4-19-2012

Ferrell v. United Financial Casualty Company Appellant's Reply Brief Dckt. 39221

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

****

Supreme Court No. 39221-2011

SAM FERRELL AND DEVA FERRELL,

Plaintiffs/Appellants,

v.

UNITED FINANCIAL CASUALTY COMPANY,

Defendant/Respondent.

****

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County.

Honorable Dane Watkins, Jr., District Judge, presiding.

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I. ADDITIONAL REBUTTAL ARGUMENT

1. This Court need not and should not apply Idaho Code § 41-1839 retroactively.

The District Court was correct in its analysis that Idaho Code § 41-1839 is not a discretionary attorneys fees statute and should therefor not be applied retroactively. Ferrells have not argued and do not intend to argue that Idaho Code § 41-1839 should be applied retroactively. It is not a discretionary statute, and the law as it existed when the Complaint was filed is the law that should be applied in this case. That is Idaho Code § 41-1839 as amended in July, 2010, which clearly provides for attorneys fees in arbitration.

Idaho Code § 41-1839 is titled "Allowance of attorney's fees in suits against **or in arbitration** with insurers." It provides as follows:

> Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state **or in any arbitration** for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action **or arbitration**.

Idaho Code § 41-1839 (2010) (Emphasis added to show the 2010 amendments.)

This is not discretionary. The statute uses the word "shall" pay attorneys fees. Therefore, the District Court needed only to address the "two requirements for an insured to be entitled to an award of attorney fees: (1) the insured must provide a proof of loss as required by the insurance policy; and (2) the insurer must fail to pay the amount justly due within thirty days after receipt of the proof of loss." *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 746-47, 152 P.3d 614, 617-18 (2007).

Weinstein v. Prudential Prop. & Cas. Ins. Co., 233 P.3d 1221, 1249-1250 (Idaho 2010).

United Financial does not dispute that the Ferrells proved these two requirements, so the District Court erred in not awarding the Ferrells attorney fees.

2. Unless this Court changes the law it set forth in *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 445 P.2d 720 (1968) and *State ex Rel Wasden v. Diacel Chemical Industries, Inc.*, 141 Idaho 102, 106 P.3d 428 (2005) this Court must apply, and the District Court should have applied, the law as it existed when the Complaint and Answer were filed.

This Court could decide this appeal by merely refusing to overrule *Unity* and *Diacel*. Neither the District Court, nor United Financial cited any law disagreeing with these holdings. Without any authority for doing so, the District Court decided to apply the law as it existed at the time the Ferrells requested arbitration. This was certainly a reasonable position, but it did not comply with the law, and it was therefor error.

The Ferrells acknowledge that the *Unity* and *Diacel* cases did not involve arbitration. Nevertheless, the District Court should have applied them. Otherwise, District Courts will not have a clear rule for which law to apply. A clear rule is especially important in arbitration actions since arbitration actions do not have a clear beginning. In an arbitration action, there are many choices for law to apply: the time of the signing of the insurance contract requiring arbitration, the time of the accident, the time the fees began incurring, the time arbitration was demanded, the time arbitration was accepted, or the time the actual arbitration began, among others. In order to avoid further appeals the District Courts need a clear rule, and the Idaho Supreme Court has given them one. Actions should be adjudicated in accordance with the law in effect at the time of the filing of the complaint or answer. *See Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 445 P.2d 720

(1968); *State ex Rel Wasden v. Diacel Chemical Industries, Inc.*, 141 Idaho 102, 106 P.3d 428 (2005).

Even if this Court finds that the District Court was correct in applying the law in effect at the time the arbitration was demanded and not at the time the complaint was filed, the District Court erred in its application of that law. This has been discussed in Appellant's Brief. In summary, the District Court should have applied the ruling in the *Martin* case and not the dicta in the *Barbee* case.

3. This was not a case filed solely for attorneys fees.

In *Barbee*, the plaintiff filed two lawsuits. One to confirm the arbitration award and amend the damages award, and a second for attorneys fees only.

Here, there is only one lawsuit, and despite United Financial's attempts to characterize this lawsuit as one for only attorney fees, this lawsuit seeks four things. The first is confirmation of the arbitration award (at the time Ferrells filed the lawsuit, no award had been tendered). The second and third are the issues of fees and costs. These two issues could not have been resolved short of a lawsuit because the arbitrators declined to decide these issues. The last issue is the amount of interest the Ferrells were entitled to. United Financial tendered interest for the entire arbitration at the post-judgement rate, which is less than the prejudgment rate. Before filing a lawsuit, the attorney for the Ferrells wrote a letter to United Financial requesting that this be remedied, and United Financial never responded. Only shortly before this appeal was filed and after months of litigation in the District Court, the parties settled that issue by Stipulation. At that same time, the parties settled the issue of confirmation of the award. These two issues also could not have been resolved short of a lawsuit.

