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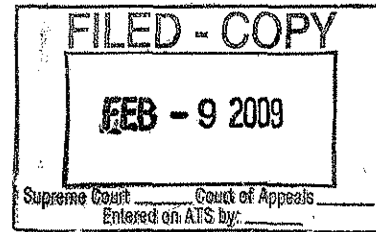

IN THE SUPREME COURT OF THE STATE OF IDAHO

DOUG CRUMP and AMY CRUMP, husband and wife,

Plaintiffs/Appellants,

v.

TED BROMLEY dba RHINO LINING,

Defendant/Respondent.

Supreme Court Docket No. 35666

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County.
Honorable Joel E. Tingey, District Judge, presiding.

B. J. Driscoll, Esq., residing at Idaho Falls, Idaho, for Appellants.
Justin B. Oleson, Esq., residing at Blackfoot, Idaho, for Respondent.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 3
STATEMENT OF FACTS 3
COURSE OF PROCEEDINGS 4
ISSUES PRESENTED ON APPEAL 8
ARGUMENT 8
- I. THE MAGISTRATE COURT ABUSED ITS DISCRETION BY FINDING BROMLEY WAS THE PREVAILING PARTY IN THIS ACTION 8
  - A. Standard of Review 8
  - B. Under *Eighteen Mile Ranch*, The Crumps Are "By Definition" The Prevailing Party In This Case 9
  - C. The Magistrate Court Improperly Applied And Interpreted Rule 68 In Determining The Prevailing Party In This Case. 12
- II. THE DISTRICT COURT ERRED BY AFFIRMING THE MAGISTRATE COURT'S FINDING BROMLEY WAS THE PREVAILING PARTY IN THIS ACTION 14
  - A. Standard of Review 14
  - B. The District Court Erred By Finding Bromley's Rule 68 Offer Of Judgment Exceeded The Crumps' "Adjusted Award." 14
    - 1. Rule 68 Does Not Apply In Determining A Prevailing Party. 14
    - 2. The District Court Misapplied Rule 68 To Determine That The Crumps Are Not The Prevailing Party 15
  - C. The District Court Erred By Comparing The Relief Sought With The Parties' Reasons For Stipulating To Judgment Instead Of Comparing The Relief Sought With The Final Judgment Itself. 18
- III. THE COURT SHOULD AWARD THE CRUMPS THEIR ATTORNEY'S FEES AND COSTS ONO APPEAL. 21

CONCLUSION 22

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES: **_Pages_**

Action Collection Services, Inc. v. Bigham, 146 Idaho 286 (Ct.App. 2008) 15
Boise Truck & Equip., Inc. v. Hafer Logging, Inc., 107 Idaho 824 (Ct.App.1984)...21
Building Concepts, Ltd. v. Pickering, 114 Idaho 640 (Ct.App.1988).......................21
Cheney v. Smith, 108 Idaho 209 (Ct.App.1985) 21
Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc., 134 Idaho 259
(Ct.App. 2000) 21
DeWils Interiors, Inc. v. Dines, 106 Idaho 288 (Ct.App.1984) 21
Eighteen Mile Ranch v. Nord Excavating & Paving, Inc., 141 Idaho 716 (2005) 6-11, 18-21
Jerry J. Joseph C.L.U. Ins. Associates, Inc. v. Vaught, 117 Idaho 555
(Ct.App. 1990) 6, 9
Payne v. Wallace, 136 Idaho 303 (Ct.App. 2001) 15-18
Spidell v. Jenkins, 111 Idaho 857 (Ct.App.1986) 21
State v. Hedges, 143 Idaho 884 (Ct.App. 2007) 14

STATUTES AND RULES:

Idaho Appellate Rule 40 ....8, 21
Idaho Appellate Rule 41 ....8, 21
Idaho Rule of Civil Procedure 54 ....5, 8, 16-21
Idaho Rule of Civil Procedure 68 ....5-7, 12-18
Idaho Code Section 12-120..8,15,17, 20-21
Idaho Code Section 12-121..16, 17-18, 21

STATEMENT OF THE CASE

The plaintiffs/appellants, Doug and Amy Crump ("Crumps"), appeal the decision of the magistrate court finding that the defendant/respondent, Ted Bromley dba Rhino Lining ("Bromley"), was the prevailing party in this action and awarding Bromley attorney's fees and costs despite the fact that Bromley recovered no affirmative relief or judgment against the Crumps on his counterclaim and the Crumps obtained judgment entered against Bromley for $200 on the Crumps' claim. The Crumps also appeal the district court's affirmance of the magistrate court's decision.

