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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRENT H. GREENWALD dba,
GREENWALD NEUROSURGICAL, P.C.,
an Idaho Corporation,

Plaintiff/Respondent/Cross-Appellant,

vs.

WESTERN SURETY COMPANY,

Defendant/Appellant/Cross-Respondent.

Docket No. 45404

Bonneville County Case No. CV-2015-5972

APPELLANT'S REPLY BRIEF

In the District Court of the Seventh Judicial District of the State of Idaho,
In and for the County of Bonneville, Honorable Joel E. Tingey, District Judge, Presiding

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I. ARGUMENT

A. <u>Greenwald Neurosurgical Does Not Analyze the District Court's Decision Under the Correct Standard of Review.</u>

Greenwald Neurosurgical appears to analyze the district court's grant of summary judgment as if it sat as the trier of fact, an analysis perhaps dictated by the district court's summary judgment decision, which misapplied the summary judgment standard.

Hence, Greenwald Neurosurgical dismisses the numerous contradictory statements and evidence in the record by arguing that "[t]hese statements clearly provide the factual basis" for the district court's conclusions, (Respondent's Brief, p. 17), and concludes its brief by stating that "[t]he summary judgment granted by the District Court was proper, *based on substantial facts,* and after giving all reasonable inferences to the Defendant." (*Id.*, p. 20.)

Rule 56(c) does not provide that summary judgment is appropriate when there are "substantial facts" supporting the trial court's decision. That is not the summary judgment standard at the district court level, or on appeal.

This Court's review of a district court's ruling on a motion for summary judgment is the same as that required of the trial court when ruling on the motion. *City of Sandpoint v. Sandpoint Independent Highway District,* 139 Idaho 65, 72 P.3d 905, 907 (2003). On appeal, this Court exercises free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.,* 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct.App.1986). On a motion for summary judgment, the trial court must determine whether the pleadings, depositions, and

admissions, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); 56(c); *Bonz v. Sudweeks,* 119 Idaho 539, 541, 808 P.2d 876, 878 (1991).

Though it was presented with a summary judgment motion, the district court appeared to misapprehend the appropriate standard in stating "the focus is whether the record supports a claim that the P.C. [Greenwald Neurosurgical] suffered damages." (R., p. 704.) It is apparent from this statement – and the decision itself - that the district court essentially decided Greenwald's Neurosurgical's motion as the trier of fact.

While it is true that district courts, where they sit as the trier of fact, weigh conflicting evidence and testimony and judge the credibility of witnesses, *see, e.g., Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.,* 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990), they are not permitted to do so on summary judgment. Rather, it is the moving party's obligation to show the "*absence*" of a genuine issue of material fact, *see Smith v. Meridian Joint Sch. Dist. No. 2,* 128 Idaho 714, 719, 918 P.2d 583, 588 (1996), which the district court in the instant matter impliedly recognized was not the case by noting that its "focus" was simply to determine whether the "record" supported Greenwald Neurosurgical's claim that it "suffered damages." (R, p. 704.)

Furthermore, the district court essentially admitted that there were genuine issues of fact in the record by concluding that "Western is correct that the new affidavits[1] attempt to *recharacterize* the alleged loss as well as the particular entity suffering the loss," (R., p. 704),

[1] This reference is to the Ditmore and Clayton affidavits of April, 2017. (R., pp. 309 and 317.)

and that "it is the source of the lost funds that has gone through a *metamorphosis*." (*Id.*) (Emphasis added.)

The above language demonstrates the district court's recognition that there were facts in the record that had changed over time.

Rule 56(c) did not give the district court the authority to interpret and analyze the change in facts and decide which to believe. Accordingly, it erred in granting summary judgment.

B. The District Court and Greenwald Neurosurgical Erroneously Claim that Western Surety Submitted No Responsive Affidavits or Evidence on Summary Judgment and Ignored that there were Genuine Issues of Disputed Material Fact in Movant's Submissions.

Greenwald Neurosurgical incorrectly claims that Western Surety failed "to supply any responsive affidavits or evidence to create an issue of fact." (Response Brief, p. 10.)[2] This argument seems intended to defend the district court's conclusion that Western Surety did not produce any evidence to contradict the accountant, Troy Clayton's statement, that Greenwald Neurosurgical was the "source of all money received by Mr. Matt Udy." (R., p. 706.) While the district court recognized that Western Surety relied on "previous disclosures" to "contradict the P.C.'s new affidavits," the court was "not convinced there [was] a contradiction." (R., p. 705.) The court reasoned that the new affidavits, rather than "contradicting prior disclosures," simply

[2] The canard that Western Surety failed to submit evidence on summary judgment features prominently in Greenwald Neurosurgical's brief. E.g., "affidavits were never countered by affidavits or evidence from the Defendant," (Respondent's Brief, p. 17), the evidence on summary judgment was "uncontroverted," (*id.*.), and "Defendant provided no affidavits nor evidence for rebuttal at summary judgment." (*Id.*, p. 21.) These statements are false and ignore that Greenwald Neurosurgical's own submissions contained disputed material facts.

