STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

SIDNEY N. SMITH, Personal Representative of the Estate of SIDNEY E. SMITH, *Plaintiff*, vs. **COEUR D'ALENE NORTH HOMEOWNERS ASSOCIATION, INC., an Idaho non-profit corporation,** *Defendant*.	Case No. **CV 2013 4700** **MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MEMORANDUM OF FEES AND COSTS AND GRANTING DEFENDANT'S MOTION FOR COSTS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

Simply stated, this dispute is about who is responsible for a drain pipe from a bathroom with a toilet and shower, which was never correctly installed (due to inadequate grade for draining), in an upper floor of a condominium project, and as a result, the shower drain would plug and back up. Complaint, p. 2, ¶¶ 5.4-5.6. If the offending pipe in question was located in the "common area" of the condominium, the Association (defendant) was responsible for fixing the problem. If it was not located in the common area, the owner (plaintiff) was responsible. Complaint, p. 3, ¶ 5.12; Declaration, ¶ 5.1. After a trial to a jury, the jury determined the defendant Association was responsible.

On December 10, 2015, a jury returned a Special Verdict in this case finding that defendant Coeur d'Alene North Homeowner's Association materially breached the

Declaration of Covenants, Conditions and Restrictions, finding such breach was the cause of plaintiff's claimed damages, awarding $1,760.00 in "incidental and consequential damages" and awarding nothing for "reasonable value of lost rental income." Special Verdict, pp. 1-2.

This matter is before the Court on Plaintiff's Memorandum of Fees and Costs, filed February 4, 2015, to which the defendant filed Defendants' [sic] Objection and Motion to Disallow Plaintiffs' [sic] Costs and Fees, on February 17, 2015; and Defendant's Motion for Costs and Defendant's Memorandum of Costs, both filed on February 17, 2015, to which the plaintiff filed Objection to Defendant's Memorandum of Costs on February 27, 2015, and Reply Memorandum in Support of Plaintiff's Request for Fees and Costs and Objection to the defendant's Motion to Disallow on March 31, 2015. Oral argument on these motions was held on May 12, 2015.

II. STANDARD OF REVIEW.

"In those circumstances where attorney fees can properly be awarded, the award rests in the sound discretion of the court and the burden is on the disputing party to show an abuse of discretion in the award." *Burns v. County of Boundary,* 120 Idaho 623, 625, 818 P.2d 327, 329 (Ct. App. 1990). The appellate court conducts a three-stage inquiry: 1) whether the lower court rightly perceived the issue as one of discretion; 2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and 3) whether the court reached its decision by an exercise of reason. *Id.*

III. ANALYSIS

A. PLAINTIFF'S CLAIMS FOR ATTORNEY FEES.

The plaintiff claims attorney fees (and costs) under I.R.C.P. 54(d) and (e) and

Idaho Code § 12-120(1) and (3). Plaintiff's Memorandum of Attorney Fees and Costs, p. 1. Each of these claims will be discussed.

1. Idaho Code § 12-120(1).

Under Idaho Code § 12-120(1), where the amount pleaded is $35,000.00 or less, "there shall be taxed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees." In order for the plaintiff to recover attorney fees, "written demand for the payment of such claim must have been made on the defendant not less than ten (10) days before the commencement of the action." The amount sought in the plaintiff's Complaint, filed on June 25, 2013, was $21,517.50. On June 12, 2013, the plaintiff's counsel sent the defendant's counsel a copy of the Complaint (which was not yet filed) and a letter demanding payment of $21,517.50. Plaintiff's Memorandum of Attorney Fees and Costs, p. 2, Exhibit A.

Under Idaho Code § 12-120(1), if a plaintiff has met the condition of making written demand prior to filing the lawsuit, which this Court finds the plaintiff has met that condition, the plaintiff is not allowed attorney fees "if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety-five percent (95%) of the amount awarded to plaintiff." The Court finds the defendant made no such tender to the plaintiff prior to the commencement of the action on June 24, 2013, at least in response to the letter of the plaintiff's counsel on June 12, 2013.

While a defendant's tender, if any, is usually made following the plaintiff's demand, nothing in Idaho Code § 12-120(1) requires that a tender by the defendant be made *in response to plaintiff's demand.* Idaho Code § 12-120(1) only requires the tender be made by the defendant at some point prior to the commencement of the

action. In this case, defendant, at a mediation held on April 5, 2013, *before* the lawsuit was filed, "tendered to the Plaintiff the amount of $2,000 for full and final settlement of his claims and alleged damages." Affidavit of Archie McGregor, p. 2, ¶ 4; Affidavit of Nancy Stricklin, p. 2, ¶ 4. Plaintiff now argues:

> The Defendant cannot contest this basis on the argument that a settlement offer was presented at mediation. This evidence is inadmissible under Idaho Rule of Evidence 408, and furthermore it was not made pursuant to Plaintiff's demand under Idaho Code § 12-120(1). The Plaintiff made its demand on June 12, 2013. Any offers made two (2) months prior in April 2013 at mediation are irrelevant to this issue.

Reply Memorandum in Support of Plaintiff's Request for Fees and Costs and Objection to Defendant's Motion to Disallow, p. 4.

First, the Court will address the plaintiff's admissibility objection. Idaho Rule of Evidence 408 provides that evidence of offers to compromise a claim "…is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim." I.R.E. 408. The defendant is not offering this testimony of Archie McGregor and Nancy Stricklin to prove liability, as liability was proven at the jury trial. Liability is no longer relevant. The defendant is offering this evidence to show that a tender was made. Idaho Rule of Evidence 408, "…does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." I.R.E. 408. While proof that a tender was made is not one of the enumerated list of examples following the words "such as" in I.R.E. 408, the language "such as" makes the list that follows inherently non-exhaustive. The Court finds proof that a tender was made is similar in purpose to "negativing a contention of undue delay", which is a listed example. Both proof that a tender was made and negativing a contention of undue

delay are collateral issues to the issue of liability. Finally, this Court appreciates that trial judges have broad discretion in determining the admissibility of evidence relating to compromises or offers to compromise and their decision will not be overturned absent a clear showing of abuse. *Quick v. Crane,* 111 Idaho 759, 780, 727 P.2d 1187, 1208 (1986). This Court finds the testimony of Archie McGregor and Nancy Stricklin as to the tender of $2,000.00 on April 5, 2013, to be admissible. The plaintiff has not contradicted such testimony.

Second, this Court will address the plaintiff's argument that the defendant's tender "was not made pursuant to Plaintiff's demand under Idaho Code § 12-120(1)." Reply Memorandum in Support of Plaintiff's Request for Fees and Costs and Objection to Defendant's Motion to Disallow, p. 4. Again, while a defendant's tender, if any, is *usually* made following a plaintiff's demand, nothing in Idaho Code § 12-120(1) *requires* that a tender by the defendant be made *in response to the plaintiff's demand.* A plain reading of Idaho Code § 12-120(1) simply requires the tender be made *before* the *filing of the lawsuit*.

