STATE OF IDAHO)
County of KOOTENAI)ss

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AT_____ O'Clock _____M
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

BERNARD GURSTEIN and SHEILA GURSTEIN, husband and wife, and RUSSELL GURSTEIN, *Plaintiffs*, vs. **KOOTENAI COUNTY, a political subdivision of the State of Idaho,** *Defendant*.	))))))))))	Case No. **CV 2008 7852** **MEMORANDUM DECISION AND ORDER: 1) DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND ORDER; DENYING DEFENDANT'S MOTION TO COMPEL AND 3) GRANTING IN PART DEFENDANT'S MOTION FOR ATTORNEY FEES AND COSTS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

The following factual summary is from this Court's October 13, 2010, Memorandum Decision and Order on Motions for Summary Judgment:

> Plaintiffs Bernard and Sheila Gurstein (Gursteins) operated a light industrial manufacturing business, U.S. Products, Inc., in California. In July 1988, U.S. Products, Inc., entered into a lease agreement with Kootenai County; the lease terms were favorable to U.S. Products, Inc., as part of an incentive program to bring employers to Kootenai County. Affidavit of Bernard Gurstein, p. 2, ¶ 8. In 1992, U.S. Products, Inc. transferred its interest in the lease to Bernard and Sheila Gurstein, and the County consented to this assignment. *Id.,* p. 3, ¶ 11. Gursteins thereafter sought an assignment of one-third of their lease interest to their son, Russell Gurstein. This assignment to Russell Gurstein was effected with the County's written consent via correspondence with the then Administrative Director of the Kootenai County Commissioners. *Id.,* ¶ ¶ 12-13. The Gursteins sold the U.S. Products business in 1998, but Gursteins retained ownership of the lease with the County and the building they had constructed as an improvement on the leasehold property, subletting the property to the new U.S. Products owner. *Id.,* p. 3, ¶ 14. The Gursteins desired to sell the improvement and assign the leasehold and began that process in 2002 or 2003; however, the

> Gursteins only received one proposal to purchase from Blue Water Technologies, Inc. (Blue Water) in October 2006. *Id.,* p. 4, ¶ 20. Gursteins entered into a purchase and sale agreement with Blue Water in 2007. That transaction was scheduled to close on October 1, 2007, and after Blue Water granted one extension to Gursteins, it was scheduled to close on October 31, 2007. The purchase and sale agreement did not close as Blue Water withdrew due to the fact that Gursteins had failed to obtain the written consent from the County to assign the subject lease. *Id.,* pp. 4-8, ¶ ¶ 21-41.
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> On September 30, 2008, Gursteins filed this lawsuit for damages against the County after the closing did not occur. Gursteins alleged the County breached the lease agreement between Gursteins and the County (in part by unreasonably withholding consent to an assignment of the lease) and the County breached the implied covenant of good faith and fair dealing. Memorandum in Support of Plaintiffs' Motion fro Partial Summary Judgment, p. 3.

Memorandum Decision and Order on Motions for Summary Judgment, pp. 1-2.

This Court denied the Gursteins' motion for partial summary judgment and granted the County's cross-motion for summary judgment. *Id.,* p. 15. In doing so, this Court reasoned:

> As to Gursteins' breach of contract claim against the County, Gursteins are not entitled to summary judgment. The County had an obligation, pursuant to the lease agreement, not to unreasonably withhold consent to an assignment or sublease. But because of Gursteins' undisputed sublease to Blue Water (for approximately one year before even seeking the County's written consent, much less receiving written consent from the County), the County did not act unreasonably in not consenting to the assignment to Blue Water in the 30-day time period following their providing Gursteins with notice of the claimed defaults. As there was no breach of the lease by the County, the County is entitled to summary judgment on this issue.
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> …
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> The express terms of the lease agreement have been discussed by the Court *supra;* and in light of the Gursteins' default for entering into a sublease for one year prior to seeking the County's approval, it cannot be said the County failed to act in good faith by issuing a notice of default.

Id., pp. 13-15.

