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

AMERICAN BANK, a Montana banking corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho corporation; BRN INVESTMENTS, LLC, an Idaho limited liability company; LAKE VIEW AG, a Lichtenstein company; BRN-LAKE VIEW JOINT VENTURE, an Idaho general partnership; ROBERT LEVIN, Trustee for the ROLAND M. CASATI FAMILY TRUST, dated June 5, 2008; E. RYKER YOUNG, Trustee for the E. RYKER YOUNG REVOCABLE TRUST; MARSHALL CHESROWN, a single man; IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company; THORCO, INC., an Idaho corporation; CONSOLIDATED SUPPLY COMPANY, an Oregon corporation; INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation; CONCRETE FINISHING, INC., an Arizona corporation; THE TURF CORPORATION, an Idaho corporation; WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation; POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation; PRECISION IRRIGATION, INC., an Arizona corporation; and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

And

CASE NO. CV-09-2619

OPINION AND ORDER RE: AMERICAN BANK'S MOTION FOR AWARD OF COSTS AND ATTORNEYS' FEES

TAYLOR ENGINEERING, INC., a Washington corporation,

Third-Party Plaintiff,

vs.

ACI NORTHWEST, INC., an Idaho corporation; STRATA, INC., an Idaho corporation; and SUNDANCE INVESTMENTS, LLP, a limited liability partnership,

Third-Party Defendants.

And

ACI NORTHWEST, INC., an Idaho corporation,

Cross-Claimant,

vs.

AMERICAN BANK, a Montana banking corporation; BRN DEVELOPMENT, INC., an Idaho corporation; BRN INVESTMENTS, LLC, an Idaho limited liability company; LAKE VIEW AG, a Lichtenstein company; BRN-LAKE VIEW JOINT VENTURE, an Idaho general partnership; ROBERT LEVIN, Trustee for the ROLAND M. CASATI FAMILY TRUST, dated June 5, 2008; E. RYKER YOUNG, Trustee for the E. RYKER YOUNG REVOCABLE TRUST; MARSHALL CHESROWN, a single man; THORCO, INC., an Idaho corporation; CONSOLIDATED SUPPLY COMPANY, an Oregon corporation; THE TURF CORPORATION, an Idaho corporation; WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation; POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation; PRECISION IRRIGATION, INC., an Arizona corporation,

Cross Claim Defendants.

Elizabeth Tellessen, WINSTON & CASHATT, and Clayton Gill, MOFFATT THOMAS BARRETT ROCK & FIELDS, for American Bank.

Steven Wetzel, Of Counsel, JAMES, VERNON & WEEKS, for ACI Northwest, Inc.

American Bank successfully dismissed three of ACI Northwest, Inc.'s claims in this matter. American Bank now seeks attorney fees and costs as per I.C. § 12-121 and seeks a sanction against ACI Northwest, Inc.'s attorney as per Rule 11. This Court grants both requests in part.

I. SUMMARY OF PROCEEDINGS

In March of 2011, nearly two years after the commencement of this action, ACI Northwest, Inc., ("ACI") filed a "Motion to Amend Cross-Claim" to include a claim of "negligent misrepresentation" against American Bank. This Court denied the Motion to Amend Cross-Claim at a hearing May 20, 2011, because "negligent misrepresentation is not recognized in Idaho," and because ACI could not show that Montana law applied. After a hearing May 20, 2011, this Court entered an "Order Granting Plaintiff American Bank's Motion to Amend Answer to ACI Northwest's Cross-claim and Order Denying Defendant ACI Northwest's Motion for Leave to Amend Cross Claim," on June 1, 2011.

Subsequently, on August 24, 2011, ACI filed an "Amended Answer to Taylor Engineering, Inc.'s Third Party Complaint and Defendant ACI Northwest Inc.'s Amended Cross Claims and Demand for Jury Trial" ("Amended Cross-Claim"). The document contained three claims against American Bank.[1] Important to the pending motion, Count 4 read:

> *23. On or about 2005 and 2006, BRN commenced a plan to develop real property located in Kootenai County, Idaho, the Improved Property.*

[1] Count 2 is a breach of contract claim against BRN Development, Inc. At the November 29, 2011, hearing, counsel for ACI stated that Count 2 is currently "dormant." On February 1, 2012, this Court issued an order continuing the trial on ACI's claims against BRN Development, Inc., until later this year. This Court also dismissed Counts 1 and 3 in its December 7, 2011 Order (*see infra*).

24. BRN entered into negotiations with ACI for substantial contracting related to a golf course community patterned after the successful Black Rock Golf Community.

25. BRN was to pay to ACI millions of dollars for substantial improvement to create a new golf course community, "Black Rock North Golf Community," on the Improved Property. American Bank agreed to finance the construction of the project. American Bank's records show that American Bank knew that ACI was working on the project and was willing to do infrastructure work for Black Rock North Golf Community. American Bank's records show that American Bank reserved the right to approve all contractors on the Black Rock North Golf Community Project. American Bank knew of ACI's valid economic expectancy to be paid for the work completed on the Black Rock North Golf Community project.

26. On information and belief, ACI believes that American Bank has negotiated deals with third parties to the project to allow a third party to buy an interest in the note and mortgage which allow the third party to benefit from ACI's materials and labors that added to the value of the subject golf course community.

27. On information and belief, ACI believes that American Bank has negotiated deals with other investors in the subject golf course community to allow investors to benefit from ACI's materials and labors that added to the value of the subject golf course community without paying for the enrichment.

28. On information and belief, ACI believes that American Bank may have taken actions which appear to be unjust, inappropriate, and probable violation of banking standards and/or regulations, including but not limited to:

28.1 Reckless disregard in communication as to construction funding;
28.2 Improper loan practices;
28.3 Insufficient ability to loan sums for a golf course community'
28.4 Improper appraisal orders and controls; and
28.5 Other incidents of unclean hands

29. Even if there were no express or implied contracts between ACI and BRN and American Bank and American Bank's joint ventures, partners, or investors as is alleged in COUNT I above, ACI has provided a benefit to BRN in the form of ACI's various construction materials and labor, which BRN has accepted and which American Bank's joint ventures, partners, or investors attempt to gain without full payment.

30. If under these circumstances any unjust enrichment exists, then such sums should be disgorged.

(Amended Cross-Claim).

Shortly thereafter, American Bank filed two motions: "Motion for Partial Summary Judgment Re: Count [4] of ACI's First Amended Cross-Claim" ("American Bank's Motion Re: Count 4") and "Motion for Summary Judgment Against ACI Northwest, Inc. on Invalidity of ACI's Claim of Lien (Count Three of ACI's Cross-Claim)" ("American Bank's Motion Re: Counts 1 and 3"). American Bank supported the motions with affidavits and memoranda. ACI responded with extensive supporting affidavits and voluminous memoranda. ACI also filed two motions: "Motion for Partial Summary Judgment" ("ACI's Motion Re: Count 1") regarding Count 1, and a "Motion to Dismiss" ("ACI's Motion to Dismiss"). ACI supported the motions with similarly extensive pleadings, and American Bank responded in turn.

