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Zenner v. Holcomb Appellant's Brief Dckt. 35034

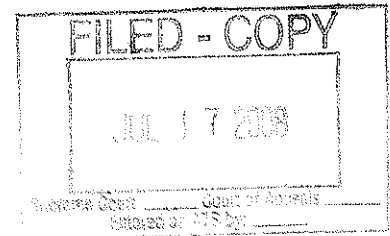
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Attorney for Appellants

IN THE SUPREME COURT OF THE
STATE OF IDAHO

BRADLEY J. ZENNER and ALLASON)
M. ZENNER,)

Plaintiffs-Respondents,)

v.)

LANCE D. HOLCOMB and JENNIFER)
K. HOLCOMB, dba HOLCOMB)
CONSTRUCTION)

Defendants-Appellants.)

Supreme Court No. 35034

APPELLANT'S BRIEF

APPEAL FROM SECOND JUDICIAL DISTRICT, LEWIS COUNTY

THE HONORABLE JOHN BRADBURY, PRESIDING

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I. STATEMENT OF THE CASE

a. Nature of the Case.

This is the opening brief of Lance and Jennifer Holcomb, d/b/a Holcomb Construction in support of the appeal from Judge Bradbury's Memorandum Decision and Order awarding \$106,049.29 in attorney fees and \$14,215.64 in costs to the Plaintiffs, Bradley J. Zenner and Allason M. Zenner.

b. Party References.

Lance Holcomb and Jennifer Holcomb d/b/a Holcomb Construction are referred to as "Holcomb", Bradley J. Zenner and Allason M. Zenner are referred to as "Zenner" for purposes of this argument.

c. Factual Statement and Procedural History.

This matter was tried before a Lewis County Jury between October 1, 2007 and October 16, 1007. The jury entered a verdict against Holcomb for \$40,000.00 (R. p. 2). The resulting Judgment has been paid and a Partial Satisfaction of Judgment has been entered.

Zenner submitted a Memorandum of Costs and an Affidavit of Attorney fees which was timely contested by Holcomb. The Court heard oral argument on November 21, 2007 and subsequently entered a Memorandum Decision and Order on January 8, 2008 awarding Zenners their "actual" lawyers fees and costs.

An Amended Judgment on verdict was entered on January 11, 2008 for attorney fees in the amount of \$106,049.29 and costs in the amount of \$14,215.64 for a total judgment of fees and costs in the amount of \$120,264.93.

Only the award of Costs and Attorney Fees is before the Court on appeal.

II. ISSUES ON APPEAL

Holcomb identifies four issues on appeal:

1. The Trial Court abused it's discretion in determining that Zenner was the prevailing party.
2. The Trial Court erred in it's award of attorney fees by failing to consider the factors set out in I.R.C.P. 54(e)(3).
3. The Trial Court erred in it's award of costs by failing to consider the requirements of I.R.C.P. 54(d)(1).
4. Holcomb is entitled their attorney fees and costs on appeal.

III. ARGUMENT

ISSUE 1

The Trial Court abused it's discretion in determining that Zenner was the prevailing party.

A trial court's determination as to which party, if any, prevailed, is discretionary. *Holmes v. Holmes*, 125 Idaho 784, 787, 874 P.2d 595 (Ct.App.1994), citing *Badell v. Badell*, 122 Idaho 442, 450, 835 P.2d 677, 685 (Ct.App.1992). The exercise of that discretion is guided by I.R.C.P. 54(d)(1)(B).¹

The factors considered by this Court reviewing an exercise of the trial court's discretion are: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *Lettunich v. Lettunich*, ___ Idaho ___, 185 P.3d 258 (2008) II, *citing Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). Wrong cite

¹ I.R.C.P. 54(d)(1)(B) provides:

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties, whether there were multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issue or claims. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Here, the Trial Court seems to perceive the issue as one of discretion. R. p. 00016. However, the Trial Court did not act within the boundaries and consistent with the legal standards applicable to specific choices available to the Trial Court nor did the Trial Court engage in an exercise of reason.

The Trial Court noted that both parties argued the amount of the Offer of Judgment as consideration of whether or not Zenner was the prevailing party, and determined that “[s]ince the contract provides that the award of lawyer’s fees and costs depends on who is the prevailing party, I conclude that it is proper to consider the Offers of Judgment for that purpose.” *Id.* at 00017.