STATEMENT OF FACTS

In August 2005, the Crumps delivered their drift boat to Bromley to be sprayed with a protective rubber coating.[1] The Crumps' boat had no cracks when they delivered it to Bromley.[2] When the Crumps returned a few days later to pick up their boat, they discovered the boat had a crack approximately eight inches long on its side panel.[3] The crack went clear through the boat as it could be seen on both the inside and outside of the boat.[4]

Bromley's employee admits that when he flipped the boat over to apply the protective coating, he heard a "pop" and then noticed the boat had a crack in it, a crack he had not noticed before.[5] The employee admitted to Bromley that he cracked the Crumps' boat when he was turning

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[1] See p. 9, l. 22 through p. 10, l. 6 and p. 17, ll. 5-9 of the transcript of the deposition of Ted Bromley taken January 12, 2006, a copy of which is attached as Exhibit "A" to the Affidavit of B. J. Driscoll filed 6/26/2006.

[2] See p. 20, l. 10 through p. 21, l. 17 of the transcript of the deposition of Ted Bromley taken January 12, 2006, a copy of which is attached as Exhibit "A" to the Affidavit of B. J. Driscoll filed 6/26/2006. See also the Affidavit of Doug Crump filed 6/26/2006.

[3] See p. 19, l. 20 through p. 20, l. 1 of the transcript of the deposition of Ted Bromley taken January 12, 2006, a copy of which is attached as Exhibit "A" to the Affidavit of B. J. Driscoll filed 6/26/2006. See also the Affidavit of Doug Crump filed 6/26/2006 and Exhibit "A" attached thereto.

[4] See p. 23, ll. 11-15 of the transcript of the deposition of Ted Bromley taken January 12, 2006, a copy of which is attached as Exhibit "A" to the Affidavit of B. J. Driscoll filed 6/26/2006. See also the Affidavit of Doug Crump filed 6/26/2006 and Exhibit "A" attached thereto.

[5] See p. 26, ll. 3-8 of the transcript of the deposition of Brent Williams taken March 16, 2006, a copy of which is attached as Exhibit "C" to the Affidavit of B. J. Driscoll filed 6/26/2006.

it over.[6] After the employee cracked the Crumps' boat, he tried to "patch" it by applying some sealant on the inside and the outside of the Crumps' boat and then painted over the sealant "to blend it in."[7] The employee admits that he did not notice any other cracks on the Crumps' boat.[8] At his deposition, Bromley admitted Rhino Linings cracked the Crumps' boat[9] and has at least some responsibility to pay for the damage to the Crumps' boat.[10]

Prior to taking their boat to Rhino Linings, the Crumps had planned a seven-day trout fishing trip in August 2005.[11] They had also planned an eight-day steelhead fishing trip in October 2005.[12] Due to the damage to their boat, the Crumps could not use their boat for these 15 days.[13]

Hyde Drift Boats estimated the costs to fix the Crumps' boat at $945.00.[14]

COURSE OF PROCEEDINGS

In November 2005, the Crumps sued Bromley to recover $2,820 in actual damages and lost use damages arising from Bromley's negligence and breach of contract arising from damage Bromley caused to the Crumps' drift boat.[15] Bromley filed an answer and counterclaim seeking $400 as the unpaid amount of Bromley's services.[16]

