STATE OF IDAHO)
County of KOOTENAI)ss
FILED 1/14/13
AT 8:30 O'Clock A M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

WINDERMERE/COEUR D'ALENE REALTY, INC.,

Plaintiff,

vs.

JENNIFER MCCARVER, ET AL,

Defendants.

Case No. **CV 2012 2798**

MEMORANDUM DECISION AND ORDER ON EX PARTE MOTION FOR ORDER TO RELEASE LIS PENDENS, OR IN THE ALTERNATIVE, EMERGENCY MOTION FOR ORDER TO RELEASE LIS PENDENS

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendants/third-party plaintiffs Jennifer McCarver's and William Jackson's (McCarver/Jackson) "Ex Parte Motion for Order to Release Lis Pendens, or in the Alternative, Emergency Motion for Order to Release Lis Pendens", filed December 18, 2012, which seeks an order by the Court requiring plaintiff Windermere/Coeur d'Alene Realty (Windermere) to release the lis pendens it imposed on the property at issue in this case. Ex Parte Motion for Order to Release Lis Pendens, p. 2. The property is located at 201 North Forest Drive in Coeur d'Alene, Idaho. Petition for Interpleader, p. 2 ¶ 1. Contemporaneous with the filing of that ex parte motion were: "Brief in Support of Defendants/Third Party Plaintiffs' Ex Parte Motion for Order to Release Lis Pendens, or in the Alternative, Emergency Motion for Order to Release Lis Pendens", "Affidavit of William (Bill) Jackson in Support of Defendants/Third Party Plaintiffs' Ex Parte Motion for Order to Release Lis Pendens, or

in the Alternative, Emergency Motion for Order to Release Lis Pendens", "Affidavit of Jennifer McCarver in Support of Defendants/Third Party Plaintiffs' Ex Parte Motion for Order to Release Lis Pendens, or in the Alternative, Emergency Motion for Order to Release Lis Pendens", and "Affidavit of Henry D. Madsen in Support of Defendants/Third Party Plaintiffs' Ex Parte Motion for Order to Release Lis Pendens, or in the Alternative, Emergency Motion for Order to Release Lis Pendens". On December 28, 2012, Windermere filed "Interpleader Windermere's Reply and Objection to McCarver's/Jackson's Ex Parte Motion and Brief to Release Lis Pendens" and an "Affidavit of Arthur B. Macomber in Support of Interpleader Windermere's Reply and Objection to McCarver's/Jackson's Ex Parte Motion and Brief to Release Lis Pendens". On January 2, 2013, Windermere filed a "Supplemental Affidavit of Arthur B. Macomber in Support of Interpleader Windermere's Reply and Objection to McCarver's/Jackson's Ex Parte Motion and Brief to Release Lis Pendens". Oral argument was held on January 3, 2013.

This Court has previously set forth the factual and procedural history of this case in its September 12, 2012, Memorandum Decision and Order on Motion for Summary Judgment:

> This lawsuit started with Plaintiff Windermere/Coeur d'Alene Realty filing its Petition and Motion for Interpleader on April 10, 2012. Windermere asked the Court to determine who should get the funds Windermere had deposited. In their April 23, 2012, Verified Response, Counterclaim, and Third Party Claim, McCarver/Jackson allege Rathbone signed a "Real Estate Purchase and Sale Agreement" (Purchase Agreement) for the sale of land owned by McCarver/Jackson sometime between July 30, 2010, and August 3, 2010. Verified Response, Counterclaim, and Third Party Claim, p. 6, ¶ 15. McCarver/Jackson further allege that the closing date of the sale was extended twice. *Id.*, pp. 6-7. The first was in consideration of Rathbone depositing non-refundable earnest money in the amount of $2,500 with Windermere Realty, memorialized in Addendum #1, signed by both parties. *Id.* That $2,500 was deposited pursuant to Addendum #1. *Id.*, p. 7. The closing date was extended a second time in consideration of Rathbone depositing an

