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

REGDAB, INC., an Idaho Corporation

Plaintiff/Respondent

vs.

BUCK GRAYBILL and LAURIE GRAYBILL,

Defendants/Appellants.

BORGES, LLC, an Idaho Limited Liability Company; CHRISTOPHER B. BORGES and ANNETTE E. BORGES, husband and wife, and the marital community composed thereof; PATRICK N. FERRICK and NATALIE I. MAKEEVA thereof; and QUICKEN LOANS, INC., a foreign corporation,

Defendants.

Supreme Court No. 45649

Bonner County No. CV-17-0582

Appeal from the District Court of the First Judicial District
Of the State of Idaho, in and for the County of Bonner

Honorable Barbara Buchanan, Presiding

AMENDED RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

A. Nature of the Case.

Respondent, Regdab, Inc. doing business as Badger Building Center (hereinafter "Badger"), operates as a supplier of construction materials and equipment. Badger initiated this lawsuit to collect for materials supplied to various projects, including the property owned by the Appellants, Buck and Laurie Graybill (hereinafter "Graybills"), pursuant to a to Idaho's Materialmen's Lien Law, Title 45, Chapter 5 of the Idaho Code that Badger recorded against the Graybills' property.

B. Course of Proceedings.

Badger specified in its complaint that it sought its attorneys fees and costs incurred in this litigation according to the mechanic's lien statute of Idaho Code § 45-513. The Graybills appeared through counsel in the lawsuit. They then allowed an order of default to be entered by the District Court. When Badger sought to enter a default judgment against the Graybills' property pursuant to mechanic's lien, the Graybills vehemently opposed and defended against a judgment. The Graybills argued at length that Badger was not entitled to any award of attorneys fees and costs because the prayer for relief in the complaint did not specify the dollar amount of attorneys fees that would be awarded if a default judgment was entered pursuant to I.R.C.P. 54(e)(4). The Graybills argued strenuously against Badger's subsequent motion for leave to amend the complaint to address their technical defense to an award of attorneys fees. The Graybills similarly filed repeated motions and detailed memoranda arguing against any judgment

being entered, or allowing any award of attorneys fees and costs to Badger. The District Court ultimately concluded that language of the mechanic's lien statute, Idaho Code § 45-513, mandated an award of attorneys fees, and thus the conflicting language of I.R.C.P. 54(e)(4) was not applicable pursuant to I.R.C.P. 54(e)(8). The District Court ultimately entered a default judgment which included an award of attorneys fees and costs to Badger.

C. Statement of the Facts.

Between September 2, 2016 and October 5, 2016, Badger furnished $10,103.22 worth of building materials to Borges, LLC from Badger's Sagle, Idaho facility. Borges, LLC used these materials for the improvement of four different residential construction projects in Bonner County, Idaho. Badger furnished building materials to Borges, LLC in the principal amount of $5,252.99 for the improvement of the Graybill's property located at 240 Hanford Drive, Sagle, Idaho 83860. (R. Vol. I, p. 65-66).

Borges, LLC had executed a Commercial Account Application with Badger, that included a Personal Guaranty executed its owner, Chris Borges. (R. Vol. I, p. 65). Borges, LLC failed to pay for the supplies purchased from Badger, despite its requests. (R. Vol. I, p. 67).

On November 10, 2016, Badger recorded a mechanic's lien on the Graybills' property to secure payment for the materials supplied to the Graybills' property. (R. Vol. I, p. 67). Badger likewise filed mechanic's liens on three other properties for which Borges used the materials purchased from Badger. (R. Vol. I, p. 67-68).

Two of the other property owners subsequently made payments to resolve the remaining debts owed on the mechanic's liens Badger had recorded against their properties, and Badger released the mechanic's liens from the title of those properties. (R. Vol. I, p. 67-68).

Badger was unable to resolve the mechanic's lien dispute with the remaining two property owners, the Graybills and Patrick Ferrick. On April 19, 2017, Badger filed the lawsuit for this case against Borges, LLC, and its owners individually, and against the Graybills and Mr. Ferrick and his wife to foreclose on Badger's mechanic's liens. (R. Vol. I, p. 9).

Borges, LLC and its owners failed to appear and defend in the case. On June 2, 2017, the District Court entered a default judgment against Borges, LLC and its owners. (R. Vol. I, p. 48-60). Badger subsequently resolved the matter with Mr. Ferrick, and the Court entered a stipulated order of dismissal for Mr. Ferrick, his wife, as well as its lenders that held a deed of trust on his property. (R. Vol. II, p. 238-240).

The Graybills appeared through its counsel on June 8, 2017. (R. Vol. I, p. 61). Badger filed a Motion for Default against the Graybills on July 27, 2017. (R. Vol. I, p. 114). The District Court entered an Order of Default against the Graybills on July 28, 2017. (R. Vol. I, p. 122-23). The District Court scheduled a case scheduling conference for August 23, 2017. (R. Vol. I, p. 9).

On August 15, 2017, Badger filed its Motion for Default Judgment against the Graybills and their property, and scheduled the hearing to take place on the same day as the scheduling conference, August 23, 2017. (R. Vol. I, p. 9, 125). On August 21, 2017, the Graybills filed a

detailed Motion to Disallow the Plaintiff's Motion, Affidavit, and Proposed Default. (R. Vol. I, p. 196-201). The Graybills defended against the substantive and procedural issues in the case, and made numerous arguments as to why default judgment should not be entered. The Graybills' Motion included an argument that there was no specific dollar amount pled by Badger in its complaint for the amount of attorneys fees that would be sought in the event of a default judgment pursuant to I.R.C.P. 54(e)(4).

Upon receiving Graybills' extensive Motion, Badger voluntarily struck the hearing for the Default Judgment. (R. Vol. I, p. 9). The parties proceeded to have the scheduling conference on August 23, 2017, which the Graybills' attorney attended. (R. Vol. I, p. 10). The Court scheduled a trial to take place in March 27, 2018. (R. Vol. I, p. 10).