After multiple delays at the request of ACI, this Court held a hearing on all the motions on November 29, 2011. After hearing from the parties, this Court entered an oral order granting American Bank's Motion Re: Count 4 and dismissed Count 4 because the requested equitable remedy of restitution does not lie where there is no privity of contract between the parties, and because ACI could not show that American Bank received a benefit to which it was not entitled. This Court later entered a written "Order Granting American Bank's Motion for Partial Summary Judgment Re: Count [4] of ACI's First Amended Cross-Claim" ("Order Re: Count 4") on January 12, 2012. On December 7, 2011, this Court also granted American Bank's Motion Re: Counts 1 and 3 in its "Memorandum Decision and Order Re: American Bank's Motion for Summary Judgment Against ACI Northwest, Inc., on Invalidity of ACI's Claim of Lien" (Count 3 of ACI's Cross-Claim); ACI Northwest, Inc.'s Motion to Dismiss; ACI Northwest, Inc.'s Motion for Partial Summary Judgment" ("December 7, 2011 Order"). This Court dismissed the claims because ACI failed to timely file its claim of lien on twelve of the thirteen contracts, and

failed to timely foreclose on the thirteenth claim of lien. This Court also denied ACI's Motion to Dismiss because it lacked any legal merit.

This Court entered a "Final Judgment for American Bank Dismissing All Cross-Claims Asserted by ACI Northwest Against American Bank" ("Final Judgment") on January 17, 2012. American Bank submitted its "Motion for Award of Costs and Attorneys' Fees" ("American Bank's Motion") on January 24, 2012, with supporting documents: "Affidavit of Elizabeth A. Tellessen in Support of American Bank's Memorandum in Support of Costs and Attorneys' Fees" ("Tellessen Affidavit"), "Affidavit of Leon Royer for American Bank in Support of Judgment for Costs and Attorneys' Fees" ("Royer Affidavit"), "American Bank's Memorandum in Support of Motion for Award of Costs and Attorneys' Fees" ("Winston Cashatt Memorandum"), " Affidavit of C. Clayton Gill in Support of American Bank's Request for Attorney Fees and Costs from ACI Northwest, Inc. (In Defense of ACI's Lien Foreclosure Action)" ("Gill Affidavit"), and "Plaintiff American Bank's Memorandum of Costs and Fees Filed Against ACI Northwest, Inc., (In Defense of ACI's Lien Foreclosure Action)" ("Moffatt Thomas Memorandum").

ACI then filed its "Objection to Plaintiff American Bank's Memorandum of Costs and Fees Filed Against ACI Northwest, Inc." ("ACI's Objection"), "Affidavit of Valerie Nunemacher" ("Nunemacher Affidavit"), and "Certificate of Law Not Contained in Idaho Reports." On February 13, 2012, ACI filed the "Affidavit of Samuel Eismann in Support of ACI Northwest, Inc.'s Objection to American Bank's Memorandum in Support of Costs and Attorneys' Fees" ("Eismann Affidavit.")

This Court heard from the parties on February 28, 2012, before taking the matter under advisement.

II. MOTION FOR COSTS AND ATTORNEYS' FEES PURSUANT TO I.C. § 12-121

In ruling upon a claim for attorneys' fees, this Court must determine a series of threshold questions and enter factual findings before entering an order awarding attorneys' fees and costs.

A. Are the Request and the Objection Timely?

According to Rule 54(d)(5),

> anytime after . . . a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but it . . . may not be filed later than fourteen (14) days after entry of judgment . . . A memorandum prematurely filed shall be considered timely.

Rule 54(e)(5) states that "attorneys' fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs." American Bank filed its request within seven (7) days of the entry of the Final Judgment, and therefore the request is timely.

Rule 54(d)(6) provides that any party may object to the claimed costs and fees

> within fourteen (14) days of service of the memorandum of costs . . . Failure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed.

(emphasis added.) ACI filed its Objection and two of the three supporting documents on February 7, 2012, within the fourteen day period. However, the Eismann Affidavit was filed on February 13, 2012. Regardless, this Court will consider the contents of the Affidavit.

B. Are there Proper Parties and an Underlying Basis for Attorney Fees?

There are proper parties for attorney fees in this matter because American Bank is a cross-claim defendant, and ACI is a cross-claimant. Therefore, they are adversarial parties with at least one claim between them and the parties were represented by attorneys. There is an

underlying basis for attorney fees because, while there is not a contract between the parties, American Bank does seek attorney fees via a statute and rule.

C. Does the Request Meet the Requirements of I.C. § 12-121?

Generally, under modern pleading practice a party need only pray for attorney fees in his pleading and is not required to declare a specific statute or rule applies. Eighteen Mile Ranch v. Nord Excavating & Paving, 141 Idaho 716, 117 P.3d 130 (2005). American Bank, however, specifically prays for attorneys' fees as per I.C. § 12-121.

Section 12–121 provides in pertinent part:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees.

The most obvious and most important restriction placed on attorney fees under I.C. § 12–121 by I.R.C.P. 54(e)(1) is the limitation of attorney fees to those situations in which the court finds that the action was "brought, pursued or defended frivolously, unreasonably or without foundation." The statute and rule apply to both the plaintiff and defendant, counter claimant and counter defendant, cross-claimant and cross-defendant.

Even though an action might be proper at its commencement, facts might thereafter develop which indicate that it was thereafter "pursued" frivolously, unreasonably or without foundation. The distinction has been made that attorney fees can be available if the action was either "brought" or "pursued" frivolously, unreasonably or without foundation. Ortiz v. Reamy, 115 Idaho 1099, 1101, 772 P.2d 737, 739 (Ct. App. 1989); *see also* Winn of Michigan, Inc. v. Yreka United, Inc., 137 Idaho 747, 754, 53 P.3d 330, 337 (2002); Anson v. Les Bois Race Track, Inc., 130 Idaho 303, 305, 939 P.2d 1382, 1384 (1997). The Idaho Supreme Court has stated that determining whether an action was brought, defended, or pursued frivolously must be more than

a mere conclusory opinion of the trial judge. Davis v. Professional Bus. Serv., Inc., 109 Idaho 810, 815–816, 712 P.2d 511, 516–17 (1985

The conduct of the parties, as opposed to the bringing, pursuing or defending of the action, cannot be a basis for the award under I.C. § 12–121, Verway v. Blincoe Packing Co., Inc., 108 Idaho 315, 319, 698 P.2d 377, 381 (Ct. App. 1985), unless it is followed by an unreasonable prosecution or defense of the action. O'Boskey v. First Fed. Sav. & Loan Ass'n, 112 Idaho 1002, 1009–10, 739 P.2d 301, 308–09 (1987).

The dismissal of a case before trial is not automatic grounds for attorney fees:

> Mere dismissal of a claim without a trial does not necessarily mean that the party against whom the claim was made is a prevailing party for the purpose of awarding costs and fees. Dismissal of a claim may be but one of many factors to consider. When the claim was dismissed may be another.