For the foregoing reasons, this Court finds Idaho Code § 12-120(1) is not available to the plaintiff in this case due to the defendant's tender of $2,000.00 before the lawsuit was filed, and due to the fact that $2,000.00 is more than 95% of the $1,760.00 awarded in the jury verdict.

2. Idaho Code § 12-120(3).

The plaintiff claims, "Attorneys' fees are available to Plaintiff pursuant to… the contract provision of Idaho Code § 12-120(3)." Plaintiff's Memorandum of Attorneys' Fees and Costs, p. 2. No additional argument is given in that brief regarding Idaho Code § 12-120(3). Idaho Code § 12-120(3) reads in pertinent part:

> In any civil action to recover on [a]…contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

The defendant argues, "this was not a commercial transaction nor did it involved [sic] a contract for the purchase of goods or services." Defendant's Memorandum of Costs, p. 6; Defendants' [sic] Objection and Motion to Disallow Plaintiffs' [sic] Costs and Fees, p. 7. The defendant correctly notes, "Thus, the gravamen of the action must be for the purchase or sale of goods, services, etc. *See, e.g., Chenery v. Agri-Lines Corp.,* 106 Idaho 687, 682 P.3d 640 (Ct. App. 1984)." Defendants' [sic] Objection and Motion to Disallow Plaintiffs' [sic] Costs and Fees, p. 7. "As noted in *Joseph v. Vaught,* 117 Idaho 555, [558], 789 P.2d 1146 [1149] (Ct. App. 1990), not all contracts are within the scope of I.C. § 12-120(3)." *Id.* There is a "contract" in dispute here: the Declaration. But that "contract", the Declaration, does not relate to the purchase or sale of goods, wares, merchandise, or services. The Declaration is a contract governing the rights and duties of the owners of units and the Association; nothing more. The fact that the owner (plaintiff) and the Association (defendant) end up arguing over the interpretation of those duties, and the fact that a remedy to that dispute might be "services" (fix the pipe), does not make the contract (the Declaration) one involving services. This is essentially the plaintiff's contorted argument when the plaintiff writes:

> The Plaintiff paid homeowners association assessments in exchange for these maintenance services by the Defendant. Thus, the CC&Rs that formed the basis of Plaintiff's action in this case constitutes a contract for services between the parties, which falls within the scope of Idaho Code §12-120(3).

Reply Memorandum in Support of Plaintiff's Request for Fees and Costs and Objection to Defendant's Motion to Disallow, pp. 4-5. The Court is not persuaded by the plaintiff's

argument. The Declaration is not a contract for services, let alone a contract for the *purchase or sale* of services. The Declaration simply establishes rights and duties between parties. The dispute is really over who is responsible for a drain pipe from a bathroom with a toilet and shower that was never correctly installed (due to inadequate grade) and, as a result, would plug and back up. Complaint, p. 2, ¶¶ 5.4-5.6. If the pipe was located in the "common area" of the condominium, the Association was responsible for fixing the problem; if not, the owner was responsible. Complaint, p. 3, ¶ 5.12; Declaration, ¶ 5.1. The jury determined the defendant Association was responsible.

This Court also finds the contract, the Declaration, is not a commercial transaction under I.C. § 12-120(3).

3. Idaho Rule of Civil Procedure 54(e)(1).

Idaho Rule of Civil Procedure 54(e)(1) states in pertinent part: "In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract."

The Restated Declaration of Covenants, Conditions, and Restriction of the Coeur d'Alene North Homeowners' Association § 14.1, provides:

> The Association (acting through the Board), any Owner, and any governmental or quasi-governmental agency or municipality having jurisdiction over the Project shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by this Declaration, and in such action shall be entitled to recover costs and reasonable attorneys' fees as are ordered by the Court.

This action was an action by the plaintiff, "any Owner", to "enforce" the "covenants" "imposed by the Declaration", and the plaintiff was successful in enforcing those

covenants. That contractual provision does not mention anything about a "prevailing party". If a contract provides for attorney fees to any party who "employ[s] legal counsel," then attorney fees may be granted even though the party requesting the fees did not prevail. *Post v. Murphy,* 125 Idaho 473, 476, 873 P.2d. 118, 121 (1994), (*citing Farm Credit Bank of Spokane v. Wissel,* 122 Idaho 565, 836 P.2d 511 (1992)). In *Post,* the plaintiff lot owners sued to prevent resubdivision of other lots by other owners on the ground that resubdivision violated recorded restrictions on the property. 125 Idaho 473, 474, 873 P.2d. 118, 119. The plaintiffs won on summary judgment; the defendants were enjoined from subdividing and from pursuing construction. 125 Idaho 473, 475, 873 P.2d. 118, 120. The trial court found the plaintiffs to be the prevailing party, but "…awarded fees and costs to the defendants, based on a provision (paragraph 24) in the Restrictions which provides for recovery of costs and fees by a grantor who employs counsel in connection with the Restrictions, and on this Court's decision in *Farm Credit Bank of Spokane v. Wissel,* 122 Idaho 565, 836 P.2d 511 (1992)". *Id.* Paragraph 24 read:

> 24. In the event that the Grantors shall employ legal counsel in connection with or to enforce these covenants and restrictions, then the persons with respect to which such employment occurs shall pay all costs incurred, including reasonable attorneys' fees.

125 Idaho 473, 476, 873 P.2d. 118, 121. The Idaho Supreme Court upheld the award of attorney fees and costs to the defendants, reasoning:

> The only requirement in paragraph 24 of the Restrictions is that a grantor employ legal counsel in connection with the Restrictions. It is beyond question that this requirement was met, since Elmar Grabher was both an original grantor and a defendant employing counsel in connection with the Restrictions.

125 Idaho 473, 476-77, 873 P.2d. 118, 121-22.

In the present case, the plaintiff has met the only condition set forth in the Restated Declaration of Covenants, Conditions, and Restriction of the Coeur d'Alene North Homeowners' Association § 14.1; that condition being that the plaintiff, as "an Owner", attempting to "enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by this Declaration". That requirement being met, the plaintiff, "…in such action shall be entitled to recover costs and reasonable attorneys' fees as are ordered by the Court." The Idaho Supreme Court then continued in *Post*:

> Contrary to plaintiffs' suggestion, it does not change the applicability of *Farm Credit* that in *Farm Credit* there was no prevailing party, while here plaintiffs prevailed on the legal issues. **Under *Farm Credit,* unless the contractual attorney fees provision specifically requires such, no "prevailing party" requirement will be imposed on a contractual right to recover fees.**

Id. (bold added). In the present case, there is no "prevailing party" requirement imposed on the plaintiff's contractual right to recover attorney fees under Section 14.1 of the Declaration.

This "prevailing party" issue in a party's right to recover fees can be confusing. The first origin of confusion is that I.R.C.P. 54(e)(1) states in pertinent part: "In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract." Thus, simply looking at the rule, one might think you need a prevailing party analysis in every case. However, the case law clarifies that.