"explained" that Udy had replenished looted accounts out of Greenwald Neurosurgical's "looted accounts." (*Id.*)

Putting aside that Western Surety submitted many pages of evidence into the record on summary judgment, (R., pp. 344-410), which the district court seemed to recognize in conceding that Western Surety was correct that the facts in the case had been "recharacterized" and gone through a "metamorphosis," (R., p. 704), Greenwald Neurosurgical's submissions never shifted the burden of producing evidence to Western Surety. This is because its submissions contained the disputed issues of genuine material fact that precluded summary judgment.

"Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." *McCoy v. Lyons,* 120 Idaho 765, 771, 820 P.2d 360, 366 (1991). In that circumstance, "opposing evidentiary matter" is not required, as the moving submissions contain disputed issues of material fact precluding summary judgment. *Id.*

Assuming, for the sake of argument, that Western Surety did not submit affidavits or evidence in opposition to the summary judgment, summary judgment was inappropriate because Greenwald Neurosurgical's submissions established that there were genuine issues of disputed material fact.

C. Greenwald Neurosurgical Ignores the Numerous Genuine Issues of Disputed Material Fact that Preclude Summary Judgment, Many of Which Involve Credibility Issues.

Greenwald Neurosurgical's brief contains virtually no discussion of the genuine issues of material fact throughout the record, many of which are the product of contradictions between its representations to Western Surety during the pre-litigation claim process, its discovery responses, and the affidavits of Janene Ditmore and Troy Clayton that were submitted on summary judgment in April, 2017.

The district court's conclusion that there was no "contradiction" between the affidavits and other evidence is itself a recognition that there were inconsistencies that required analysis by a trier of fact (which the district court was not). The district court did not have the authority, on summary judgment, to decide that the conflicting facts before it were not contradictory.

"A determination of credibility should not be made on summary judgment if credibility can be tested in court before the trier of fact." *Lowry v. Ireland Bank,* 116 Idaho 708, 711, 779 P.2d 22, 25 (Ct.App. 1989); *Argyle v. Slemaker,* 107 Idaho 668, 691 P.2d 1283 (Ct.App. 1984).

This rule is reflected in IDJI 2d 1.00, which gives the jury (and the jury alone) the power to decide credibility issues:

> The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formulate for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

With these basic rules in mind, the record before the district court was filled with inconsistencies, contradictions, impossibilities, and witness credibility issues that only a jury could resolve.

On appeal, the issue is simply whether there was evidence in the record from which a jury *could* conclude in Western Surety's favor. *Lowry*, 116 Idaho at 711, 779 P.2d at 25. On this record there clearly was evidence from which a jury could conclude that Udy did not take money from Greenwald Neurosurgical.

1. As the District Court Recognized, Greenwald Neurosurgical's Story Changed After the District Court Ruled that the Bond Only Covered Greenwald Neurosurgical's Losses.

As the district court recognized, none of Greenwald Neurosurgical's claim submissions before litigation[3] showed what its losses were, if any. "However, there is nothing in the 214 pages [in the claims file submitted on summary judgment] that clearly identifies any transfers wrongfully made from the P.C. account to either Allagash, Dr. Greenwald's credit card accounts, or some other destination." (R., pp. 704-705.)

The court concluded that it was only the April, 2017 Ditmore and Clayton affidavits that shifted the burden to Western Surety to show that money was not "transferred from the P.C. account as purported," (R., p. 705), while at the same time acknowledging that Greenwald Neurosurgical had "re-characterize[d] the alleged loss as well as the particular entity suffering

[3] In support of its reply brief on summary, Greenwald Neurosurgical submitted an affidavit from its counsel, Larren Covert, which attached the entirety of Western Surety's underwriting and claims files. The latter contained all claims materials submitted to Western Surety by Greenwald Neurosurgical. (R., pp. 424-676.) The claim file is denoted by the word "CLAIM" before the bates number.

the loss" and that the "source" of the "lost funds" had undergone a "metamorphosis." (R., p. 704.)

Remarkably, the district court commented in its decision that "[t]here is no reason why losses *once accurately attributed to Allagash and/or Dr. Greenwald personally* cannot also be traced to losses originally sustained by the P.C." (R., p. 705 (emphasis added).) While a jury could perhaps reach this conclusion, there is an alternate explanation for the change in stories that is less charitable for Greenwald Neurosurgical.[4]

The alternative explanation, which the district court's decision prevent Western Surety from making to a jury, is that Matthew Udy either took no money from Greenwald Neurosurgical, or took far less than the $100,000.00 bond limit.

Greenwald Neurosurgical provided no evidence that Udy took money from it in the claim process, ignored repeated requests by Western Surety to provide that evidence before litigation, and took the position that it didn't have to provide that evidence because the bond covered Dr. Greenwald personally,[5] Allagash Realty, Greenwald Neurosurgical, and any business that operated out of Greenwald Neurosurgical's address.

