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### Greenwald v. Western Surety Company Appellant's Reply Brief 2 Dckt. 45404

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**IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO**

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**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

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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

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**PLAINTIFF-RESPONDENT-CROSS APPELLANT'S REPLY BRIEF**

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**ISSUES PRESENTED IN REPLY BRIEF**

1. The District Court Erred in Not Awarding the Full Amount of Attorney Fees and Costs to Plaintiff.
  
2. 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 of the factual findings of the District Court

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.

## ARGUMENT

### 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. The discretion of the Court must be based upon findings supported by the record. *See Payne v. Foley*, 102 Idaho 760, 639 P.2d 1126 )1982. If there is no support for the findings in the record, the findings will be considered an abuse of discretion. *Id.*

In determining the availability and amount of attorney fees, the Court undertakes a two tiered analysis; 1- prevailing party, 2- amount of attorney fees. In this matter, there is no question that Plaintiff was the prevailing party. 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.

Defendant has argued that I.R.C.P. 54(d)(1)(B) allows the court to apportion the costs between the parties considering all the claims involved in the action. However, this analysis only comes upon an analysis of the prevailing party. I.R.C.P. 54(d)(1)(B) states that a division of attorney fees and costs may be apportioned based upon a finding that the parties prevailed in part and did not prevail in part. This is not applicable to this case.

In this matter, there are no counterclaims by the Defendant, 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 a claim by claim analysis of the case.

Further, the analysis by the Court of the individual motions in the matter was improper. “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).

Finally, the District Court was required to determine the amount of attorney fees. While the Court may be able to make a determination of reasonableness, that determination must be within the exercise of discretion of the Court. In the decision by the District Court, however, the District Court made no findings and made no record to support its finding on the amount of attorney fees. The District Court simply stated, “the Court finds that Plaintiff is entitled to an award of attorney fees in the amount of \$15,360.” R. Vol. 2 p. 761. There were not findings to support this determination.

### **CONCLUSION**

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 of attorney fees below and award a full award of attorney fees both below and on appeal.

DATED this 20<sup>th</sup> day of July, 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:

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

DATED this 20<sup>th</sup> day of July, 2018.



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LARREN K. COVERT, ESQ.  
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