The second source of confusion comes from some of the cases interpreting I.R.C.P. 54(e)(1). There is case law which at first glance would indicate a "prevailing

party" analysis is always used, contrary to *Post* and *Farm Credit*. The provisions of I.R.C.P. 54(e) apply in processing a contractual claim for attorney fees. In *Chadderdon v. King,* 104 Idaho 406, 411-12, 659 P.2d 160, 165-66 (Ct. App. 1983), the Idaho Court of Appeals held that the criteria of I.R.C.P. 54(d)(1)(B) are used to determine the prevailing party in the contract litigation. However, in *Chadderdon,* the contract itself stated "…the prevailing party shall be entitled to recover, in addition to all other rights hereunder, reasonable attorney's fees, including court costs." 104 Idaho 406, 411, 659 P.2d 160, 165, n. 2. In *Burnham v. Bray,* 104 Idaho 550, 553-55, 661 P.2d 335, 338-40 (Ct. App. 1983), the Idaho Court of Appeals held that the definition of a prevailing party in I.R.C.P. 54(d)(1)(B) applies to a determination of attorney fees under a contract as well as under a statute. But in *Burnham,* the buy-sell agreement stated the "successful party" shall be entitled to recover reasonable attorney fees. 104 Idaho 550, 553, 661 P.2d 335, 338.

In the present case, this Court specifically finds as a matter of fact that there is no "prevailing party" requirement imposed on the plaintiff's contractual right to recover attorney fees under Section 14.1 of the Declaration, and that as a matter of law, *Post* and *Farm Credit* (and *Chadderdon* and *Burnham* when the facts of those cases are considered) do not require a prevailing party analysis when that requirement is not imposed by the contract at issue.

In the present case, the defendant claims Section 14.1 of the Declaration "only applies to actions brought against third parties because it provides that only a party who has 'jurisdiction over the Project' may sue for enforcement of the CCRs…" Defendants' [sic] Objection and Motion to Disallow Plaintiffs' [sic] Costs and Fees, p. 7; Defendant's Memorandum of Costs p. 6. The Court is not persuaded by such argument and finds it

to be an unsupportable misreading of the plain language of the provision. Again, the language of § 14.1 reads:

> The Association (acting through the Board), any Owner, and any governmental or quasi-governmental agency or municipality having jurisdiction over the Project shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by this Declaration, and in such action shall be entitled to recover costs and reasonable attorneys' fees as are ordered by the Court.

The defendant's argument defies rules of punctuation. This Court finds a plain reading of the provision is that: A) 1) the Association, 2) any Owner, and 3) any governmental or quasi-governmental agency or municipality having jurisdiction over the project, B) shall have the right to enforce by any (court) proceedings in law (damages) or in equity (injunctive relief), C) all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by this Declaration, and D) in such action shall be entitled to recover costs and reasonable attorneys' fees as ordered by the Court. A plain reading of that provision is that "having jurisdiction over the project" pertains to and modifies or further narrows the category "governmental or quasi-governmental agency or municipality", and does not pertain to, modify or further narrow the categories of "the Association" or "any Owner". There is no comma, no semi-colon between "municipality" and "having jurisdiction over the project." The defendant's argument to the contrary defies not rules of pronunciation but also elementary definition. What "owner" would have "jurisdiction" over the project? And really, contrary to the defendant's (the Association's) argument, the Association does not have "jurisdiction" either. Both "any Owner" and "the Association" have standing, but neither has jurisdiction. Jurisdiction is vested in courts and governmental agencies and entities. Jurisdiction is defined as "1. A government's general power to exercise authority over all

persons and things within its territory…2. A court's power to decide a case or issue a decree…3. A geographic area within which political or judicial authority may be exercised…4. A political or judicial subdivision within an area…" Black's Law Dictionary, Seventh Edition, p. 855 (1999). Finally, the defendant's argument lacks any logic.

This Court finds that the language "having jurisdiction over the Project" only applies to "governmental or quasi-governmental agency or municipality", and in no way limits this attorney fees provision of Section 14.1 to apply only to actions brought against third parties.

This Court finds the plaintiff, as an "owner", had a right to enforce the covenants set forth in the Declaration, and that is exactly what the plaintiff did in filing this lawsuit, and at trial the plaintiff succeeded in that regard. Under *Post* and *Farm Credit*, since the Declaration is silent on the issue of a "prevailing party", it is not necessary that the plaintiff be found to be the "prevailing party."

The attorney fees provision of Section 14.1 also allows attorneys' fees for the defendant in this case due to the language, "The Association (acting through the Board)…" It could be argued that this could lead to the absurd result where, in any litigation, the Association and the Owner get each other's fees paid for by the other side. First, the Association has not requested fees in this case. Second, while the attorney fees provision of Section 14.1 is silent on the issue of a "prevailing party", the provision makes clear that in a dispute over enforcement of the covenants, whoever enforces that covenant should have their attorneys' fees paid for by the party against whom the covenant was enforced. That provision allows "The Association (acting through the Board) [the defendant herein]), any Owner, … shall have the right to

enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by this Declaration…" The plaintiff sued to enforce the covenants that both the plaintiff and the defendant had to live and operate under. In that lawsuit, the plaintiff won. As a result of the jury's Special Verdict, the plaintiff enforced the conditions imposed by the Declaration. Throughout this litigation, the defendant sought to avoid its responsibilities under the Declaration, and in that regard, the defendant lost. While the defendant certainly has made offers to settle, at important times, the defendant sought in this lawsuit to completely avoid liability under the Declaration. Those important times were at the inception of this litigation when the defendants filed their Answer, and also at the end of this litigation in closing argument before the jury. In its Complaint, the defendant requests: "WHEREFORE, this answering Defendant prays that the Plaintiff take nothing by his Complaint, that the same be dismissed with prejudice…" Answer and Demand for Jury Trial, p. 6. In addition to those two bookends, on July 30, 2014, the defendant filed a Motion for Summary Judgment and Defendant's Memorandum in Support of Motion for Summary Judgment, which sought to avoid all liability based on an argument in the CCRs governing insurance coverage. The defendant lost that argument. Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment, filed September 29, 2014. On November 24, 2014, the defendant filed Defendant's Motion to Reconsider Court's Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment. Defendant lost that argument. Memorandum Decision and Order Denying Defendant's Motion for Reconsideration, filed December 1, 2014.

The Court finds the plaintiff is entitled to reasonable attorney fees under Idaho

Rule of Civil Procedure 54(e)(1).

4. Amount Awarded.

The plaintiff requests costs in the amount of $379.82 and attorney fees in the amount of $15,559.00. Plaintiff's Memorandum of Attorneys' Fees and Costs, p. 7. This is based on the "adjusted" award of attorney fees, which is discussed in the section immediately below. In the present section, the Court will only analyze the amount of costs and attorney fees requested by the plaintiff for the "adjusted" award.