In opposing Western Surety's summary judgment - which argued that the bond only covered Greenwald Neurosurgical, and that there was no evidence Udy took money from

[4] Furthermore, the court's statement is troubling because it seems to settle that the claim, as presented to Western Surety before litigation, was not covered, i.e., Western Surety appropriately denied the claim pre-litigation (because there was no apportionment of loss to Greenwald Neurosurgical) but got sued anyway.

[5] Greenwald Neurosurgical argues in its cross-appeal that Dr. Greenwald was covered for his personal losses under the bond. (Respondent's Brief, pp. 21-23.)

Greenwald Neurosurgical - the *only* evidence presented by Greenwald Neurosurgical that it had losses was its counsel's statement at the hearing on Western Surety's summary judgment that "We have provided documentation showing 28,534 from Greenwald Neurosurgical. The *rest of it* was from Allagash and credit card fraud." (Tr., 01/11/2017 Hearing, 21:23-22:2 (emphasis added).)

It was only after the district court, on January 13, 2017, (R., p. 283), ruled that the bond only covered losses to Greenwald Neurosurgical, that Greenwald Neurosurgical presented an entirely new version of the facts via the Ditmore and Clayton affidavits in April, 2017.

Why were the "facts" presented by the April, 2017 Ditmore and Clayton affidavits never presented to the Idaho Falls Police during its 2013 investigation, or to Western Surety during the claim process? Why, when Western Surety asked for documentation of losses to Greenwald Neurosurgical on January 19, 2014, (R., p. 482), March 21, 2014, (R., p. 480), June 3, 2014, (R., p. 467), August 28, 2014, (R., p. 466), and January 5, 2015, (R., p. 463), did Greenwald Neurosurgical give it nothing?

And why, when it finally responded to Western Surety's request for apportionment on April 17, 2015, did Greenwald Neurosurgical argue that the loss was covered simply because Udy was employed by one of Dr. Greenwald's entities (Greenwald Neurosurgical) and "gained access to the credit cards and Allagash funds exclusively through his employment for Dr. Greenwald, in his neurosurgical center?" (R., p. 227.)

Based on the foregoing, a jury could absolutely conclude that the reason Greenwald Neurosurgical never identified loss to it during the claim process was because it either had no

losses or because its losses were at or below the number ($28,553.00) represented by its counsel in open court on January 1, 2017.

2. **There Is Evidence that Greenwald Neurosurgical Falsely Claims that Udy Took $140,095.00 From It Rather than from Allagash Realty.**

Greenwald Neurosurgical chooses to ignore that its accountant, Troy Clayton, told the Idaho Falls Police that Udy took $140,095.00 from Allagash Realty by intercepting rental checks, from 2011 into 2013, and depositing them in a fake Allagash Realty account he created at his credit union. (Appellant's Brief, p. 20.)

He never told the Idaho Falls Police that Udy went to Janene Ditmore, Greenwald Neurosurgical's office manager, and fraudulently induced her to transfer, to the penny, that same amount ($140,095.00) to the phony Allagash account, which he then spent on himself: "As a result of the deception, Ms. Ditmore withdrew funds from Greenwald Neurosurgical *and deposited the funds into the fraudulent Allagash account* which was thereafter removed by Mr. Udy for his personal use." (R., p. 320, ¶ 13.)[6] Clayton said this, for the first time, in April, 2017.

Putting aside the obvious question of why Clayton withheld this information from the Idaho Falls Police during its initial investigation, the check ledger Greenwald Neurosurgical presented to Western Surety in support of its claim does not show deposits to Udy's "phony" Allagash Realty account from the Greenwald Neurosurgical account. Rather, as the Idaho Falls Police concluded, the ledger showed $140,095.00 in "rentals taken" by Udy. (R., p. 491.)

[6] Greenwald Neurosurgical is correct that the cite to R., p. 310, ¶ 13 at p. 15 of Western Surety's opening brief is incorrect. The quote – which is accurate - is at p. 320 of the record.

If, as Clayton contends, Ditmore transferred $140,095.00 from the Greenwald Neurosurgical account, at Udy's request, to Udy's phony Allagash account, that should be reflected in a bank statement for Greenwald Neurosurgical account and in the ledger for the phony Allagash account presented to Western Surety as part of the claim.

No such transfers are reflected in the statements.

Even if they were it would mean that Udy took $140,095.00 in Allagash rents *and* $140,095.00 from Greenwald Neurosurgical, for a combined total of $280,190.00. Greenwald Neurosurgical never contended that was the case in its claim, instead stating simply that Udy took $140.095.00 "from Allagash," (R., p. 478), a figure confirmed by the Idaho Falls Police following its interview of Clayton and its review of the evidence submitted to it by Greenwald Neurosurgical.

