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PROFESSIONAL SUMMARY

- Legal Counsel and Educator with a demonstrated history of success in administrative and civil litigation, legal research and analysis, discovery, legal briefing, oral argument and appellate practice.
 - Over 20 years of experience with litigation, administrative proceedings, and appellate practice in Idaho State and Federal Courts.
 - Strong commitment to education, ethics and pro-bono community service.
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LEGAL EXPERIENCE

Attorney and Legal Counselor

January, 2003 - Present

- Practice focused on client representation, consultation and advisory work in all aspects of litigation before Idaho Administrative Agencies and in Idaho State, Federal and Appellate Courts.
- Practice includes extensive history of representing clients and resolving disputes in administrative and civil litigation in Idaho State and Federal Trial and Appellate Courts.

Adjunct Professor, Concordia University School of Law

January, 2018 - Present

- Serve as Adjunct Faculty Professor teaching the Alternative Dispute Resolution course at Concordia University School of Law in Boise, Idaho.
- Responsible for development of course syllabus, grading rubric, lesson plans, classroom presentation materials and teaching coursework.

Deputy Attorney General, State of Idaho

September, 1997 - January, 2003

- Served as Deputy Attorney General for the State of Idaho in the Divisions of Civil Litigation and Family and Children's Services.

- Responsibilities included administrative and civil litigation practice before Idaho State Agencies and in Idaho State and Federal courts as well as appellate representation in Idaho Appellate Courts.
- Responsibilities also included legal counseling and training for state agencies including preparing and presenting statewide training and education regarding administrative practices and procedures.

Law Clerk, Delaware Superior Court

September, 1994 - June, 1995

- Responsibilities included research and analysis of governing law, preparing legal memoranda and drafting judicial opinions for Delaware Superior Court.

Legal Intern, United Nations

June, 1993 - August, 1993

- Served as Legal Intern for the United Nations in Geneva, Switzerland. Responsibilities included research and analysis of International Administrative Law and drafting memoranda and administrative law decisions.

EDUCATION

Delaware Law School (Widener University)

J.D., May 1995

- Juris Doctorate awarded May, 1995.
- AmJur Award Recipient.

University of Delaware

B.A., June 1991

- Bachelor of Arts in History awarded June 1991.
- Honors Graduate; Dean's List; 1990 University of Delaware Humanities Scholar.

PROFESSIONAL ASSOCIATIONS

- Supreme Court of Idaho.
- United States District Court, District of Idaho.
- Ninth Circuit Court of Appeals.

EDUCATIONAL OUTREACH AND COMMUNITY SERVICE

Idaho State Bar Service Award

- Recipient of the Idaho State Bar Service Award for volunteer and community service.

Attorneys for Civic Education

- Serve as Co-Chair of Attorneys for Civic Education (ACE).
- Service includes promoting opportunities for civics education in Idaho schools to ensure that Idaho students have a solid understanding of our constitutional form of government.

Idaho State Bar Law Related Education Committee

- Served as Member of the Law Related Education Committee promoting legal education in Idaho schools and universities.
- Service included acting as Mentor, Advisor and Judge for the Idaho High School Mock Trial Program and teaching the Idaho Citizen's Law Academy.

Idaho Volunteer Lawyer's Program

- Serve as Pro Bono Attorney representing victims in cases of domestic violence, divorce, and child protection proceedings.

Ada County Board of Community Guardians

- Served two terms on the Ada County Board of Community Guardians serving as Board Chairperson during second term.

PROFESSIONAL REFERENCES

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Mitch Toryanski

February 1, 2020

John H. Tippetts
Director
Idaho Director of Environmental Quality
1410 N. Hilton
Boise, Idaho. 83706

Re: Letter of Recommendation for David Lloyd

Dear Director Tippetts:

This letter is in support of David Lloyd's application to be a hearing officer for the Department of Environmental Quality (DEQ). I unreservedly endorse Mr. Lloyd's application and emphatically urge you to select him. He will be a tremendous asset to you and the department.