As to costs, all that is sought by the plaintiff based on the "adjusted" award is $379.82, which is the filing fee of $96.00 incurred June 25, 2013, and the deposition transcript incurred on July 11, 2014. Plaintiff's Memorandum of Costs and Fees, Exhibit E. Defendant objects to the hourly rate of plaintiff's attorneys ($190.00-$250.00 per hour) citing *Harris v. Alessi,* 141 Idaho 901, 910, 120 P.3d 289, 298 (Ct. App. 2005), and to the reimbursement for a legal intern, which defendant claims is "tantamount to a paralegal", and paralegal expenses are not recoverable as attorney fees, citing *Perkins v. U.S. Transformer,* 132 Idaho 427, 431, 974 P.2d 73, 77 (1999). Defendants' [sic] Objection and Motion to Disallow Plaintiffs' [sic] Costs and Fees, pp. 10-11.

As to the hourly rate, *Harris* certainly does not establish a cap for the State of Idaho for all time. All the State of Idaho Court of Appeals held was it was not an abuse of the trial court's discretion to modify the requested hourly rate of $135 an hour downward to $110.00 per hour, for a case in Pocatello in 2005. 141 Idaho 901, 910, 120 P.3d 289, 298. Much more recently, involving local attorneys, this Court held:

> IHD objects to the hourly rate of Attorney Beverly Anderson, who was billed at $225.00 per hour. Memorandum of Costs and Affidavit of C. Matthew Andersen in Support of Attorney's Fees and Costs, p. 6. Yet,

IHD's own attorney witnesses, Douglas S. Marfice, Brent Featherston and Susan Weeks (also counsel for IHD), all have hourly rates of $250.00 per hour, or $25.00 more per hour than Beverly Anderson, who has five years more experience than Marfice and eight years more experience than Featherston. This justifies an upward departure from what City initially requested.

IHD objects to C. Matthew Andersen's hourly rate of $325.00 per hour. Andersen has been a member of the Washington State Bar since 1976, or thirty-eight years. None of IHD's attorney witnesses have that length of experience. Memorandum of Costs and Affidavit of C. Matthew Andersen in Support of Attorney's Fees and Costs, pp. 3, 6. For the reasons stated below, the Court finds IHD's objections to C. Matthew Andersen's hourly rate to be unavailing.

IHD points the Court to its March 12, 2013, decision in *Samuel v. Black Rock Development, Inc., et al.,* Kootenai County Case No. CV 2012 4492, pointing out that this court adjusted attorney fees downward finding rates of $400.00 per hour for one attorney, $275.00, $225.00 and $220.00 per hour for other attorneys unreasonable, where this court reduced the attorney fees requested downward by 33%. Memorandum in Support of Objection to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs and Attorney Fees, p. 6. Counsel for IHD is correct that this Court reduced attorney fees downward by 33%. Kootenai County Case No. CV 2012 4492, Memorandum Decision and Order Granting in Part and Denying in Part Plaintiff Samuel's Motion for Award of Attorney Fees and Costs and Granting Plaintiff's Motion to Certify Judgment, p. 19. But counsel for IHD also knows this argument is incomplete, as IHD's argument overlooks two clearly made points in that decision. First, is the fact that the one-third reduction in the amount of attorney's fees sought in *Samuel* was based on *all twelve* of the I.R.C.P. 54(e)(3)(A-L) factors, of which, hourly rate is but one factor. Second, when the Court analyzed the hourly rate of the applicant attorneys in *Samuel*, the Court found such rates were unreasonable, but in doing so specifically held:

> This Court specifically finds the $400.00 per hour rate by attorney Robert A. Dunn to be unreasonable. The Court finds the $275.00 per hour rate by Kevin W. Roberts, $225.00 per hour rate by Jason T. Piskel and $220 per hour rate by Michael R. Tucker, attorneys licensed in Idaho for five years, seven years and six years, respectively, to be unreasonable.

Kootenai County Case No. CV 2012 4492, Memorandum Decision and Order Granting in Part and Denying in Part Plaintiff Samuel's Motion for Award of Attorney Fees and Costs and Granting Plaintiff's Motion to Certify Judgment, p. 18. There is a big difference between an attorney of seven years in the *Samuel* case requesting his hourly rate of $400.00 per hour and an attorney of C. Matthew Andersen's thirty-eight years of experience requesting his hourly rate of $325.00 in the present case. Experience is perhaps the largest factor in any attorney determining his

> hourly rate, a rate which the market will decide can be justified, and in any particular case, the client ratifies is justified. Experience is a factor for this Court to consider. I.R.C.P. 54(e)(3)(C). The Court specifically finds Andersen's hourly rate is reasonable, given his experience. The Court also finds that the affidavits submitted by IHD justify the exact hourly rate charged by City's other attorney, Beverly Anderson. The Court finds her hourly rate of $225.00 (for most of her work) and $250.00 (for one half hour), to be reasonable, given her experience.

City of Sandpoint v. Independent Highway District, Bonner County Case No. CV 2013 1342, Memorandum Decision and Order Granting in Part (As to Timing of This Court's Prior Decision) and Denying in Part (As to Amount of Attorney Fees Previously Awarded) Defendant IHD's Motion for Reconsideration of Attorney Fees, October 24, 2014, pp. 5-7. In the present case, Peter Smith IV, counsel for the plaintiff, has ten-years of experience and an hourly rate of between $240/hour and $250/hour (depending on the year the work was performed), and co-counsel Lindsey Simon has six years of experience and an hourly rate of $190/hour or $200/hour (again, depending on the year the work was performed). Plaintiff's Memorandum of Attorneys' Fees and Costs, pp. 4-5. Given the *City of Sandpoint* decision, this Court cannot find the hourly rate of Peter Smith IV or Lindsey Simon to be unreasonable sufficient to merit a downward departure in fees requested.

As to the legal extern, plaintiff notes: "Tori Osler is a 2014 law school graduate, Rule 9 legal intern in the State of Washington, and an associate attorney in the law firm of Lukins & Annis, P.S." Plaintiff's Memorandum of Attorneys' Fees and Costs, p. 4. Defendant is correct that *Perkins* states, "Fees for paralegal services clearly are not contemplated as awardable attorney fees or costs under I.R.C.P. 54(e)(3)." 132 Idaho 427, 431, 974 P.2d 73, 77, citing *Hines v. Hines,* 129 Idaho 847, 855, 934 P.2d 20, 28 (1997). But a law school graduate with a provisional license who is an associate

attorney in the law firm is certainly much different than a paralegal. The Court finds Tori Osler's fees are allowed as attorney fees and finds the hourly rate of $170/hour reasonable for an extern and an attorney with less experience in the law firm.

The Court has reviewed the I.R.C.P. 54(e)(3)(A-K) factors, and finds no reason for either an upward or downward departure from the amount of fees claimed by plaintiff.