While the district court accepted Clayton's conclusory statement that Greenwald Neurosurgical was the "source of all money received by Mr. Matt Udy," (R., p. 706), numerous facts contradict that conclusion, including Clayton's own words to the Idaho Falls Police and the documentary submissions to Western Surety.

3. There is Evidence That Greenwald Neurosurgical Falsely Claims that Udy Transferred $130,091.20 from Its Account to Pay Balances on Dr. Greenwald's Personal Credit Cards.

The April, 2017 affidavits of Ditmore and Clayton essentially rewrote the claim submissions for the $130,091.20 charged by Udy on Dr. Greenwald's personal credit cards.

During the claim process, and before the district court's January 13, 2017 summary judgment ruling, the submissions all claimed that Dr. Greenwald, personally, was liable for the

charges on the cards taken out by Udy in his name: a. "*I* am unable to obtain relief from the credit card charges . . ." (R., p. 486, ¶ 10; R., p. 95, ¶ 10); b. money was taken from "*my* checking accounts" to pay for "these credit card charges." (R., p. 95, ¶8; R., p. 486, ¶ 9.)

So, in Dr. Greenwald's own words, the loss was his, not Greenwald Neurosurgical's.

The summary sheets for each credit card, submitted to Western Surety to support the claim, showed only "charges" and not payments. (R., pp. 599, 652, 654, and 566); *see also* Appellant's Brief, p.10.

To this day neither Greenwald Neurosurgical or anyone else has claimed or argued that the statements for the credit cards, which are part of the record, show payments of $130.090.20 on the cards with funds taken from Greenwald Neurosurgical. This is because they do not, contradicting Ditmore's claim that Udy used "Greenwald Neurosurgical business funds to pay for his credit card charges." (R., p. 312, ¶ 14. e.) She stated, categorically, that "[t]hese funds taken were fraudulently removed from the Greenwald Neurosurgical business account to pay for the amounts fraudulently charged by Mr. Udy." (*Id.*, ¶ 14. f.) *Yet, neither the credit card statements contained in the claim file* (R., pp. 535-665)*, or the summary of expenditures on the cards* (R., pp. 599, 652, 654, 566)*, support this statement.*

Additionally, Ditmore's version of the credit card losses is different than Clayton's, who claimed that Udy "would approach Ms. Ditmore and report that he needed money from the business account to pay Dr. Greenwald's credit card statements." (*Id.*, p. 319, ¶ 11.) He then induced Ditmore to transfer an "exaggerated amount," deposited the amount in "Dr. Greenwald's personal account," and then "withdrew the excess money for his personal use." (*Id.*)

These versions cannot be squared. Ditmore claimed that Udy used the money he had her transfer from the Greenwald Neurosurgical account to pay the combined balances of $130,091.20 on the personal credit cards he had fraudulently used. Clayton claimed that Udy had her transfer an "excess" amount of money (totaling $130,091.20) from Greenwald Neurosurgical under the premise of paying down the balances on the personal credit cards he had fraudulently used, but then spent that excess on himself.

Putting aside that neither of these versions of events were presented to either the Idaho Falls Police during its investigation, or to Western Surety during the claims process, both things could not have happened. They are inconsistent, and it is up to a jury to decide who or what to believe, and to assess the credibility of Ditmore and Clayton.

Last, there is the problem that there is no apportionment of the $89,000.00 figure identified by Ditmore as being the sum Udy fraudulently induced her to transfer from Greenwald Neurosurgical to cover the $140,095.00 in Allagash expenses and/or to pay down the $130.091.20 in charges on Dr. Greenwald's personal credit cards. Accordingly, if a jury found – as it could – that Udy simply took checks from Allagash Realty tenants, deposited them in his phony Allagash account, and spent them, then none of the purported $89,000.00 was actually utilized to defraud Greenwald Neurosurgical via the Allagash misrepresentations. Accordingly, that portion of the $89,000.00 transferred out of Greenwald Neurosurgical under the guise of covering Allagash debts would not be recoverable. But, we don't know what portion of the $89,000.00 that would be.

D. <u>There Was Evidence Udy Did not Meet the Bond's Definition of an "Employee."</u>

Greenwald Neurosurgical misses the central point of Western Surety's argument, which is that – accepting the Ditmore and Clayton affidavits as true – Udy's purported theft was not covered by the bond since he induced Ditmore to transfer funds from Greenwald Neurosurgical for the benefit of either Allagash Realty or, with respect to the credit cards, for the benefit of Dr. Greenwald.

The bond only protected against losses caused by an "employee," meaning one in "the regular service of the Insured in the ordinary course of the Insured's business during the term of this bond, and whom the insured compensates by salary…." (R., p. 470, ¶ 4.)

Surety bonds are interpreted as any other contract and "[t]he interpretation and legal effect of an unambiguous contract are questions of law to be resolved by the court rather than the jury." *Luzar v. Western Surety Co.,* 107 Idaho 693 (1984); *Thompson v. U.S. Fidelity & Guaranty Co.,* 3 F.Supp. 756 (D. Idaho 1933) (a surety cannot be held liable beyond the terms of its bond).