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[6] See p. 21, ll. 14-17 of the transcript of the deposition of Ted Bromley taken January 12, 2006, a copy of which is attached as Exhibit "A" to the Affidavit of B. J. Driscoll filed 6/26/2006.
[7] See p. 19, l. 20 through p. 20, l. 11 of the transcript of the deposition of Brent Williams taken March 16, 2006, a copy of which is attached as Exhibit "C" to the Affidavit of B. J. Driscoll filed 6/26/2006.
[8] See p. 20, ll. 12-16 of the transcript of the deposition of Brent Williams taken March 16, 2006, a copy of which is attached as Exhibit "C" to the Affidavit of B. J. Driscoll filed 6/26/2006.
[9] See p. 29, ll. 3-7 of the transcript of the deposition of Ted Bromley taken January 12, 2006, a copy of which is attached as Exhibit "A" to the Affidavit of B. J. Driscoll filed 6/26/2006.
[10] See p. 26, ll. 20-23 of the transcript of the deposition of Ted Bromley taken January 12, 2006, a copy of which is attached as Exhibit "A" to the Affidavit of B. J. Driscoll filed 6/26/2006.
[11] See p. 7, l. 15 through p. 9, l. 8 of the transcript of the deposition of Amy Crump taken May 15, 2006, a copy of which is attached as Exhibit "E" to the Affidavit of B. J. Driscoll filed 6/26/2006. See also p. 29, l. 4 through p. 30, l. 6 of the transcript of the deposition of Doug Crump taken May 15, 2006, a copy of which is attached as Exhibit "D" to the Affidavit of B. J. Driscoll filed 6/26/2006.
[12] See the Affidavit of Doug Crump filed 6/26/2006.
[13] See the Affidavit of Doug Crump filed 6/26/2006.
[14] See Exhibit 1 from the deposition of Doug Crump taken May 15, 2006, a copy of which is attached as Exhibit "F" to the Affidavit of B. J. Driscoll filed 6/26/2006.
[15] R Vol. I, p. 7.
[16] R Vol. I, p. 31.

By March 16, 2006, the Crumps had incurred $721.40 of costs in prosecuting their claims, including filing fees, service fees, deposition transcript fees, and deposition subpoena fees.[17] On March 16, 2006, Bromley made an offer of judgment for $1,000 pursuant to Idaho Rule of Civil Procedure 68.[18] The Crumps did not accept the offer of judgment.

In June and July 2006, the parties filed cross-motions for summary judgment.[19] The magistrate court denied both motions for summary judgment, but did determine that $600 was the amount to repair the damage to the Crumps' boat.[20] Following the magistrate court's ruling on summary judgment, the parties stipulated to entry of judgment against the Bromley for $200, but expressly reserved the issue of attorney's fees and costs for the determination of the court.[21] In April 2007, the magistrate court entered judgment for the Crumps against Bromley for $200.[22]

After entry of judgment, the Crumps filed a motion for attorney's fees and costs on the grounds that they were the prevailing party under Idaho Rule of Civil Procedure 54(d)(1)(B) in that they obtained a $200 judgment on their claims and Bromley obtained no affirmative relief on his counterclaim.[23] Bromley filed his own motion for attorney's fees and costs, arguing he was the prevailing party because the Crumps recovered only $200 of the amount they claimed and he had made an offer of judgment under Rule 68 for $1,000.[24] The Crumps objected to Bromley's motion for attorney's fees and costs on the grounds that Bromley was not the prevailing party.[25] The Crumps further argued that Bromley's $1,000 offer of judgment was not relevant to the determination of the prevailing party and was only relevant to an award of costs,

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[17] R Vol. II, pp. 155-156.
[18] R Vol. II, p. 140.
[19] R Vol. I, pp. 46 and 55.
[20] R Vol. I, p. 120
[21] R Vol. II, p. 131.
[22] R Vol. II, p. 142.
[23] R Vol. I, p. 121.
[24] R Vol. II, p, 136.
[25] R Vol. II, p, 150.

not attorney's fees.[26] Bromley objected to the Crumps' motion for attorney's fees and costs on the grounds that the Crumps were not the prevailing party.[27]

On June 7, 2007, the magistrate court entered a memorandum decision and order finding that the Crumps were not the prevailing party based on Rule 54(d)(1)(B) and *Eighteen Mile Ranch v. Nord Excavating & Paving, Inc.*, 141 Idaho 716 (2005).[28] Rather, the magistrate court concluded that Bromley was the prevailing party "pursuant to his timely offer of judgment under [I.R.C.P.] 68."[29] The magistrate court explained that Bromley was the prevailing party "pursuant to Rule 68 where he offered $1,000 and settled for $200 which was less than that which was offered."[30]