B. DEFENDANT'S CLAIMS FOR COSTS AND PLAINTIFF'S CLAIMS FOR COSTS AND FEES.

1. Amount of Costs and Fees.

The defendant filed Defendant's Motion for Costs and Defendant's Memorandum of Costs. In the Defendant's Motion for Costs, the defendant requests, "…its costs incurred in the above action as the prevailing party on the Plaintiff's Complaint filed against said Defendant." Defendant's Motion for Costs, p. 1. The defendant cites to I.R.C.P. 54(d) and 68 for this request. *Id.;* Defendant's Memorandum of Costs, p. 1. Defendant writes, costs "…are therefore allowable as a matter of right pursuant to Rules 54(d)(1)(C) and 68, Idaho Rules of Civil Procedure." Defendant's Memorandum of Costs, p. 1. The defendant then concludes its argument: "Moreover, the Court should award the Association its costs as a matter of right consistent with Rules 54(d) and 68, IRCP, because the Association was the prevailing party under *Burns v. County of Boundary, supra,* and moreover the Association beat the pre-suit tender as well as the respective Rule 68 Offers of Judgment." *Id.,* p. 7. Thus, it is clear the defendant makes this request under those combined rules; in other words, the defendant does not claim costs under I.R.C.P. 54(d), and also claim separately under I.R.C.P. 68.

Idaho Rule of Civil Procedure 68 allows costs (not attorney fees) to a defending

party, if certain criteria are met. The defendant, appropriately, only seeks costs and not fees. However, the issue of the plaintiff's attorney fees is part of the criteria under I.R.C.P. 68.

The defendant argues it (the Association) is the "prevailing party." Defendant's Memorandum of Costs, pp. 1-7. It is interesting to note that I.R.C.P. 68 does not mention "prevailing party" in the text of the rule. Idaho Rule of Civil Procedure 68 only applies when, 1) a defendant ("a party defending a claim"), 2) "any time more than 14 days before trial begins", 3) "serves upon the adverse party" (the plaintiff), 4) "an offer to allow judgment to be taken against the defending party" which offer of judgment must also include all attorney fees and costs recoverable by the plaintiff. If those criteria are met, and if the plaintiff receives an "adjusted award" which is *less* than the offer of judgment made by the defendant, then the plaintiff pays the costs of the defendant incurred by the defendant *after* the defendant made the offer (conversely the defendant shall not be liable for costs incurred by the plaintiff incurred *after* the offer), and the defendant pays the costs of the plaintiff incurred *before* the defendant made the offer. I.R.C.P. 68(b)(i), (iii) and (ii), respectively. The defendant is correct in arguing:

> In *Payne v. Wallace,* 136 Idaho 303, 32 P.3d 695 (Ct. App. 2001), the Idaho Court of Appeals considered the same argument proffered by the Plaintiff in this case and ruled that adjusting an award under Rule 68 only applies when the Plaintiff is actually entitled to attorney fees. *Id.* at 310-11, 32 P.3d at 702-03.

This is where the concept of "prevailing party" can creep in to I.R.C.P. 68. Basically, in most cases, if a plaintiff did not prevail, then the situation that the "the Plaintiff is actually entitled to attorney fees" does not arise, as set forth in *Payne*. *Payne* was a personal injury action. Thus, in *Payne,* unlike the situation here where the Declaration allows attorney fees for enforcement of the declaration (and prevailing party is not

relevant), *Payne* had to be the prevailing party to even get to the sequential analysis under I.R.C.P. 68. The trial court in *Payne* found Payne was the prevailing party. 136 Idaho 303, 310, 32 P.3d 695, 702. Then, only after making that finding, did the trial court in *Payne* go through the sequential analysis and find the defendant Wallace was entitled to costs after the offer of judgment was made. 136 Idaho 303, 311, 32 P.3d 695, 703. In the present case, as discussed above, there is no prevailing party analysis for the plaintiff to recover costs and fees in this case under I.R.C.P. 54(e)(1) when provided for by contract. Thus, under that basis, this Court finds whether the plaintiff prevailed is not an issue under I.R.C.P. 68. However, in an abundance of caution, if this Court has misread *Payne*, and if this Court must still analyze who is the prevailing party, the Court does so in the section below.

The Court now turns its attention to the "adjusted award" analysis of I.R.C.P. 68(b) and the sequential analysis under I.R.C.P. 68(b)(i), (ii) and (iii). The pertinent facts under those analyses are as follows:

In this case, on July 7, 2014, the defendant served an "offer of judgment" upon counsel for the plaintiff, in the amount of $6,300.00. Affidavit of Michael L. Haman in Support of Defendant's Motion/Memorandum of Costs and Defendant's Objection to Plaintiff's Memorandum of Fees/Costs, p. 3, ¶ 5, d. On November 21, 2014, the defendant served an "offer of judgment" upon counsel for plaintiff, in the amount of $20,000.00. *Id.,* ¶ 5, f. On December 10, 2015, a jury returned a Special Verdict in this case finding that the defendant Coeur d'Alene North Homeowner's Association materially breached the Declaration of Covenants, Conditions and Restrictions, finding such breach was the cause of the plaintiff's claimed damages, awarding $1,760.00 in "incidental and consequential damages" and awarding nothing for "reasonable value of

lost rental income." Special Verdict, pp. 1-2. As of July 7, 2014, the date of the first offer of judgment, the plaintiff had incurred attorney fees in the amount of $7,080.50. Plaintiff's Memorandum of Attorneys' Fees and Costs, pp. 8-9 (somewhat of an affidavit included in the memorandum), Exhibit D, p. 5. Costs at that time were $96.00, the cost of the filing fee for the Complaint. *Id.,* Exhibit E. As of November 21, 2014, the date of the second offer of judgment, the plaintiff had incurred a total attorney fees in the amount of $15,559.00. *Id.,* Exhibit D, p. 10. As of that date, costs totaled $379.82. *Id.,* Exhibit E.

Looking at the July 7, 2014, Offer of Judgment, under I.R.C.P. 68(b), the Court adds the verdict amount of $1,760.00, the costs incurred up to that date of $96.00 and attorney fees incurred up to that date of $7,080.50, for a total "adjusted award" of $8,936.50, and compare it to the $6,300.00 Offer of Judgment. Because the "adjusted award" is more than the Offer of Judgment, defendant "must pay those costs, as allowed under Rule 54(d)(1), incurred by the offeree (plaintiff) both before and after the making of the offer." I.R.C.P. 68(b). Since there is another Offer of Judgment, the same analysis must be made.