On January 5, 2011, Judgment was entered in favor of the County. Gursteins moved for reconsideration on January 19, 2011, filing the memorandum in support of

their motion for reconsideration on March 28, 2011. The County filed its motion for costs and attorney fees along with its memorandum of costs on January 19, 2011. Gursteins timely filed their objection to the request for costs and fees and memorandum in support thereof on February 2, 2011. *See* I.R.C.P. 54(d)(6) (requiring objections to be filed within fourteen days of service of a memorandum of costs and fees). On April 4, 2011, the County filed a Motion to Compel (requesting this Court order Gursteins to answer discovery responses to discovery propounded to them on February 16, 2011), an Affidavit of Darrin L. Murphey in support of that motion to compel, and a Motion to Shorten Time to hear such motion to compel at the hearing scheduled for April 6, 2011. Oral argument on the County's motion for fees and costs, Gursteins' objection to fees and costs, and Gursteins' motion for reconsideration was held on April 6, 2011. At the beginning of that hearing, counsel for Gursteins had no objection to the County's motion to shorten time to hear the County's motion to compel. Accordingly, that motion to shorten time was granted at the April 6, 2011, hearing. After hearing argument on the County's Motion to Compel, the Court denied such on the record. All other motions were taken under advisement.

After oral argument on April 6, 2011, later that day the County filed its "Supplemental Affidavit (of Darrin L. Murphey) in Support of Memorandum of Costs." No objection to that affidavit has been made by the Gursteins. That affidavit has been considered by this Court.

II. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks,* 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). Similarly, the district court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford,* 139

Idaho 744, 753, 86 P.3d 458, 467 (2004).

III. ANALYSIS.

A. Gursteins' Motion to Reconsider.

Gursteins request this Court to reconsider its October 13, 2010, Memorandum Decision and Order arguing their breach of the lease was not material, could not have been cured, and resulted in no damage to the County. Memorandum in Support of Plaintiffs' Motion for Reconsideration, pp. 13-23. Gursteins contend the question of whether their breach was material remains a question of fact and reiterate that Blue Water's sublease would have been approved (presumably had Gursteins properly sought consent of the County as contemplated by the lease), as evidenced by the County's ultimate consent to the Blue Water sublease. *Id.,* pp. 14-15. Gursteins claim curing the breach would have been impossible as they could not "venture back in time in an effort to obtain the County's 'prior' consent." *Id.,* p. 15. Gursteins argue the breach was not material given the circumstances because the County could identify no damage resulting from Blue Water's sublease entered into prior to Gursteins' obtaining the County's consent. *Id.,* pp. 15-16. Gursteins go on to note for the Court the possibility that the County's alleging a material breach is a mere pretext; that the County wished to increase the lease rate and withheld consent to an assignment in order to obtain such a higher rate. *Id.,* pp. 16-17. Gursteins provide the Court with an illustrative example of their breach, which they claim caused no damage and is factually incapable of being cured:

> Let us suppose that the Gursteins were five days late in the payment of their lease obligation to Kootenai County, in 1993, 1994, and 1995. Even though the County accepted these lease payments, those lease payments were made in an untimely manner, thereby constituting "defaults" in accordance with the terms of the lease. The "defaults," like the defaults in failing to ask for the <u>prior</u> permission to lease to Blue Water, are factually and legally incapable of ever being cured. One can't go back in

time and ever make them timely.

Id., p. 18.

Ultimately, Gursteins argue a breach which causes no damage and cannot be factually or legally cured is immaterial and the County acted unreasonably in withholding consent to an assignment based on such an immaterial breach. *Id.,* p. 20. This argument also forms the basis for Gursteins' claim that the County breached the covenant of good faith and fair dealing. *Id.,* p. 22.

In response, the County argues Gursteins are seeking the Court's rewriting of the lease itself, because there is no dispute that § 8.04 of the lease requires the County's prior written approval for an assignment and § 9.02 is a non-waiver clause. Defendant's Reply to Memorandum in Support of Plaintiffs' Motion for Reconsideration, p. 3. The County cites to *Deal v. Cockrell,* 111 Idaho 127, 721 P.2d 726 (1986) for the proposition that failure to obtain prior written consent to a sublease by a lessor constitutes a material breach. *Id.,* pp. 4-5. The County goes on to cite this Court's reasoning that the implied covenant of good faith and fair dealing does not override specific lease terms and that the County's withholding consent for a requested sublease entered into prior to seeking approval does not violate the covenant of good faith and fair dealing. *Id.,* pp. 6-7.

