: “Ms. Ditmore withdrew funds from Greenwald Neurosurgical and deposited the funds into the fraudulent Allagash account ...”)

The financial scheme utilized by Mr. Udy was to intercept the money that should have been going into the actual, valid Allagash account and placing it into the fraudulent Allagash account, and then having Greenwald Neurosurgical put money into the actual Allagash account to cover necessary expenses. In this way, the PC was damaged in the amount of \$140,095.00 that it had to unnecessarily transfer to the actual, valid Allagash account to cover the amounts taken by Mr. Udy.

Defendant additionally attempts to create an issue with Plaintiff's response to Interrogatory No. 2, which stated that Mr. Udy did not withdraw funds from the PC's accounts. *Appellant's Brief p. 21*. There is no issue with this statement as the Affidavit of Janeene Ditmore clearly states that she was the one to transfer the funds out of the PC accounts at the request of Mr. Udy. R.p.311. There is no inconsistency despite the attempts of the Defendant to create one.

Finally, Defendant attempts to create a factual issue by taking a statement by counsel from a hearing out of context and comparing it to the affidavits filed in support of summary judgment. As is clearly shown by the entire statement, there were, and are several areas where Mr. Udy took funds. There is no contradiction presented by the statements of counsel and the affidavits in this matter. The affidavits clearly show the amounts stolen and how they were stolen. Most importantly, Defendant failed to provide any affidavits or evidence to the contrary.

2. "There was Ample Evidence that Udy Did Not Use Greenwald Neurosurgical Money to Pay Dr. Greenwald's Personal Credit Cards.

Defendant next seeks to create an issue of fact where none exists by claiming the credit card charges were not paid with PC funds. Defendant's arguments for this allegation are only that Mr. Greenwald was seeking relief from the credit card companies for unauthorized charges and that funds were transferred from more than one PC account. *Appellant's Brief pp.23-24*.

Plaintiff's efforts seeking to have the fraudulent charges reversed and the affidavit testimony to that effect do not indicate or prove that the funds to pay these fraudulent charges were not taken from the PC funds. The Defendant's arguments that had the amounts been paid off there would have been no charges to dispute is illogical. The charges were made and were able to be disputed even after they were paid off.

The funds transferred to the personal accounts to pay for the credit card charges were from the PC accounts as shown by the affidavits. Arguing about the disputes with the credit card companies is completely insufficient to avoid summary judgment.

Likewise, the claimed issue of a difference in the affidavit of Mr. Greenwald citing accounts and the affidavits of Mr. Ditmore and Mr. Clayton are incorrect. The affidavit of Janeene Ditmore provided a Transactions by Account document to show the source of the funds utilized by Mr. Udy. R.p.316. This document shows the Greenwald Neurosurgical business accounts used as the source of the funds. This document shows the “Main” checking account at Zion’s Bank and the “Misc” checking account at Zion’s bank. Clearly there were “accounts” utilized for the source of the funds by Udy but these accounts were the Greenwald Neurosurgical account.

3. “The District Court’s Conclusions Were Not Supported By The Record

Defendant’s final argument against the summary judgment is a general statement that the District Court failed to recognize disputed facts based on the fraudulent statements by the Defendant concerning the prior affidavits and documents.

Defendant’s example of the alleged disputed facts the District Court failed to recognize comes from the money transferred to the Allagash account. In the briefing, Defendant notes that Ms. Ditmore would transfer funds from the PC accounts to the other accounts as directed by Udy. Defendant then claims, “Clayton said that Udy would “present to Ms. Ditmore statements from the fraudulent Allagash account, to verified [sic] lack of funds to pay Allagash expenses.” R., p. 310 ¶ 13.)” *Appellant’s Brief* p. 26. (Initially it must be noted that this quoted language is not to be found at the given record citation.) Defendant then argues that these two statements

from the affidavits shows, “There was no evidence that Udy “looted” accounts and replenished them by misleading Ditmore to transfer Greenwald Neurosurgical funds.” *Id.* The “looted” and “replenish” language was utilized by the District Court to characterize the affidavit evidence concerning the movement of the funds in this matter.

The actual facts and statements by Janeene Ditmore in her affidavit clearly provide the factual support for the District Court’s findings on Summary Judgment. The affidavit states,

10. From 2008 to September 13, 2013, Mr. Udy would come to me on a regular basis to purportedly obtain money to pay Mr. Greenwald’s credit card accounts, as well as pay for expenses incurred by Allagash Realty, which held real property purchases made by Brent Greenwald.

11. After Mr. Udy admitted his dishonesty in September of 2013, an internal audit of the business and credit card accounts was conducted.

12. I learned from my examination of the audit and financial records that Mr. Udy utilized several methods, all of which accomplished theft from Greenwald Neurosurgical.