The bonded entity was a neurosurgical practice, Greenwald Neurosurgical, not Allagash Realty or Dr. Greenwald, personally. A neurosurgical practice does not, by definition, include personal services for its owner or services for a real estate company owned by an owner of the neurosurgical practice. Hence, the purported misrepresentations Udy used to allegedly induce Ditmore to transfer funds from Greenwald Neurosurgical – i.e., so he could "cover" money he had taken from Allagash Realty and pay down balances charged on Dr. Greenwald's personal credit cards - were not made in the "ordinary course" of the "Insured's business."

Furthermore, contrary to the district court's analysis, Udy did not have the authority to move money out of "the P.C.," Greenwald Neurosurgical.[7] The district court's conclusion that moving money "out of the P.C." was part of the "regular service" Udy performed for the P.C., (R., p. 703), is simply wrong, or – at the very least – disputed.

Both the Ditmore and Clayton affidavits noted that only Ditmore had authority to transfer money,[8] and the description of Ditmore's job duties submitted on summary judgment provides that her duties included:

> * *Administer all banking associated with the medical practice* for both payables and receivables.
> **Exclusive management* of banking of medical practice funds received with assistance or periodic oversight by account personnel (Troy Clayton, CPA).
> *Assist, facilitate deposit, transfer, withdrawal of funds in various personal and alternate business accounts per Owner's needs.

(R., p. 315 (emphasis added).)

Accordingly, Udy's fraud was accomplished wile acting on behalf of two unbonded entities, Dr. Greenwald (personally) and Allagash Realty. He did not have the authority to

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[7] On appeal we are now told that Udy simply had the authority to "request the movement of money for the PC." (R., p. 19.) During the claims process Dr. Greenwald asserted that Udy had "complete and unrestricted access to all of my confidential personal and business accounts," and that his responsibilities included "payment of accounts payable. . ." (R., p. 472, ¶ 3.) With respect to the Greenwald Neurosurgical account, these statements are false, as only Ditmore had the authority to transfer those funds.

[8] Clayton stated that funds could not be moved without Ditmore's knowledge, (R., p. 318, ¶ 9), Ditmore noted that all funds withdrawn from Greenwald Neurosurgical were reviewed and managed by her, (R., p. 310, ¶ 6), and that Udy "individually and separately managed the personal and Allagash accounts and paid Mr. Greenwald's credit card statements and other bills." (R., p. 310, ¶ 7.) Furthermore, Udy was employed to "manage Mr. Greenwald's investment accounts, rental properties and pay his credit card invoices and personal bills as received." (Id., p . 310, ¶ 8.)

transfer money out of Greenwald Neurosurgical, and had to deceive Ditmore into doing that for the sole benefit of two unbonded entities, Dr. Greenwald (personally) and Allagash Realty.

While there is no dispute that only Greenwald Neurosurgical paid Udy, there seems little to no dispute that by definition the operation of a neurosurgical practice does not include performing personal tasks for an owner (such as the payment of personal credit cards) or the management of a real estate company. Hence, none of the things Udy did to accomplish his fraud were done in the "ordinary course" of working for a neurosurgical practice. He did not have the authority to transfer funds out of Greenwald Neurosurgical, and had to deceive Ditmore – allegedly – into doing that.

On these facts, Udy is no different than any other third party in a position to take money from a third party. His alleged theft was not accomplished in the "ordinary course" of working for a neurosurgical practice, and he did not have the authority – as an employee of Greenwald Neurosurgical – to transfer funds to third parties. Only Ditmore had that authority.

Stated differently, on this record the alleged theft from Greenwald Neurosurgical was essentially accomplished by someone (Udy) on behalf of third parties who did not compensate him for his services. He was not acting on behalf of Greenwald Neurosurgical.

The district court's decision essentially writes the bond's definition of an "Employee" out of the policy, as the court awarded Greenwald Neurosurgical $100,000.00 for money allegedly taken from it by Udy in the course of acting on behalf of non-covered entities, while incidentally employed by Greenwald Neurosurgical.

While Greenwald Neurosurgical's response is simply that Udy worked for Greenwald Neurosurgical and, therefore, if he stole from that entity there is coverage, that position ignores the bond's definition of an "Employee," which requires that the theft be accomplished in the "regular service of the Insured" (a neurosurgical practice) in the "ordinary course" of the "Insured's business" (a neurosurgical practice).

Udy's theft, as alleged by the Ditmore and Clayton affidavits, was not accomplished as an "Employee" of Greenwald Neurosurgical, as that term is defined by the bond. Accordingly, there is at least a disputed issue of fact as to whether the bond covered the purported loss to Greenwald Neurosurgical.