Looking at the November 21, 2014, Offer of Judgment, under I.R.C.P. 68(b), the Court adds the verdict amount of $1,760.00, the costs incurred up to that date of $379.82 and attorney fees incurred up to that date of $15,559.00, for a total "adjusted award" of $17,698.82, and compare it to the $20,000.00 Offer of Judgment. Because the "adjusted award" is less than the $20,000.00 Offer of Judgment, the plaintiff "must pay those costs (but not fees) of the offeror (defendant) as allowed under Rule 54(d)(1), incurred after the making of the offer." I.R.C.P. 68(b)(i). The only costs sought by the defendant, which were incurred after November 21, 2014, are $1,400.00 for witness

David Carlson, "Reasonable Expert Witness Fees for Testifying (*See* Exhibit "D" to the Haman Affidavit)." Affidavit of Michael L. Haman in Support of Defendant's Motion/Memorandum of Costs and Defendant's Objection to Plaintiff's Memorandum of Fees/Costs, p. 2, ¶ 3.A. Additionally, defendant "must pay those costs of the offeree (plaintiff), as allowed under Rule 54(d)(1), incurred before the making of the offer." Those costs amount to $379.82. Finally, the defendant "shall not be liable for costs **and attorney fees** awardable under Rules 54(d)(1) and 54(e)(1) of the offeree incurred after the making of the offer." I.R.C.P. 68(b)(iii) (bold added). The plaintiff requested costs after November 21, 2014, in the amount of $216.58. Plaintiff's Memorandum of Attorneys' Fees and Costs, pp. 8-9, Exhibit E. The plaintiff is not entitled to those costs under I.R.C.P. 68. The plaintiff requested fees after November 21, 2014, in the amount of $18,386.50. *Id.,* Exhibit D. The plaintiff is not entitled to those fees under I.R.C.P. 68.

2. Prevailing Party Analysis for Purposes of I.R.C.P. 68.

This Court finds the plaintiff to be the prevailing party in this litigation if such finding is necessary for I.R.C.P. 68 under *Payne*.

> The determination of a prevailing party involves a three-part inquiry. The court must examine (1) the result obtained in relation to the relief sought; (2) whether there were multiple claims or issues; and (3) the extent to which either party prevailed on each issue or claim.

Jerry J. Joseph C.L.U. Ins. Assocs., Inc. v. Vaught, 117 Idaho 555, 557, 789 P.2d 1146, 1148 (Ct. App. 1990); *see also Sanders v. Lankford,* 134 Idaho 322, 325, 1 P.3d 823, 826 (Ct. App. 2000); *Anderson v. Schwegel,* 118 Idaho 362, 366, 796 P.2d 1035, 1039 (Ct. App. 1990). The defendant has cited *Burns v. County of Boundary,* 120 Idaho 623, 626, 818 P.2d 327, 330 (Ct. App. 1990) (citing *Odziemek v. Wesly,* 102 Idaho 582, 634

P.2d 623 (1981), *Chadderdon v. King,* 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983), and *Burnham v. Bray,* 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983)) for the quotation that the trial court is "not required to simply award attorney fees to any party who obtained a monetary judgment, no matter how paltry. Rather, the court is allowed to consider the presence and absence of awards of affirmative relief and determine which party, on balance, prevailed in the action." Defendant's Memorandum of Costs, pp. 1-2.

In *Chadderdon v. King*, the Chadderdons owned a commercial building and sued King, the contractor on that building, for breach of the construction contract. 104 Idaho at 407, 659 P.2d at 161. King filed a counterclaim to recover amounts expended over the price expressed in the construction agreement. *Id.* The jury denied recovery to both parties. *Id.* King then applied for an award of attorney fees and costs, which the trial court granted. *Id.* The Idaho Court of Appeals noted that the trial court "…determined both parties prevailed in part (as to the claims asserted by each against the other), but that the contractor King had prevailed on the 'main issue of the case which consumed the majority of the trial,' i.e., the owners' cause of action against the contractor." 104 Idaho at 411, 659 P.2d at 165. The present case involves no counterclaim. In the present case, the plaintiff abandoned his claim for breach of fiduciary duty claim prior to trial, and at trial, only the plaintiff prevailed. While the plaintiff did not prevail to the extent he had hoped, he prevailed more than getting nothing, which is what the defendant argued the plaintiff should receive.

In *Burnham v. Bray,* the Idaho Court of Appeals upheld the trial court's decision not to award attorney fees to either side in a partnership dissolution. 104 Idaho 550, 553-55, 661 P.2d 335, 338-90. Prior to trial, Bray tendered payment of the Burnhams' share of the profit sharing funds to the court, which awarded the Burnhams those funds

in judgment. 104 Idaho at 552-53, 661 P.2d at 337-38. The trial court refused to award damages or attorney fees to the Burnhams, finding Bray had acted reasonably in withholding payment, and having determined most of the issues pertaining to partnership dissolution in favor of Bray. 104 Idaho at 553, 661 P.2d at 338. The Idaho Court of Appeals held the trial judge's decision not to award attorney fees to either side was the result of a proper exercise of his discretion. 104 Idaho at 555, 661 P.2d at 340. The Court of Appeals' analysis was as follows:

> The Burnhams arguably were the "successful party" in this litigation, so far as payment of the profit sharing funds was concerned. However, the trial court found that the Brays and the other respondents prevailed on other claims arising out of the buy-sell contract. Although the judge acknowledge respondents "technically won the lawsuit," his decision—when read in its entirety—indicated that both the plaintiffs and the defendants had been partial successful." The court considered the nature of the case, and characterized it as a "good faith contest." It is apparent he considered the result obtained in relation to the relief sought by the respective parties on the multiple claims. He determined the extent to which each of the parties prevailed and he declined to award attorney fees to either side.

104 Idaho at 554-55, 661 P.2d at 339-40. In the present case, most, if not all, pre-trial rulings went in favor of the plaintiff and against the defendant. At trial the plaintiff abandoned his breach of fiduciary duty theory and proceeded only on the breach of contract theory. The plaintiff convinced the jury that the defendant breached the contract (the declarations). The plaintiff received an award of $1,760.00. While that is less than the "approximately $30,000.00" (Defendants' Objection and Motion to Disallow Plaintiffs' Costs and Fees) plaintiff's counsel asked for at trial, it is more than zero, which is what the defendant's counsel asked for at trial.

The defendant focuses on the fact that on November 20, 2014, the defendant offered plaintiff $20,000.00 to settle the plaintiff's claims, which offer was rejected by

the plaintiff. Affidavit of Michael L. Haman in Support of Defendant's Motion/Memorandum of Costs and Defendant's Objection to Plaintiff's Memorandum of Fees/Costs, p. r, ¶ 5, f. Though not cited by the defendant, the Court has found some authority for that argument.\

In *Yellowpine Water User's Ass'n v. Imel*, 105 Idaho 349, 670 P.2d 54 (1983), a water association brought a test case in the magistrate division against a homeowner to collect a water assessment fee of $234 and was awarded $26 at trial. The Idaho Supreme Court stated "[W]e hold that [plaintiff] is not a prevailing party" because the plaintiff's demand for $234 was "excessive" and the defendant had tendered the payment of $26 before trial. 105 Idaho at 352, 670 P.2d at 57.

However, it is not necessary that the plaintiff prevail in the exact amount prayed for in his complaint. In *Barber v. Honorof,* 116 Idaho 767, 780 P.2d 89 (1989), the Idaho Supreme Court reversed the denial of attorney fees in a foreclosure of a materialman's lien for $11,000.00 in which the judgment was rendered for slightly more than $8,000.00. The Idaho Supreme Court held that the fact that the plaintiff did not prevail in the amount requested in his complaint was not automatic grounds for denial of attorney fees and remanded the case back to the trial court to reconsider the question of attorney fees "after consideration of all relevant factors bearing on the determination." 116 Idaho at 771, 780 P.2d at 93; *see also J.E.T. Dev. V. Dorsey Constr. Co., Inc.,* 102 Idaho 863, 642 P.2d 954 (Ct. App. 1982).