> additional $7,500 non-refundable earnest money with Windermere, memorialized in Addendum #2, signed by both parties. *Id.,* p. 7, ¶ 22. At the time of the Third Party Complaint, the additional $7,500 earnest money had not been deposited. *Id.,* p. 8.
>
> Rathbone appeared *pro se,* and in his "Verified Response to Petition and Motion for Interpleader" filed on June 11, 2012, denied McCarver/Jackson's allegations, and set forth affirmative defenses in his Answer, filed. Verified Response to Petition and Motion for Interpleader, pp. 2-3.
>
> In their Motion for Summary Judgment, McCarver/Jackson state that they are entitled to summary judgment because Rathbone has submitted the $7,500 earnest money to the Court. Motion for Summary Judgment, p. 2. Furthermore, McCarver/Jackson request attorney fees and costs incurred in bringing the action. *Id.,* p. 3. McCarver/Jackson did not state the basis for their claim of attorney fees in their motion for summary judgment.
>
> In his Response, Rathbone admits to the submission of the $7,500 to the Court and states that he has no objection to the payment of that money. Response to Motion for Summary Judgment, p. 1, ¶ 1. However, Rathbone objects to payment of attorney fees and costs and states that he attempted to provide the $7,500 at the onset but that McCarver/Jackson demanded attorney fees above and beyond the amount requested and thus he was forced to submit the funds to the Court. *Id.*, pp. 1-2, ¶ 2.

Memorandum Decision and Order on Motion for Summary Judgment, pp. 1-3.

At the conclusion of the September 12, 2012, hearing, the Court granted summary judgment in favor of McCarver/Jackson and took the matter of attorney fees and costs under advisement. *Id.*, p. 6. The Court issued its written opinion denying McCarver/Jackson's request for an award of attorney fees and costs until further action was taken by the parties pursuant to I.R.C.P. 54(d). *Id.*, pp. 5-6.

On September 25, 2012, McCarver/Jackson filed a Motion for Entry of Judgment and Issuance of Rule 54(b) Certificate. On November 27, 2012, a hearing was held on the motion and a Judgment and Rule 54(b) Certificate was signed by this Court, as well as an Order Awarding Attorney Fees and Costs and Judgment to McCarver/Jackson.

On November 30, 2012, Windermere filed a memorandum of Costs and Request for Discharge and supporting Affidavit, claiming that it is entitled to costs as a matter of

right pursuant to I.R.C.P. 54(d)(1) and is entitled to attorney's fees pursuant to I.C. § 5-321 and I.R.C.P. 54(e)(1). Memorandum of Costs, pp. 2-3. On November 30, 2012, counsel for McCarver/Jackson presented this Court with an Amended Judgment and Rule 54(b) Certificate for signature. The Court signed the Amended Judgment, but on that Amended Judgment the Court did not sign the Rule 54(b) Certificate as proposed by counsel for McCarver/Jackson. Amended Judgment, p. 3. The reason for this is set forth below.

The sole difference between the original Judgment and the Amended Judgment is that the original Judgment leaves open the question of whether or not any parties are to be awarded attorney fees and costs (Judgment, p. 3) and the Amended Judgment closes that question by stating that "Judgment is entered against Defendant/Third Party Defendant WILLIAM RATHBONE in the amount of $9,187.25 for Defendants/Third Party Plaintiffs' attorney's fees and costs." Amended Judgment, p. 3. No mention is made expressly in either judgment that Windermere is also entitled to any attorney fees or costs.

On December 14, 2012, Windermere, through its attorney, sent a letter directly to the Court Clerk, requesting the delay of the release of the interpleader funds until the Court has had an opportunity to rule on its Memorandum of Costs and the "appropriate appeal period has passed." Affidavit of Henry D. Madsen in Support of Defendants/Third Party Plaintiffs' Ex Parte Motion for Order to Release Lis Pendens, or in the Alternative, Emergency Motion for Order to Release Lis Pendens, p. 3, ¶ 9, Exhibit 3, p. 2. As support, Windermere states that the Judgment, signed by the Court on November 27, 2012, was not a final judgment and that it hadn't "seen the Court's signed 54(b) Certificate." *Id.*, p. 1. In counsel for Windermere's letter, no rule basis is given as to why a "letter" to the Clerk of Court was sent rather than seeking an

emergency hearing before the Court. Again, it is noted that the 54(b) Certificate on the November 27, 2012, Judgment *was* signed, whereas the 54(b) Certificate on November 30, 2012, was not.