E. <u>The Court's Decision that Only Greenwald Neurosurgical Was Covered is Correct.</u>

Greenwald Neurosurgical resurrects its argument that Dr. Greenwald, and all of his business entities, are covered for their losses from Udy's theft. *See* Respondent's Brief, pp. 22-23. This argument is primarily based on the view that because the bond identifies the insured as "Brent H. Greenwald dba Greenwald Neurosurgical,"[9] and because an assumed business name is simply a name under which another entity does business, Dr. Greenwald, personally, is the insured under the bond. *See id.*, p. 22, *citing* Idaho Code § 30-21-803. Furthermore, because Dr. Greenwald wanted to cover "any and all businesses conducted from my office location" when he obtained the bond in 2002, (R., pp. 91-92, ¶ 3), he argues that he and all his businesses are

[9] This is, actually, incorrect, as the bond identifies the insured as "Brent H. Greenwald dba Greenwald Neurosurgical 3200 CHANNING WAY, A-106, IDAHO FALLS, ID 83404." (R., p. 18.)

covered because the bond states it is "FOR ANY TYPE OF BUSINESS." Respondent's Brief, p. 23.[10]

The argument fails for a variety of reasons, not the least of which is that it is incoherent. Greenwald Neurosurgical argues on p. 23 that "daily usage" indicates that the bond covers "all businesses" owned by the insured, but then three paragraphs later argues that the district court incorrectly ruled that the identity of the named insured on the bond "means anything other than Brent H. Greenwald." Which is it? Does the bond cover all entities, and Dr. Greenwald personally, or just Dr. Greenwald, personally?

Furthermore, Dr. Greenwald is not a party to this litigation, and neither is Allagash Realty. It is axiomatic that a judgment cannot be entered for a person or entity that is not a party to the action. *Valentine v. Perry,* 118 Idaho 653, 655-56, 798 P.2d 935, 937-38 (1990). Hence, the argument that either is covered under the bond is inappropriately before this Court.

At this point, respondent has effectively mooted the issue, as the affidavits of Ditmore and Clayton contend that Udy (a) took the $140,095.00 (initially identified as taken from Allagash Realty) from Greenwald Neurosurgical, and (b) took the $130,091.20 (initially

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[10] What Dr. Greenwald subjectively "intended" back in 2002 is immaterial. Though a court in some circumstances is permitted to analyze "what a reasonable person in the position of the insured would have understood the language of the contract to mean," *see Foremost Ins. Co. v. Putzier*, 102 Idaho 138, 142 (1981), that analysis is simply one rule of construction conducted solely to determine the intent of the parties with respect to an ambiguous contract. *Id.* The rule is only applied after a determination of ambiguity by the court, and it is an objective standard. Under the doctrine of reasonable expectations, "the controlling test is a purely subjective one as to what the insured believed he was purchasing, with the only restraint being that that belief be reasonable." *Id.*, n. 5. This is not the test in Idaho. Accordingly, Dr. Greenwald's subjective beliefs are immaterial.

identified as taken from Dr. Greenwald personally) as also being taken from Greenwald Neurosurgical.

It is difficult to understand how Greenwald Neurosurgical can argue that the losses are to it in this appeal, but at the same time urge upon the court an interpretation of the bond that would permit it to argue – in the event of a remand – that there is coverage for losses to Dr. Greenwald, personally, Allagash Realty, LLC, and Greenwald Neurosurgical.

Those considerations aside, the district court appropriately decided that only Greenwald Neurosurgical can be covered by the bond.

The district court decided that the bond could only cover one entity, the neurosurgical practice, because the bond only covers losses caused by an "employee" paid a "wage" or "salary" by the named insured. (R., p. 285 and 287.) It was undisputed that only Greenwald Neurosurgical paid Udy a wage or salary. (R., p. 285.) Accordingly, only its losses could be covered.

Just because Dr. Greenwald had Mr. Udy do things for himself and Allagash Realty[11] did not make Mr. Udy an "employee" of either *under the bond.*

The policy defines an "employee" as follows:

> SECTION 4. The word Employee or Employees, as used in this bond, shall be deemed to mean, respectively, 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

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[11] As Dr. Greenwald noted in his affidavit, he has employees at his 3155 Channing Way, Suite B address who "provide services relating to not only the neurosurgery practice, but also bookkeeping and accounting with regard to my personal investments." (R., p. 91, ¶ 1.)

> Insured in the ordinary course of the Insured's business during the term of 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. (Emphasis added.)

It was undisputed below that Greenwald Neurosurgery, P.C., paid Mr. Udy, which is undisputed on this appeal, and there was no evidence below that either Dr. Greenwald or Allagash Realty compensated Udy with wages or salary. This is shown by Mr. Udy's W4 and W2,[12] and an affidavit by Dr. Greenwald in which he stated that Mr. Udy worked for his "practice." (R., pp. 58-59.[13])

Because Mr. Udy does not meet the bond's definition of employee with respect to Allagash Realty, LLC, or Dr. Greenwald personally, there can be no coverage for either. There is only coverage for losses caused by an employee, who is paid a wage or salary by the named insured, for loss to the named insured.