The Trial Court improperly used the offer of judgment, I.R.C.P. 68, to determine the prevailing party for the purpose of awarding attorney fees. In *Ireland v. Ireland*, 123 Idaho 955, 961, 855 P.2d 40 (1993), the Trial Court found that Milton Ireland was the prevailing party in significant part and awarded him his attorney fees under Idaho Code § 12-121 and I.R.C.P. 54(e)(1). In support of this finding, the court cited Milton's offer of judgment under I.R.C.P. 68. *123 Idaho at 961.*

The Idaho Supreme Court, in considering whether the trial court abused it’s discretion in awarding attorney fees, found that the court should not have used Rule 68 to support an award of attorney fees.

Rule 68 "is intended to protect a defendant against a plaintiff's claim for costs where the defendant has made a reasonable offer of judgment and where the verdict recovered by the plaintiff is less favorable than the offer." *Vulk v. Haley*, 112 Idaho 855, 859, 736 P.2d 1309, 1313 (1987). Rule 68 is not intended to provide for an award of attorney fees. *Id.* This rule applies only to judgments obtained by plaintiffs, putting a special burden on prevailing plaintiffs to whom a settlement offer is made to show that they are entitled to costs. *Jones v. Berezay*, 120 Idaho 332, 334, 815 P.2d 1072, 1074 (1991).

Id. (Emphasis added). Therefore, the Trial Court abused its discretion in considering the I.R.C.P. 68 offer of judgment in relation to an award of attorney fees.

Further, in deciding that Zenner was the prevailing party, the Trial Court abused its discretion in considering factors beyond those allowed by I.R.C.P. 54(d)(1)(B)“ . . . the Trial Court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties.”) The court improperly considered the other damages recoverable in addition to the jury award, and the extent to which the Zenner had a choice in proceeding to trial and the parties participation in the settlement process. R. p. 00018. Under no circumstances should the Trial Court consider in it’s determination of which party was the prevailing party evidence of the parties participation in pretrial dispute resolution.²

Zenner sought \$120,000 in damages. The jury only awarded \$40,000 in damages. Considering the “other damages recoverable,” which are based on the determination of who is the prevailing party, it is an abuse of discretion to use the amount of attorney fees and costs which would go to the prevailing party to *decide* the prevailing party. In doing so, the Trial Court is essentially “using the word to define the word.” Such circular reasoning is not a proper exercise of reason, and is instead an abuse of discretion.

Additionally, if properly considered, and in light of the jury’s award of only one-third of the damages sought, the court would have reasoned that Holcomb, not Zenner is was the party that actually did not have a choice but to proceed to trial and prevailed given the

Court not using other damages recoverable to award
properly award
Requirement
Happ
Merely to show
Holcomb's arguing for minimal damage

² I.R.E. 507 contemplates that the Court would not be making assumptions about the conduct of pretrial dispute resolution in determining who might be the prevailing party.

available choices to it. Finally, it appears from the Court's analysis that Zenner is rewarded for their participation in the "litigation" dispute resolution process meanwhile Holcomb is to be punished for his failure to "settle" the matter in the dispute resolution process.

The Trial Court's analysis is simply a risk analysis supported only by the Court's subjective analysis and not an application of I.R.C.P. 54(d) and other appropriate Idaho Law.

The Trial Court does not clearly articulate in a way consistent with I.R.C.P. 54(d)(1)(B), its basis for concluding that Zenner is the prevailing party. The Trial Court's failure to do so demonstrates that the Court erred in its exercise of discretion.

ISSUE 2

The Trial Court erred in it's award of attorney fees by failing to consider the factors set out in I.R.C.P. 54(e)(3).

The review of the Court's exercise of discretion in the award of attorney fees requires consideration the same three factors. *Id. Lettunich II*. However, here the Trial Court determined that it did not have discretion in determining the amount of fees to award based upon the "plain meaning" of the parties contract. Since the contract did not provide a "reasonableness" qualification to the amount of attorney fees and costs to be awarded, the entirety of the fees were awarded by the Trial Court.

Specifically the Trial Court determined it was not necessary to consider the application of the factors of I.R.C.P. 54(e) in determining the appropriateness of the amount to be awarded in attorney fees.³

I.R.C.P. 54(e) allows an award of “reasonable attorney fees, which at the discretion of the court may include paralegal fees” to the prevailing party “when provided for by any statute or contract. . . .”

The Trial Court erred in its conclusion that;

“the Supreme Court did not intend to impose a reasonableness standard on a contract where none was contracted for. Rather it intended for Civil Rule 54(e)(1) to allow, and for Civil Rule 54(e)(3) to provide, standards for determining what is reasonable only when court involvement is contemplated as a component of the contract.”