I have known David Lloyd for over 20 years. During that time, we have practiced together in the Idaho legal community where David has a well-deserved reputation as a skilled professional. As former legal counsel for the Idaho Bureau of Occupational Licenses and Deputy Attorney General serving the Department of Insurance, I have seen many administrative hearing officers in action. I know what it takes to be a good one and what is expected of hearing officers from the executive branch of government's perspective. I believe that David Lloyd would be among the very best. He is very smart, has great analytical skill and is a very good writer. He is hard-working, conscientious and prompt. He would be a very fair hearing officer with a calm and thoughtful judicial demeanor. His extraordinary competence and character would be a credit to DEQ and would inspire parties who appeal agency decisions with great confidence in the process.

Mr. Tippetts, I am confident that if you give David Lloyd an opportunity to handle one of your cases, you will be very pleased. Please feel free to contact me anytime about this matter.

Sincerely,

Mitch Toryanski

Mitch Toryanski

IN THE SUPREME COURT OF THE STATE OF IDAHO

DONNA SIMONO,

Plaintiff,

TURNER HOUSE, LARRY J. ROGERS,
CHERYL BARKER, AND DOES I through X,

Defendants-Third Party
Plaintiffs-Respondents

TURNER HOUSE, LARRY J. ROGERS,
CHERYL BARKER,

Third Party Plaintiffs-
Respondents

TREASURE VALLEY AREA OF NARCOTICS
ANONYMOUS, and NARCOTICS
ANONYMOUS LITERATURE,

Third Party Defendants-
Appellants

Supreme Court Docket No: 43191

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District in and for the County of Elmore.

THE HONORABLE LYNN G. NORTON, presiding.

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TABLE OF CONTENTS

I.	STATEMENT OF THE CASE.....	i
	A. NATURE OF THE CASE.....	1
	B. COURSE OF PROCEEDINGS.....	2
	C. STATEMENT OF THE FACTS.....	4
II.	ISSUES PRESENTED ON APPEAL.....	4
III.	ARGUMENT.....	4
IV.	ATTORNEY FEES AND COSTS.....	13
V.	CONCLUSION.....	13

TABLE OF CASES AND AUTHORITIES

Cases

Brooks v. Gigray Ranches, 128 Idaho 72, 78, 910 P.2d 744, 750 5

Brower v. E.I. DuPont De Nemours & Co., 117 Idaho 780, 784, 792 P.2d 345, 349 (1990) 5,6,7,8

C&G Inc., v. Rule, 135 Idaho 763, 769, 25 P.3d 76, 82 (2001)..... 5,8

Erickson v. Flynn, 138 Idaho 430, 438 64 P.3d 959, 966 (Ct. App. 2002) 15

Great Plains Equipment, Inc. v. Northwest Pipeline Corp., 136 Idaho 466, 471, 36 P.3d 218, 223
(2001) 5,12

J.R. Simplot Co. v. Chemetics Int'l, Inc., 130 Idaho 255, 258, 939 P.2d 574, 577 (1997)..... 15

J.R. Simplot v. Rycair, Inc., 138 Idaho 557, 565, 67 P.3d 36, 44 (2003)..... 5,6,7,8,9,10,11, 13