Chenery v. Agri–Lines Corp., 106 Idaho 687, 692, 682 P.2d 640, 645 (Ct. App. 1984). While not dispositive, dismissal is one of the factors to be considered. Platt v. Brown, 120 Idaho 41, 44, 813 P.2d 380, 383 (Ct. App. 1991); P.N. Cedar, Inc. v. D & G Shake Co., 110 Idaho 561, 569, 716 P.2d 1333, 1340 (Ct. App. 1986).

In examining the defensive measures taken by a defendant, the Idaho Supreme Court stated, "The frivolity and unreasonableness of a defense is not to be examined only in the context of trial proceedings." Turner v. Willis, 116 Idaho 682, 685, 778 P.2d 804, 807 (1989), *rev'd on other grounds*, 119 Idaho 1023, 812 P.2d 737 (1990). In addition, the "total conduct" of the party must be examined. The Idaho Supreme Court has stated:

> The trial court cites I.R.C.P. 54(e)(1) as one basis for the award of attorney fees. Whereas in this case there are multiple claims and multiple defenses, it is not appropriate to segregate those claims and defenses to determine which were or were not frivolously defended or pursued. The total defense of a party's proceedings must be unreasonable or frivolous.

Magic Valley Radiology Assocs., P.A., v. Professional Business Services, Inc, 119 Idaho 558, 563, 808 P.2d 1303, 1308 (1991), *see also* Desfossess v. Desfossess, 122 Idaho 634, 639, 836 P.2d 1095, 1100 (1992).

Thus, the entire course of the litigation must be taken into account. If there is a legitimate, triable issue of fact, attorney fees cannot be awarded to the prevailing party even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings, 135 Idaho 518, 524-25, 20 P.3d 702, 708-09 (2001).

The fact that a party loses is not grounds to award attorney fees under I.C. § 12–121 unless, "the position advocated by the non-prevailing party is plainly fallacious and, therefore, not fairly debatable." Associates Northwest, Inc. v. Beets, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987); Clements Farms, Inc. v. Ben Fish & Son, 120 Idaho 209, 814 P.2d 941 (Ct. App. 1990), *rev'd on other grounds*, 120 Idaho 185, 814 P.2d 917 (1991) (holding that attorney fee awards under I.C. § 12–121 are "improper where the non-prevailing party has presented a 'genuine and fairly debatable' issue").

The Idaho Supreme Court has repeatedly stated that an award of fees under this statute is within the broad and sound discretion of the trial court. Anderson v. Goodliffe, 140 Idaho 446, 450, 95 P.3d 64, 68 (2004); Win of Michigan, Inc., 137 Idaho at 754, 53 P.3d at 337; Etcheverry Sheep Co. v. J.R. Simplot Co., 113 Idaho 15, 19, 740 P.2d 57, 61 (1987); O'Boskey v. First Fed. Sav. & Loan Ass'n, 112 Idaho 1002, 1008, 739 P.2d 301, 307 (1987), *citing* Everett v. Trunnell, 105 Idaho 787, 790–91, 673 P.2d 387, 390–91 (1983).

If the trial judge determines that attorney fees should be awarded under I.C. § 12–121, I.R.C.P. 54(e)(2) requires the court to make written findings "as to the basis and reasons for

awarding such attorney fees." These findings can be stated in the award or in a separate document. The Idaho Court of Appeals has stated that, "[t]he absence of such a finding requires us to reverse the award of attorney fees." Bosshardt v. Taylor, 104 Idaho 660, 661, 662 P.2d 241, 242 (Ct. App. 1983). *See also* Henderson v. Smith, 128 Idaho 444, 452, 915 P.2d 6, 14 (1996); Snipes v. Schalo, 130 Idaho 890, 893, 950 P.2d 262, 265 (Ct. App. 1997). The findings must be specific findings of fact and must be supported by the evidence. "An award of attorney fees under I.C. § 12–121 is discretionary; but it must be supported by findings and those findings, in turn, must be supported by the record." Wing v. Amalgamated Sugar Co., 106 Idaho 905, 910–11, 684 P.2d 307, 312–13 (Ct. App. 1984), *citing* Bosshardt v. Taylor, 104 Idaho 660, 662 P.2d 241 (Ct. App. 1983). *See also* McGrew v. McGrew, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003).

While American Bank only seeks attorneys' fees for defending against the "Tort and Equitable Claims," in Count 4 in the Amended Cross-Claim, this Court is obligated to consider the entirety of the litigation when determining whether the requirements of I.C. § 12-121 are met. Regarding Counts 1 and 3, it appears that ACI brought these claims in opposition to American Banks initial foreclosure claims because ACI asserted that its liens were valid and maintained a certain priority against other lien holders, and that ACI was entitled to collect against the bond. This Court certainly has concerns about manner in which ACI pursued Counts 1 and 3 given the narrow, straight forward set of facts and law. However, even though ACI's voluminous pleadings and repeated delays appear unnecessary in hindsight, and even though this Court ultimately dismissed Counts 1 and 3 because ACI could not show that its liens were valid, this Court concludes that Counts 1 and 3 were most likely not frivolously brought or pursued because

ACI's argument that it had a valid lien that resulted from one contract instead of multiple contracts had legal merit.

Regarding Count 2 (the breach of contract claim against BRN Development, Inc.) because the claim is pending it would be premature to determine whether ACI brought or pursued this claim frivolously as it thus far appears to be a legitimate claim that ACI provided labor and materials for BRN Development, Inc.'s project, and did not receive payment from BRN Development, Inc. under the contract between the parties. Notably, however, ACI has admittedly allowed this claim to fall "dormant."

The bulk of the litigation between American Bank and ACI over the last year, however, centers on ACI's two other claims: negligent misrepresentation[2] and Count 4. This Court notes these claims involve tortious allegations and equitable remedies that are unrelated to the foreclosure action and consumed a significant amount of this Court's, and the parties, resources. In the Amended Cross-Claim, ACI made general allegations of American Bank "violating banking standards," and acting in an "unjust, inappropriate" manner because American Bank obtained the subject property as a result of the foreclosure action after ACI had performed work that "improved" the property. ACI alleged that American Bank was unjustly enriched as a result and that the "sums should be disgorged."

ACI's claims in this case are similar to those in the case of Stevenson v. Windermere Real Estate/Capital Group, Inc., Docket No. 38121, 2012 Opinion No. 55 (March 22, 2012).[3] In that case, Stevenson entered into a real estate purchase agreement with Jefferson to buy a condo,

[2] The negligent misrepresentation cross-claim is discussed infra at Part III. Although this Court has specified a separate sanction in regards to this claim, this Court adopts the analysis in Part III as part of its consideration of whether I.C. § 12-121 applies to the whole of the litigation. This Court also adopts the analysis in Part III of ACI's Motion to Dismiss as part of its consideration of whether I.C. § 12-121 applies to the whole of the litigation.