13. First, Allagash accounts:

a. Mr. Udy through his employment obtained access to internal business records to set up a fraudulent second and fraudulent Allagash Account which the office was unaware of.

b. Mr. Udy would approach me in the office and falsely state that there were expenses and bills to pay out of the “Allagash” checking account, and that the account had insufficient funds to cover the expenses.

c. I would check the valid Allagash account that I was aware of, and observe the inadequate balance to pay the expenses represented as being due. As a result, I withdrew amount requested by Mr. Udy, and deposited the requested amount into the valid Allagash checking account to enable the expenses to be paid.

d. Mr. Udy then appropriated the money deposited by Greenwald Neurosurgical and placed in the valid Allagash account for his personal use, without my knowledge. R.pp.310-311.

These statements clearly provide the factual basis for the conclusion by the District Court how Udy used the various accounts and that the funds from the PC were used to then cover the amounts needed. The affidavit confirms that Udy caused funds to be placed in the actual Allagash account and the personal accounts from the PC accounts to cover the funds taken by Udy and the expenses created by Udy.

Defendant's claim that there was no factual basis for the District Court's decision is without any accurate factual support. The facts the District Court relied upon were in the affidavits provided with the Motion for Summary Judgment, which affidavits were never countered by affidavits or evidence from the Defendant.

The Motion for Summary Judgment decision issued by the District Court was proper and was supported by uncontroverted evidence. The baseless allegations and misrepresentations by Defendant were and are insufficient to prevent summary judgment.

B. Mr. Udy' Status of Employee Under the Bond

Defendant's final issue on appeal claims that the District Court improperly determined that Mr. Udy was an employee of Greenwald Neurosurgical acting within the course of his employment. Defendant claims Mr. Udy was a "hybrid employee working for Greenwald Neurosurgical, Mr. Greenwald and Allagash Realty."

Defendant's position on appeal directly contradicts the position taken in Defendant's Motion for Reconsideration. In requesting reconsideration from the District Court, Defendant stated, "Mr. Udy does not meet the bond's definition of an employee for any other entity other than the neurosurgical practice, because only the neurosurgical practice paid him a salary or wages." R.p.138. Defendant then further states, "Just because Dr. Greenwald had Mr. Udy do

things for himself and Allagash Realty does not make Mr. Udy an employee of either under the bond.” *Id.* It is undisputed that Mr. Udy was an employee of Greenwald Neurosurgical. Even the Defendant acknowledged that it was the PC that paid Mr. Udy his wages. R.p.139.

The duties of Mr. Udy at the PC were also undisputed. Mr. Udy was employed as a financial manager whose duties included receipt of income, payment of accounts payable, payments to credit cards and payments for miscellaneous charges and services of various types. *Affidavit of Brent H. Greenwald, MD* R.p.53. The affidavit of Ms. Ditmore also noted that Mr. Udy’s responsibilities were to make payments to accounts and direct PC funds. R.p.310.

As Defendant previously argued that Mr. Udy was an employee only of Greenwald Neurosurgical, it cannot now reverse course and make claims that he was not an employee. Additionally, as Defendant previously claimed that Mr. Udy was not an employee of Mr. Greenwald nor Allagash it cannot now so claim.

Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first. *A & J Const. Co. v. Wood*, 141 Idaho 682, 684, 116 P.3d 12, 14 (2005). The policy behind judicial estoppel is to protect “the integrity of the judicial system, by protecting the orderly administration of justice and having regard for the dignity of the judicial proceeding.” *Id.* at 685, 116 P.3d at 15 (quoting *Robertson Supply Inc. v. Nicholls*, 131 Idaho 99, 101, 952 P.2d 914, 916 (Ct.App.1998)). Broadly accepted, it is intended to prevent parties from playing fast and loose with the legal system. *Id.*

Defendant's prior position on Mr. Udy prohibits it from now claiming the opposite. Defendant used its prior position to gain a summary judgment ruling and now seeks to gain a second advantage on appeal by taking the opposite position.

Defendant has also failed to appeal and seek review of the District Court's January 13, 2017 Memorandum Decision and Order, granting Defendant summary judgment requested in its Reconsideration motion. This Order found that Mr. Udy was employed by the PC, the PC was the only covered entity and that the only remaining issue was if and to what amount the PC was damaged. R.pp.287-287. Having failed to appeal this Order and finding in this appeal, Defendant has now waived any argument on appeal.

There exists no issue of fact to prevent the granting of summary judgment in this matter.