The district court correctly decided this issue. (R., p. 287 (Udy only an employee of the "P.C." and therefore there could only be coverage for losses to it.)

Furthermore, Greenwald Neurosurgical does not seem to understand that, if it is correct, then Dr. Greenwald is the *sole* insured, and judgment in Western Surety's favor is appropriate

[12] The W-4 (R., p. 58) at the bottom identifies "Greenwald Neurological" as Mr. Udy's employer, while the W-2 (R., p. 59) identifies Greenwald Neurosurgical Corp. as Mr. Udy's employer.

[13] The Affidavit of Brent H. Greenwald (dated January 15, 2014) provides that Dr. Greenwald's neurosurgery "practice" is located at 3155 Channing Way, Suite B, Idaho Falls, and that he employed several people "in [his] practice," including "Matt Udy." (R., p. 53, ¶¶ 1 and 2.)

because it is undisputed that only Greenwald Neurosurgical paid Udy, and Udy does not qualify as an "employee" of Dr. Greenwald (personally) because Dr. Greenwald (personally) did not pay him.

There are other problems with Greenwald Neurosurgical's argument.

First, there is no such entity as "Brent H. Greenwald dba Greenwald Neurosurgical." It was not registered with the Idaho Secretary of State before the litigation, during it, or to date. (The court should note that Western Surety never made an issue of this and stipulated, on the record, that it considered Greenwald Neurosurgical to be the insured.)[14] It is meritless to argue that the bond can cover a dba that has never existed.[15]

Second, this Court should understand that initially Greenwald Neurosurgical succeeded in convincing the district court that the named insured in the bond was "ambiguous" because the named insured was not registered with the Idaho Secretary of State. Once it created an ambiguity the plan, apparently, was to argue for coverage based on Dr. Greenwald's intentions when the bond was obtained in 2002. Dr. Greenwald argued that he intended to bond himself, personally, and "all my professional and business activities," (R., p. 92, ¶ 4), and "any type of business conducted under the roof of my office at 3155 Channing Way, Idaho Falls." (R., p. 93, ¶ 8.)

[14] Counsel noted at the January 13, 2017 hearing on Western Surety's motion for summary judgment that the company never used the fact that the dba wasn't registered as a coverage defense and that it considered Greenwald Neurosurgical to be the insured.

[15] Idaho Code § 30-21-810 provides that anyone transacting business in Idaho under an assumed business name without having complied with the requirements of this chapter shall not be entitled to maintain a legal action until it has filed a certificate. Western Surety has never raised the statute as a defense but recognizes that at this stage of the litigation this Court may determine that the issue is germane.

It is not possible to interpret the named insured on the bond as applying to any entity other than Greenwald Neurosurgical.

Rules of contract interpretation require analysis of the policy language alone. *See Farm Bureau Ins. Co. of Idaho v. Kinsey*, 149 Idaho 415, 419 (2010) (a provision in an insurance policy is ambiguous if it is reasonably subject to conflicting interpretations). *See also Brown v. Greenheart*, 157 Idaho 156, 166 (2014) (holding that when a document is ambiguous then evidence as to the meaning of the instrument may be submitted to the finder of fact); *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716,723,291 P.3d 399,406 (2012) ("[t]he purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered. In determining the intent of the parties, this Court must view the contract as a whole ....Whether a contract is ambiguous is a question of law").

The identified insured ("Brent H. Greenwald dba Greenwald Neurosurgical 3200 CHANNING WAY, A-106, IDAHO FALLS, ID 83404") is not "reasonably subject to conflicting interpretations." *Farm Bureau*, 149 Idaho at 419. The 3200 Channing Way address was Greenwald Neurosurgical's address when the bond was applied for and purchased, as the bond notes and as the 2001 articles of incorporation provide. (R., p. 49.) There was no evidence this was Dr. Greenwald's personal address. Furthermore, Allagash Realty, LLC, did not exist until 2009. It is not possible to interpret a bond that identifies a single entity, at a single address, to have the "reasonable conflicting meaning" of insuring the doctor personally and any business owned by him at any time from 2002 forward.

Applying basic rules of contract construction, the only "reasonable" interpretation is that the neurosurgical practice is "the Insured."

It is not grammatically possible to give the entity identified in the bond more than one meaning, or the expansive meaning urged by Greenwald Neurosurgical, i.e., that the bond covered any business owned by Dr. Greenwald from 2002 onward. Whether or not the entity exists, there is only one entity identified (a neurological practice), and expanding it to include two or more entities (one of which is an individual) would require the conjunction "and" and/or "or" on the line, or a comma between entities/individuals, or some other indication in the language itself that it means more than one entity and/or individual. Because taking this approach would "create a liability not assumed by the insurer," i.e., the insuring of multiple businesses and/or individuals, the Court should not interpret the bond as potentially insuring more than one insured.

Supporting this analysis is that the bond's indemnification language uses the singular term "the Insured," and uses the singular term "Insured" throughout. There is no reference to "Insureds," or any indication that the bond contemplates insuring multiple entities.