[3] Remittitur has not issued in Stevenson as of the date this Court issues its opinion. However, this Court notes that Remittitur would issue on April 13, 2012, and as of the date of this opinion no party has filed a Petition for Review with the Idaho Supreme Court.

and deposited $38,000 in earnest money with Jefferson's broker Windermere Real Estate/Capital Group, Inc. ("Windermere"). Stevenson, 2012 Opinion No. 55, p. 2. Windermere transferred all of the funds to Jefferson. Id. Jefferson had a representation agreement with Windermere that obligated Jefferson to pay Windermere a commission for producing a "ready, willing and able purchaser." Id. As per this agreement, Jefferson paid Windermere $9,500. Id. However, Jefferson breached the real estate purchase agreement with Stevenson, and did not return the $38,000 earnest money. Id. Stevenson sued Jefferson and Windermere. Stevenson settled with Jefferson (Jefferson agreed to refund the escrow deposit less the $9,500 commission to Windermere), but pursued its claim of "unjust enrichment" against Windermere. Id.

Stevenson alleged that Windermere was unjustly enriched by receiving the $9,500. Id. The district court granted Windermere's motion for summary judgment dismissing Stevenson's unjust enrichment claim against Windermere, and the Idaho Supreme Court affirmed, holding that: "when [Stevenson] authorized Windermere to forward the deposit to Jefferson, they conferred the $38,000 benefit to Jefferson . . . Although Jefferson subsequently conferred a benefit upon Windermere by paying the $9,500 commission, this was not a benefit that Stevenson conferred upon Windermere." Id. at 7. Thus, because there was no privity of contract between Stevenson and Windermere, and because Jefferson acted as a conduit for the funds to which Windermere was contractually entitled to receive from Jefferson, Stevenson's unjust enrichment claim was not sustainable.

ACI's claim was similarly not sustainable. In this case there was no genuine issue of material fact that there was no privity of contract between ACI and American Bank, and even if there was, no benefit had been conferred on American Bank by ACI that American Bank was not entitled to obtain. Like the Stevenson case, the evidence presented here not only showed that

there was no contractual relationship between American Bank and ACI, but also that representatives from American Bank and ACI never had any contact with each other. ACI fully admitted that 1) ACI had a contract with BRN Development, Inc. and that its representatives dealt with Marshall Chesrown of BRN Development, Inc., 2) that American Bank had a loan agreement and mortgage with BRN Development, Inc., and 3) that it was Marshal Chesrown that represented to ACI that BRN Development, Inc. would pay ACI with proceeds from the loan from American Bank.

Regardless, ACI made the same argument that the Stevensons made: that an "implied in fact contract" existed between American Bank and ACI such that American Bank would continue to disperse funds to the conduit, BRN Development, Inc., and that BRN Development, Inc. would in turn pay ACI for its labor and materials.[4] But, according to ACI, American Bank "packaged the loan for failure," planning to obtain the subject property through foreclosure after it was improved by ACI by stopping the flow of funds to BRN Development, Inc. However, ACI did not produce any evidence showing the "implied in fact contract," but instead ACI complained that it did not have the funds to engage in the in-depth discovery needed to obtain the evidence.

ACI also could not show that American Bank obtained a benefit, and even if American Bank did obtain a benefit, ACI could not show that American Bank was not entitled to that benefit. ACI stipulated to the posting of the bond and releasing the subject property to American Bank and ACI has never claimed that American Bank improperly acquired the collateral in the

[4] Justice Horton acknowledged that the Court was "surprised" that the Stevensons would forgo their right to recover the full amount under the real estate and purchase agreement on apparent reliance on Jefferson's belief that another party ought to pay the remaining $9,500. Stevenson, 2012 Opinion No. 55, p.2, fn. 1. This Court is similarly surprised that ACI would pursue a party with which it had no contract (American Bank) to recover funds owed by a party ACI alleges it contracted with to perform work on the project (BRN Development, Inc.) solely based on statements made by Marshall Chesrown about American Bank's obligations to BRN Development, Inc.

foreclosure action. Thus, American Bank was entitled to obtain the subject property, just like Windermere was entitled to obtain the $9,500 commission in the Stevenson case. Moreover, while American Bank arguably obtained the collateral in its improved state as a result of the work performed by ACI, unlike Windermere, American Bank lost the funds loaned to BRN Development, Inc., and incurred the additional costs maintaining the subject property.

ACI added Count 4 over a year after ACI filed its initial answer in June 2010, and over two years after it had not been paid for the work, but did so without any supporting evidence. Even though ACI had at least a year, if not more, to obtain factual evidence of privity of contract between American Bank and ACI, ACI failed to produce any evidence whatsoever that ACI and American Bank had any privity of contract such that an equitable claim could be sustained. ACI also lacked any evidence that American Bank obtained any benefit, much less a benefit it was not entitled to obtain. As a result, Count 4 was brought without any factual foundation.

It is also this Court's opinion that ACI subsequently frivolously and unreasonably defended Count 4 throughout the summary judgment proceedings. ACI's defense amounted to bare and conclusory statements and general, rather mysterious, allegations regarding American Bank's supposed motives to own the subject property. Even if ACI did not have the supporting factual evidence when it made the claim and intended to later conduct the requisite depositions or investigation, ACI defended Count 4 during summary judgment proceedings knowing that it could not prove the legal requirement of privity or that American Bank obtained any benefit to which it was not entitled, or any benefit at all.

Either position taken by ACI is untenable, but taking the positions simultaneously is "plainly fallacious, and therefore not fairly debatable." Associates Norwest, Inc., 112 Idaho at 605, 733 P.2d at 826. Because the record supports this Court's opinion that ACI brought Count

4 without any foundation, and because ACI subsequently defended Count 4 frivolously and unreasonably, the requirements of I.C. § 12-121 are met and American Bank is entitled to an award of attorney fees.

D. Which Party is the Prevailing Party?

In determining who is the prevailing party in an action the trial court has an abundance of discretion. Shore v. Peterson, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009). The definition of a prevailing party set forth in I.R.C.P. 54(d)(1)(B). "In determining which party prevailed where there are claims and counterclaims between opposing parties, the court determines who prevailed in the 'action'; that is, the prevailing party question is examined and determined from an overall view, not a claim by claim analysis." Shore, 146 Idaho at 914, 204 P.3d at 1125. When determining whether a party is a prevailing party, "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).

There is no question that American Bank is the prevailing party as per the cross-claims between ACI and American Bank. American Bank obtained dismissal of all of ACI's cross-claims. This Court, then, finds and concludes that American Bank is the prevailing party and is entitled to an award of attorney fees and costs as per Idaho Rule of Civil Procedure 54(d)(1)(B).

E. Are the Requested Attorneys' Fees Reasonable?

American Bank seeks $70,651.00[5] in attorneys' fees, paralegal fees, law clerk fees, and automated legal research in the Tellessen Affidavit for American Bank's defense of Count 4. This determination is within the sound discretion of the trial court and will not be disturbed on

[5] In the Supplemental Affidavit of Elizabeth Tellessen, filed February 21, 2012, American Bank withdrew its request for $1,331 in computer aided legal research and $300 for a teleconference. These amounts have been deducted from American Bank's request for attorney fees as per Rule 54(e).

appeal unless there is an abuse of discretion. Sun Valley Potato Growers v. Texas Refinery, 139 Idaho 761, 769, 86 P.3d 475, 483 (2004). The "reasonableness" of the amount of an attorney fee award is based on the trial court's consideration of certain factors, which are set forth in I.R.C.P. 54(e)(3). Id. Rule 54(e)(3) enumerates the factors which should be considered in determining the amount of the award:

> In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:
>
> (A) The time and labor required.
> (B) The novelty and difficulty of the questions.
> (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
> (D) The prevailing charges for like work.
> (E) Whether the fee is fixed or contingent.
> (F) The time limitations imposed by the client or the circumstances of the case.
> (G) The amount involved and the results obtained.
> (H) The undesirability of the case.
> (I) The nature and length of the professional relationship with the client.
> (J) Awards in similar cases.
> (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
> (L) Any other factor which the court deems appropriate in the particular case.