Statutes

I.C. § 12-120(3) 2,3,4,5,6,7,8,11,12

I.C. § 12-120 2

Rules

I.R.A 35 (a)(5), (b)(5) and 41 4, 13

I.R.A 35 (a)(5), (b)(5), 40 and 41 4,13

I.R.C.P. 14..... 8

I.R.C.P. 54(e)(1) 54(d)(1) 3

I. STATEMENT OF THE CASE.

A. NATURE OF THE CASE.

This case arises from the district court's denial of Third Party Defendants'/Appellants', Treasure Valley Area of Narcotics Anonymous' and Narcotics Anonymous Literature's (collectively "TVNA") request for attorney's fees for its successful defense of claims for liability based on duties arising under a commercial lease. The case was initiated when Plaintiff Donna Simono ("Simono") made claims for personal injury resulting from her fall on the stairs of the Turner House, a commercial building in Mountain Home, Idaho. At the time of Simono's fall, the Turner House building was owned and managed by Defendants/Third Party-Plaintiffs/Respondents, Turner House, Larry J. Rogers' and Cheryl Barker (collectively "Turner House"). R. Vol. I, pp. 33. TVNA were tenants leasing space on the third floor of the Turner House. *Id.* On March 5, 2013, Simono filed her Verified Complaint and Demand for Jury Trial against Turner House alleging that she fell on the stairs of the Turner House due to inadequate lighting between the second and third floors. R. Vol. I, pp. 19-23.

Turner House filed its Third Party Complaint against TVNA on November 4, 2013 alleging that TVNA was liable for Simono's injuries based on TVNA's failure to adequately maintain the meeting room it leased on the third floor of the Turner House under the terms of the commercial lease ("Lease") between Turner House and TVNA. R. Vol. I, pp. 32-38.¹ Simono's claims for personal injury and Turner House's claims for third party liability against TVNA were tried to a jury. The jury trial resulted in a verdict in favor of TVNA on the express question of "[w]as there a breach of contract on the part of" TVNA "which was a proximate cause of Plaintiffs' damages?" R. Vol. IV, p. 618.

¹ Although the Rental Agreement/Lease was supposedly attached to the Third Party Complaint as "Exhibit A" (R. Vol. 1, p. 8, ¶ 8) it was inadvertently omitted by Turner House when it filed the Third Party Complaint with the Court. A copy of the Rental Agreement/Lease can be found at R. Vol. 1, pp. 108-109.

Despite prevailing on each of Turner House's claims for liability based on the Lease, the district court denied TVNA's Motion for an award Attorney Fees from Turner House pursuant to Idaho Code §12-120(3) in response to TVNA's initial Motion for Costs and Fees and subsequent Motion for Reconsideration. This Appeal results from the district court's denial of TVNA's attorney fees request against Turner House under I.C. § 12-120(3).

B. COURSE OF PROCEEDINGS.

In their Third Party Complaint, Turner House alleged that TVNA was liable for Simono's injuries on the basis of four substantive causes of action: 1) Breach of Contract; 2) Breach of the Implied Covenant of Good Faith and Fair Dealing; 3) Indemnification; and 4) Negligence. R. Vol. I, pp. 35-37. Each of Turner House's claims for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing and Indemnification were expressly based on duties allegedly arising from the terms of the Lease. *Id.*, pp. 35-36. Turner House's cause of action for Negligence was based on a duty to exercise ordinary care in "maintaining the rental property leased from the Third Party Plaintiffs." *Id.*, p. 36. In its Third Party Complaint, Turner House also made a claim for attorney's fees against TVNA based, in part, on I.C. § 12-120. *Id.*, p. 37. TVNA's Answer and Demand for Jury Trial denying that Turner House was entitled to recovery on any of its claims was filed on December 9, 2013. R. Vol. I, pp. 42-48.

After the discovery process was completed, Simono's and Turner House's claims were tried to a jury between December 5 and 10, 2014. TVNA successfully defended Simono's underlying allegations as well as each of Turner House's third party claims at trial. R. Vol. IV, pp. 617-619. On December 16, 2014, the district court lodged its Final Judgment. R. Vol. IV, p. 620-621. In its Final Judgment, the district court acknowledged that all of Turner House's claims against TVNA had been

tried and dismissed. *Id.* Turner House's claim for Breach of the Implied Covenant of Good Faith and Fair Dealing against TVNA was dismissed with prejudice by the district court at the conclusion of evidence. *Id.*, p. 2. Turner House's claims for Breach of Contract, Indemnification and Negligence were each dismissed with prejudice as the result of the jury verdict. *Id.*