As discussed by the County, *Deal* involves both a breach of a nonassignment clause and nonwaiver of the lease provision prohibiting assignment. 111 Idaho 127, 127-28, 721 P.2d 726, 726-27. The lease at issue in *Deal* prohibited assignment of the mining operations lease without prior written consent of the lessor; the Idaho Supreme Court upheld the lower court's determination that the plaintiffs/lessees' actions in entering into a transferring the lease on at least three occasions amounted to a violation and breach of the lease agreement. 111 Idaho 127, 128, 721 P.2d 726, 727. Contrary

to Gursteins' contentions on the instant motion for reconsideration, *Deal* stands for the proposition that waiver of a party's right to terminate a lease for breach of a nonassignment clause may be a factual question, but does not preclude summary judgment in a court trial where facts are not in dispute. *Id.* Because this matter was set for a five-day court trial, the Court was entitled to draw the most reasonable inferences from the uncontroverted evidence. *See e.g. J.R. Simplot Co v. Bosen,* 144 Idaho 611, 618, 167 P.3d 748, 755 (2006).

In an unreported Washington Appellate Division case, the question of whether an unconsented sublease is a material breach allowing for forfeiture arose, that Court wrote:

> Whitehead, LLC argues that even if the sublease was a breach of the lease, it was not a material breach which allowed a forfeiture.
>
> For a breach to be material, the violation must be substantial. *Port of Walla Walla v. Sun-Glo Producers, Inc.,* 8 Wn. App. 51, 59, 504 P.2d 324 (1972); *Central Christian Church v. Lennon,* 59 Wash. 425, 109 P. 1027 (1910). A material breach is one "serious enough to justify the other party abandoning the contract…one that substantially defeats the purpose of the contract." *Park Ave. Condo. v. Buchan Devs.,* 117 Wn.App. 369, 383, 71 P.3d 692 (2003). Parties to an original lease may lawfully covenant that no assignment of the lease should be valid without the written consent of the lessor, and an assignment in violation of such a covenant will confer no rights on the assignee. *Coulos v. Desimone,* 34 Wn.2d 87, 98-99, 208 P.2d 105 (1949).
>
> Here, the Lease allows for assignment, but it clearly requires a process to make any assignments valid. Failure to follow this process immediately voids the sublease. While this alone protected the landlord, the parties further agreed that the failure to provide notice and obtain prior consent was an event of default giving the landlord rights to terminate the lease. The very existence of such sanctions shows that the parties agreed that prior notice and consent was material. The Swansons *and* Whitehead, LLC knew that they were required to seek Munro's consent at least 90 days prior to the sublease (the Swansons had previously sought Munro's consent in another agreement for a loan secured by the leasehold interest.) Their failure to give prior written notice was willful and was a material breach.

Munro v. Swanson, 137 Wash.App. 1015, ____, Not reported in P.3d, 2007 WL

512533, *11 (Wash.App. Div. 1, 2007). While *Munro* is certainly not binding upon this Court, it is very instructive. Here, the lease specifically states "[f]ailure to obtain prior written approval from the county will constitute default." Complaint, Exhibit A, p. 23. Default, in turn, provides the County with the option, *inter alia,* to terminate the lease by notifying the lessee in writing. *Id.,* p. 19, ¶ 8.02. It follows that the parties agreed in writing to the same set of facts giving rise to a material breach in *Munro.* Gursteins' argument, that a breach which causes no damage and cannot be factually or legally cured is immaterial, is incorrect. And, again, as this Court has previously stated, because of the Gursteins' default for entering into a sublease for one year prior to seeking the County's approval, the County did not fail to act in good faith by issuing a notice of default. Memorandum Decision and Order on Motions for Summary Judgment, p. 15.

Finally, although not addressed directly by the County, Gursteins' argument by analogy to the County's waiver of late payments is entirely off point. The lease itself explicitly provides no default (meaning no breach, material or immaterial) would result from numerous payments made five days late. The lease specifically states a default in rent occurs when the lessee fails to pay any rent or other charges due within ten days after the due date. Complaint, Exhibit A, p. 18 ¶ 8.01(A). Gursteins' argument fails because, while the lease dictates a default occurs when an assignment is made without prior written consent, no such result would occur even if numerous lease payments between 1993 and 1995 were five days late.

