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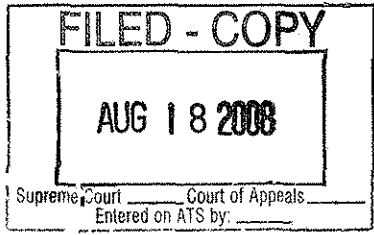
Zenner v. Holcomb Respondent's Brief 2 Dckt. 35034

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRADLEY J. ZENNER and ALLASON M. ZENNER,

Plaintiffs-Respondents,

vs.

LANCE D. HOLCOMB and JENNIFER K. HOLCOMB, d b a HOLCOMB CONSTRUCTION,

Defendants-Appellants.

Supreme Court No: 35034

RESPONDENT'S BRIEF

Appealed from the District Court of the Second Judicial District in the State of Idaho, In and For the County of Lewis.

The Honorable John Bradbury, District Judge Presiding

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

The Defendants/Appellants, Lance D. Holcomb and Jennifer K. Holcomb, dba Holcomb Construction (hereafter "Holcomb") have appealed the *Memorandum Decision and Order* entered by District Court Judge Bradbury on January 8, 2008, in which the Plaintiffs/Respondents, Bradley J. Zenner and Allason M. Zenner (hereafter "Zenner") were awarded \$106,049.29 for attorney fees and \$14,215.64 for costs.

B. COURSE OF PROCEEDINGS AND STATEMENT OF RELEVANT FACTS

On June 19, 2002, Zenner contracted with Holcomb to build a house for them on their property near Nezperce, Lewis County, Idaho. (R. p. 14) The contract was drafted by Holcomb and paragraph 20 of the contract provided as follows:

Attorney's 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's fees and costs paid by the other party.

(R. p. 14)

On December 29, 2003, Zenner filed a complaint requesting damages for breach of contract against Holcomb. (R. pp. 1-5) A ten day jury trial was held in Lewis County beginning October 1, 2007. (R. p. 15) Zenner sought \$120,000 in damages at trial, Holcomb argued for minimal damages, and ultimately the jury awarded \$40,000 to Zenner. (R. pp. 15, 18)

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ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT ZENNER WAS THE PREVAILING PARTY.

The determination of who is a prevailing party, for the purpose of receiving an award of attorney fees, is committed to the sound discretion of the trial court. *Decker v. Homeguard Systems*, 105 Idaho 158, 161, 666 P.2d 1169, 1172 (Ct. App. 1983). That determination will not be disturbed unless an abuse of discretion has occurred. *Id.* Where the trial court has exercised its discretion after a careful consideration of the relevant factual circumstances and principles of law, and without arbitrary disregard for those facts and principles of justice, that exercise of discretion has not been abused and will not be disturbed. *Id.*

The exercise of that discretion is guided by I.R.C.P. 54(d)(1)(B) which 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, 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.

Holmes v. Holmes, 125 Idaho 784, 787, 874 P.2d 595, 598 (Ct. App. 1994). In reviewing on appeal an exercise of the trial court's discretion, the Court considers (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such

1 discretion and consistently with any legal standards applicable to specific choices; and (3) whether
2 the court reached its decision by an exercise of reason. *Id.*

3 In this case a review of the District Court's *Order* shows that in determining that Zenner was
4 the prevailing party, the District Court perceived that determination as one of its discretion, acted
5 within the boundaries of such discretion and consistently with I.R.C.P. 54(d)(1)(B), and reached its
6 decision by an exercise of reason. *See R.* pp. 16-19.

7
8 While conceding that the District Court perceived this issue as one of discretion, Holcomb
9 contends that the District Court did not act within the boundaries and consistent with the legal
10 standards applicable to specific choices available to the District Court nor did the District Court
11 engage in an exercise of reason. Zenner disagrees with these contentions.

12
13 Holcomb first takes issue with the District Court's use of the offer of judgment in its
14 prevailing party analysis. This argument lacks merit in light of the fact that Holcomb argued that
15 the offer of judgment supported their contention that Holcomb, and not Zenner, should be considered
16 the prevailing party because the jury award was only \$5,000 more than the offer of judgment.
17 Holcomb made the offer of judgment an issue in the prevailing party analysis and cannot now take
18 the position that the District Court abused its discretion by addressing the offer of judgment in its
19 prevailing party analysis when Holcomb argued the offer of judgment in support of their position.
20

21 Holcomb's position that the District Court abused its discretion by considering the offer of
22 judgment in its analysis is further without merit based on *Ireland v. Ireland*, 123 Idaho 955, 855
23

1 P.2d 40 (1993). While Holcomb has cited this case in support of their position, *Ireland* does not
2 actually hold that considering the offer of judgment was an abuse of discretion. In fact, while the
3 Idaho Supreme Court in *Ireland* stated that the trial court should not have considered the offer of
4 judgment in its analysis, the Court still found that the trial court did not abuse its discretion. 123
5 Idaho at 961, 855 P.2d at 46 (we cannot say that the court abused its discretion in awarding
6 respondent his attorney fees).