In response to the jury verdict and the district court's Final Judgment, TVNA filed its Motion for Costs and Fees and supporting Memorandum on December 30, 2014 requesting an award of attorney fees for its defense of Turner House's claims under I.C. § 12-120(3) and I.R.C.P. 54(e)(1) 54(d)(1). R. Vol. IV, pp. 630-674. Turner House filed its Objection to TVNA's Motion for Costs and Fees on January 12, 2015. R. Vol. IV, pp. 678-687. On January 27, 2015, the district court issued its Order Granting TVNA's Motion for Costs in Part but Denying Fees ("January 27, 2015 Order"). R. Vol. IV, pp. 688-695. In its January 27, 2015 Order, the district court found that TVNA was the prevailing party on the basis of the final judgment and acknowledged that TVNA obtained a judgment with regard to all claims made by Turner House, but denied TVNA's request for attorney fees. *Id.*, p. 690-695. Based on this Order, the district court entered its Second Amended Final Judgment on January 27, 2015. R. Vol. IV, pp. 697-699.

TVNA filed its Motion for Reconsideration of the district court's January 27, 2015 Order and to Alter or Amend the Second Amended Final Judgment on February 9, 2015 and supporting Memorandum on February 10, 2015. R. Vol. IV, pp. 700-711. In response, Turner House again objected to TVNA's request for attorney fees. R. Vol. IV, pp. 712-719. After TVNA filed its reply on March 4, 2015 (R. Vol. IV, pp. 720-726), the district court lodged its Order denying Reconsideration of Third-Party Defendant's Fees ("March 9, 2015 Order") on March 9, 2015. R. Vol. IV, pp. 727-738. TVNA filed its Notice of Appeal on April 20, 2015. R. Vol. IV, pp. 739-

743.

C. STATEMENT OF FACTS.

On the night of January 7, 2013, Simono attended a Narcotics Anonymous meeting held in the third floor room of the Turner House that TVNA leased from Turner House. The owner of the Turner House building, Defendant Larry Rogers, was in the process of remodeling the Turner House at that time. In addition to completing work on retail space on the first floor of the Turner House, Rogers was in the process of completing an apartment for his use on the second floor. Although there was a lighting fixture on the second floor, it had not yet been wired for electricity, and was, therefore, in-operational. When she left the meeting room on the third floor, Simono traversed the third floor landing and began descending the stairs leading to the second floor. At the bottom of the stairs between the third and second floors, Simono fell and seriously injured both of her ankles.

II. ISSUES PRESENTED ON APPEAL

- A. Whether the District Court Erred in Denying TVNA's Motion for Attorney Fees Pursuant to I.C. § 12-120(3) in its Order Granting Third Party Defendant's Motion for Costs in Part but Denying Fees.
- B. Whether Appellant TVNA is Entitled to an Award of Attorney Fees on Appeal Pursuant to I.C. § 12-120(3) and this Court's Authority to Grant Appellate Attorney Fees under I.A.R. 35 (a)(5), (b)(5) and 41.

III. ARGUMENT

- A. The District Court Erred in Denying TVNA's Motion for Attorney Fees Pursuant to I.C. § 12-120(3) in its Order Granting Third Party Defendant's Motion for Costs in Part but Denying Fees.

I.C. § 12-120(3) requires an award of attorney fees arising out of any "civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty or contract

relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction. In order for attorney fees to be awarded under the commercial transaction provision of I.C. § 12-120(3), 1) “there must be a commercial transaction that is integral to the claim,” and 2) “the commercial transaction must be the basis on which recovery is sought.” *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001) (quoting *Brooks v. Gigray Ranches*, 128 Idaho 72, 78, 910 P.2d 744, 750; *C&G Inc. v. Rule*, 135 Idaho 763, 769, 25 P.3d 76, 82 (2001) (quoting *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 784, 793 P.2d 345, 349 (1990))).