The finding of the District Court was that Mr. Udy was an employee of the PC and that as a financial manager, Mr. Udy's regular service of the insured's business in its normal course included the moving of money. R.p.702. The District Court correctly noted that what happened after the money was transferred out of the PC and to whom it was transferred does not matter. *Id.*

Defendant argues on appeal that Mr. Udy had no authority to transfer funds out of the PC and that transferring money out of the PC was not part of the ordinary course of work for a neurosurgical practice. Each of these assertions are without any basis in fact or law.

Mr. Udy had the authority to request the movement of money for the PC. The affidavit of Ms. Ditmore indicates that she was the one that had the ability to make the transfers, but the transfers were made at Mr. Udy's request. R.pp.310-311. While the affidavits make clear that Mr. Udy did not have the actual ability to move the funds, there is nothing to dispute his ability to request the transfer and have Ms. Ditmore perform the transfer.

By claiming that moving money out of the PC is not part of the ordinary course work for the neurosurgical practice, Defendant attempts to restrict the definition of ordinary course work to an illogical and impractical level. Defendant would have the interpretation be so narrowly construed as to rule out any typical and normal office functions. If accepted, the definition would not include any secretarial work, client interaction, phone calls or other actions that Defendant deems to be other than direct neurosurgical medical actions. According to the Defendant, you cannot pay bills as an ordinary course of a business.

Defendant additionally asserts that the Defendant “did not agree to bond a “hybrid” employee. This argument is also without any basis. Both the application for the bond and the bond itself indicates that an employee may be a full or part-time employee. R.pp.18,35. As such, at best, and only after an unimaginable stretch of common sense to form this requirement, Mr. Udy was still a covered employee under a part-time theory. It has never been disputed that Mr. Udy was the financial manager of Greenwald Neurosurgical. His time sheets and pay stubs have confirmed this. It is also without an issue of fact that as Mr. Udy was the financial manager, and in accordance with his duties therein, transferred and had transferred money out of the accounts of Greenwald Neurosurgical. Where or to whom the money was transferred is immaterial. It is only material that Mr. Udy, as financial manager for Greenwald Neurosurgical, took money from the business for an unauthorized purpose. That is what is covered by the bond. The schemes used to accomplish this do not alter the base facts.

CONCLUSION

The summary judgment granted by the District Court was proper, based on substantial facts, and after giving all reasonable inferences to the Defendant. The Court is not required to

make unreasonable inferences or find disputed facts where Defendant provided no affidavits nor evidence for rebuttal at summary judgment.

Defendant's appeal should be dismissed and Plaintiff awarded attorney fees and costs as requested above.

CROSS APPEAL

A. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON DEFENDANT'S MOTION AND RECONSIDERATION

The District Court erred in finding on summary judgment and reconsideration that the Surety Bond only covered Greenwald Neurosurgical, PC. This is based on the clear and plain language of the Surety Bond.

“The interpretation of a contract begins with the language of the contract itself.” *Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 26, 137 P.3d 409, 413 (2006). If the language of the contract is unambiguous, then its meaning and legal effect must be determined from its words. *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004).

Insurance contracts are adhesion contracts, typically not subject to negotiation between the parties, any ambiguity that exists in the contract must be construed most strongly against the insurer. *Armstrong v. Farmers Insurance Co. of Idaho*, 147 Idaho 67, 205 P.3d 1203, 2009.

Idaho Courts have been sensitive to the situation of insurance buyers in light of their unequal bargaining power vis-à-vis insurance carriers. The general rule is that because insurance contracts are adhesion contracts, typically not subject to negotiation between the parties, any

ambiguity that exists in the contract must be construed most strongly against the insurer. Unless contrary intent is shown, common, non-technical words are given the meaning applied by laymen in daily usage, as opposed to the meaning derived from legal usage—in order to effectuate the intent of the parties. *Gearhart v. Mutual of Enumclaw Ins. Co.*, 160 Idaho 666, 378 P.3d 454, 2016.

The Surety Bond in this matter states the Insured as “Brent H. Greenwald dba Greenwald Neurosurgical.” R.p.18. I.C. §30-21-803 defines a dba or an assumed business name as:

A) Any name other than the true name of any filing entity or limited liability partnership, under which name the entity holds itself out for the transaction of business in the state of Idaho; or

(B) Any name under which any individual, any group of individuals or other persons, or any entity other than a filing entity or limited liability partnership, holds itself out for the transaction of business in the state of Idaho, if that name does not include in full the true names of all individuals and other persons who have a financial interest in the business which is or may be transacted; which name shall not include words or abbreviations which falsely state or imply governmental affiliation or the existence of a filing entity or limited liability partnership.

In general

In Idaho, an assumed business name, or “DBA” designation, is a name under which another entity does business; it is not the legal entity's true name.

A designation of a dba does not create a separate legal entity. It is merely another name for the true name of the individual. As applied to this matter, as there is no legal entity created or noted by a dba, the Insured under the Surety Bond is Brent H. Greenwald.