The amount of attorneys' fees to be awarded is properly determined by utilizing the factors in Rule 54(e)(3) and no one factor is to be given more weight than any other. Paralegal fees and law clerk fees are also recoverable as part of the attorneys' fees. I.R.C.P. 54(e)(1).

The trial court has an enormous amount of discretion in determining the amount of an attorney fee award, and the rules do not require that the court state how it determined the amount of the award. Brinkman v. Aid Ins. Co., 115 Idaho 346, 351, 766 P.2d 1227, 1235 (1988). Although a trial court need not make specific findings demonstrating how it employed any of the factors listed in Rule 54(e)(3), it is required to consider those factors when determining the amount of the fees to award and it should, at a minimum, provide a record establishing that it

considered the factors under the rule. Pinnacle Engineers, Inc. v. Heron Brook, LLC, 139 Idaho 756, 760, 86 P.3d 470, 474 (2004); Sun Valley Potato Growers v. Texas Refinery, 139 Idaho 761, 769, 86 P.3d 475, 483 (2004).

A trial court must not address all of the factors in writing, but the record must show that the court considered all of the factors. Johannsen v. Utterbeck, 146 Idaho 423, 429, 196 P.3d 341, 347 (2008) (where the trial court concluded that the amount of fees requested was excessive, but did not indicate on the record why the trial court reached that determination), *citing* Lee v. Nickerson, 146 Idaho 5, 10-11, 189 P.3d 467, 472-73 (2008); *see* University of Idaho Foundation v. Civic Partners, 146 Idaho 527, 199 P.3d 102 (2008) and Griffith v. Clear Lakes Trout Co., Inc., 143 Idaho 733, 740, 152 P.3d 604, 611 (2007). It is sufficient if the trial court states that it has taken the factors listed in Rule 54(e)(3) into consideration. Awards of attorney fees have been upheld where the record indicates that the parties briefed and argued the factors because it can be presumed from such a record that the trial court considered the factors of Rule 54(e)(3). Pinnacle Engineers, Inc., 139 Idaho at 760-71, 86 P.3d at 474-75.

Criterion (D) of Rule 54(e)(3) requires the court to consider "the prevailing charges for like work." The Idaho Supreme Court stated in Lettunich v. Lettunich, that the trial court "should consider the fee rates generally prevailing in the pertinent geographic area, rather than what any particular segment of the legal community may be charging." A party claiming attorney fees does not have to submit evidence as to what is a reasonable fee. Halliday v. Farmers Ins. Exch., 89 Idaho 293, 300, 404 P.2d 634, 641 (1965); Smith v. Great Basin Grain Co., 98 Idaho 266, 561 P.2d 1299 (1977). At least such evidence is not required in every case. Clark v. Sage, 102 Idaho 261, 629 P.2d 657 (1981).

Because most attorneys keep computerized time records of their services, there may be a tendency to compute the attorney fee based upon a time and reasonable hourly charge. However, in Craft Wall of Idaho, Inc. v. Stonebraker, the Idaho Court of Appeals held, "[t]he time and labor actually required, however, is not the 'be all, end all' of the attorney fee question.... A court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney." 108 Idaho 704, 705-706, 701 P.2d 324, 325-326 (Ct. App. 1985).

Rule 54(e)(5) requires an attorney to present an affidavit stating the basis and method of computation of the attorney fee claimed. The introduction of hourly time sheets into evidence is not a prerequisite to an award of attorney fees. Hackett v. Streeter, 109 Idaho 261, 263, 706 P.2d 1372, 1374 (Ct. App. 1985). However, in All American Realty, Inc. v. Sweet, the Idaho Supreme Court held that the trial court erred in not requiring the party claiming attorney fees to itemize the time spent on the case when requested by opposing counsel. 107 Idaho 229, 231, 687 P.2d 1356, 1358 (1984).

American Bank asserts that the following hourly rates are reasonable: $250 per hour for Mr. Gill; $225-375 per hour for Winston Cashatt partners; $185-210 per hour for Winston Cashatt associates; $95-120 per hour for Winston Cashatt paralegals; and $80-95 per hour for Winston Cashatt law clerks. American Bank also requests $1299.61 for computer aided research. American Bank, via the Tellessen Affidavit, supports the reasonableness of the attorney fee request.

ACI lodges numerous objections, but none of the objections implicate the factors of Rule 54(e). ACI's complaint that American Bank was represented by more than one attorney at depositions and hearings carries little weight because American Bank has provided information

that sufficiently describes the role of each attorney and assigns a billable amount to the task. There does not appear to be any duplicate billing between the firms representing American Bank.

ACI also complains that American Bank expended an unreasonable amount of time on drafting, researching, and filing pleadings in this case. This is also not a consideration under I.R.C.P. 54(e). As a result, ACI's request to discount American Bank's attorney fee bill is not supported by legal argument or the facts before this Court.

While ACI claims that American Bank's attorneys unreasonably expended time communicating with its clients, preparing witnesses and defending depositions, it is clear from I.R.C.P. 54(e) that ACI's implication that American Bank should not have taken Count 4 as seriously as it did is not a factor this Court may consider. Instead, a review of American Bank's request for fees shows that American Bank expended the necessary time and effort to defend itself from ACI's accusations.

ACI's objection to Ms. Isserlis' hourly rate, which is the highest rate of any of the attorneys at Winston Cashatt, is also unfounded. This Court is familiar with the going rate charged by attorneys in the Coeur d'Alene area and knows that attorneys of similar experience who are partners at local law firms charge between $250 - $300 per hour. Ms. Isserlis is an attorney in the Coeur d'Alene area with substantial experience and she bills at the partner rate at Winston Cashatt. While this rate is higher than the going rate of $250-$300 for the same level of experience in the area, it is a comparable rate.

ACI's objection to American Bank's attorneys billing for communications informing Fidelity National Timber Resources of the status of ACI's claims as per ACI's motion to dismiss is unpersuasive. ACI implicated Fidelity National Timber Resources as a potential party in its Amended Cross-Claim, and because Fidelity National Timber Resources was represented by the

same attorney's as American Bank and because Fidelity National Timber Resources' interests were integral to this matter (*see* Part III *infra*; see also December 7, 2011, Order), it follows that American Bank's attorneys at Winston Cashatt would communicate with Fidelity National Timber Resources. Thus, ACI's objection is without merit.

ACI's objection to billings for communications between its attorneys at two separate firms is also unfounded. It is expected that attorneys will communicate with each other in order to strategize and avoid duplication of efforts, regardless of whether they are in the same or separate firms. Thus, the billings for such communications are reasonable.