In its January 27, 2015 Order, the district court determined that:

This is not an issue of a duty to defend or indemnification. The court is not aware that the Third Party Plaintiff ever made a request of the Third Party Defendant to defend the negligence claim under the terms of the rental agreement. Additionally, the Third Party Plaintiff was not determined to be negligent, by the jury therefore, there was no request for indemnification for any damages. The crux of the Third Party Complaint and the claims litigated at trial was that it was the Third Party Defendant’s negligence, if any, that caused the injuries to Ms. Simono. The rental agreement was not integral to the claim of negligence by Mrs. Simono. The main thrust of this lawsuit was clearly in tort. Therefore, attorney fees to the Third Party Defendant are not available for defending this claim.

R. Vol. IV, p. 694.

In its January 27, 2015 Order, the district court supported its decision to deny TVNA’s Motion for Costs and Fees requesting an award of attorney fees pursuant to I.C. § 12-120(3) on the basis that the case before the court “mirrors” *J.R. Simplot v. Rycair, Inc.*, 138 Idaho 557, 565, 67 P.3d 36, 44 (2003). R. Vol. IV. p. 694. In *J.R. Simplot v. Rycair*, Plaintiff Simplot and Defendant Rycair entered into a commercial lease whereby Rycair leased premises on Irving Street in Boise, known as the Kaiser building. The lease was executed on September 1, 1995 and the building was destroyed by fire approximately 16 months later. *Id.* at 38, 67 P.3d at 559. Simplot then filed suit

to recover its losses related to the destruction of the building and alleged claims both for breach of contract and negligence. *Id.* In response, Rycair filed a motion for partial summary judgment on the breach of contract claims, requesting that the district court find that Rycair was not required to purchase and keep in force first-party fire insurance on the building and that it was not required to indemnify Simplot for the property damage without proof of Rycair's negligence. *Id.* The district court granted Rycair's motion and dismissed Simplot's breach of contract claims against Rycair. *Id.*

After Simplot filed an amended complaint restating its breach of contract claims as well as adding other breach of contract theories, Rycair filed a second motion for partial summary judgment with regard to the new breach of contract theories. *Id.* The district court again granted Rycair's motion dismissing Simplot's breach of contract claims prior to trial. *Id.* At the conclusion of trial, the jury rendered a verdict that Rycair was not negligent and the district court awarded Rycair attorney fees and costs as a matter of right. *Id.* In awarding attorney fees to Rycair on both the contract claims which had been dismissed on summary judgment and on the negligence claim that was tried, the district court found that:

[T]he lease the parties entered into was for commercial use and therefore constituted a "commercial transaction" for purposes of I.C. § 12-120(3). The district court further determined that Simplot's "continuous references to the contract and attempts to inject contract claims or issues into the negligence claim ... shows that the commercial transaction was the basis upon which Simplot attempted to recover."

Id. at 565, 67 P.3d at 44.

Simplot then appealed the district court's grant of Rycair's motions for partial summary judgment and the award of attorney fees. On appeal, Simplot contended that the district court erred in awarding the portion of attorney fees to Rycair related to the negligence claim. *Id.* at 565, 67 P.3d at 44. In response, Rycair asserted that all of Simplot's allegations and action in the case were

based upon the lease and thus the defense presented by Rycair was based entirely upon the lease.

Id. Rycair asserted, therefore, that it was proper for the district court to award attorney fees pursuant to I.C. § 12-120(3). *Id.*

In reaching its decision in *J.R. Simplot v. Rycair*, this Court held that:

Idaho Code § 12-120(3) allows for the recovery of attorney fees by the prevailing party in a civil action to recover on any commercial transaction. The term "commercial transaction," as defined by I.C. § 12-120(3), includes all transactions except transactions for personal or household purposes. This Court has previously held that " '[a]ttorney fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover.' " *C & G, Inc. v. Rule*, 135 Idaho 763, 769, 25 P.3d 76, 82 (2001) (quoting *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990)).