B. The County's Motion to Compel.

As mentioned above, the County's Motion to Shorten Time to hear its Motion to Compel was granted at the April 6, 2011, hearing. The Motion to Compel was also denied at hearing, but the following provides the Court's analysis for the record.

The County's Motion to Compel seeks discovery responses to discovery propounded to Gursteins on February 16, 2011, to which Gursteins neither timely responded nor objected. Affidavit of Darrin L. Murphey, filed April 4, 2011, pp. 2-3, ¶¶ 7-8. At oral argument on April 6, 2011, counsel for Gursteins argued that there is no vehicle for post-judgment discovery, that the discovery requested was not relevant, and is covered by the attorney-client privilege. Essentially, the County seeks to discover the amount of time Gursteins' attorney spent on this case (Affidavit of Darrin L. Murphey, filed April 4, 2011, pp. 2-3, ¶¶ 7-8, Exhibit "C"), apparently to rebut the argument by Gursteins that the County's attorney fee claim is not supported by adequate records. Objection to Memorandum of Costs and Request for Attorney Fees, pp. 4, 5. The County responded "In fact, it is the belief of the undersigned (County's counsel) that Plaintiff's counsel spent significantly more than 102.75 hours on this matter." Response to Plaintiffs' Objection to Memorandum of Costs and Request for Attorney Fees, p. 4.

This Court finds Gursteins' objection that there is no vehicle for post-judgment discovery to be without merit. Gursteins cited no rule for that claim. This Court can find nothing in I.R.C.P. 26 which would support Gursteins' claim, and I.R.C.P. 26(b)(1) certainly infers post-judgment discovery may be obtained. By analogy, I.R.C.P. 69 explicitly allows for examination of the judgment debtor.

This Court finds Gursteins' objection that the discovery is not relevant to be well taken, but not persuasive. The only relevance of such information sought to be discovered by the County is to allow the County to make the argument, in defense of their own attorney's time record-keeping deficiencies, that if the Gursteins' counsel spent a certain amount of time (presumably more than the 102.75 hours sought by the County's counsel), then the time sought by County's counsel must be justified. While the weakness of that argument is palpable, the information sought is nonetheless

relevant. Marginally relevant.

This Court finds Gursteins' objection that the discovery is protected by the attorney-client privilege is well-taken and persuasive. Idaho Rule of Evidence 502 governs. The billing by Gursteins' counsel to the Gursteins meets the requirements that the communication was confidential, and the communication was for the purpose of facilitating the conditions of professional legal services. *State v. Allen,* 123 Idaho 880, 885-86, 853 P.2d 625, 630-31 (Ct.App. 1993); *Star Phoenix Mining Co. v. Hecla Mining Co.*, 130 Idaho 223, 232, 939 P.2d 542, 551 (1997); *Kirk v. Ford Motor Co.*, 141 Idaho 697, 703-04, 116 P.3d 27, 33-34 (2005). Accordingly, the County's Motion to Compel must be denied.

Ordinarily, this Court awards attorney fees to the prevailing party on any discovery dispute (motion to compel or motion for protective order), as long as the prevailing party complies with this Court's pre-trial order. In this situation, attorney fees will not be granted in favor of Gursteins, even if requested, as the Gursteins failed to timely object under I.R.C.P. 33(a). The discovery requests were sent by the County to Gursteins on February 16, 2011. Thus, responses were due by Gursteins on approximately March 18, 2011. No responses were made by Gursteins and on April 4, 2011, the County filed its Motion to Compel.