The analysis and decision of the District Court did not follow the proper legal analysis of applying the plain meaning of the words of the bond, nor did the District Court construe the wording of the bond most strongly against the insurer as required.

The legal standards applicable require this court to construe the language of the policy “most strongly against the insurer”, and to give the meaning applied by laymen in daily usage. The burden is on Western Surety to use clear and precise language if it desires to restrict the coverage of the policy. *Gearhart v. Mutual of Enumclaw*, supra.

The unambiguous and clear language of the bond states that the bond is “FOR ANY TYPE OF BUSINESS.” R.p.18. This language, when viewed from a layman, daily usage indicates that all businesses by the Insured are covered.

Brent Greenwald had several businesses he sought to have covered when he sought the Surety Bond. R.pp.91-92. The policy was specifically not sought under the neurosurgical business. *Id.* It was intended to have all business he conducted included. *Id.* This is the coverage Mr. Greenwald understood the Surety Bond to cover. *Id.*

The District Court held in its Order that the FOR ANY TYPE OF BUSINESS language, “likely relates to the form on which the bond is issued.” R.p.286. This is a factual finding by the District Court which does not construe the language of the policy most strongly against the insurer. In fact, this interpretation of the Surety Bond is without any factual basis as to any “form” used by the Defendant and the holding would not interpret the language, but delete it completely.

The granting of any summary judgment and/or reconsideration holding that “Brent H. Greenwald dba Greenwald Neurosurgical” means anything other than Brent H. Greenwald is contrary to existing law and without any legal basis. The holding of the District Court limiting damages to Greenwald Neurosurgical PC should be reversed.

**B. THE DISTRICT COURT ERRED IN NOT AWARDING THE FULL ATTORNEY
FEES AND COSTS TO PLAINTIFF**

The District Court erred and abused its discretion in failing to award all of the attorney fees requested in this matter.

A determination on prevailing parties is committed to the discretion of the trial court and we review the determination on an abuse of discretion standard. *Burns v. Baldwin*, 138 Idaho 480, 486–87, 65 P.3d 502, 508–09 (2003). When examining whether a trial court abused its discretion, this Court considers whether the trial court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason. *Trilogy Network Sys., Inc. v. Johnson*, 144 Idaho 844, 847, 172 P.3d 1119, 1122 (2007).

In this matter, the Plaintiff was completely successful and the Defendant completely unsuccessful. Plaintiff sought an award of \$100,000.00, the policy limit for the Surety Bond. Defendant sought to pay nothing. While the District Court is able to make a determination as to the prevailing party is, that determination in this matter is clear based on the results of the case.

The District Court, however, incorrectly engaged in an evaluation of individual claims and the outcome of various motions in this matter in making an award of attorney fees. This is an incorrect analysis and results in an abuse of discretion. “In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed “in the action.” That is, the prevailing party question is examined and

determined from an overall view, not a claim-by-claim analysis.” *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005).

In this matter, there are no counterclaims, only the Plaintiff’s claim. Therefore, as the Plaintiff was 100% successful on its claim, there is not apportionment of the requested attorney fees based on an internal motion by motion analysis of the case.

Additionally, the finding of the District Court that the “Plaintiff is entitled to an award of attorney fees in the amount of \$15,360” is without any factual foundation, reasoning or basis. This is an abuse of discretion. When the District Court notes not facts to support its finding, a court on appeal has no basis upon which to evaluate the discretion of the court.

As the Plaintiff was completely successful in its claim and the Defendant did not prevail on its claim, the full award of attorney fees should have been granted. The Court should find that the District Court abused its discretion by engaging in a motion by motion analysis and not an overall view, as required and award the Plaintiff \$38,170 in attorney fees.

CONCLUSION

The determination of the District Court that Greenwald Neurosurgical, PC was the only entity covered by the Surety Bond was incorrect and not based on case law and the clear language of the document. Additionally, the District Court’s award of attorney fees was based on an improper analysis of the case and not an overall view as required. This Court should reverse the determination of the covered entity and grant a full award of attorney fees below and a full award of attorney fees on appeal as addressed above.

DATED this 10th day of May, 2018.


LARREN K. COVERT, ESQ.
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day I served a copy of the foregoing document upon the designated parties affected thereby as follows:

Joshua S. Evett
Elam & Burke, P.A.
251 East Front Street, Suite 300
P. O. Box 1539
Boise, Idaho 83701

- U.S. MAIL
- FAX (208) 384-5844
- HAND DELIVERY
- COURTHOUSE BOX
- EXPRESS DELIVERY

DATED this 10th day of May, 2018.


LARREN K. COVERT, ESQ.
Attorney for Plaintiff