In response to Windermere's letter, McCarver/Jackson, through their attorney, sent their own letter on December 14, 2012, to the Court Clerk, objecting to the prevention of disbursement of the interpleader funds, pursuant to the Court's Judgment, stating that the November 27, 2012, Judgment was a final judgment, as evidenced by the signed 54(b) Certificate. *Id.*, Exhibit 4. Apparently Counsel for McCarver/Jackson was happy to follow suit initiated by his opponent, and in so doing, commit the same transgression; in counsel for McCarver/Jackson's letter, no rule basis is given as to why a "letter" to the Clerk of Court was sent rather than seeking an emergency hearing before the Court.

On that same day as the letter exchange with the Clerk of Court, December 14, 2012, McCarver/Jackson filed a "Motion to Disallow and/or Objection to Windermere's Memorandum of Costs and Request for Discharge", along with a supporting brief. On December 28, 2012, Windermere filed "Reply to Defendants' McCarver and Jackson's Objection to Windermere's Memorandum of Costs and Request for Discharge", and a separate pleading entitled "Additional Authority—In Support of Reply to Defendants' McCarver and Jackson's Objection to Windermere's Memorandum of Costs and Request for Discharge". Finally, on December 31, 2012, counsel for McCarver/Jackson filed a Notice of Hearing on its "Motion to Disallow and/or Objection to Windermere's Memorandum of Costs and Request for Discharge", scheduling hearing on that motion for February 1, 2013.

As previously mentioned, on December 18, 2012, McCarver/Jackson filed the "Ex Parte Motion for Order to Release Lis Pendens, or in the Alternative, Emergency

Motion for Order to Release Lis Pendens", along with a supporting brief and affidavits from Jennifer McCarver, Bill Jackson and their attorney, Henry Madsen. In their "Brief in Support of Defendants/Third Party Plaintiffs' Ex Parte Motion for Order to Release Lis Pendens, or in the Alternative, Emergency Motion for Order to Release Lis Pendens", McCarver/Jackson argue Windermere's lis pendens against the subject property is not a valid lis pendens because they allege Windermere is using the lis pendens as leverage to ensure payment of Windermere's attorney fees relating to the interpleader filing. Brief in Support of Defendants/Third Party Plaintiffs' Ex Parte Motion for Order to Release Lis Pendens, or in the Alternative, Emergency Motion for Order to Release Lis Pendens, p. 4. As such, McCarver/Jackson also request the Court impose I.R.C.P. 11 Sanctions against Windermere's attorney, Art Macomber and award McCarver/Jackson attorney fees pursuant to I.C. § 12-123. Brief in Support of Defendants/Third Party Plaintiffs' Ex Parte Motion for Order to Release Lis Pendens, or in the Alternative, Emergency Motion for Order to Release Lis Pendens, pp. 5-7. Counsel for McCarver/Jackson does not favor the Court with his suggestion as to what the appropriate sanction under I.R.C.P. 11 might be.

On December 28, 2012, Windermere filed its Interpleader Windermere's Reply and Objection to McCarver's/Jackson's Ex Parte Motion and Brief to Release Lis Pendens, along with an affidavit from Arthur Macomber. Windermere argues that a Lis Pendens, as a mere notice, does not halt a sale and that Windermere was not using the lis pendens to ensure payment of its attorney fees. Reply and Objection to McCarver's/Jackson's Ex Parte Motion and Brief to Release Lis Pendens, pp. 2-3, 5. Windermere also states that because the November 30, 2012, Amended Judgment did not include the signed 54(b) Certificate, the judgment was not final. *Id.,* p. 3. Finally, Windermere objects to the imposition of Rule 11 sanctions and further states that I.R.E.

408 precludes the admission of evidence regarding attempts at compromise related to the release of the lis pendens, alteration of Windermere's memorandum of costs or Windermere's request for attorney fees. *Id.,* pp. 5-7.

At oral argument, counsel for McCarver/Jackson argued lis pendens is not appropriate for an interpleader action because there is no language in the interpleader action stating a claim against the right of possession of the property or a right to title of the property. Counsel for McCarver/Jackson argued a lis pendens is appropriate when there is a dispute over the right of title or right of possession of real property, not when there is a dispute over the rightful owner of interpleaded funds.