C. The County's Motion for Attorney Fees and Costs.

The County moves this Court for an Order determining it the prevailing party pursuant to I.R.C.P. 54(e)(1) and for fees pursuant to I.C. §§ 12-117, 12-120, 12-121, 12-123, and/or section 9.03 of the lease at issue. Motion for Costs and Attorney Fees, p. 2. Gursteins reply there is no claim that they "acted without a reasonable basis in fact or law" or frivolously and the County's request for fees pursuant to I.C. § 12-117, 12-121, and 12-123 should be denied. Objection to Memorandum of Costs and request

for Attorney Fees, pp. 2-3. In addition to Gursteins' general objection, they object specifically to the County's request for costs as a matter of right with regard to $350 in attorney fees for Peter Erbland and $600 in expert witness trial preparation fees for Stan Moe. *Id.,* p. 3. Gursteins argue the County provided the Court with no evidence as to what Mr. Erbland did or why his time was necessary and Mr. Moe never testified at deposition or trial. *Id.* The County responds to Gursteins' objection to the request for costs and fees by stating it primarily seeks fees pursuant to I.C. § 12-120(3), as it is the prevailing party. Response to Plaintiffs' Objection to Memorandum of Costs and Request for Attorney Fees, pp. 2-3. The County goes on to argue its requests for Mr. Moe's and Mr. Erbland's fees are reasonable and were necessary in defending the lawsuit. *Id.,* pp. 3-4.

Here, the County filed its memorandum of costs within fourteen days of entry of judgment as contemplated by I.R.C.P. 54(d)(5). Gursteins field their objection timely within fourteen days of their receipt of the memorandum of costs. I.R.C.P. 54(d)(6). In determining the prevailing party entitled to costs, the Court is to "consider the final judgment or result of the action in relation to the relief sought by the respective parties." I.R.C.P. 54(d)(1)(B). In their objection, Gurtseins do not affirmatively dispute the County's being the prevailing party, rather they argue the award of fees and two specific cost items are inappropriate. And, indeed, the Court would be hard-pressed to not find the County the prevailing party in light of the Judgment denying Gursteins' motion for partial summary judgment and dismissing the Gursteins' petition with prejudice. This Court finds the County is the prevailing party in this litigation.

As to costs as a matter of right, Gursteins' objections are well-taken. The County cannot claim the costs as a matter of right regarding Peter Erbland's attorney fees or Stan Moe's expert witness fees because neither individual testified at deposition in this

matter (Memorandum of Costs, p. 2, ¶ 3), and it is impossible for them to testify at trial in this matter because there will be no trial. I.R.C. P. 54(d)(1)(C)8. To the extent the County seeks Peter Erbland's fees as a discretionary cost, the County has not set forth for the Court that such costs were "necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed". I.R.C.P. 54(d)(1)(D). While the costs incurred were in all likelihood reasonable and necessary, there is nothing before the Court to indicate that they are "exceptional." The County has not successfully identified these costs as amounting to anything beyond "routine costs associated with modern litigation overhead." *See Total Success Investments, LLC v. Ada County Highway Dist.,* 148 Idaho 688, 694, 227 P.3d 942, 948 (Ct.App. 2010). Indeed, the County has not even broken out which costs it claims are as a matter of right and which costs are discretionary. Memorandum of Costs, p. 2, ¶ 3. As for Peter Erbland's attorney fees, they would likely have been awarded as attorney fees to the prevailing party (not as discretionary costs), had they been itemized as they should have been (and as Darrin Murphey itemized his time). For Peter Erbland's time to be awarded as attorney fees, there would need to be some indication as to the work Peter Erbland performed and his hourly rate for such work. The County has failed to provide this information. Affidavit of Darrin L. Murphy, filed April 4, 2011, p. 2, ¶ 5.

The only costs requested by the County which would qualify as a matter of right which are appropriate are the court reporting costs. I.R.C.P. 54(d)(1)(C)9, 10. Those costs amount to $997.03.

Without conceding that the County is entitled to an award of attorney fees, Gursteins argue the only possible bases for such an award would be I.C. § 12-120(3), applicable to the commercial lease in this matter, or the lease itself. Objection to Memorandum of Costs and Request for Attorney Fees, p. 3. Gursteins contend they

did not act frivolously or without a basis in law or fact such that I.C. § 12-117, § 12-121, or § 12-123 would be applicable. *Id.,* pp. 2-3. An award of attorney fees under I.C. § 12-121 may only be granted by the Court when it finds that the case was brought, pursued or defended frivolously, unreasonably, or without foundation. *Hossner v. Idaho Forest Industries, Inc.,* 122 Idaho 413, 835 P.2d 648 (1992). Similarly, attorney fees under I.C. § 12-117 are not awarded where it cannot be shown that the parties acted without a reasonable basis in fact or law. *Stacey v. Idaho Dep't of Labor,* 134 Idaho 727, 9 P.3d 530 (2000). The County has not set forth any allegation of any purportedly unreasonable or frivolous conduct by Gursteins. While the Gursteins did not prevail, this Court specifically finds there is no unreasonable or frivolous conduct in this litigation by Gursteins.