Badger then filed a Motion to Amend the Complaint on September 6, 2017, to address the Graybills' litany of objections to the form of Badger's Complaint. (R. Vol. II, p. 202-37). The hearing date for the Motion to Amend was September 20, 2017. (R. Vol. II, p. 202-04). Badger filed a detailed Memorandum and proposed Amended Complaint. (R. Vol. II, p. 208-37). Badger's proposed Amended Complaint included a specific dollar amount for attorneys fees in the event a default judgment is entered in order to address the Graybills' argument that a dollar amount needed to be specified in the complaint in the event a default judgment was entered pursuant to I.R.C.P. 54(e)(4). (R. Vol. II, p. 232). It further dealt with and addressed a number of other arguments made by the Graybills.

The Graybills' counsel appeared at this hearing on September 20, 2017, and again argued at length against Badger's Motion to Amend. (Tr. Vol. I, p. 36-43). The Graybills' counsel argued that the Graybills had filed a Notice of Tender of Funds on August 21, 2017, and that somehow that precluded an award of attorneys fees, and somehow constituted res judicata. (Tr. Vol. I, p. 38, L. 8-25, p. 39, L. 1-7, R. Vol. I, p. 9). The Graybills continued to argue about whether it was a personal judgment versus a judgment against the Graybill's property. (Tr. Vol. I, p. 39, L. 8-10). They argued at length against the amendment of the complaint because there had been an order of default, and that it cannot be amended after an order of default is entered. (Tr. Vol. I, p. 37, L. 1-11). This is despite the fact that Badger agreed to stipulate to vacating the order of default if that was the obstacle. (Tr. Vol. I, p. 44, L. 11-25). The Graybills continued argue at length that there could not be an award of attorneys fees since there was a precise dollar figure specified in the complaint. (Tr. Vol. I, p. 37, L. 12-25, p. 38, L. 1-25).

During the September 20, 2017, the District Court denied the Badger's Motion to Amend the Complaint. The District Court reasoned that there was no need to amend the complaint to specify a dollar figure in the event of a default, because the complaint specified that Badger was seeking an award of attorneys fees and costs for having to foreclose on the mechanic's lien against the Graybill's property. The District Court reasoned that the Graybills had notice that attorneys fees would be sought as part of the judgment. (Tr. Vol. I, p. 42, L. 22-25, p. 43, L. 1-14). Since the Graybills had notice that Badger would be seeking its attorneys fees and costs, it would serve no basis to amend the complaint to specify a dollar amount as it would just require unnecessary additional attorneys fees. (Tr. Vol. I, p. 45, L. 22-25, p. 46, L. 1-13).

On September 21, 2017, the Graybills filed a detailed pleading entitled "Graybills' Memorandum On Issue of An Award of Attorney Fees On Plaintiff's Motion for a Default Judgment." (R. Vol. II, p. 241-45). The Graybills again argued at length the objections raised during the hearing about how Badger no longer had a mechanic's lien because the Graybills had "paid" the debt owed by the mechanic's lien through an attempted tender of funds that Badger returned to the Grabyills. (R. Vol. II, p. 242). The Graybills argued at length about their defense to an award of attorneys fees since they argued that Badger needed to specify a dollar amount in the prayer for relief in the event of a default pursuant to I.R.C.P. 54(e)(4). (R. Vol. II, p. 242-45).

On September 29, 2017, the District Court issued a Memorandum Decision and Order in which the District Court denied Badger's Motion to Amend the Complaint, and Denied Graybills' Motion to Disallow an award of attorneys fees and costs to Badger. (R. Vol. II, p. 246-59). Although the Graybills do not cite to the record in their Brief, this is the order in which the District Court provides the rationale for awarding Badger its attorneys fees and costs pursuant to Idaho Code § 45-513. The District Court directed Badger to file a motion for default judgment, and to schedule it for a hearing. The documentation to be included in the default judgment motion included "a Memorandum of Costs (I.R.C.P. 54(d)(4)), an Affidavit of Attorney's Fees (I.R.C.P. 54(e)(3), (5)), and an Affidavit of Amount Due (I.R.C.P. 55(b)(1)." (R. Vol. II, p. 259).

On October 3, 2017, Badger filed its Motion for Default Judgment pleadings, including an affidavit for attorneys fees and the Memorandum of Costs. (R. Vol. II, p. 261-360). The hearing for the Motion for Default Judgment was scheduled to take place on October 18, 2017. On October 16, 2017, the Graybills again filed a detailed pleading entitled "Graybills' Objection and Motion to Disallow Plaintiff's Second Motion for Default Judgment." (R. Vol. II, p. 361-386). In this lengthy Memorandum, the Graybills' continued to defend against any award of attorneys fees, and argued at length regarding the District Court's analysis in the September 29, 2017 Memorandum Decision and Order. (R. Vol. II, p. 361-386).

On October 23, 2017, the District Court granted Badger's Motion for Default Judgment and entered an Order for the Sale of the Graybills' Property. In the Order, the Court awarded Graybill $7,160.00 in attorneys fees and $974.62 in costs, for a total amount of $8,134.62. (R. Vol. III, p. 418). This is in addition to the principal amount owed of $5,252.99 plus prejudgment interest. The District Court awarded Badger the total judgment amount of $13,941.45. (R. Vol. III, p. 419-20). The District Court entered the Default Judgment for that amount on October 23, 2017. (R. Vol. III, p. 405-07). The District Court further entered an order on October 23, 2017, denying the Graybills' Motion to Disallow Plaintiff's Second Motion for Default Judgment. (R. Vol. III, p. 422-24).

Pursuant to the Court's Order for the Sale of the Graybills' Property, the Sheriff scheduled a sale to take place on December 19, 2017. (R. Vol. III, p. 431). On December 4, 2017, the Graybills filed their Notice of Appeal in this case. (R. Vol. III, p. 425). On December

14, 2017, the District Court entered an Order for the Stay of Execution Pending the Appeal, and the Graybills deposited the funds to the Court. (R. Vol. III, p. 430-32).

II. ISSUES ON APPEAL

1. Should the Court affirm the District Court's judgment awarding attorneys fees and costs to Badger because the Graybills appeared and actively defended the case before the default judgment was eventually entered by the District Court.

2. Should the Court affirm the District Court's judgment awarding attorneys fees and costs to Badger because the Graybills' technical defense could have been addressed by the District Court granting Badger's Motion to Amend the Complaint.