4. The District Court erred in relying on United Financial's late submission of evidence regarding costs to reconsider its award of costs.

I.R.C.P. 54(d)(1)(A) states "costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court." I.R.C.P. 54(d)(6) states in part that "[f]ailure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed." Emphasis added.

On March 11, 2010, the Ferrells filed their motion for attorneys fees and costs and affidavit of fees and costs. Oral argument on the motion for fees and costs was held on April 6, 2011. Tr. pp. 11-40. This was 26 days after Ferrells filed their Affidavit of Fees and Costs setting forth their requested fees and costs with billings attached. R. p. 55. Before the oral argument, United Financial never objected to an award of costs, but at the hearing, for the first time, United Financial objected to costs and brought up the argument that the insurance contract provided that the parties would pay their own costs. United Financial had faxed the insurance contract to the Ferrells and to the Court only minutes before the hearing, and neither the Ferrells nor the District Court had received it or reviewed it before the hearing. The District Court found that Ferrells did not object to the admission of the insurance contract and to this new argument at the hearing on April 6, 2011. Based upon this, the District Court reconsidered its award of costs and denied Ferrells costs.

In fact, although on April 6, 2011, the insurance contract had not been submitted into evidence, and counsel for Ferrells had not seen what United Financial was trying to put into evidence, Ferrells did object. Ferrells argued in regards to costs under I.R.C.P. 54(d) as follows:

> MR. WESSEL: And, in fact, under 54(d)(6), they need to do an objection to costs within 14 days of service of memorandum of costs, and failure to timely object to items of memorandum of costs shall constitute a waiver of all objections to the costs. Tr. p. 21, l.25-p. 22, l. 4.

* * *
THE COURT: And I take it there was no objection to the Court considering the contract?
MR. WESSEL: Well, I don't know what he has put – I haven't seen it, so if it's the contract, I wouldn't have an objection to the Court looking at it. I'd like to look at it first and make sure it's what Mr. Lerma says it is.
THE COURT: Okay. If you see it and you have any problem with it, notify the Court. Otherwise the Court will consider it and issue a written decision. Tr. p. 39, l.13-20, p.39, l. 25- p. 40, l. 2.

In addition to Ferrells' objection to the admission of the insurance contract at the hearing on April 6, 2010, as soon as Ferrells received the late submission they saw a problem with the document and notified the Court. They filed a written objection to the admission of the document on April 11, 2010. Tr. pp. 98-99.

Again, even if the District Court was correct in its analysis that the insurance contract should trump the Idaho Court Rules, a late submission of the contract does not satisfy the requirements of I.R.C.P. 54(d)(6). This Court has found many times that failure to object to costs within 14 days constitutes waiver of **all** objections to costs. (Emphasis added). *See Bagley v. Thomason,* 149 Idaho 799, 241 P.3d 972 (2010); *Conner v. Dake,* 103 Idaho 761, 653 P.2d 11; *Long v. Hendricks,* 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985); *Griffin v. Griffin,* 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982).

5. Ferrells cited attorney fees on appeal pursuant to I.C. § 41-1839 as one of the issues on appeal in paragraph 3, page 7 of Appellant's brief.

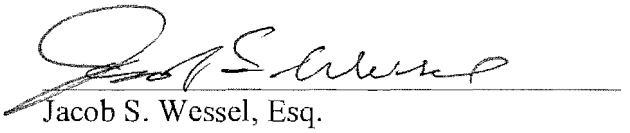
In its response brief, United Financial argues that Ferrells failed to cite attorney fees on appeal as an issue on appeal. This is incorrect.

II. CONCLUSION

The District Court found the Ferrells to be the prevailing party at arbitration. They are therefore entitled to fees and costs pursuant to Idaho Code § 41-1839, I.R.C.P. 54(d)(1)(A), and I.A.R. Rule 41. The District Court erred in its application of the law, and United Financial cites nothing in its briefing that would justify overturning this Court's prior case law.

DATED this 17 day of April, 2012.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 12 day of April, 2011, I caused two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

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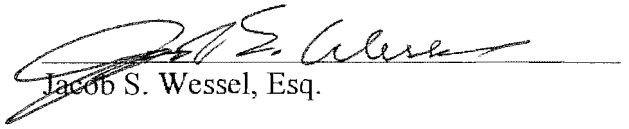
By: 
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