Obviously, if just prior to trial the defendants offered to settle for $20,000.00, the jury verdict of $1,760.00 was a jury award that surprised even the defendants. For the plaintiff, after just rejecting said offer of $20,000.00, and then arguing at trial for nearly $40,000.00, the jury verdict of $1,760.00 had to be incredibly disheartening. When

viewed in light of the parties pre-trial offers, the jury verdict is obviously an outlier, significantly below the estimates given by either party.

This Court finds that the amounts offered and rejected in settlement has little bearing on which party is the prevailing party. This is because, in the final analysis, the parties did not settle the matter; the parties turned to a jury trial. This Court finds that what was argued to the trier of fact, the jury, is more important in determining the prevailing party than what was offered and rejected at various times between the parties. When the defendants at trial, in argument before the jury, argue for zero because the defendant is not liable, and the jury finds defendants liable and finds the defendant caused the plaintiff $1,760.00 in damages, the plaintiff prevailed. Certainly, the plaintiff did not obtain the nearly $40,000.00 counsel for the plaintiff argued for in damages before the jury, but the jury answered both questions asked of them in plaintiff's favor.

Comparing this case to a percentage, the plaintiff prevailed by more than 50% and arguably prevailed 100%. The jury was asked two questions: Did the defendant breach the covenant? And if they find breach, What are plaintiff's damages? Looking at it that way, the plaintiff prevailed 100%.

On the issue of breach alone, the plaintiff prevailed on 50% of the issues, based only on the first question asked of the jury. But the plaintiff prevailed at least to some extent on the second question. Even though the plaintiff's damages were less than they asked, the plaintiff was still awarded damages; thus, the plaintiff prevailed at least in part on the second question. That brings the plaintiff well over 50% at an absolute minimum. The plaintiff prevailed in this litigation.

The plaintiff dismissed his breach of fiduciary duty claim. Even if this is factored

in to the percentage analysis, this Court finds the plaintiff prevailed by well over 50%. It matters not whether the plaintiff established liability on one cause of action or two, as the damages would likely have been the same.

Because of the fact that it does not matter how many ways the plaintiff established liability, as long as the plaintiff established liability, in this Court's opinion, the dismissal of the breach of the fiduciary duty claim by the plaintiff is more appropriately a factor to be determined in the amount of attorney fees and not in the prevailing party analysis.

The plaintiff sued the defendant for breach of fiduciary duty and for breach of the declaration (breach of contract). Complaint, pp. 5-6, "VII. First Cause [sic] Action, Breach of Fiduciary Duty", ¶¶ 7.1-7.3; p. 6 "VIII. Second Cause of Action, Breach of Declaration", ¶¶ 8.1-8.4

At trial, the plaintiff did not offer any instructions of the plaintiff's claim of breach of fiduciary duty, instead only offering instructions on the plaintiff's claim of breach of contract. Plaintiff's Proposed Jury Instructions 11, 13, 14. The plaintiff's Trial Brief breathed not a word about the plaintiff's claim of breach of fiduciary duty, and only discussed breach of contract and damages therefor. Plaintiff's Trial Brief, pp. 4-9. Just prior to trial, the defendant obviously thought they were defending the breach of fiduciary duty claim (Defendant's Trial Brief, pp. 2-4); however, none of the defendant's proposed jury instructions discussed the plaintiff's claim of breach of fiduciary duty.

A dismissal of one of several claims in an action does not mean that the party against whom the claim was made is a prevailing party for the purpose of awarding fees; the dismissal of a claim is but one of many factors to consider, and the timing of the dismissal of a claim may be another. *Chenery v. Agri-Lines Corp.,* 106 Idaho 687,

692, 682 P.2d 640, 645 (Ct. App. 1984). "[W]here the parties have succeeded on entirely separate claims, those claims are properly distinguished and should be analyzed separately in determining whether attorney fees are appropriate." *Bumgarner v. Bumgarner*, 124 Idaho 629, 644, 862 P.2d 321, 325 (Ct. App. 1993). The Idaho Court of Appeals has held:

> However, individual theories should not be seen as isolated parts of the case, framed by their own encapsulated facts, but as different ways to obtain one specific recovery—a single claim. From this view, we held that when attorney fees are allowed under I.R.C.P. 54(e)(1), either by statute or contract, the amount should not be based upon individual prevailing theories.

Burns v. County of Boundary, 120 Idaho 623, 626, 818 P.2d 327, 330 (Ct. App. 1990) (citing *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 733 P.2d 824 (Ct. App. 1987) and *Nalen v. Jenkins*, 113 Idaho 79, 741 P.2d 366 (Ct. App. 1987)). In *Burns*, the trial court awarded attorney fees only for the work performed on successfully obtaining the equitable injunctive relief, and not for work performed after obtaining injunctive relief, specifically at trial where he asked for recovery of $1,000,000.00 but where he received a decision from the court for $45 in damages. Affirming the attorney fees decision of the trial court, the Idaho Court of Appeals in *Burns* held:

> We see nothing in our decisions in *Associates* and *Nalen* which bears upon this case. Here, the district court distinguished, not between two separate theories supporting a single claim for relief, but between two entirely separate claims—one seeking equitable injunctive relief and the other seeking damages in an action at law. Our rules of procedure envision that a district court may distinguish between separate claims in awarding costs, I.R.C.P. 52(d)(1)(B), and attorney fees, I.R.C.P. 54(e)(2). Under this procedure, we conclude that it was proper for the court to consider claims separately in awarding attorney fees.

120 Idaho 623, 626, 818 P.2d 327, 330. In *Burns,* it is easy to see why the trial court separated the claims in analyzing fees; the claims were for different remedies, and

played out at different times in the litigation. One claim was for injunctive relief (an order from the court precluding the county commissioners' termination of the airport manager contract), for which Burns was successful, and another claim was for damages, for which Burns was not very successful. The injunctive relief was at the onset of the case, and the damage decision was at the end of the case. The present case lacks that distinction. Both the breach of contract claim and breach of the covenant of good faith were alleged at the outset (Complaint, pp. 5-6, "VII. First Cause [sic] Action, Breach of Fiduciary Duty", ¶¶ 7.1-7.3; p. 6 "VIII. Second Cause of Action, Breach of Declaration", ¶¶ 8.1-8.4), and only at trial was the breach of the covenant of good faith abandoned. Both the breach of contract claim and breach of the covenant of good faith sought the singular remedy of damages. It would also seem that discovery and trial preparation for the two theories would have inextricably overlapped.