3. Is Badger entitled to an award of attorney's fees and costs on appeal pursuant to Idaho Code § 12-121 because the Graybills have filed this appeal unreasonably and without foundation.

III. ARGUMENT

A. The Trial Court Appropriately Awarded Badger Its Attorneys Fees Pursuant to I.C. 45-513.

The District Court correctly found that the language of Idaho Code § 45-513 mandated an award of attorneys fees, which is directly contrary to the language of I.R.C.P. 54(e)(4) pertaining to awards of attorneys fees for default judgments. The District Court correctly concluded that since the mandatory language in Idaho Code § 45-513 was inconsistent language of I.R.C.P. 54(e)(4), that language of the statute controlled pursuant to I.R.C.P. 54(e)(8), and warranted an award of attorneys fees and costs to Badger.

The Graybills have appealed the District Court's order awarding attorneys fees and costs arguing:

> Regdab did no plead any amount but the District Court awarded default fees anyway because if found that Idaho Rules of Civil Procedure § 54(e)(4)(B) was inconsistent with Idaho Code § 45-513 so Idaho Rules of Civil Procedure § 54(e) did not apply. This is an error because Idaho Code § 45-513 does not provide any means to calculate a reasonable fee so it is not inconsistent with Idaho Rules of Civil Procedure § 54(e).

(App. Brief pg. 2). The Graybills' argument is wrong for several reasons. First, Badger did plead in the prayer for relief of the complaint that Badger be awarded its reasonable attorneys fees and costs pursuant to Idaho Code § 45-513. (R. Vol. I, p. 74). As will be addressed in the next section of this brief, that is sufficient when a defendant appears and actively defends in the lawsuit before a default judgment is ultimately entered.

Second, the District Court did not conclude that I.R.C.P. 54(e) in its entirety was inapplicable. The District Court only concluded that the subpart I.R.C.P. 54(e)(4) (B) did not apply because it directly contradicted the mandatory language of the Idaho Code § 45-513. The case law that the District Court relied upon continued to use the factors of I.R.C.P. 54(e)(3) for ruling upon the reasonable attorneys fees and costs. In the District Court's Memorandum Decision and Order, the District Court directed Badger to prepare an affidavit of attorneys fees utilizing the factors of I.R.C.P. 54(e)(3) prior to entering the default judgment. (R. Vol. II, p. 259). Badger did prepare an affidavit according to the factors set forth in I.R.C.P. 54(e)(3), which the District Court used to base the award of attorneys fees and costs. (R. Vol. II, p. 265).

Third, the case law that the Graybills rely upon is not applicable because it dealt with the narrow issue of whether the factors of I.R.C.P. 54(e)(3) should apply to an award of attorneys fees pursuant to a statute. The application of I.R.C.P. 54(e)(3) is not disputed in this case. The

case law did not deal with the conflicting provisions of I.R.C.P. 54(e)(4) to a statute, and thus it is inapplicable.

The District Court correctly looked to the holding of *Olsen v. Rowe,* 125 Idaho 686, 873 P.2d 1340 (Ct. App. 1994), for guidance on the issue. (R. Vol. II, p. 251- 54). The Court in *Olsen* explained that the language in I.R.C.P. 54(e)(1) uses the permissive language which requires the finding of a prevailing party within the discretion of the district court. The mechanic's lien statute, Idaho Code § 45-513, includes mandatory language requiring the court to award attorneys fees to a successful lien claimant. Thus the court concluded that I.R.C.P. 54(e)(1) does not apply because it was inconsistent with the statutory language and thus did not apply pursuant to I.R.C.P. 54(e)(8). *Olsen v. Rowe,* 125 Idaho at 688–89. The court, however, did continue to find that the reasonableness of the attorneys fees would be awarded pursuant to the factors set forth in I.R.C.P. 54(e)(3). *Olsen*, 125 Idaho at 689.

The court in *Olsen* emphasized the mandatory language of the lien statute, and the case laws that has consistently held that attorneys fees must be awarded to the lien claimant.

> Idaho Code § 45–513, on the other hand, states, "The court *shall* also allow as part of the costs the moneys paid for filing and recording the claim [of lien], and reasonable attorney's fees." (Emphasis added.) This provision has been interpreted to mean that the costs of filing and recording, as well as the attorney fees, are incidental to the foreclosure of the lien. Therefore, the lien is also enforceable as to the costs and fees. *See Smith v. Faris–Kesl Constr. Co., Ltd.,* 27 Idaho 407, 423, 150 P. 25, 30 (1915) (attorney's fee is merged with and becomes a part of the principal debt for which foreclosure of the lien is sought); *see also Barber v. Honorof,* 116 Idaho 767, 771, 780 P.2d 89, 93 (1989); *J.E.T. Development v. Dorsey Construction Co.*, 102 Idaho 863, 865, 642 P.2d 954, 957 (Ct.App.1982). Our Supreme Court has indicated that the statutory right to attorney fees under I.C. § 45–513 upon lien foreclosure applies even where the defendant property

> owner has been successful on a counterclaim, so long as the counterclaim did not totally offset the amount of the lien. *Dawson v. Eldredge*, 89 Idaho 402, 409, 405 P.2d 754, 761 (1965).

Olsen v. Rowe, 125 Idaho at 688; *see also Fairfax v. Ramirez*, 133 Idaho 72, 78, 982 P.2d 375, 381 (Idaho Ct. App. 1999) (noting that an award of attorney fees and costs in favor of successful lien claimant is mandatory, but that the amount of attorney fees is left to the court's discretion). The Court then explained:

> Therefore, it appears that I.C. § 45–513 provides for a mandatory award of attorney fees as part of the enforcement of the lien, while I.R.C.P. 54(e) (1) requires the finding of a prevailing party within the discretion of the district court. This apparent conflict, however, is resolved by the language of I.R.C.P. 54(e)(8). It states:
>
> > The provisions of this Rule 54(e) relating to attorney fees shall be applicable to all claims for attorney fees made pursuant to section 12–121, Idaho Code, and to any claim for attorney fees made pursuant to any other statute, or pursuant to any contract, to the extent that the application of this Rule 54(e) to such a claim for attorney **1343 *689 fees *would not be inconsistent* with such other statute or contract. [Emphasis added.]
>
> **To the extent that Rule 54(e) is inconsistent with I.C. § 45–513, we hold that the rule has no application and does not modify the statute.**

Olsen v. Rowe, 125 Idaho at 688–89(emphasis added). The court, however, did continue to find that the reasonableness of the attorneys fees would be awarded pursuant to the factors set forth in I.R.C.P. 54(e)(3). *Olsen*, 125 Idaho at 689.