Rule 54(e)(3)(K) explicitly allows a prevailing party to request the reasonable cost of computerized legal research. The charges as submitted and amended by American Bank appear reasonable on their face and ACI has failed to show otherwise.

As noted above, although attorneys keep computerized time records of their services, there may be a tendency to compute the attorney fee based upon a time and reasonable hourly charge. However, "a court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney." Craft Wall of Idaho, Inc., 108 Idaho at 705-706, 701 P.2d at 325-326. A review and careful consideration of all the factors listed in Rule 54(e)(3) reveals that American Bank has submitted a rational, well supported, and reasonable request for attorneys' fees and computerized legal research. However, this Court has also taken into consideration the novelty and difficulty of the matter presented and the necessary research, communication, and effort to defend against Count 4 of the Amended Cross-Claim. Given the broad discretion of this Court, and the applicable law, this Court concludes that American Bank's request for attorneys'

fees is reasonable, but that the amount should be discounted in accordance with the factors listed in Rule 54(e)(3). ***American Bank is awarded $58,000 in attorney fees.***

F. Is the Prevailing Party Entitled to Costs as a Matter of Right?

Under Rule 54(d)(1)(C), certain costs are awarded as a matter of right, and the following are at issue here:

> *2. Actual fees for service of any pleading or document in the action whether served by a public officer or other person.*
>
> *3. Witness fees of $20.00 per day for each day in which a witness, other than a party or expert, testifies at a deposition or in the trial of an action.*
>
> *4. Travel expenses of witnesses who travel by private transportation, other than a party, who testify in the trial of an action, computed at the rate of $.30 per mile, one way, from the place of residence, whether it be within or without the state of Idaho; travel expenses of witnesses who travel other than by private transportation, other than a party, computed as the actual travel expenses of the witness not to exceed $.30 per mile, one way, from the place of residence of the witness, whether it be within or without the state of Idaho.*
>
> . . . .
>
> *7. Cost of all bond premiums.*
>
> . . . .
>
> *9. Charges for reporting and transcribing of a deposition taken in preparation for trial of an action, whether or not read into evidence in the trial of an action.*
>
> *10. Charges for one (1) copy of any deposition taken by any of the parties to the action in preparation for trial of the action.*

(Rule 54(d)). American Bank seeks costs as a matter of right for the following: actual fees for service pursuant to I.R.C.P. 54(d)(1)(C)(2), witness fee and travel expenses pursuant to I.R.C.P. 54(d)(1)(C)(3)&(4); bond premiums pursuant to I.R.C.P. 54(d)(1)(C)(7); reporting and transcribing depositions as per I.R.C.P. 54(d)(1)(C)(9) and (10). ACI objects, arguing that the cost of the bond premiums are not allowable and that the rest of the costs are unreasonable.

Regarding the fees for service, this Court agrees with American Bank, and ACI does not object, that the July 11, 2011, service fee of $145.00 (Tellessen Affidavit, ¶4), must be awarded to American Bank as per Rule 54(d)(1)(C)(2).

Regarding witness fees and travel expenses, this Court agrees with American Bank, and ACI does not object, that the amount of $25.00 incurred by Mr. Radobenko on June 28, 2011, must be awarded to American Bank as per Rule 54(d)(1)(C)(3) & (4).

This Court agrees with American Bank that the following amounts must be awarded to American Bank as costs as a matter of right as per Rule 54(d)(1)(C)(9):

Date	**Witness**	**Cost**
03/08/2011	Transcript of William Radobenko	374.40
03/08/2011	Transcript of James Haneke	329.70
03/08/2011	Transcript of Douglas Foster	801.99
03/21/2011	Transcript of Kyle Capps	369.66
03/22/2011	Transcript of Kyle Capps	293.18
08/15/2011	Transcript of William C. Radobenko	421.25
08/17/2011	Transcript of L. Royer	328.25
09/06/2011	Transcript of Mark Hendrickson	611.85
09/22/2011	Transcript of L. Royer	367.10
09/23/2011	Transcript of Douglas Foster.	640.85
	TOTAL	**$4,583.23**

Regarding ACI's complaint that American Bank obtained duplicate deposition transcripts for its attorneys at two different law firms, this Court agrees with ACI that Rule 54(d)(1)(C)(9) and (10) do not contemplate an award of costs as a matter of right for multiple copies of a deposition transcript. Thus, this Court hereby declines to award the additional deposition transcript costs as a cost as a matter of right as requested by American Bank.

This Court, however, agrees with American Bank that it is entitled to recover the cost of all bond premiums paid by American Bank as per Rule 54(d)(1)(C)(7). ACI objects stating that bond premiums are not awardable as a cost as a matter of right, and even so, the cost is

unreasonable. However, ACI's argument against awarding the amount of the bond premium is merely a conclusory statement that is not supported by any law. ACI agreed to the posting of the bond in lieu of the lien in this matter and the cost of the bond premium is based on the amount ACI alleged it was entitled to recover. Also, the plain language of Rule 54(d)(1)(c)(7) is the "cost of all bond premiums." Further, as American Bank correctly points out, the posting of the bond benefitted both parties:

> American Bank to mitigate its losses and free its collateral from a lien that has subsequently been determined to be invalid. ACI benefited from the lien in that it provided ACI with a guaranteed form of payment if ACI prevailed in its action.

(Winston Cashatt Memorandum, p.6.) ACI cannot now complain that American Bank's expenditure of the bond premium is not recoverable or unreasonable. As a result, this Court awards as a cost as a matter of right as per subsection (7) the cost of all bond premiums paid by American Bank, in the amount of $40,500 (Moffatt Thomas Memorandum, Ex. B).

Additional items may be allowed "upon a showing that said costs were necessary and exceptional costs reasonably incurred," but this Court must make "express findings as to why such specific items of discretionary costs should or should not be allowed." I.R.C.P. 54(d)(1)(C) and (D). American Bank seeks to recover the cost of the duplicate deposition transcripts as a discretionary cost. This Court agrees that it can award the cost of duplicate deposition copies as a discretionary cost, but this Court does not find the cost of duplicate copies of the deposition transcript either necessary or exceptional. If the two firms representing American Bank desired to request two copies of the transcripts instead of one copy and sharing the transcript or duplicating it in-house, that is a cost American Bank must bear. This Court therefore declines to award the cost of the duplicate deposition transcripts. ***This Court hereby awards to American Bank $45,208.23 in costs as a matter of right, and $0 in discretionary costs.***

III. MOTION FOR ATTORNEY FEES AS PER I.R.C.P. 11(a)

American Bank moved for sanctions in November 2011, and scheduled a hearing for December 15, 2011. Because of this Court's December 7, 2011, Order, this Court did not hold the hearing. Instead, American Bank now moves for attorneys' fees as per its previous motion and as part of the Motion for Award of Costs and Attorneys' Fees.[6]

Awarding attorney fees as per Rule 11 is a discretionary decision. Slack v. Anderson, 140 Idaho 38, 89 P.3d 878 (2004); Gubler v. Brydon, 125 Idaho 112, 867 P.2d 986 (1994). Rule 11 provides in part:

> *. . .The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

(Emphasis added.) The most unusual thing about I.R.C.P. 11 is that it allows the imposition of attorney fees against either a party or the party's attorney. The rule provides that the signature of an attorney on a pleading or motion certifies that "after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." (Id., emphasis added.) Additionally, by signing, the party or attorney certifies that the pleading is "not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation." (Id., emphasis added.)