Id. at 564, 67 P.3d at 43.

This Court in *J.R. Simplot v. Rycair* then held that I.C. § 12-120(3) provided for the award of attorney fees to Rycair as the prevailing party based on its defense of Simplot's claims for breach of contract based on the commercial lease. Specifically, this Court held that:

The commercial lease is integral to the contract claims and served as one of the theories upon which Simplot sought to recover. Attorney fees could be properly awarded by the district court under the lease and I.C. § 12-120(3) for claims relating to the lease. However, the lease and I.C. § 12-120(3) do not provide for fees on the claims relating to the negligence cause of action. Therefore, Rycair should not be awarded attorney fees for defending at trial the tort claim concerning negligence.

Id. at 565, 67 P.3d at 44.

This Court in *J.R. Simplot v. Rycair* then set aside the district court's award of attorney fees on the basis of both the contract and negligence claims. This Court remanded the case to the district court to allocate the attorney fees incurred by Rycair in defending against the breach of contract claims dismissed on summary judgment but not to include fees incurred in defending the negligence cause of action. *Id.*

In its March 9, 2015 Order, the district court found that Turner House's claims against TVNA were governed by I.R.C.P. 14:

[The Third-Party Claim] cannot simply be an independent or related claim but must be based upon Plaintiff's claim against Defendant. The crucial characteristic of a Rule 14 claim is that Defendant is attempting to transfer to the Third-Party Defendant the liability asserted against him by the original Plaintiff. The fact that the alleged Third-Party Claim arises from the same transaction or set of facts as the original claim is not enough.

R. Vol. IV., p. 735.

The district court then found that, "the only valid contract claims against Third-Party Defendant were those which were based on indemnification." R. Vol. IV., p. 735. The district court then restated its earlier finding from its January 27, 2015 Order stating: "[t]hird-Party Plaintiffs essentially withdrew any contract claims at trial, leaving the sole issue for determination that of indemnification." *Id.* The district court then found in its March 9, 2015 Order that:

At its heart, this case was about negligence, and Third-Party Defendant was as interested in showing its non-negligence as were Third-Party Plaintiffs/Defendants. The issues of contractual indemnification or the contract were in the background, and were never, "the substantial point or essence of the claim, grievance, or complaint." GRAVAMEN, Black's Law Dictionary (10th Ed. 2014).

R. Vol. IV., p. 736.

As noted above, this Court found an award of attorney's fees to Rycair in the *J.R. Simplot v. Rycair* case proper under I.C. 12-120(3) where Simplot had made "continuous references to the contract" and attempted "to inject contract claims or issues into the negligence claim...." showing "that the commercial transaction was the basis upon which Simplot attempted to recover." *Id.* at 565, 67 P.3d at 44. While the holding in *J.R. Simplot v. Rycair* establishes that TVNA was entitled to an award of attorney fees for its defense of Turner House's claims based on the Lease even had the claims been dismissed prior to trial, the record clearly shows that Turner House did not

“essentially” withdraw its “contract claims at trial.” This finding by the district court was error.

In this case, as in *J.R. Simplot v. Rycair*, Turner House made continuous references to the Lease in support of its contract claims and also injected contract claims and issues into the negligence claim throughout trial. The Lease served as the basis for Turner House’s claims against TVNA from opening statement through the final jury verdict. In its opening, Turner House told the jurors that Ms. Rogers would testify that the Lease was in place at the time of Simono’s injuries. Tr. Vol. I, p. 41, LL. 13-18. Specifically, Turner House asserted during its opening statement that, “[a]s part of the terms of that lease, Narcotics Anonymous was responsible for the upkeep of the maintenance of the stairs from the bottom to the third floor, because they were the only ones using it on a daily basis.” Id., LL. 19-23. During Ms. Rogers’s initial testimony in Simono’s case in chief, Ms. Rogers identified the Lease and it was admitted into evidence as Turner House’s Exhibit B. Tr. Vol. I, p. 153, L. 3-p. 158, L. 14. Turner House then elicited testimony from Ms. Rogers attempting to support its claims against TVNA not only with the written terms of the Lease, but also with additional terms under what Ms. Rogers claimed was a “verbal lease.” Tr. Vol. I, p. 158, L. 20-p. 166, L. 6.