The holding of *Olsen v. Rowe* is consistent with the Court's holding in the case of *Zenner v. Holcomb*, 147 Idaho 444, 450, 210 P.3d 552, 558 (2009), where the Court concluded I.R.C.P. 54(e) does not apply to an award of attorneys fees pursuant to the language of the parties'

contract. The Court made the award of actual attorneys fees based upon the language of the contract. It did not base its award on I.R.C.P. 54(e). The Court concluded that the language of the contract was inconsistent with the language of I.R.C.P. 54(e), and thus the Rule was inapplicable pursuant to I.R.C.P. 54(e)(8). The discretionary language of I.R.C.P. 54(e)(1) was inapplicable, and the factors for what constitutes a reasonable award set forth in I.R.C.P. 54(e)(3) because it was inconsistent with the plain wording of the contract. *Zenner v. Holcomb*, 147 Idaho at 450-51.

The District Court in this case did not go as far as the Court did in *Zenner v. Holcomb*, and conclude that entire I.R.C.P. 54(e) was inapplicable because of the conflicting provisions with subparts I.R.C.P. 54(e)(1) and I.R.C.P. 54(e)(3). Rather, the District Court only concluded that the subpart I.R.C.P. 54(e)(4)(B) did not apply because it directly contradicted the mandatory language of the Idaho Code § 45-513.

> Applying the holding of *Olsen v. Rowe* and Rule 54(e)(8) to the facts of this case, this Court finds that Rule 54(e)(4)(B)'s requirement that the amount of attorney's fees in the event of default be included in the prayer for relief and that the fee award not exceed the amount in the prayer to be inconsistent with Idaho Code § 45-513, which mandates the award of certain costs and reasonable attorney's fees in lien foreclosure actions. Thus, Rule 54(e)(4)(B) is not applicable to this case. Accordingly, the Court "shall" allow Regdab "as part of the costs the money paid for filing and recording the claim, and reasonable attorney's fees." I.C. § 45-513.

(R. Vol. II, p. 254). As pointed out by the District Court in the Memorandum Decision, the language of I.R.C.P. 54(e)(8) has changed since the *Olsen v. Rowe* decision. (R. Vol. II, p. 253). The rule now provides:

> Any claim for attorney fees, including claims pursuant to Idaho Code section 12-121, must be made pursuant to Rule 54(e) **unless an applicable statute or contract provides otherwise.**

(Emphasis added). The change in the wording is broader than the previous rule, and it further supports the reasoning and holding of *Olsen v. Rowe*, as well as the District Court's decision. The I.R.C.P. 54(e)(4) requirements are contrary to the language of the statute Idaho Code. § 45–513. Thus, the I.R.C.P. 54(e)(4) requirements have no application to this case, and not modify the statute, Idaho Code § 45–513.

The District Court directed Badger to prepare an affidavit of attorneys fees utilizing the factors of I.R.C.P. 54(e)(3) prior to entering the default judgment consistent with *Olsen v. Rowe* decision.

> The documentation in support of the second default judgment must include a Memorandum of Costs (I.R.C.P. 54(d)(4)), **an Affidavit of Attorney's Fees (I.R.C.P. 54(e) (3)**, (5)), and an Affidavit of Amount Due (I.R.C.P. 55(b)(1).

(R. Vol. II, p. 259)(emphasis added). Badger complied with the District Court's order and prepared an affidavit according to the factors set forth in I.R.C.P. 54(e)(3). (R. Vol. II, p. 265).

The Graybills primarily rely upon *Bailey v. Bailey*, 153 Idaho 526, 530, 284 P.3d 970, 974 (2012), which did not address the issue at hand. In that case, there was no dispute that the statute at issue, Idaho Code § 15–3–720, allowed for an award of attorneys fees. The issue was whether to apply the reasonableness standards set forth in I.R.C.P. 54(e)(3), when awarding attorneys fees. The Court concluded that there was nothing inconsistent between the language of the statute and the measure of the reasonableness of attorneys fees standard set forth in I.R.C.P.

54(e)(3). Accordingly, I.R.C.P. 54(e)(8) did not preclude the court from applying the reasonable factors set forth in I.R.C.P. 54(e)(3) when making an award. The court in *Bailey v. Bailey*, did not addressed the default provisions of I.R.C.P. 54(e)(4), and whether that was inconsistent with the statutory provisions of Idaho Code § 15–3–720. The Court in *Bailey* did not address a directly conflicting provision between the statute and court rule such as the case at hand. Thus, the Graybills' reliance upon the *Bailey* case is misplaced.

The District Court's holding and reasoning makes abundant sense. It is incredibly difficult and impractical to forecast the amount of attorneys fees that will be incurred for the lien foreclosure lawsuit in the event of a default judgment in a case such as the one at hand. In this case, Badger sued the contractor, Borges, LLC, and the property owners for several projects. It is unclear at the outset if either the contractor or the owner of the property, or both, will contest the amount due pursuant to the contract or the mechanic's lien. If either contests the matter, a lien foreclosure cannot simply take place by a default judgment. The lien foreclosure process is a difficult and cumbersome process, and requires the entry of multiple pleadings with the Court. In addition to a default judgment, there needs to be an order for the sale of the property, a notice of levy, a writ of execution, a notice of sheriff's sale which has to be published in the newspaper for several weeks. In the end, what purpose does it serve to put a forecasted dollar amount in complaint for the Graybills? They are not going to let the property be sold by a sheriff's sale. As in this case, they will use whatever legal maneuvering they can to prevent that from taking place, including an appeal, and cause Badger to incur substantial attorneys fees and costs collecting this debt that is clearly owed. Such a burden is directly contrary to the purpose and

language of the lien statute Idaho Code § 45-513. The restrictive requirements in I.R.C.P. 54(e)(4) set up unnecessary and cumbersome road blocks for companies such as Badger to be able to seek payment for modest amounts due. The statutory language of Idaho Code § 45-513 and the case law that has interpreted it, have clearly held that lien claimants should be able to recover the amount they have supplied to construction projects, and not being able to recover the debt owed because the attorneys fees and costs are more than the debt and unrecoverable. The Court should affirm the District Court's ruling and similarly find that the language and process set forth in I.R.C.P. 54(e)(4) is contrary to the mandatory language of Idaho Code 45-513, and thus not required in this case.