At oral argument, counsel for Windermere in response initially stated that it does not have a problem with releasing the lis pendens if the Court were to so order it. However, Windermere argued that McCarver/Jackson misinterpret I.C.§ 5-505 because the interpleader was filed related to an unresolved real estate contract for which the statute of limitations for breach of such a contract has not expired. Windermere claims that statute does not state the plaintiff needs to have an interest claimed in the property in its pleadings. Instead, Windermere argues all the plaintiff must do is recognize that the action affects the title or right of possession to real property, in this case the entering into the real estate contract between Rathbone and McCarver/Jackson, which Windermere argues triggered a change in the interest of the real property, where equitable title in the property went to Rathbone, to be held in trust by McCarver/Jackson. Windermere claims Idaho case law supports this argument.

At oral argument, counsel for Windermere also acknowledged that I.C. § 5-505 does not, on its face, envision an interpleader action. However, counsel for Windermere argued that while I.C. § 5-505 does not expressly include interpleader actions, it does not expressly disallow interpleader actions either. As such,

Windermere argued that this Court would need to interpret I.C. § 5-505 and determine whether or not it includes interpleader actions.

Counsel for Windermere then argued that a lis pendens is not a lien, but merely a notice and, as such, even if this Court were to order the release of the lis pendens, the potential buyers of the property would still be taking the property at some risk because all three defendants (McCarver, Jackson and Rathbone) reserved the right to bring further claims against each other in their pleadings. Thus, Windermere argues it did not improperly record the lis pendens in this case. Counsel for Windermere stated the lis pendens was recorded in April 2012, and that though Windermere does not know when the current sale of the property began, Windermere did not record the lis pendens to be used as a tool to compel McCarver/Jackson to pay its attorney fees. Furthermore, Windermere argued its refusal to release the lis pendens prior to the hearing was not to compel payment of attorney fees, but rather because Windermere felt that the release might be wrongful, given its interpretation of Idaho case law and its belief that the action was still pending in this case. Windermere argued that if the lis pendens was to be released, it should be released pursuant to Court order, which required this Court to interpret the scope of I.C. § 5-505.

Due to counsel for Windermere's "no objection" made at oral argument, this Court ordered the release of the lis pendens. This Court also took the issue of whether or not the lis pendens was improperly recorded under advisement.

II. STANDARD OF REVIEW.

There is currently no standard of review for motions for release of lis pendens in Idaho.

The standard of review for an appellate court reviewing the district court's imposition of sanctions pursuant to Rule 11 is the abuse of discretion standard. *Sun*

Valley Shopping Ctr. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). The intent of the rule is to grant courts the power to impose sanctions for discrete pleading abuses or other types of litigative misconduct." *Campbell v. Kildew,* 141 Idaho 640, 650, 115 P.3d 731, 741 (2005) (citing *Kent v. Pence,* 116 Idaho 22, 23, 773 P.2d 290, 291 (Ct.App. 1989). Such a discretionary decision is reviewed on appeal via a three-tiered inquiry: 1) whether the lower court correctly perceived the issue as one of discretion, 2) whether the lower court acted within the boundaries of such discretion and 3) whether the court reached its decision by an exercise of reason. *Sun Valley*, 119 Idaho 87, 94, 803 P.2d 993, 1000.

III. ANALYSIS

A. Windermere Improperly Recorded the Lis Pendens, and Subsequently Improperly Refused to Release the Lis Pendens.

A lis pendens is a notice to the world of the existence of a claim affecting certain real property. *Suitts v. First Security Bank of Idaho, N.A.*, 100 Idaho 555, 559, 602 P.2d 53, 57 (1979). Idaho Code § 5-505 governs lis pendens and states:

> In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

Idaho Code § 5-505.

A lis pendens does not, by itself, establish or change anyone's legal rights, but the filing of a lis pendens may highlight a possible legal problem affecting the property,

thereby "inducing an extra measure of caution by potential purchasers or lenders until the litigation is concluded." *Jerry J. Joseph C.L.U. Ins. Associates, Inc. v. Vaught*, 117 Idaho 555, 557, 789 P.2d 1146, 1148 (Ct.App. 1990). However, it does not follow that any underlying legal rights have been altered. *Vaught*, 117 Idaho 555, 557-58, 789 P.2d 1146, 1148-49. Thus, a lis pendens does not create a lien. *Benz v. D.L. Evans Bank*, 152 Idaho 215, 223, 268 P.3d 1167, 1175 (2012). The filing of a lis pendens "is necessary only for the purpose of giving record notice to subsequent purchasers or encumbrancers of the property who have not actual notice of the action or of the claim upon which it is based." *Smith v. Faris-Kesl Constr. Co.*, 27 Idaho 407, 427, 150 P. 25, 32 (1915).