Mr. Rogers, the owner of the Turner House, also testified during Simono’s case in chief and provided testimony not only about the terms of the written lease, but also about additional alleged verbal lease agreements for the maintenance of the stairwell. Tr. Vol. III, p. 92, L. 24-p. 95, L. 4. In response, TVNA was required to cross-examine Mr. Rogers to elicit his testimony that there was nothing in the written terms of the Lease that would have required TVNA to maintain the stairwell and that the Lease required additional terms be in writing. Tr. Vol. III, p. 102, L. 15-p. 107, L. 18.

During the interim jury instruction conference on December 10, 2014, Turner House then indicated that it was still pursuing its claim for Indemnification based on the Lease but that indemnification was a question of law for the court to determine after the jury reached its verdict. Tr. Vol. II, p. 252, L. 19-p. 254, L. 23. In addition, the district court then stated that jury instructions on Turner House's Breach of Contract Claim and the issue of good faith and the covenant of fair dealing would still be required before the case could be submitted to the jurors. Id., p. 253, L. 24-p. 254, L. 9.

Subsequently, TVNA moved for a directed verdict dismissal of Turner House's claims based on lack of evidence. Tr. Vol. III, p. 321, L. 19-p. 326, L. 17. In response, the district court denied TVNA's motion on the Breach of Contract Claim but granted its Motion dismissing Turner House's claim for Breach of the Implied Covenant of Good Faith and Fair Dealing under the Lease. Tr. Vol. III, p. 326, L. 18-p. 332, L. 5. During the next jury instruction conference, the district court granted Turner House's request for a jury instruction related to a burden of proof on breach of contract under the terms of the Lease against TVNA. Tr. Vol. III, p. 373, LL. 9-23. This determination resulted in the district court charging the jury with "Question No. 4" which asked the jurors to determine was there a breach of contract on the part of TVNA which was a proximate cause of Plaintiff's damages. Tr. Vol. III, p. 430, L. 22-p. 431, L. 5; R. Vol. IV, p. 618. After deliberations, the jury found that there was no breach of the Lease by TVNA that was a proximate cause of Plaintiff's damages. R. Vol. IV, p. 618.

The *J.R. Simplot v. Rycair* case involved similar legal issues regarding an award of attorney's fees in case involving both claims for breach of contract based on a commercial lease and a separate claim for negligence. *J.R. Simplot v. Rycair*, therefore, supported TVNA's request

for attorney fees under I.C. § 12-120(3) in an apportioned amount based on its defense of Turner House's claims for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing and Indemnification. Where more than one claim is pled, there can be more than one gravamen, and attorney fees can still be awarded for a specific claim if the claim is the type governed by I.C. § 12-120(3). *Great Plains Equipment, Inc.* at 472, 36 P.3d at 224. TVNA prevailed at trial on each of Turner House's claims, obtaining dismissal with prejudice on each of these claims in the Second Amended Final Judgment.

The Lease clearly constituted a commercial transaction under I.C. § 12-120(3) which defines commercial transactions as including all transactions except transactions for personal or household purposes. As the Third Party Complaint alleged, Turner House's causes of action for Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing were entirely based on the terms and provisions of the Lease. R. Vol. IV., p. 35. Not only was TVNA forced to defend itself through trial based on alleged duties arising from the written terms of the Lease, Turner House alleged at trial that the Lease had been amended by additional verbal terms creating additional duties. Throughout trial, Turner House attempted to introduce parol evidence to support its claim that subsequent verbal agreements not found in the written terms of the Lease had created additional contractual duties that were breached by TVNA. Tr. Vol. I, p. 160, L. 16-p. 166, L. 6.