B. The Graybills Appeared and Actively Defended the Lawsuit Before Default Judgment Was Eventually Entered.

The Graybills' argument that the District Court's award of attorneys fees was improper fails because the Graybills appeared and actively defended the lawsuit before the Court entered the default judgment. This was issue was dealt with in a similar case of *Magleby v. Garn*, 154 Idaho 194, 197, 296 P.3d 400, 403 (2013). The Graybills cited to and discussed this case in their memorandum to the District Court prior to the entry of the default judgment. (R. Vol. II, p. 381). In *Magleby,* the defendants appeared and defended thcase. The trial court eventually entered a default judgment against the defendants in that lawsuit after significant litigation took place and the defendants actively defended the lawsuit. The Court interpreted the requirements of I.R.C.P. 54(e)(4) for awarding attorneys fees, and concluded that the plaintiff should have been awarded its reasonable attorneys fees when the defendants actively defended the case.

> There are two situations in which the default attorney fees provision of I.R.C.P. 54(e) (4) may be implicated. The most common situation is when the defendant does not appear or defend. In that event, a specific dollar figure is required, and the trial court may not award a greater sum than the plaintiff has specifically requested. The less common situation is that which is presented by the case before us. **In this situation, the defendant appears and defends, thus forcing the plaintiff to incur additional attorney fees, but default judgment is eventually entered.** This situation may arise, as in the present case, when an attorney is permitted to withdraw and no further appearance is forthcoming, *see* I.R.C.P. 11(b)(3), or default judgment may be entered as a sanction for violation of court orders, *see* I.R.C.P. 37(b)(2)(C); 37(e). **In those cases in which the defendant has appeared and defended, only later to be the subject of a default judgment, at the time the complaint is filed the plaintiff is unable to meaningfully assign a number to the requested attorney fees to be entered in the event of default, as the amount of reasonable attorney fees is necessarily dependent upon future, unknown events, i.e., the extent to which additional services by plaintiff's counsel are required to respond to the defense of the lawsuit.**

Magleby v. Garn, 154 Idaho at 197 (emphasis added).

The Court went on to explain that the "district court's decision, limiting the Maglebys to $2,500, is inconsistent with the purpose of the rule, which is to place a defaulting party on notice of its exposure to a potential award of attorney fees in the event of default. The decision is also inconsistent with the literal language of the rule." *Magleby v. Garn*, 154 Idaho at 198. The prayer for relief in the complaint satisfied the requirements of I.R.C.P. 54(e)(4), where it asked for "the actual cost of attorney fees and Court costs." *Magleby v. Garn*, 154 Idaho at 197.

At the time of *Magleby* decision, I.R.C.P. 54(e)(4) was worded differently the current rule. I.R.C.P. 54(e)(4) at the time of the decision required a specific dollar amount in the prayer for relief, which the rule currently does not require.

> I.R.C.P. 54(e) (4) provides that attorney fees "shall not be awarded unless the prayer for relief in the complaint states that the party is seeking attorney fees and *the dollar amount* thereof in the case judgment is entered by default." It continues, stating that any award in case of a default judgment "shall not exceed the amount prayed for in the complaint. Any award of attorney fees pursuant to I.C. Section 12–120, in default judgments in which the defendant has not appeared shall not exceed the amount of the judgment for the claim, exclusive of costs."

Magleby v. Garn, 154 Idaho at 197 (emphasis added). The current language of I.R.C.P. 54(e)(4) does not have the language "the dollar amount thereof." It just specifies the amount of attorneys fees.

In this case, the Graybills had notice that attorneys fees would be sought as part of the judgment as Badger specified in its prayer for relief that it would seek its "attorneys fees and costs incurred in this litigation pursuant to . . . Idaho Code § 45-513." (R. Vol. I, p. 74). The prayer for relief was sufficient to put the Graybills on notice if they contested Badger's lien claim, that they faced the award of attorneys fees and costs as set forth in the complaint. That is sufficient for the rule pursuant to the holding of *Magleby.*

In this case, the Graybills appeared and actively defended the lawsuit prior to the eventual entry of the default judgment. As set forth above, the Graybills appeared through its counsel on June 8, 2017. (R. Vol. I, p. 61). Badger filed a Motion for Default against the Graybills on July 27, 2017. (R. Vol. I, p. 114). The District Court entered an Order of Default against the Graybills on July 28, 2017. (R. Vol. I, p. 122-23). The District Court scheduled a case scheduling conference for August 23, 2017. (R. Vol. I, p. 9).

On August 15, 2017, Badger filed its Motion for Default Judgment against the Graybills and their property, and scheduled the hearing to take place on the same day as the scheduling conference, August 23, 2017. (R. Vol. I, p. 9, 125). On August 21, 2017, the Graybills filed a detailed Motion to Disallow the Plaintiff's Motion, Affidavit, and Proposed Default. (R. Vol. I, p. 196-201).

The Graybills defended against the substantive issues in the case including:

1. The Graybills objected that their mailing address was not 240 Hanford Drive, Sagle, Idaho 83860, nor is Graybills' mailing address 4683 E. Hudlow Road, Hayden, Idaho, 83835. The Graybill appeared to contest whether there had been notice of the mechanic's lien had apparently been mailed to the correct mailing address.

2. The Graybills argued that Badger was seeking a judgment against the Graybills personally, rather than just against the Graybills' property. (R. Vol. I, p. 196-97).

The Graybills further argued various procedural issues in its Motion, including:

1. The Graybills contended that Badger's prayer for relief in the complaint improperly asked the court to order the sheriff to execute a deed to the purchaser at a sheriff's sale of the Graybill's Property, since that cannot be done until the right of redemption has passed.