On the other hand, removal of a lis pendens, as the result of a settlement or judgment, has no effect on legal rights, but simply is a signal to others that a dispute over those rights has been resolved. *Vaught*, 117 Idaho 555, 558, 789 P.2d 1146, 1149.

However, it is improper to use a lis pendens as some kind of lien to ensure payment. *Berkshire Investment, LLC v. Taylor*, 153 Idaho 73, __, 278 P.3d 943, 956 (2012). In ruling so, the Idaho Supreme Court cited *Yadon v. Lowry*, 126 P.3d 332, 337 (Colo.App. 2005), which held that examples of improper use of process include recording a lis pendens "as leverage to demand money, property, or some other advantage in exchange for a release or dismissal of the action."

McCarver/Jackson argue the lis pendens here was recorded in Kootenai County by Windermere against the property at issue on April 10, 2012 under Instrument No. 2353532000 concurrent with Windermere's filing of the Petition and Motion for Interpleader. Brief in Support of Ex Parte Motion to Release Lis Pendens, p. 4.

McCarver/Jackson state that the November 27, 2012, Judgment signed by this Court was a final judgment, which adjudicated the lawful owner of the interpleaded funds. *Id.* Under that understanding, they argue that there is no longer a pending request for adjudication; therefore, the lis pendens here is no longer necessary. *Id.* Furthermore, McCarver/Jackson argue Windermere refuses to release the lis pendens unless and until McCarver/Jackson pay Windermere's attorney fees related to the interpleader filing. *Id.* Based on this belief, McCarver/Jackson cite to *Berkshire* and *Yadon*, stating that lis pendens are not to be used as a lien to ensure payment. Brief in Support of Ex Parte Motion to Release Lis Pendens, pp. 4-5. Finally, McCarver/Jackson argue that because Windermere's attorney is so "blatantly" improperly using a lis pendens in this case, that I.R.C.P. 11 sanctions should apply. Brief in Support of Ex Parte Motion to Release Lis Pendens, p. 7.

Windermere replies and argues there was no final judgment in this case, as the November 30, 2012, Amended Judgment did not have the Rule 54(b) Certificate signed by this Court. Interpleader Windermere's Reply and Objection to McCarver's/Jackson's Ex Parte Motion and Brief to Release Lis Pendens, p. 3. Windermere further states it did not impose the lis pendens invalidly and is not refusing to release the lis pendens to ensure payment of attorney fees, but rather because under the law (Windermere cites *Donaldson v. Thousand Springs Power Co.*, 29 Idaho 735, 162 P.334 (1916), discussed below) related to equitable title (and the fact that both McCarver/Jackson and Rathbone left open the possible of further litigation), that release of the lis pendens would be improper prior to full settlement of the case. *Id.*

Idaho Rule of Civil Procedure 54(a) states a "judgment is final if either it has been certified as final pursuant to subsection (b)(1) of this rule or judgment has been entered

on all claims for relief except costs and fees, asserted by or against all parties in the action." I.R.C.P. 54(a). Thus, a judgment can be final, even if it has not been certified, so long as judgment has been entered on all claims for relief, except costs and fees.

In its Petition and Motion for Interpleader, Windermere requested that the Court 1) adjudicate the proper and lawful owner of the interpleaded funds, 2) issue an order discharging Windermere from liability to Jackson, McCarver or Rathbone and 3) award Windermere costs and attorney fees. Petition for Interpleader, p. 3.