Turner House's cause of action for Indemnification was based on both the written terms of the Lease and/or the common law of indemnification arising from the commercial transaction between the parties. *Id.*, p. 36. The basis for each of Turner House's contract claims was the terms and provisions of the Lease and the Lease clearly constituted the basis upon which Turner House attempted to recover against TVNA. While TVNA was also forced to defend itself at trial against

Simono's underlying negligence claim due to the Third Party Complaint, the Lease was integral to Turner House's third party contract claims and constituted the basis for Turner House's attempt to recover against TVNA. TVNA should have been awarded its attorney fees for the defense of each of Turner House's Contract claims under I.C. § 12-120(3).

In addition, Turner House's cause of action for negligence was based on the existence of a commercial transaction between the parties. As alleged by Turner House, TVNA had a duty to exercise ordinary care in "maintaining the rental property leased from the Third Party Plaintiffs." Tr. Vol. I, p. 36. While the Simono's claim for negligence against Turner House was based on common law theories of premises liability, Turner House's claim for negligence against TVNA was entirely based on the alleged duties of TVNA arising from the Lease and purported oral amendments. In the absence of any alleged duty to maintain the premises in the Lease, Turner House would have had no support for the duty and breach elements of its claim for negligence against TVNA.

As noted above, "[A]ttorney fees can still be awarded for a specific claim if the claim is of the type covered by I.C. § 12-120(3) even when the claim is covered by other theories that would not trigger application of the statute. *Great Plains Equipment, Inc.* at 472, 36 P.3d at 224. In this case, the Lease was the sole basis for the duty and breach elements of Turner House's negligence claim against TVNA and constituted at least part of the basis for its effort to recover against TVNA on this claim. TVNA should also have been awarded its attorneys fees under I.C. § 12-120(3), in whole or in part, for the defense of Turner House's negligence claim because the Lease was integral to the creation of TVNA's alleged duty and constituted the basis on which Turner House sought recovery against TVNA for its alleged breach.

B. Appellant TVNA is Entitled to an Award of Attorney Fees on Appeal Pursuant to I.C. § 12-120(3) and this Courts' Authority to Grant Appellate Attorney Fees under I.A.R. 35 (a)(5), (b)(5) and 41.

Pursuant to I.C. § 12-120(3) and this Courts' authority to grant Appellate costs and attorney fees under I.R.A 35 (a)(5), (b)(5), 40 and 41, TVNA requests an award of its costs and reasonable attorney fees on Appeal. If this Court determines that TVNA was entitled to an award of its attorney's fees in the district court action pursuant to I.C. § 12-120(3) and determines that TVNA is the prevailing party here on Appeal, I.C. § 12-120(3) mandates an award of attorney fees on appeal as well as in the trial court. *Erickson v. Flynn*, 138 Idaho 430, 438 64 P.3d 959, 966 (Ct. App. 2002) (citing *J.R. Simplot Co. v. Chemetics Int'l, Inc.*, 130 Idaho 255, 258, 939 P.2d 574, 577 (1997)).

IV. ATTORNEY FEES AND COSTS

Pursuant to I.C. § 12-120(3) and I.R.A 35 (a)(5), (b)(5), 40 and 41, TVNA requests an award of its costs and reasonable attorney fees on Appeal.

V. CONCLUSION

Turner House's third party claims against TVNA centered upon the Lease and alleged verbal amendments to the Lease, both of which constituted Commercial Transactions pursuant to I. C. § 12-120(3). But for the Lease, TVNA would not have been involved in the underlying litigation and is, therefore, entitled to an award of its attorney fees for its successful defense of Turner House's claims at trial and as well as here on Appeal.

Respectfully submitted this ____ day of _____.

SAETRUM LAW OFFICES

By _____
David W. Lloyd, Of Counsel