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[6] This Court will consider American Bank's request under Rule 11(a) separately, but adopts its findings and conclusions in Part II above.

The Idaho Supreme Court has stated, "[t]he reasons for which attorney fees may be awarded pursuant to I.C. § 12–121 and I.R.C.P. 54(e)(1) are not reasons that will support an award of sanctions pursuant 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); *see also* Tolley v. Thi Co., 140 Idaho 253, 263, 92 P.3d 503, 513 (2004); Landvik by Landvik v. Herbert, 130 Idaho 54, 61, 936 P.2d 697, 704 (Ct. App. 1997); Gubler v. Brydon, 125 Idaho 112, 867 P.2d 986 (1994). "Rule 11(a)(1) is not a broad compensatory law. It is a court management tool. The power to impose sanctions under this rule is exercised narrowly, focusing on discrete pleading abuses or other types of litigative misconduct within the overall course of a lawsuit." Kent v. Pence, 116 Idaho 22, 23–24, 773 P.2d 290, 291–92 (Ct. App. 1989).

In Durrant v. Christensen, 117 Idaho 70, 785 P.2d 634 (1990) (Durrant I) and Durrant v. Christensen, 120 Idaho 886, 821 P.2d 319 (1991) (Durrant II), after much discussion, the Idaho Supreme Court concluded that I.R.C.P. 11(a)(1) fees are not a question of bad faith, but instead Rule 11 attorney fees can be awarded even though the attorney has not acted in bad faith. In addition, the Court cannot simply award attorney fees as a sanction under Rule 11(a)(1) because the claims are not "well grounded in fact," but instead "the trial court must determine whether the litigant made a proper investigation upon reasonable inquiry." Hanf v. Syringa Realty, Inc., 120 Idaho 364, 816 P.2d 320 (1991).

This Court must consider four factors when considering imposition of Rule 11 sanctions. Those factors include (1) the time available to the signer for investigation prior to filing; 2) to what extent the signer had to rely on the facts as provided by his client; 3) whether the claim was based on a "plausible view of the law;" or 4) whether the signer relied on prior counsel. Sun Valley Shopping Center v. Idaho Power Company, et al., 119 Idaho 87, 90-91, 803 P.2d 993

(1991). Because ACI did not have prior counsel, but instead maintained the same primary attorney throughout, the fourth factor is not a factor that this Court must consider in this case.

American Bank seeks $2,091.00 in fees for defending against ACI's Motion to Dismiss, and an additional $5,000 as a sanction for defending against multiple pleadings and for specific instances of misconduct. While this Court has been aware of the allegations of court delays, instances of improper service, unnecessary pleadings, and allegations of unprofessional behavior throughout this matter, this Court will only consider two discrete pleading abuses in regards to American Bank's request for attorney fees: ACI's Motion to Amend Cross-Claim and ACI's Motion to Dismiss.

A. ACI had Sufficient Time Available for Investigation and Reasonable Inquiry Prior to Filing the Motions

Notably, ACI's pleadings throughout this case show that ACI was aware that work on the subject project had ceased and that ACI had not been paid for the work by BRN Development, Inc., as of at least March 2009. American Bank filed the original complaint in this action on April 1, 2009, but did not list ACI as a lien holder in the pleading and did not serve ACI.[7] However, ACI soon became a party to the litigation and ACI filed its "Answer to Taylor Engineering, Inc.'s Third Party Complaint and Defendant ACI Northwest, Inc.'s Cross-Claim and Demand for Jury Trial," on June 7, 2010. ACI filed its Motion to Amend Cross-Claim seeking to add the "negligent misrepresentation" claim nine months later in March of 2011. ACI's proposed claim of "negligent misrepresentation" in the Motion to Amend Cross-Claim involved supposed communications or representations made at either the inception of the loan in 2006, or during the dispersement of the loan from American Bank to BRN Development, Inc. It appears, then, that ACI had at least two years, if not five years, to investigate any negligent

[7] See this Court's December 7, 2011 Order.

misrepresentation claim, and reasonably inquire into the application of the law on negligent misrepresentation in Idaho and Montana, before filing the Motion to Amend Cross-Claim.

In regards to the Motion to Dismiss, ACI filed its Amended Cross-Claim on August 24, 2011, as allowed by this Court on August 3, 2011, and then filed its Motion to Dismiss on August 31, 2011, a mere six days later. The Motion to Dismiss sought to replace American Bank with Fidelity National Timber Resources as the cross-claim defendant, who obtained American Bank's interest in the loan and collateral after this Court issued its decision granting summary judgment in favor of American Bank on February 24, 2011. As discussed on multiple prior occasions, particularly as part of ACI's Amended Cross-Claim, and as set forth in the record, ACI was aware of the transfer of American Bank's interests in the loan and collateral to Fidelity National Timber Resources after February 24, 2011, and before August 3, 2011, when this Court allowed ACI to file its Amended Cross-Claim. Thus, ACI had some months to investigate whether American Bank was the proper party and reasonably inquire into the entities' interests in the loan and collateral before filing the Motion to Dismiss.

B. Reliance on ACI for Factual Information was Limited

The extent to which ACI's attorneys would have to acquire factual information from ACI in order to proceed with the individual motions is extremely limited because any necessary information was available from other sources, and the substance of the motions presented primarily legal questions, not factual issues. In regards to ACI's Motion to Amend Cross-Claim, the only fact that ACI presented this Court is that American Bank is a Montana corporation. ACI has not claimed that it could not acquire additional information from its client in order to pursue its Motion to Amend Cross-Claim. More importantly, ACI's Motion to Amend Cross-Claim presented a question of law: whether a negligent misrepresentation claim under Montana law

could be sustained in an Idaho court. Certainly this legal component of the Motion to Amend Cross-Claim required no unobtainable factual input from ACI.

As for ACI's Motion to Dismiss, the motion was based strictly on an issue of law: who is the proper cross-claim defendant. There is no indication that ACI's attorneys needed information from ACI about the transfer of interest from American Bank to Fidelity National Timber Company, or, if ACI was the entity with the information, that ACI did not provide the information to ACI's attorneys. As a result, ACI's pleadings do not meet the second of the Sun Valley Shopping Center factors.

C. ACI's Motions Were Not Based on a Plausible View of the Law

This Court's orders in regards to ACI's Motion to Amend Cross-Claim and Motion to Dismiss answers this question. As stated by this Court on the record on May 20, 2011, while ACI attempted to cloak its Motion to Amend Cross-Claim in the guise of "extending" negligent misrepresentation to this case, the Idaho Supreme Court has clearly and repeatedly prohibited extending the claim beyond accountants, and has only considered extension in the arena of professional negligence matters. Notably, ACI did not seek reversal or modification of the law on negligent misrepresentation. Also, ACI based its Motion to Amend Cross-Claim on the law of another jurisdiction (Montana), but failed to provide any showing of any contacts, much less the required significant contacts, such that this Court could plausibly apply Montana law. Thus, ACI's Motion to Amend Cross-Claim was not based on any plausible view of the law.