Memorandum Decision and Order, R. p. 00024-25.

Rule 54(e) permits an award of *reasonable* attorney fees *when* provided for by statute or contract. It would strain the plain meaning of I.R.C.P. 54(e) to interpret that to mean that a contract must provide for “*reasonable* attorney fees”, in order to apply the factors of I.R.C.P. 54(e). The Rule encompasses any contract providing for attorney fees, not just those in which the contract (or statute) provides for “reasonable” attorney fees. *Lettunich v. Lettunich*, 141 Idaho 425, 111 P.3d 110 (2005).

Plaintiff?

³

This conclusion of the Trial Court is in stark contrast to the Trial Court’s use of I.R.C.P. 54(d)(1)(B) to determine who is the prevailing party. See Memorandum Decision and Order, R. p. 00016.

Further, pursuant to I.R.C.P. 54(e)(3), “in the event the court grants attorney fees...it shall consider the following factors. . . .” Therefore, if the Trial Court grants attorney fees, it is required to consider the 54(e)(3) factors. *Id Lettunich I at p. 435*

The trial court’s Order merely touched on Rule 54(e)(3)(B) in noting the complexity of the case, R. p. 00015, and 54(e)(3)(G) in discussing that Holcomb’s attorney fees were \$54,000. R. p. 00019. The Trial Court did not mention that Zenner’s attorney fees were almost twice what Holcomb incurred. R. p. 00027.

This Court recently did not equivocate in the appropriateness of applying the factors of I.R.C.P. 54(e)(3). *Lettunich v. Lettunich*, ___ Idaho ___, 185 P.3d 258, (2008), citing *Smith v. Mitton*, 140 Idaho 893, 902, 104 P.3d 367, 376 (2004).⁴ However, there is no other indication that the Trial Court considered the 54(e)(3) factors or used them to analyze the amount to be awarded. In fact, the Trial Court ruled that the Zenner was entitled to their “actual” lawyer fees and costs. R. p. 00025. Thus, the Trial Court erred in not considering I.R.C.P. 54(e)(3) factors as required.⁵

⁴ Subsequent to the Trial Court’s Memorandum Decision and Order the Idaho Supreme Court decided *Lettunich v. Lettunich*, ___ Idaho ___, 185 P.3d 258 (2008) II confirming the Court’s analysis in *Lettunich v. Lettunich*, 141 Idaho 425, 111 P.3d 110 (2005)I.

⁵ I.R.C.P. Rule 54(e)(3). Amount of attorney fees, provides:

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.

In granting attorney fees pursuant to a contract, Rule 54(e)(8) provides that the provisions of Rule 54(e) relating to attorney fees shall be applicable to the extent that the application of this Rule 54(e) to such a claim for attorney fees would not be inconsistent with such other statute or contract. The Trial Court erred in finding that the parties contract provision of attorney fees precluded the application of Rule 54. See R. p. 00022.

A closer look at Idaho case law relied on by the Trial Court leads to a different conclusion than reached by the Trial Court.

In *Holmes*, the request for attorney fees was made pursuant to a provision in the property settlement agreement, which stated: "If action is instituted to enforce any of the terms of this agreement then the losing party agrees to pay to the prevailing party all costs and attorneys fees incurred in this action." *Holmes*, 125 Idaho at 786 (emphasis added).

The contract provision in *Lettunich I* stated: "In the event of any legal action to enforce the terms of this settlement agreement, the prevailing party shall be entitled to an award of costs, including attorneys fees." *Lettunich*, 141 Idaho at 434 (emphasis added).

In *Bank of Idaho*, the guaranty instrument recited an agreement by *Christopherson* "to pay a reasonable attorneys' fee and all other costs and expenses which may be incurred by Bank in the enforcement of this Guaranty." *Bank of Idaho v. Colley*, 103 Idaho 320, 326, 647 P.2d 776 (Ct.App.1982)(emphasis added).

In *Decker v. Homeguard Systems*, 105 Idaho 158, 160, 666 P.2d 1169 (Ct.App.1983), the statute under which the trial court there awarded the disputed fees, Idaho Code § 48-608(3), provided: "Costs shall be allowed to the prevailing party unless the court otherwise directs. In any action brought by a person under this section, the court shall award,

48-608(3)

in addition to the relief provided in this section, reasonable attorneys fees to the plaintiff if he prevails....” (Emphasis added).

In *Lettunich I*, the Court stated it did not disagree with the findings the court made, instead concluding that the lower court did not properly consider the Rule 54(e)(3) criteria. “The rule, employing the term ‘shall,’ is mandatory-it requires the court to consider all eleven factors plus any other factor the court deems appropriate.” *Id. At p. 435* (emphasis added).