Idaho Code § 12-120(3) grants the prevailing party the right to an award of reasonable attorney's fees in "any civil action to recover… in any commercial transaction." "The term 'commercial transaction' is defined to mean all transactions except transactions for personal and household purposes." I.C. § 12-120(3). And, I.C. § 12-120(3) does not require that there be a contract between the parties before that statute is applied; "the statute requires only that there be a commercial transaction." *Great Plains Equip., Inc. v. Northwest Pipeline Corp.,* 136 Idaho 466, 472, 36 P.3d 218, 224 (2001). The lease itself also provides for an award of attorney fees to the prevailing party in an amount to be adjudged by the Court. Complaint, Exhibit A, p. 24, ¶ 9.03.

Gursteins do not object to I.C. § 12-120(3) as a basis for attorney fees. This Court specifically finds the gravamen of this lawsuit to be a "commercial transaction." The County is entitled to attorney fees even though its attorney is a salaried employee.

In the Interest of Dunmire, 100 Idaho 697, 700, 604 P.2d 711, 714 (1979).

Gursteins object to the requested amount of fees by the County as not being sufficiently supported by information or foundation. Objection to Memorandum of Costs and Request for Attorney Fees, pp. 4-5. The County requests $23,118.75 in attorney fees, arrived at by multiplying the 102.75 hours spent on this case, by $200.00 per hour, as a claimed reasonable hourly rate. Memorandum of Costs, p. 2, ¶ 3. (The Court notes based on those hours and that hourly rate, the amount requested for attorney fees should actually be $20,550.00). In their supplemental memorandum, Gursteins argue the hourly cost to the County for its salaried employee attorney amounts to approximately $4,536 and an award of over $20,000 would be a windfall to the County. Supplemental Memorandum in Support of Plaintiffs' "Objection to Memorandum of Costs and Requests for Attorney Fees", pp. 2-3. This is based on the County's attorney having a salary and benefit package which amounts to $44.15 per hour.

In determining an amount of fees to be awarded, the Idaho Rules of Civil Procedure set forth factors a Court "shall" consider. I.R.C.P. 54(e)(3). While the hourly "cost" to the County for its attorney's work does not amount to the $20,550.00 amount sought, the Court is to consider numerous factors. On one hand, the Rules contemplate the Court consider "the prevailing charges for like work", not the amount such work in fact cost the County. I.R.C.P. 54(e)(3)(D). On the other hand, just as this Court is not limited to the party-attorney fee agreement in a private attorney situation, (*Nalen v. Jenkins,* 114 Idaho 973. 763 P.2d 1081 (Ct.App. 1988)), this Court is free to award an amount that is higher or lower than what the party must pay their attorney under the agreement (or under the County's salary and benefit package with its attorney in the present case). It is important to note the basis for which this Court

considers attorney fees. The only basis available to the County is I.C. § 12-120(3), as this action is a commercial dispute. Attorney fees awarded under that statute are not "punitive" in nature, but are more a "cost of doing business." Idaho Code § 12-120(3) creates no favored class and does not impose a penalty and the determination of a reasonable fee under that statute should not be colored by characterizing the award as a penalty. *DeWils Interiors, Inc. v. Dines,* 106 Idaho 288, 291, 678 P.2d 80, 83 (Ct.App. 1984). The function of that statute is to allocate attorney fees as an expense of resolving certain commercial disputes through the courts. *Id.* "Because the allocation [of attorney fees under I.C. § 12-120(3)] turns solely upon a determination of the prevailing party, the statute is facially neutral", "It identifies no favored category of litigant to be rewarded, nor disfavored category to be penalized." *Id.* The Court has found I.C. §§ 12-117 and I.C. § 12-121 not applicable, as Gursteins have not acted unreasonably or frivolously. While I.C. §§ 12-117, and I.C. § 12-121 are not "punitive" in nature, (*see, DeWils Interiors,* 106 Idaho 288, 291, 678 P.2d 80, 83), they are statutes imposing attorney fees to deter unreasonable or frivolous conduct; thus, if not "punitive", they are "sanctions" for conduct that is sought to be deterred, similar to I.R.C.P. 11(a)(1). *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 96, 803 P.2d 993, 1002 (1991). There is no conduct by Gursteins to be deterred in the present case. Accordingly, the actual cost to the County is more appropriate than the claimed prevailing hourly rate by private attorneys. This Court finds the actual cost, a factor which can be considered under I.R.C.P. 54(e)(3)(L), has more weight in the instant case than prevailing hourly rate by local attorneys under I.R.C.P. 54(e)(3)(D).