As noted in Stein on Personal Injury Damages Database, April 2015, Jacob A. Stein, Part 3, Adjustments and Limitations to Awards, Chapter 17 Attorneys' Fees and Interest, § 17:56, Recovery Under Statute or Rule—"Prevailing" or "successful" party:

> Statutes providing for an award of attorneys' fees often utilize the terms "prevailing" or "successful" as the criteria to determine the eligibility for an award of fees. * * *
>
> A typical formulation of the "prevailing party" standard was set forth by the United States Supreme Court in *Hensley v Eckerhart*:[n. 6, 461 U.S. 424, 434, 103 S.Ct. 1933, 1940] plaintiffs are considered prevailing parties "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." [n 7. U.S., See also *Farrar v. Hobby,* 506 U.S. 103, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992); *Texas State Teachers Ass'n v. Garland Independent School Dist.,* 489 U.S. 782, 103 L. Ed. 2d 866, 109 S. Ct. 1486 (1989); *Krichinsky v. Knox County Schools,* 963 F.2d 847 (6th Cir. Tenn. 1992). Fla. *Smith v. Adler,* 596 So. 2d 696 (Fla. Dist. Ct. App. 4th Dist. 1992). Mass. *Draper v. Town Clerk of Greenfield,* 384 Mass. 444, 425 N.E.2d 333 (1981), cert. denied, 456 U.S. 947, 72 L. Ed. 2d 471, 102 S. Ct. 2016.] A party need not necessarily succeed on all issues in the case to be considered a prevailing party.[n. 8, U.S. *Farrar v. Hobby,* 506 U.S.

103, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992); *Krichinsky v. Knox County Schools,* 963 F.2d 847 (6th Cir. Tenn. 1992);*Hendrickson v. Branstad,* 934 F.2d 158 (8th Cir. Iowa 1991). Alas. *Day v. Moore,* 771 P.2d 436 (Alaska 1989). Ark. *ERC Mortg. Group, Inc. v. Luper,* 32 Ark. App. 19, 795 S.W.2d 362 (1990).]

Obviously, in this case, plaintiff succeeded on the significant issue of breach of contract (declaration), and succeeded on the damage claim, albeit not to the extent desired.

This Court finds the most appropriate way to analyze the abandonment of plaintiff's breach of fiduciary claim prior to trial is to look at the entire course of litigation.

The Complaint was filed June 25, 2013, again, alleging both breach of contract (declaration) claim and a claim for breach of the covenant of good faith. An Answer and Demand for Jury Trial was filed August 5, 2013. There are seventeen affirmative defenses, but none of them are any more targeted toward breach of fiduciary duty as opposed to breach of contract (breach of the declaration). Many of the affirmative defenses pertain to an alleged lack of duty owed by the defendant. A year later, the defendant moved for summary judgment. Summary judgment was based on an argument of 1) waiver (regarding insurance coverage), 2) lack of causation between any action taken by the defendant as to damages sustained by the plaintiff. Memorandum in Support of Summary Judgment, pp. 5-9. In the defendant's briefing, the lack of causation argument seemed to pertain only to the plaintiff's negligence claims (*Id.,* pp. 6-8), but in conclusion that briefing asks for all claims to be dismissed (*Id.,* p. 9), and no claims were dismissed. In this Court's September 29, 2014, Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment, this Court denied summary judgment on the causation issue, but limited it to the plaintiff's breach of fiduciary duty claim, and not the breach of contract claim. Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment,

pp. 9-12. On November 4, 2014, the defendants filed Defendant's Motion to Reconsider Court's Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment. That motion was limited to the waiver argument and insurance coverage, and did not touch on causation at all. Defendant's Motion to Reconsider Court's Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment, pp. 1-4. On December 1, 2014, this Court issued its Memorandum Decision and Order Denying Defendant's Motion for Reconsideration. The case then proceeded to trial on December 8, 2014, before Senior District Judge Steven Verby. Trial was only on the breach of contract claim, and resulted in a finding by the jury that the defendant materially breached the Declaration of Covenants, Conditions and Restrictions, and an award by the jury of $1,760.00 for "incidental and consequential damages". Special Verdict, pp. 1-2.

Thus, the breach of fiduciary duty claim was discussed in part in the defendant's motion for summary judgment, but so was the breach of contract claim. The defendant's motion to reconsider concerned **only** the breach of contract claim. Only the breach of contract claim was tried to the jury. Thus, throughout the litigation, the vast majority of the effort by both parties was focused on the breach of contract claim.

Smith v. Mitton, 140 Idaho 893, 104 P.3d 367 (2005) indicates it would be error for this Court to attempt to segregate out the time spent by the plaintiff's counsel on the breach of fiduciary duty claim as compared to time spent by the plaintiff's counsel on the breach of contract claim. The pertinent portion of *Smith* is as follows:

> Burley asserts that the trial court erred in awarding attorney fees to Smith for several different reasons. First, Burley contends that Smith's cost bill does not distinguish between costs incurred relating to claims pursued at trial and those abandoned before trial. Burley cites *Hackett v. Streeter,* 109 Idaho 261, 706 P.2d 1372 (Ct.App.1985), to support the

> argument that the attorney fees need to be segregated, however, the holding of *Hackett* is not applicable to the present case. In *Hackett,* the court refused to award attorney fees when there was no attempt to segregate fees incurred while representing a client, who was found liable, and another client, who was not found liable. The court noted, "it is incumbent upon a party seeking attorney fees to present sufficient information the court to consider factors as they specifically relate to the *prevailing* party or parties seeking fees." *Id.* at 264, 706 P.2d at 1375 (emphasis in original). That case is easily distinguished from the present case. Smith's counsel only represented one party. *Hackett* mandates segregation of fees for multiple clients; it does not require that fees be segregated according to the specific claims of each client. Therefore, Burley's argument that it was error to award attorney fees based on failure to distinguish between costs incurred relating to claims pursued at trial and those abandoned prior to trial fails.

140 Idaho 893, 901, 104 P.3d 367, 375.

This Court finds the fact that the breach of fiduciary claim was abandoned on the eve of jury trial does not change the fact that plaintiff is the prevailing party in this litigation. This Court also finds no reduction in the amount of attorneys' fees sought by plaintiff should result by the fact that the breach of fiduciary claim was abandoned on the eve of jury trial.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED as of November 21, 2014, the date of the second offer of judgment, plaintiff had incurred a total attorney fees in the amount of $15,559.00, and costs of $379.82, and plaintiff's requested fees and costs is GRANTED and fees and costs in those amounts are awarded in favor of plaintiff against the defendant.

IT IS FURTHER ORDERED the costs sought by defendant which were incurred after November 21, 2014, are $1,400.00 for witness David Carlson, and defendant is awarded those costs against the plaintiff.

IT IS FURTHER ORDERED plaintiff's requested costs incurred after November

21, 2014, in the amount of $216.58 are DENIED as plaintiff is not entitled to those costs under I.R.C.P. 68.

IT IS FURTHER ORDERED plaintiff's requested fees incurred after November 21, 2014, in the amount of $18,386.50 are DENIED as plaintiff is not entitled to those fees under I.R.C.P. 68.

Entered this 1st day of July, 2015.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of July, 2015, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Peter J. Smith, IV	667-4125	Michael L. Haman	676-1683

_____
Jeanne Clausen, Deputy Clerk