Further supporting this analysis is that the bond plainly provides that it is for a "business." It does not cover individuals. It is therefore not a "reasonable interpretation" of the insured identified in the bond to include Dr. Greenwald personally, because it is a bond that protects a business.

In conclusion, there is no way to "reasonably" interpret the inclusion of a single, non-existent named insured on the policy into two business entities (one of which, Allagash Realty

LLC, did not even exist in 2002, being formed in 2009) and an individual, for a total of three named insureds.

Nor is it reasonable to reach the extreme interpretation urged by Plaintiff in paragraphs 4 and 8 of Dr. Greenwald's Affidavit, i.e., that the bond covered any business owned by Dr. Greenwald at any time at his neurosurgical practice's address. (R., pp. 92-93, ¶ 3.)

Last, Greenwald Neurosurgical's effort to argue that the bond covered all of Dr. Greenwald's businesses because it states, at the top, that it is a "DISHONESTY BOND (FOR ANY TYPE OF BUSINESS)," is misplaced. The district court rejected the argument, finding that it could not be utilized to expand the "otherwise specific identity of the insured. . ." (R., p. 286.) Even were one to assume that the language is part of the insuring language, it does not change the outcome here, as the language merely indicates that the bond is not limited to a specific type of business. It applies to "any type," i.e., neurosurgical practice, real estate office, etc. It certainly cannot be "reasonably" construed to mean that it applies to "any" business of "any type" owned by the insured, including businesses not identified as a named insured.

F. Assuming this Court Upholds the Judgment, the District Court's Attorney Fee Adjustment was Appropriate.

The district court's refusal to award Greenwald Neurosurgical its full amount of attorney fees under Idaho Code § 41-1839 was warranted, as the court exercised its discretion under Rule 54 and refused to award Greenwald Neurosurgical fees for litigating the claims of non-parties, i.e., Dr. Greenwald personally and Allagash Realty, LLC. (R., pp. 759-760.) "Much of the attorney fees incurred prior to this Court's Decision of January 13, 2017 were incurred in

promoting the claims of these non-parties. Those attorney fees are not recoverable." (R., p. 760.)

IRCP 54 (d)(1)(B) provides that the Court may "apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained." Attorney fees are processed in the same manner as costs. *See* IRCP 54(e)(5). Greenwald Neurosurgical incurred significant fees on issues that it either lost on or that had no relationship to the sole issue identified by the Court as at issue, which was the loss to the P.C. The district court, correctly, refused to award those.

For the same reasons, the district court correctly refused to award all fees incurred under Idaho Code §41-1839, as the statute only permits an award of a "reasonable" amount of fees.

Last, Western Surety argues there is a basis for this Court to hold that the district court should have awarded no attorney fees. This is because Idaho Code § 41-1839 requires submission of a valid proof of loss before suit. Here, the district court determined that the pre-litigation materials submitted to Western Surety did not apportion loss to Greenwald Neurosurgical, which it later found to be the only covered entity. It was only when the Ditmore and Clayton affidavits were submitted in April, 2017, that the court considered there to have been evidence of loss to Greenwald Neurosurgical, long after the complaint was filed.

This Court should not award attorney fees where a bond claimant ignores its surety's requests for information necessary to adjust the claim. While Western Surety still contends that

there are disputed issues of fact in the case, the facts of loss to Greenwald Neurosurgical were not provided until the Ditmore and Clayton affidavits in April, 2017.

That is a little late under Idaho Code §41-1839, which requires submission of a valid proof of loss in advance of litigation before fees can be awarded.

II. CONCLUSION

Greenwald Neurosurgical's contentions, documentary evidence, and legal positions have been ever-changing throughout the life of the claim and in the litigation. It refused to apportion loss to itself during the claims process, taking the position that because the bond covered loss to Dr. Greenwald personally, his neurosurgical practice, and his real estate company, apportionment was unnecessary. Once it lost that battle it submitted the Clayton and Ditmore affidavits and claimed that the amounts taken "from Allagash" and incurred on Dr. Greenwald's personal credit cards were actually taken from Greenwald Neurosurgical. And it asks this Court to rule that the bond covers all of the above entities, even though the Clayton and Ditmore affidavits seems to say that the money was only taken from Greenwald Neurosurgical. And even though neither Dr. Greenwald, personally, or Allagash Realty, are parties to the case.

Greenwald Neurosurgical's case is rife with contradictions.

Accordingly, this Court should reverse the district court's grant of summary judgment.

DATED this 25th day of June, 2018.

ELAM & BURKE, P.A.

By: [signature]
Joshua S. Evett, Of the firm
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of June, 2018, I caused a true and correct copy of the foregoing document to be served as follows:

Ronald L. Swafford	_____ U.S. Mail
Trevor L. Castleton	_____ Hand Delivery
Larren K. Covert	_____ Federal Express
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Joshua S. Evett

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