2. The Graybills contended that there was no specific request in the prayer for relief in the complaint for interest.

3. The Graybills contended that there was no specific dollar amount pled by Badger in its complaint that for the costs for recording, the title report. I.R.C.P. 54(d). The Graybills also argue that the certain costs should not be awarded to Badger since they are not specifically allowed by a statute.

4. The Graybills argued that a specific dollar amount for attorneys fees had not been pled for I.R.C.P. 54(e)(4).

5. The Graybills objected to the interest rate.

6. The Graybills argued that Badger needed to file a Memorandum of Costs for the Graybills to then object, apparently relying upon I.R.C.P. 54(d)(4). (R. Vol. I, p. 197-201).

Upon receiving Graybills' extensive Motion, Badger voluntarily struck the hearing for the Default Judgment. (R. Vol. I, p. 9). The parties proceeded to have the scheduling conference on August 23, 2017, which the Graybills' attorney attended. (R. Vol. I, p. 10). The Court scheduled a trial to take place in March 27, 2018. (R. Vol. I, p. 10).

Badger then filed a Motion to Amend the Complaint on September 6, 2017, to address the Graybills' litany of objections to the form of Badger's Complaint. (R. Vol. II, p. 202-37). The hearing date for the Motion to Amend was September 20, 2017. (R. Vol. II, p. 202-04). Badger filed a detailed Memorandum and proposed Amended Complaint. (R. Vol. II, p. 208-37). Badger's proposed Amended Complaint included a specific dollar amount for attorneys fees in the event a default judgment is entered in order to address the Graybills' argument that a dollar amount needed to be specified in the complaint in the event a default judgment was

entered pursuant to I.R.C.P. 54(e)(4). (R. Vol. II, p. 232). It further dealt with and addressed a number of other arguments made by the Graybills.

The Graybills' counsel appeared at this hearing on September 20, 2017, and again argued at length against Badger's Motion to Amend. (Tr. Vol. I, p. 36-43). The Graybills' counsel argued that the Graybills had filed a Notice of Tender of Funds on August 21, 2017, and that somehow that precluded an award of attorneys fees, and somehow constituted res judicata. (Tr. Vol. I, p. 38, L. 8-25, p. 39, L. 1-7, R. Vol. 1, p. 9). The Graybills continued to argue about whether it was a personal judgment versus a judgment against the Graybill's property. (Tr. Vol. I, p. 39, L. 8-10). They argued at length against the amendment of the complaint because there had been an order of default, and that it cannot be amended after an order of default is entered. (Tr. Vol. I, p. 37, L. 1-11). This is despite the fact that Badger agreed to stipulate to vacating the order of default if that was the obstacle. (Tr. Vol. I, p. 44, L. 11-25). The Graybills continued argue at length that there could not be an award of attorneys fees since there was a precise dollar figure specified in the complaint. (Tr. Vol. I, p. 37, L. 12-25, p. 38, L. 1-25).

During the September 20, 2017, the District Court denied the Badger's Motion to Amend the Complaint. The District Court reasoned that there was no need to amend the complaint to specify a dollar figure in the event of a default, because the complaint specified that Badger was seeking an award of attorneys fees and costs for having to foreclose on the mechanic's lien against the Graybill's property. The District Court reasoned that the Graybills had notice that attorneys fees would be sought as part of the judgment. (Tr. Vol I, p. 42, L. 22-25, p. 43, L. 1-

14). Since the Graybills had notice that Badger would be seeking its attorneys fees and costs, it would serve no basis to amend the complaint to specify a dollar amount as it would just require unnecessary additional attorneys fees. (Tr. Vol. I, p. 45, L. 22-25, p. 46, L. 1-13).

On September 21, 2017, the Graybills filed a detailed pleading entitled "Graybills' Memorandum on Issue of An Award of Attorney Fees on Plaintiff's Motion for a Default Judgment." (R. Vol. II, p. 241-45). The Graybills again argued at length the objections raised during the hearing about how Badger no longer had a mechanic's lien because the Graybills had "paid" the debt owed by the mechanic's lien through an attempted tender of funds that Badger returned to the Grabyills. (R. Vol. II, p. 242). The Graybills argued at length about their defense to an award of attorneys fees since they argued that Badger needed to specify a dollar amount in the prayer for relief in the event of a default pursuant to I.R.C.P. 54(e)(4). (R. Vol. II, p. 242-45).

On September 29, 2017, the District Court issued a Memorandum Decision and Order in which the District Court denied Badger's Motion to Amend the Complaint, and Denied Graybills' Motion to Disallow an award of attorneys fees and costs to Badger. (R. Vol. II, p. 246-59).

On October 3, 2017, Badger filed its Motion for Default Judgment pleadings, including an affidavit for attorneys fees and the Memorandum of Costs. (R. Vol. II, p. 261-360). The hearing for the Motion for Default Judgment was scheduled to take place on October 18, 2017. On October 16, 2017, the Graybills again filed a detailed pleading entitled "Graybills' Objection

and Motion to Disallow Plaintiff's Second Motion for Default Judgment." (R. Vol. II, p. 361-386). In this lengthy Memorandum, the Graybills' continued to defend against any award of attorneys fees, and argued at length regarding the District Court's analysis in the September 29, 2017 Memorandum Decision and Order. (R. Vol. II, p. 361-386).

The Court should affirm the District Court's award of attorneys fees based upon the holding of *Magleby,* because the Graybills actively defended this case. As explained by the Court in *Magleby*, the Graybills had notice if they contested the claim, that they faced the award of attorneys fees and costs as set forth in the complaint. Badger did not need to quantify a specific dollar amount because Badger did specify that it would be an amount to proven at the time of trial. As explained by the Court in *Magleby*, in a case such as this one where the Graybills appeared and actively defended the case, only later to have a default judgment entered, at the time Badger filed the complaint it could not meaningfully assign a number to the requested attorneys fees to be entered at the event of the default. The "amount of reasonable attorney fees is necessarily dependent upon future, unknown events, i.e., the extent to which additional services by plaintiff's counsel are required to respond to the defense of the lawsuit." *Magleby,* 154 Idaho at 197. Since the Graybills appeared and actively defended, Badger was not required to forecast the amount of attorneys fees in the event of a default judgment. The Court should therefore affirm the District Court on this basis.