7
8 *Ireland* further undermines Holcomb's argument that the District Court abused its discretion
9 by considering factors beyond I.R.C.P. 54(d)(1)(B). *Ireland* stands for the proposition that the
10 opposite is true, that considering factors beyond I.R.C.P. 54(d)(1)(B) is not an abuse of discretion
11 as long as a trial court considers the factors in I.R.C.P. 54(d)(1)(B). While Zenner's position is that
12 the District Court did not consider any irrelevant or inappropriate factors in determining that Zenner
13 was the prevailing party, for argument sake, even if the District Court had it would still not have
14 abused its discretion. I.R.C.P. 54(d)(1)(B) requires that the District Court consider the final
15 judgment or result of the action in relation to the relief sought by the respective parties. The District
16 Court did so in this matter. *See* R. p. 18 (In exercising that discretion I consider whether or not the
17 jury decided in the Zenners' favor, how the jury award compared to what was sought, ...) The
18 District Court's determination that Zenner was the prevailing party was reached through an exercise
19 of reason. *See* R. p. 18 (There is no question that the Zenners recovered. Mr. Holcomb initially did
20 not want to pay anything for repairs. He argued for minimal damages at trial.)
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24 RESPONDENT'S BRIEF

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1 A review of the *Order* at issue in this case does not support the conclusion that the District
2 Court abused its discretion in determining that Zenner was the prevailing party. The District Court
3 identified that the determination was discretionary, identified the factors in I.R.C.P. 54(d)(1)(B), and
4 applied the facts reasonably to these factors in making its determination that Zenner was the
5 prevailing party. Holcomb has failed to show that the District Court's decision on this matter is an
6 abuse of discretion and Zenner respectfully urges this Court to affirm the District Court's decision
7 on this issue.
8

9 B. THE TRIAL COURT DID NOT ERR IN ITS AWARD OF ATTORNEY FEES BY
10 FAILING TO CONSIDER THE FACTORS SET OUT IN I.R.C.P. 54(E)(3).

11 The genesis of the underlying case is a building contract between the parties that was
12 subsequently breached by Holcomb. (Holcomb ultimately admitted the job was defective. *See R.*
13 *p. 25*) This contract was drafted by the Defendants and paragraph 20 of the contract provided at
14 follows:
15

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

19 (Emphasis mine)
20

21 In its *Order*, the District Court held that Zenner was entitled to their actual attorney fees and
22 costs based on the contract between the parties and that the I.R.C.P. 54(e)(3) does not apply based
23

1 on the terms of the contract. *See* R. pp. 19-25. Holcomb contends that the District Court erred in
2 failing to apply the factors in I.R.C.P. 54(e)(3) to the award of attorney fees.

3 Analyzing the contract between the parties and the applicable law establishes that the District
4 Court did not err in its decision regarding this issue. The District Court began its analysis by
5 pointing out that there was no condition in the contract limiting attorney fees and costs to what
6 is reasonable, that the purpose of contracts is to allocate duties and risks, persons are entitled to
7 contract for anything that is legal, and since there was no evidence of disparity in bargaining power,
8 fraud, or overreaching, it was obligated to enforce the terms of the contract. (R. pp. 19-20)

10 The District Court then correctly pointed out that courts are not permitted to add terms to a
11 contract, and unless ambiguous, a contract must be interpreted according to the plain meaning of its
12 terms. (R. p. 20) The District Court found that the contract is not ambiguous and even if it was then
13 it would still be construed against Holcomb because it was his contract. (R. p. 21) The District Court
14 concluded that the contract should not be tempered by the reasonableness criteria of I.R.C.P. 54(e)(3)
15 unless the contract explicitly or implicitly provided for that and the District Court found that in this
16 case the contract did not make such a provision. (R. pp. 22-25)

18 The District Court's analysis is right on especially consider the plain language of I.R.C.P.
19 54(e)(8):

21 The provisions of this Rule 54(e) relating to attorney fees shall be applicable to ... any
22 claim for attorney fees made pursuant to any other statute, or pursuant to any
23 contract, **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.**

24 RESPONDENT'S BRIEF

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1 (Emphasis mine)

2 In this case applying the reasonableness criteria in I.R.C.P. 54(e)(3) to the contract is
3 inconsistent with the plain unambiguous language of the contract and contradicts the plain language
4 of I.R.C.P. 54(e)(8). As such the District Court did not err in awarding Zenner their attorney fees
5 without considering I.R.C.P. 54(e)(3).