As stated above, I.C. § 5-505 states that a lis pendens is appropriate in an action "affecting the title or the right of possession of real property". I.C. § 5-505. This Court specifically finds Windermere's interpleader action does not involve a dispute over the title or right of possession of the property, but rather involves a dispute simply over the rightful owner of the interpleaded monies. Windermere cites *Donaldson v. Thousand Springs Power Co.*, 29 Idaho 735, 162 P.334 (1916) as authority for its position that the law regarding equitable title support no release until final resolution of the case. Interpleader Windermere's Reply and Objection to McCarver's/Jackson's Ex Parte Motion and Brief to Release Lis Pendens, p. 3. Windermere's reliance on *Donaldson* is entirely misplaced. In *Donaldson*, the Idaho Supreme Court stated that "where real estate is sold under a valid contract, the purchase money to be paid in part and the deed executed at a future day, the equitable title passes at once to the vendee, and equity treats the vendor as a trustee for the purchaser of the estate sold, and the purchaser as trustee of the purchase money for the vendor, since equity treats things agreed to be done as done." 29 Idaho 735, __, 162 P. 334, 338. While it is true that this principle is still Idaho law today, that principle does not in any way affect the decision of this Court.

Idaho Code § 5-505 is specific in its language that a lis pendens only applies to

those actions affecting a "title" or "right of possession" in the property. An interpleader action, such as this one, does not affect a title or right of possession in the property because the only dispute to be resolved is who is the rightful owner of the interpleaded funds, the earnest money. This interpleader action is not a determination of who has title or right of possession of the property, and this Court's determination that McCarver/Jackson are the rightful owners of the interpleaded monies similarly does not affect the title or right of possession of the property. Therefore, Windermere's recording of the lis pendens in April 2012 was improper under I.C. § 5-505.

Even if it were proper for Windermere to record the lis pendens in April 2012 (again, the Court finds it was not proper), Windermere's argument fails because its refusal to release the lis pendens was also not proper. The original Judgment of November 27, 2012, (with the signed Rule 54(b) Certificate) states:

1) McCarver/Jackson are the rightful and legal owners of the earnest money which is the subject of the Petition for Interpleader and Third Party Complaint, and 2) the claims regarding right, title and interest to and in the earnest money and in regard to the lawful owner of the earnest money in this matter are resolved. Judgment, pp. 2-3. The only issues still unresolved are the attorney fees and costs requested by Windermere, which is not required for a judgment to be final under I.R.C.P. 54(a). As such, the judgment from November 27, 2012, and November 30, 2012, are final, and therefore, there is no reason for a lis pendens to remain on the property. Even if Windermere did not refuse to release the lis pendens to compel payment of its attorney fees, the judgment was final under I.R.C.P. 54(a) and Windermere's refusal to release the lis pendens was improper.

B. Idaho Rule of Civil Procedure 11 Sanctions are Appropriate against Windermere.

Idaho Rule of Civil Procedure 11(a)(1) requires that "pleadings, motions, and

other papers signed by an attorney or a party must meet certain criteria and failure to meet such criteria will result in the imposition of sanctions." *Slack v. Anderson,* 140 Idaho 38, 39-40, 89 P.3d 878, 879-80 (2004). Pursuant to I.R.C.P. 11(a)(1), all pleadings, motions and other papers signed by an attorney must meet certain criteria. Where such motions, pleadings or other papers are not well grounded in fact, warranted by existing law or a good faith argument for extension, modification, or reversal of existing law, or are interposed for improper purposes (such as to harass, cause undue delay, or needlessly increase the cost of litigation), imposition of sanctions results. I.R.C.P. 11(a)(1); *Slack v. Anderson,* 140 Idaho 38, 39-40, 89 P.3d 878, 879-880 (2004) (citing *Durrant v. Christensen,* 117 Idaho 70, 74, 785 P.2d 634, 638 (1990)). The proper focus of the trial court is whether the party "made a proper investigation upon reasonable inquiry." *Sun Valley*, 119 Idaho 87, 95, 803 P.2d 993, 1001 (quoting *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990).

In *Slack,* the Supreme Court upheld the District Court's imposition of Rule 11 sanctions, agreeing that the attorney's allegations as signed and filed "were not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and resulted in unnecessary delay and needless increase in the cost of litigation", because he had not exercised reasonableness in asserting that a third party had a direct claim against an insurance company. 140 Idaho 38, 40-41, 89 P.3d 878, 880-81.