C. The Court Should Affirm the Court's Decision Based Upon the Fact any Procedural Issues Could Have Been Addressed by the Motion to Amend the Complaint.

The Court should alternatively affirm the District Court's award of attorneys fees because the Graybills' technical defense to the award of attorneys fees could have been addressed had the District Court granted Badger's Motion to Amend the Complaint.

"When a judgment on appeal reaches the correct conclusion, but employs reasoning contrary to that of this Court, we may affirm the judgment on alternate grounds." *Kosmann v. Gilbride*, 161 Idaho 363, 366, 386 P.3d 504, 507 (Idaho, 2016). Badger is not seeking a modification of the judgment entered by the Court or the relief granted by the Court, and thus it is appropriate for the Court to affirm on this alternative basis. I.A.R. 11(g) provides:

> **(g) Cross-appeals and Additional Issues on Appeal.** After an appeal has been filed from a judgment or order specified above in this rule, a timely cross-appeal may be filed from any interlocutory or final judgment, order or decree. If no affirmative relief is sought by way of reversal, vacation or modification of the judgment, order or decree, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal.

Courts have interpreted this rule to not require a cross-appeal when the respondent is seeking to affirm the district court's judgment on an alternative basis.

> A cross-appeal is required only when the respondent seeks to change or add to the relief afforded below, but not when it merely seeks to sustain a judgment for reasons presented at trial which were not relied upon by the trial judge but should have been. *Mortensen v. Chevron Chemical Co.*, 107 Idaho 836, 693 P.2d 1038 (1985), (Huntley, J., concurring); *Waterman Steamship Corp. v. Gay Cottons*, 414 F.2d 724 (9th Cir.1969).

Walker v. Shoshone County, 112 Idaho 991, 993, 739 P.2d 290, 292 (Idaho, 1987) (citing I.A.R. 11(f), which is now I.A.R. 11(g)).

For the reasons set forth above, the District Court was correct to award Badger its attorneys fees and costs pursuant to Idaho Code § 45-513. The Court should affirm the District Court's award of attorneys fees because Graybills' technical defense regarding the award could have been addressed had the District Court granted Badger's Motion to Amend the Complaint that it promptly filed in the case. (R. Vol. II, p. 202-237). Badger proposed to amend the complaint to provide a specific dollar amount for the attorneys fees and costs in the event a default judgment was entered against the Graybills. (R. Vol. II, p. 232). This was early in the case, and leave to amend is freely granted by the Court. There was further no prejudice to the Graybills.

Badger cited to the case of *Farber v. Howell*, 105 Idaho 57, 58, 665 P.2d 1067, 1068 (1983), where an order of default had been entered, and where there was a subsequent motion to amend the complaint afterwards to increase the attorneys fees being sought. While the case was reversed on a different ground, the court did not indicate in the opinion that the post-default amendment was improper. Neither the Graybills, nor the District Court, cited to any court rule or other legal authority that prevented the amendment after a default order had been entered. (Tr. Vol. I, p. 35 L. 1-16,).

The District Court disagreed that there was any requirement to specify an amount of attorneys fees in the complaint under the Court Rule, I.R.C.P. 54(e)(4). The District Court further commented that a default order had been entered against the Graybills, and that the District Court did not believe it was appropriate to amend the complaint after the default order

had been entered. The District Court believed it would result in unnecessary additional attorneys fees and costs. (Tr. Vol. I, p. 45, L. 22-25, p. 46, L. 1-13).

The Graybills' counsel took the opportunity to seize upon the District Court's comments about the order of default being entered, and argued at length how it was somehow inappropriate to allow an amendment to address the attorney fee issue complaint. This is despite the fact that the Graybills were filing multiple pleadings and actively defending the case after the Court had entered to the order of default. (Tr. Vol. I, p. 37 L. 1-11,).

Badger agreed to stipulate to an order vacating the order of default if necessary. (Tr. Vol. I, p. 44 L. 1-25,). The District Court is free to set aside an entry of default for good cause, I.R.C.P. 55(c). Badger's consent to set aside the entry of default to address the Graybills procedural argument regarding an award of attorneys fees on the entry of default judgment was good cause to set aside the default if the Court that was necessary to do.

Had the District Court allowed the Motion to Amend the Complaint, there would have been no basis for the Graybills' argument about an award of attorneys fee upon the entry of the default judgment. This is an alternative basis for the Court to affirm the District Court's award of attorneys fees.

1. <u>Leave to Amend a Complaint is Freely Given by the Court.</u>

I.R.C.P. 15(a)(2) provides that a party may amend its complaint by the court's leave, and that the "court should freely give leave when justice so requires." I.R.C.P. 15(c)(1)(B) provides that an amendment of a pleading relates back to the date of the original pleading when "the

amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out, or attempted to be set out in the original pleading."

"A court should liberally grant a motion to amend a complaint." *Iron Eagle Dev., LLC v. Quality Design Sys., Inc.*, 138 Idaho 487, 492, 65 P.3d 509, 514 (2003). In this case, the proposed Second Amended Complaint merely clarified the claims being asserted against the Graybills. There are not new claims being alleged, nor new parties being added to the lawsuit.

Idaho Courts which have addressed this situation where a complaint is being amended to simply clarify the claims, and where no new claims are being added, and where no new parties are being added, have held that the Court should grant leave to amend the complaint unless the noticed party would be unduly prejudiced thereby in maintaining its defense.

> Under Rule 15(c) the amended pleading must be examined to determine whether the new claims "arose out of the conduct, transaction, or occurrence set **1080 *1017 forth or attempted to be set forth in the original pleading." We believe the district court took a hypertechnical view of the rule when it concluded that the amended complaint was not sufficiently related to the original complaint. Underlying Rule 15(c) and its relation-back provisions is the concept that a party should be given notice of the allegations against him. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1497–1498 at 489–516 (1971). **Therefore, if a party is put on notice by the original complaint, an amendment to cure a defective pleading should not be prohibited unless the noticed party would be unduly prejudiced in maintaining its defense. One of the purposes of Rule 15 is to allow amendments to expand or cure defective pleadings. *Id.* It is well settled that, in the interest of justice, courts should favor liberal grants of leave to amend.** *Wickstrom v. North Idaho College*, 111 Idaho 450, 725 P.2d 155 (1986); *Markstaller v. Markstaller*, 80 Idaho 129, 326 P.2d 994 (1958); C. LEWIS, IDAHO PRE–TRIAL CIVIL PROCEDURE, V–1 to –2 (1982).