6 It must be emphasized that, pursuant to the contract, the prevailing party is entitled to have
7 the other side pay its attorney's fees and costs. Nowhere does the contract limit the prevailing
8 party's award of attorney fees and costs to a reasonable analysis. By no means does that imply that
9 the Zenner's attorney fees and costs are unreasonable, the point is that the contract states that the
10 prevailing party gets its attorney fees and costs - simple as that.
11

12 This contract was drafted by Holcomb and Holcomb had every opportunity to draft paragraph
13 20 to provide that the prevailing party be awarded "reasonable" attorney fees. However, Holcomb
14 did not draft the contract that way, and the plain language of the contract does not require a
15 reasonable analysis. As written, the contract provides that the prevailing party gets the actual
16 attorney's fees and costs that it incurred from the other party. The purpose of contractual attorney
17 fee provisions are to deter litigation and parties to such contracts proceed at their own risk that they
18 might have to not only pay their own attorney's fees and costs, but the other side's as well. Holcomb
19 drafted this contract and proceeded with litigation expecting that if they prevailed that they would
20 be entitled to receive their attorney's fees and costs, however, Zenner and not Holcomb prevailed.
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24 RESPONDENT'S BRIEF

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1 As such, the District Court's decision awarding Zenner the attorney fees submitted without
2 considering I.R.C.P. 54(e)(3) is not in error and should be affirmed.

3 Holcomb's contention that the factors of I.R.C.P. 54(e)(3) applies to any contract providing
4 attorney fees contradicts the plain language of I.R.C.P. 54(e)(8). The plain language does not
5 support such a conclusion and in fact expressly states differently. *See* I.R.C.P. 54(e)(8) (to the extent
6 that the application of this Rule 54(e) to such a claim for attorney fees would not be inconsistent with
7 such other statute or contract)

8
9 The contract in this case provides that the "prevailing party shall be entitled to have its
10 attorney's fees and costs paid by the other party." Zenner is the prevailing party and submitted the
11 attorney fees that they have contractually incurred to the District Court. If the District Court had
12 applied the factors of I.R.C.P. 54(e)(3) to the Zenner's attorney fees, the District Court would have
13 been in essence rewriting an unambiguous contract on its own accord. Such an action is contrary
14 not only to the plain language of I.R.C.P. 54(e)(8) but also to well established contractual principles.
15 As such Holcomb respectfully contends that the District Court did not err and requests that this Court
16 affirm the District Court's award of attorney fees to Zenner.
17

18 C. THE TRIAL COURT DID NOT ERR IN ITS AWARD OF COSTS BY FAILING TO
19 CONSIDER THE FACTORS SET OUT IN I.R.C.P. 54(d)(1).
20

21 For the same reasons set forth above, the District Court did not err by not considering the
22 factors set out in I.R.C.P. 54(d)(1). The plain and unambiguous terms of the contract drafted by
23

1 Holcomb dictate that Zenner is entitled to the costs they incurred. No additional analysis is required
2 and to do so would be in err. Zenner respectfully urges the Court to affirm the District Court's award
3 of costs as set forth in his *Order*.

4 D. HOLCOMB IS NOT ENTITLED TO THEIR ATTORNEY FEES AND COSTS ON
5 APPEAL.

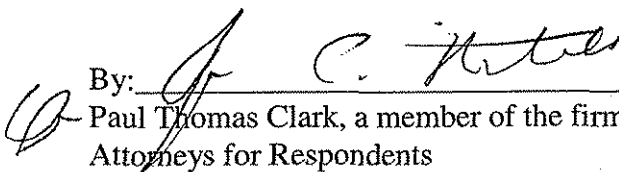
6 Holcomb is not entitled to attorney fees and costs pursuant to IAR 41 and Idaho Code 12-
7 121. Under I.C. 12-121, the Court may award attorney fees to the prevailing party only if the Court
8 is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, or
9 without foundation. *Lettunich v. Lettunich*, 141 Idaho 425, 436, 111 P.3d 110, 121 (2005).
10 Obviously that is not the case in this matter and pursuant to contract drafted by Holcomb, Zenner
11 will be entitled to attorney fees and costs relating to this appeal.
12

13 **CONCLUSION**

14
15 Based on the foregoing, the District Court did not abuse its discretion in finding that Zenner
16 was the prevailing party. Furthermore, based on the contract between the parties and applicable law,
17 the District Court did not err in awarding Zenner attorney fees and costs without considering I.R.C.P.
18 54(e)(3) and I.R.C.P. 54(d)(1). As such Holcomb is not entitled to attorney fees and costs relating
19 to this appeal.
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1 DATED this 14th day of August, 2008.

2 CLARK AND FEENEY

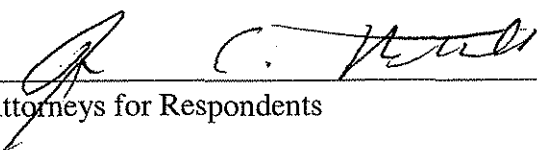
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4 By: 
5 Paul Thomas Clark, a member of the firm.
6 Attorneys for Respondents

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10
11 **CERTIFICATE OF SERVICE**

12 I HEREBY CERTIFY that on the 14th day of August, 2008, I caused to be served a true and correct
13 copy of the foregoing document by the method indicated below, and addressed to the following:

14 Edwin L. Litteneker
15 Special Deputy Attorney General
16 322 Main Street
17 PO Box 321
18 Lewiston, Idaho 83501

U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy

19 By: 
20 Attorneys for Respondents

21
22
23
24 RESPONDENT'S BRIEF

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