In this case, Windermere's improper recording of the lis pendens could be construed as a different, albeit false, interpretation of I.C. § 5-505. However, its refusal to release the lis pendens, even after the final judgment had been rendered and ordered on November 27, 2012, with a signed Rule 54(b) Certificate, is not a false

interpretation, but a blatant disregard for the plain language of I.R.C.P. 54(a). Idaho Rule of Civil Procedure 54(a) states that a signed Rule 54(b) Certificate is not always required for a judgment to be final, but that a judgment can be final so long as the only issue still in dispute is attorney fees and costs. That is exactly what is at issue between the parties now. Windermere has requested attorney fees and costs by submitting a Memorandum of Costs on November 30, 2012, coincidentally when the Amended Judgment was signed. Those requested attorney fees and costs are not sufficient to render a judgment not final, as clearly stated in the Idaho Rules of Civil Procedure. Reasonable inquiry into the plain language of I.R.C.P. 54(a) would have made that clear. Windermere's argument is a clear disregard of the plain language of I.R.C.P. 54(a) and as such is not a good-faith argument, warranted by existing law, as required under I.R.C.P. 11. It is not necessary for this Court to determine whether Windermere's refusal to release the lis pendens was to compel payment of its attorney fees. Motive is not really relevant. What is relevant is the lack of a good-faith argument that is important. Similarly, the fact that a lis pendens does not equate to a lien is not relevant. Windermere's argument on that issue seems to be an argument that McCarver/Jackson were not damaged. Whether a party has suffered damages is not relevant to an I.R.C.P. 11 analysis. Idaho Rule of Civil Procedure 11 sanctions are within the Court's discretion, and pursuant to that discretion, Rule 11 sanctions are imposed against Windermere. There is nothing inappropriate about Windermere's filing the interpleader action. However, Windermere should not have filed the lis pendens. Also, after Windermere wrongfully filed the lis pendens, Windermere should not have subsequently refused to release the lis pendens. Thus, attorneys fees incurred by McCarver/Jackson relative to the lis pendens are awarded against Windermere and in favor of McCarver.

C. Costs Pursuant to I.C. § 12-123 are Appropriate Against Windermere.

An award of attorney fees and costs under I.C. § 12-123 is discretionary and is reviewed for an abuse of discretion. *Ackerman v. Bonneville County*, 140 Idaho 307, 313, 92 P.3d 557, 563 (Ct.App. 2004). As such, review would include the three-tiered inquiry stated above.

Idaho Code § 12-123 "allows for such an award to a party adversely affected by frivolous conduct, which is defined as conduct that 'obviously serves merely to harass or maliciously injure another party to the civil action' or 'is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.'" *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, __, 278 P.3d 943, 956 (2012); *Ackerman*, 140 Idaho 307, 313, 92 P.3d 557, 563.

As stated above, the plain language of I.R.C.P. 54(b) was clear on the point of the two circumstances in which a judgment is deemed final. While it could be argued that one of the circumstances (that of the Rule 54(b) Certificate) was not met, there is nothing before this Court to suggest that the other (that of judgment being entered for all claims except attorney fees and costs) has not been met. As stated above, the original Judgment decided the issues, save attorney fees, and the only grounds for which Windermere claims the action is still ongoing is the issue of its attorney fees and costs, which are not necessary for final adjudication under Rule 54(a). Thus, Windermere's defense against the motion to release lis pendens was frivolous, and in this Court's discretion, fees and costs should be granted for McCarver/Jackson against Windermere.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must grant the ex parte motion for release of lis pendens against Windermere. The request for Rule 11 sanctions must be

granted and the request for an award of attorney fees and costs pursuant to I.C. § 12-123 must be granted.

IT IS HEREBY ORDERED release of lis pendens in favor of McCarver/Jackson against Windermere is GRANTED.

IT IS FURTHER ORDERED the request for Rule 11 sanctions is GRANTED.

IT IS FURTHER ORDERED the request for an award of attorney fees and costs pursuant to I.C. § 12-123 is GRANTED.

Entered this 11th day of January, 2013.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 14th day of January, 2013, 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 #
Douglas S. Marfice	664-5884 ✓
William M. Rathbone, pro se - Mail.	
~~Henry D. Madsen~~	~~664-8080~~
Arthur Macomber	664-9933 ✓
Henry D. Madsen	664-6258 ✓

Jeanne Clausen, Deputy Clerk

#9480