Gursteins note no billing increment was for less than fifteen minutes regardless of the work completed, notations for "trial preparation" are vague and, in fact, this

matter was resolved approximately one month before the date set for trial, and no corroborating information, such as dates, is listed in the itemization of hours. Objection to Memorandum of Costs and Request for Attorney Fees, p. 4. Because no dates for the work performed are listed and because of the inordinately large number of hours claimed by the County, Gursteins argue the request for fees is unreasonable. *Id.,* p. 5.

This Court does not find 102.75 hours by the County's attorney to be "inordinately large." The Court finds no significance to the fact that the County's attorney accounted for time in 15-minute increments (as opposed to 10-minute increments or 6-minute increments as some attorneys do). The Court can also understand why an attorney for a governmental entity, like in-house counsel, might not have exact dates attached to the hours worked, where a private attorney with hundreds of clients would attach dates to billed hours. While it certainly may not be the best practice to not keep track of dates, the County's attorney has satisfied the requirement that the party submit time sheets. *Sun Valley Potato Growers v. Texas Refinery*, 139 Idaho 761, 769, 86 P.3d 475, 483 (2004).

Finally, some time was spent preparing for trial by counsel for the County, after the motions for summary judgment were argued on September 14, 2010. On September 14, 2010, this Court took those motions under advisement, and this Court's Memorandum Decision and Order on Motions for Summary Judgment was not filed until October 13, 2010, only a month before the trial was scheduled to begin on November 15, 2010. It is understandable that there would be time spent in trial preparation by the County's attorney between oral argument on September 14, 2010, and the date this Court filed its decision on October 13, 2010. For any party's counsel to stop preparing for trial counting on prevailing on summary judgment would be foolhardy.

This Court finds $4,536.00 is a reasonable fee to be awarded to the County, pursuant to I.C. § 12-120(3), given consideration of all the factors in I.R.C.P. 54(e)(3)(A)-(L).

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court denies Gursteins' motion for reconsideration, grants costs as a matter of right which are appropriate, denies discretionary costs and grants attorney fees in the amount of $4,536.00 as a reasonable fee to be awarded to the County, pursuant to I.C. § 12-120(3).

IT IS HEREBY ORDERED the Gursteins' motion for reconsideration is DENIED.

IT IS FURTHER ORDERED the County is the prevailing party.

IT IS FURTHER ORDERED costs are awarded in favor of the County against Gursteins, as a matter of right, in the amount to $997.03, pursuant to I.R.C.P. 54(d)(1)(C). To that extent, the County's Motion for Costs and Fees is GRANTED.

IT IS FURTHER ORDERED attorney fees are awarded in the amount of $4,536.00 as a reasonable fee to be awarded to the County, against Gursteins, pursuant to I.C. § 12-120(3). To that extent, the County's Motion for Costs and Fees is GRANTED.

IT IS FURTHER ORDERED all other discretionary costs and costs as a matter of right are not allowed. To that extent, the County's Motion for Costs and Fees is DENIED.

IT IS FURTHER ORDERED the County's Motion to Shorten Time to hear its Motion to Compel is GRANTED as stated at the April 6, 2011, hearing.

IT IS FURTHER ORDERED the County's Motion to Compel is DENIED as stated a the April 6, 2011, hearing. The material sought is protected under the attorney-client privilege, I.R.E. 502. No request for fees by the prevailing party (Gursteins) will be

entertained.

Entered this 25th day of April, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2011, 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 #
John F. Magnuson	667-0500	Darrin L. Murphey	446-1621

_____
Jeanne Clausen, Deputy Clerk