Consistent with the Court’s Decision in *Lettunich I*, this Court recently found similar language at play here, to require the application of the factors of I.R.C.P. 54(e)(3). *Mihalka v. Shepherd*, 145 Idaho 547, 181 P.3d 473 (2008).

Here, the Trial Court erred in attaching significance to the word “award” in its analysis of the *Lettunich I* case.⁶

⁶

The contract provision in *Lettunich* is quite different from the lawyer’s fees provision in the contract between the Zenner and Mr. Holcomb which provided that the prevailing party is “entitled to have its [sic] attorney fees paid by the other party.” In *Lettunich* the contract provision implicitly invoked the court’s participation in deciding what the lawyer’s fees should be because the prevailing party was entitled to an *award*—which must be made by the court—of costs which included lawyer’s fees. In contrast to the contract in *Lettunich*, there is nothing in the Zenners’ contract with Mr. Holcomb that similarly invokes the court’s participation in deciding what the lawyer’s fees should be. The contract between the Zenners and Mr. Holcomb simply entitles the prevailing party to have its lawyer’s fees paid by the other party. It does not mention an award of costs which would implicitly invoke court rules that provide for the award of costs, which include lawyer’s fees.

. . . . I therefore conclude that *Lettunich* is not precedent for applying Rule 54 criteria to a contract that neither explicitly nor implicitly invokes their application.

Trial Court’s Memorandum Decision and Order R. pp. 00023-24.

Clearly Zenner invoked the Court's assistance in determining what the award of attorney fees should be. The Trial Court's analysis of the contract ignores the body of Zenner's verified Complaint and Prayer.

Zenner requested only for the Court's award of "reasonable" attorney fees not Zenner's actual attorney fees.⁷

Clearly Zenner invoked the assistance of the Court in determining an award of "reasonable" attorney fees.

The Court also fails to analyze the entirety of the parties attorney fees contractual provision. The Court only places emphasis on the later portion of the language not analyzing the language at the beginning of the provision that contemplates the Court's involvement.⁸

7

VII.
Attorney fees and costs.

13. In order to recover damages referred to above, it has been necessary for the Plaintiffs to employ Paul Thomas Clark of the Law Offices of Clark and Feeney, Lewiston, Idaho, to represent them in this action. The Defendants should be ordered to pay to the Plaintiff's an amount as and for reasonable attorney fees as the Court seems just, and for costs necessarily incurred for prosecuting this action pursuant to I.C. 12-120, 12-121.

VIII.
Prayer for Relief

WHEREFORE, the Plaintiff respectfully prays for relief and judgment, Order and Decree of this Court against the Defendant as follows:

C. For an award of reasonable attorney fees and costs necessarily incurred herein;

R. p. 00004

⁸ Paragraph 20 of the Construction Contract between the Zenner's and Holcomb provides:

Attorney fees. Should any kind of proceeding including litigation or arbitration be necessary to enforce the provisions of this agreement the prevailing party shall be entitled to have it's attorney fees and costs paid by the other party. *Emphasis added.*

The lack of the use of the word “award” does not distinguish *Lettunich I* from the case here. For example, the *Holmes* Court used the word “award” when discussing the issue of attorney fees, where the case involved a contract provision requiring the losing party to pay “all costs and attorneys fees” to the prevailing party. *Holmes*, 125 Idaho at 786.⁹

In *Bank of Idaho v. Colley*, 103 Idaho 320, 326, 647 P.2d 776 (Ct.App.1982), the Court noted that the bank's claim for attorney fees was based upon a contract, not upon the discretionary power to grant attorney fees under Idaho Code § 12-121.¹⁰

The Court there went on to say:

Rule 54(e)(3) sets forth factors to be considered in fixing the amount of the award. These factors are applicable wherever they would not conflict with the contract or statute upon which the award is based. See Rule 54(e)(8). We perceive no general impediment to applying these factors in this case.

Id. at p. 326 (Emphasis added).

⁹ The two courts reviewing the dispute of the *Lettunich* family did not requires a contractual analysis of the parties' agreement to determine if I.R.C.P. 54 (e)(3) applied.

¹⁰ “The provision for attorney fees in the guaranty agreement is broad and unconditional. The more restrictive criteria set forth in Rule 54(e)(1), for determining entitlement to an award of attorney fees under Idaho Code § 12-121, are not applicable here. We conclude that the cause should be remanded to the district court with direction to award a reasonable fee.”