Herrera v. Conner, 111 Idaho 1012, 1016–17, 729 P.2d 1075, 1079–80 (Ct. App. 1986), dismissed (Apr. 30, 1987)(emphasis added).

The Court in *Herrera* looked at the following factors to determine if there was prejudice to the defendants by the amendment.

> But while amendments are to be freely granted, the district court must also consider whether the nonamending party would be prejudiced as a result of the amendments. *See, e.g., Ladd v. Coats, supra.* For instance, courts should closely examine amendments sought immediately prior to trial, after substantial pretrial work has been completed, to determine the extent of any prejudice that would be suffered by the opposing party if the amendment were granted. Application of the relation-back provisions of 15(c) should not be governed solely by whether the amendment avoids statute of limitation problems. Rather the focus should be upon whether the nonamending party has notice of a claim against it within the limitation of action period and whether the nonamending party would be prejudiced by any changes in the pleadings.

Herrera v. Conner, 111 Idaho at 1016–17.

In this case, there was no prejudice to the Graybills. The District Court had just had the scheduling conference on August 23, 2017, for a trial date scheduled to occur in March 27, 2018. (R. Vol. I, p. 9-10). Badger filed its Motion to Amend on September 6, 2017, and the hearing took place on September 20, 2017. (R. Vol. II, p. 206-37). The deadline to file a motion to amend the pleadings according to the Court's Order Setting Trial and Pretrial Order was not until November 21, 2017. (R. Vol. II, p. 215). There had not been substantial pretrial work. The Graybills certainly had notice of the claims and they were not prejudiced by any change in the pleadings. The proposed Second Amended Complaint simply addresses the technical arguments raised by the Graybills in their object to Badger's Motion for Default Judgment.

2. Idaho Courts Have Allowed a Motion to Amend After an Order of Default Has Been Entered against a Defendant.

There is no prohibition to amending a complaint after an order of default has been entered. This issue was addressed in the case of *Farber v. Howell*, 105 Idaho at 58, 665 P.2d at 1068. In that case, the plaintiffs moved to enter defendants' default on the ground that they had failed to enter an appearance or substitute attorneys within the time required. Although a default order on that ground was entered, default judgment was not taken. The plaintiffs thereafter sought and received permission of the judge to file and serve an amended complaint on defendants. The amended complaint prayed for an additional $1,200.00 in attorney fees if the action went by default. The defendants were served with a copy of the complaint. The defendants failed to answer the complaint within twenty days, and the plaintiffs moved for a default judgment, on the grounds that service had been completed and the defendant had failed, refused, and neglected to appear or plead to said complaint within the time required by law. Judgment was entered on the default. *Farber v. Howell*, 105 Idaho at 58. The default judgment was reversed on the grounds that the plaintiffs did not provide the defendants with the three-day notice before obtaining the original order of default. Nevertheless, there was nothing in that opinion that precluded the amendment of the complaint after the original default order was entered. The District Court should have likewise allowed Badger leave to amend its complaint to plead a specific dollar amount for an award of attorneys fees when the default judgment was entered. This would have addressed the Graybills' technical argument, and it is an alternative basis as why the District Court's attorney fee award should be affirmed.

D. Badger Should Be Awarded its Attorneys Fees on Appeal.

The Graybills have filed an appeal of the District Court's modest award of attorneys fees and costs of $8,134.62, that was based upon I.C. 45-513. The Graybills did this even though it is well recognized by the Courts that attorneys fees and costs cannot be awarded on appeal pursuant to I.C. 45-513. *Fairfax v. Ramirez,* 133 Idaho 72, 79, 982 P.2d 375, 382 (Idaho App.,1999)(citing *Hendrix v. Gold Ridge Mines, Inc.,* 56 Idaho 326, 54 P.2d 254 (1936) which held that Idaho legislature evidenced intent to limit available attorney fees to those incurred in the district court by adopting the general language of a California lien statute, but deleting that portion of the statute which had specifically authorized attorney fees for action in appellate courts.)

There are three different bases for the Court to affirm the District Court's award of attorneys fees and costs to Badger, which the Graybills knew full well before they pursued this appeal. The Graybills have relentlessly argued a very technical defense for attorneys fees which are clearly owed under the lien statute pursuant to I.C. 45-513. The Graybills have needlessly increased the cost by pursuing this defense which is contrary to the statute, the very purpose of the default judgment rule, and which could have easily been addressed through an amendment of the complaint, which the Defendants vehemently fought. Given the issues involved, the Court should award attorneys fees and costs to Badger pursuant to I.C. 12-121, because the Graybills brought this appeal unreasonably and without foundation. *Fairfax v. Ramirez,* 133 Idaho at 79.

The Graybills argue for an award of attorneys fees under I.C. 12-121 in the event that Badger responded to their appeal to affirm the District Court's well reasoned judgment. There is certainly no basis for an award of attorneys fees to the Graybills under that statute, and the Court should deny the Graybills' request.

IV. CONCLUSION

Based upon the foregoing, Badger respectfully requests that the Court affirm the District Court's Judgment, which included an award of attorneys fees and costs pursuant to Idaho Court § 45-513.

DATED this 17th day of October 2018.

STAMPER RUBENS, P.S.

/s/ Matthew T. Ries
MATTHEW T. RIES
Attorney for Respondent/Plaintiff Regdab, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October 2018, I caused to be served a true and correct copy of the following RESPONDENT'S BRIEF by the method indicated below, and addressed to the following:

Mr. Arthur M. Bistline 1205 N. 3rd Street Coeur d'Alene, ID 83814	☐ U.S. Mail ☐ Certified Mail ☐ Facsimile: 208-665-7290 ☒ iCourt: arthur@bistlinelaw.com
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/s/ Laurel K. Vitale
LAUREL K. VITALE

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