Additionally, this Court reiterates its December 7, 2011, Order in which it concluded that ACI's Motion to Dismiss lacked any legal merit and operated as a significant diversion from well-established procedural rules. Notably, this Court pointed out to counsel for ACI that dismissing American Bank may actually be detrimental to ACI, because if American Bank was

dismissed, then "there would be no party in front of this Court that would be the holder of the bond anymore." (Hearing, November 29, 2011.) As discussed in the December 7, 2011, Order, ACI's Motion to Dismiss was not based on any plausible view of the applicable procedural rules.

D. ACI's Motions Appear to be Interposed for the Improper Purposes of Unnecessary Delay and Increasing in the Cost of Litigation for All the Parties

As discussed above, Rule 11 is a court management tool, used to address discrete pleading abuses. It is this Court's opinion that ACI's motions achieved one goal: interposing unnecessary delay in the proceedings at the expense of this Court's docket and increasing the cost of litigation to all the parties, including ACI. As the record shows, ACI made its Motion to Amend Cross-Claim just prior to the trial date and at the same time sought bifurcation of its claims. As a result of the Motion to Amend Cross-Claim and the request to bifurcate, this Court and American Bank were required to accommodate a new trial schedule for ACI's claims and expended court time and resources on ACI's meritless legal argument. Additionally, ACI filed its Motion to Dismiss just as American Bank began summary judgment proceedings, but this Court and American Bank rescheduled the summary judgment proceedings and the Motion to Dismiss twice to accommodate ACI's attorney. Again, this Court and American Bank expended its time and resources on a meritless motion that simply delayed the entirety of the proceedings.

All of the lien holders in this matter suffered losses and incurred attorney fees and costs in their attempts to recover those losses. While the assistance of attorneys is absolutely necessary, attorneys have an obligation to not needlessly increase the cost of the litigation at the expense of their client, this Court, or the opposing party. It is the opinion of this Court that the delays interposed by ACI's meritless motions needlessly increased the cost of the litigation for both American Bank and ACI, and consumed necessary court time and resources. As a result,

the attorney for ACI shall pay to American Bank the reasonable attorney fees associated with the Motion to Amend Cross-Claim and the Motion to Dismiss.

There is certainly a question as to the amount of attorney fees that should be awarded to American Bank. As noted above, this Court adopts its previous findings and conclusions in regards to Rule 54(e). In the Tellessen Memorandum, American Bank specifically asks for $2,091.00 for defending against ACI's Motion to Dismiss. It follows that this is a reasonable amount for defending against ACI's Motion to Amend Cross-Claim. Even so, Rule 11(a)(1) allows for this Court to impose any "appropriate sanction." This Court finds that awarding attorney fees in the amount of $2,091.00 for each motion is an appropriate sanction under Rule 11(a)(1). ***The attorney for ACI is therefore ordered to pay to American Bank $4,182.00 in attorney fees.***

IV. CONCLUSION

American Bank's Motion for Award of Costs and Attorneys' Fees is hereby GRANTED IN PART. ACI Northwest, Inc., is HEREBY ORDERED TO PAY to American Bank $58,000.00 in attorneys' fees as per I.C. § 12-121. ACI Northwest, Inc. is also HEREBY ORDERED TO PAY to American Bank $45,208.23 in costs as a matter of right as per I.R.C.P. 54. It is HEREBY FURTHER ORDERED that the attorney for ACI, Steven Wetzel, is hereby ordered to pay to American Bank reasonable attorney fees in the amount of $4,182.00 as per I.R.C.P. 11(a)(1). American Bank shall submit a judgment in accordance with Idaho Rule of Civil Procedure 54.

DATED this 28th day of March, 2012.

John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I certify that on this 28 day of March 2012, I caused a true and correct copy of OPINION AND ORDER RE: AMERICAN BANK'S MOTION FOR AWARD OF COSTS AND ATTORNEY FEES to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

Nancy L. Isserlis Elizabeth A. Tellessen Winston & Cashatt Bank of America Financial Center 601 W. Riverside, Suite 1900 Spokane, Washington 99201-0695 *Attorney for Plaintiff*	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Via Fax: 509-838-1416
Randall A. Peterman C. Clayton Gill Moffatt Thomas Barrett Rock & Fields Chtd. 101 S. Capital Blvd., 10th Floor Boise, Idaho 83702 *Attorney for Plaintiff American Bank*	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Via Fax: 208-385-5384
Richard D. Campbell Campbell, Bissell & Kirby, PLLC 7 South Howard Street, Suite 416 Spokane, WA 99201 *Attorney for Defendant, Polin & Young Construction, Inc.*	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Via Fax: 509-455-7111
Charles B. Lempesis Attorney at Law W 201 7th Avenue Post Falls, Idaho 83854 *Counsel for Thorco, Inc.*	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Via Fax: 208-773-1044
Douglas Marfice Ramsden & Lyons, LLP P.O. Box 1336 Coeur d'Alene, Idaho 83816-1336 *Attorneys for Trustee of the Ryker Young Revocable Trust*	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Via Fax: 208-664-5884

John R. Layman
Layman, Layman & Robinson, PLLP
601 S. Division Street
Spokane, Washington 99202
Counsel for BRN Development, Inc., BRN Investments, Lake View AG, Robert Leven, Trustee for the Roland M. Casati Family Trust and, Marshall Chesrown

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Via Fax: 509-624-2902

Gregory Embrey
Witherspoon Kelley
608 Northwest Blvd., Ste. 300
Coeur d'Alene, ID 83814
Counsel for Taylor Engineering, Inc.

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Via Fax: 509-458-2728

Terrance R. Harris
Ramsden & Lyons, LLP
P.O. Box 1336
Coeur d'Alene, Idaho 83816-1336
Receiver Maggie Y. Lyons

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Via Fax: 208-664-5884

Steven C. Wetzel
James Vernon & Weeks, PA
1626 Lincoln Way
Coeur d'Alene, Idaho 83814
Attorney for Third Party Defendant ACI

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Via Fax: 208-664-1684

Edward J. Anson
Witherspoon Kelley
608 Northwest Blvd., Ste. 300
Coeur d'Alene, Idaho 83814
Attorney for Wadsworth Golf, The Turf Corp. and Precision Irrigation, Inc.

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Via Fax: 208-667-8470

Robert Fasnacht
850 W. Ironwood Dr., Ste. 101
Coeur d'Alene, ID 83814
Courtesy Copy

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Via Fax: 208-664-4789

Cory J. Rippee
Eberle, Berline, Kading, Turnbow & McKlveen
PO BOX 1368
Boise, ID 83701-1368
Courtesy Copy

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Via Fax: 208-334-8542

Clifford T. Hayes
Clerk of the District Court

By _____
Deputy Clerk