Bank of Idaho v. Colley, 103 Idaho 320, 326, 647 P.2d 776 (Ct.App.1982)

In the instant case, the application of Rule 54(e)(3) factors would not conflict with the parties contract and certainly not the pleadings of Zenner. *See Lettunich I, 141 Idaho at 434-435*. The application of I.R.C.P. 54(e)(3) factors are consistent with the prayer for relief made in the Zenner's Complaint.

Moreover, the Zenner's Memorandum of Costs and Affidavit of Attorney Fees, while citing the attorney fees provision of the contract at issue, nevertheless argues that "Plaintiff Zenner is entitled to a reasonable attorney fees (sic). . . ." R. p. 00043 (emphasis added). The Zenner's Memorandum of Costs and Affidavit of Attorney Fees also states that "the sum of \$107,239.29 is reasonable to be awarded as said Plaintiff's attorney fees to be taxed as costs. . . ." *Id.* (emphasis added); that "all services shown on said Exhibit "B" were reasonable and necessary"; that "the hourly rates charged for legal services above mentioned are reasonable and were necessary. . . ."; and finally, "[i]t is the opinion of the undersigned that the sum of \$107,239.29 is a reasonable attorney fee to be awarded in this matter." R. pp. 00043-44. (Emphasis added). Clearly, Zenner expected that their contract with Holcomb entitled them to no more than reasonable attorney fees and costs to be awarded by the Trial Court.

The Trial Court in its interpretation of the contract determines that the entirety of the attorney fees will be awarded. In applying the “plain meaning” of the parties’ agreement the Trial Court awards paralegal time and fees as attorney fees. Holcomb did not contract for the payment of paralegal fees.¹¹

Therefore, while Rule 54(e) permits an award of *reasonable* attorney fees when provided for by statute or contract, here the Trial Court erred in finding that the contract provision precluded it from considering the Rule 54(e)(3) factors.

ISSUE 3

The Trial Court erred in its award of costs by failing to consider the requirements of I.R.C.P. 54(d)(1).

The Trial Courts award of attorney fees is subject to the same analysis of failing to view the award of costs as an exercise of discretion and its failure to properly exercise its discretion. *Id., Lettunich II, citing Sun Valley.* The Trial Court failed to analyze I.R.C.P. 54(d)(1) and apply the Rule as required or engage in any exercise of reason.

The analysis set out above in the award of attorney fees is applicable here but is not repeated in its entirety.

¹¹ I.R.C.P. 54(e) places the award of paralegal fees within the sound discretion of the Trial Court. Since the Trial Court here was unwilling to interpose a reasonableness term, it should not have added a payment of “paralegal fees” term to the parties agreement. *Id. Lettunich II, (2008).* Further, there is nothing to demonstrate that the Court saw this issue as one that required the exercise of discretion.

Didn't exercise discretion for costs

Not a contract cite

Able counsel for Zenner acted consistently with the requirements of I.R.C.P. 54(d)(1) setting out the basis pursuant to Rule 54(d)(1) for the costs claimed to be appropriate.

Counsel did not presumptively believe based on his actions that I.R.C.P. 54(d)(1) was not going to apply to the award of costs based on the contractual language of the parties. However, no analysis was made by the Trial Court of the necessity of the discretionary costs sufficient to comply with I.R.C.P. 54(d)(1). *Fuller v. Wolters*, 119, Idaho 415, 807 P.2d 633 (1991). Just as the Court failed to demonstrate its exercise of reason in failing to apply I.R.C.P. 54(d)(1). The Court failed to demonstrate the exercise of discretion for an award of costs pursuant to I.R.C.P. 54(d)(1).

ISSUE 4

Holcomb is entitled their attorney fees and costs on appeal.

Upon prevailing and consistent with the parties agreement, Holcomb is entitled to an award of attorney fees and costs pursuant to IAR 41 and Idaho Code § 12-121. *Adjei-Twum v. Gibson*, lw080708101, Idaho (2008), *Lettunich v. Lettunich* ___ Idaho ___, 185 P.3d 258 (2008).

IV. CONCLUSION

The Trial Court abused its discretion in determining who is the prevailing party. The Trial Court further abused its discretion in determining that I.R.C.P. 54(d)(1) and I.R.C.P. 54(e)(3) did not apply and in its determination of the amount of fees awarded by the Court. Finally Holcomb is entitled to attorney fees on appeal.

DATED this 15 day of July 2008.



Edwin L. Litteneker
Attorney for Appellant

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On this 15 day of July 2008.



Edwin L. Litteneker