On June 19, 2007, the Crumps filed a motion for reconsideration, explaining that the magistrate court applied *Eighteen Mile Ranch* in a manner exactly contrary to the law and erroneously relied on Rule 68 to determine the prevailing party.[31] The Crumps explained that while the court had discretion to determine the prevailing party, "the court's discretion is not unbridled."[32] In *Eighteen Mile Ranch*, the Idaho Supreme Court reversed the district court's finding that neither party prevailed and concluded that Nord was "by definition" the prevailing party because Nord successfully avoided all liability on Eighteen Mile Ranch's claims and recovered on its own claims. In this case, the magistrate court should find the Crumps are the prevailing party because they successfully avoided all liability on Bromley's claim and recovered on their own claims. The Crumps explained that the magistrate court's conclusion was exactly backwards to the Supreme Court's decision in *Eighteen Mile Ranch*. The Crumps also argued

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[26] R Vol. II, pp. 154-156.
[27] R Vol. II, p. 138.
[28] R Vol. II, p, 161.
[29] R Vol. II, p, 161.
[30] R Vol. II, p, 161.
[31] R Vol. II, pp. 163-172.
[32] R Vol. II, p. 164 (quoting *Jerry J. Joseph C.L.U. Ins. Associates, Inc. v. Vaught*, 117 Idaho 555, 557 (Ct.App. 1990).

that the magistrate court misinterpreted and misapplied Rule 68 to the case, relying on Rule 68 in determining the prevailing party and then failing to include the Crumps' costs incurred up to the date of service of the offer of judgment in the court's analysis of the adjusted award.[33]

On August 15, 2007, the magistrate court denied the Crumps' motion for reconsideration. The magistrate court did not mention *Eighteen Mile Ranch*. Instead, the court explained, "Based on the 'overall view', and the results of this case, technically, each party prevailed in part. However, [Bromley] prevailed so substantially that the Court finds and concludes that [Bromley] is the overall prevailing party or the substantially greater prevailing party."[34] The magistrate court also did not correct its prior misapplication of Rule 68. Instead, it concluded that the Crumps reading of Rule 68 was "inconsistent with the intent of the rule" and "presents an even stronger basis for an award of attorney fees."[35] Nonetheless, and without any explanation, the magistrate court did reduce the attorney's fee award to Bromley from $2,400 to $1,200.

On August 27, 2007, the Crumps filed their notice of appeal to the district court.[36] Following the parties' briefing and oral argument, the district court entered its appellate decision affirming the decision of the magistrate court.[37] The district court held that to say Bromley "did not recover on his counterclaim is not accurate" because the parties included a credit for Bromley's $400 counterclaim in reaching the stipulated judgment for $200 against Bromley. Even though Bromley obtained no affirmative relief or judgment against the Crumps, the district court found that the Crumps "failed on their defense of [Bromley's] counterclaim."[38] The

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[33] R Vol. II, pp. 163-169.
[34] R Vol. II, pp. 177-178.
[35] R Vol. II, p. 178.
[36] R Vol. II, p. 182.
[37] R Vol. II, p. 226.
[38] R Vol. II, p. 229.

district court held the magistrate court's "consideration of Bromley's offer of judgment and the finding that the offer exceeded Crumps' judgment (or adjusted award) was not in error."[39]

On September 8, 2008, the Crumps filed their notice of appeal to this Court.[40]

ISSUES PRESENTED ON APPEAL

1. Did the magistrate court abuse its discretion by finding that Bromley is the prevailing party where Bromley recovered no affirmative relief or judgment against the Crumps and the Crumps recovered a $200 judgment against Bromley?

2. Did the district court err by affirming the magistrate court's finding that Bromley is the prevailing party where Bromley recovered no affirmative relief or judgment against the Crumps and the Crumps recovered a $200 judgment against Bromley?

3. Are the Crumps entitled to an award of their attorney's fees and costs on appeal under Idaho Code Section 12-120(1), Idaho Rule of Civil Procedure 54, and Idaho Appellate Rules 40 and 41?

ARGUMENT

I.

THE MAGISTRATE COURT ABUSED ITS DISCRETION BY FINDING BROMLEY WAS THE PREVAILING PARTY IN THIS ACTION.

A. Standard Of Review.

"A determination on prevailing parties is committed to the discretion of the trial court and [the appellate court] review[s] the determination on an abuse of discretion standard." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718-719 (2005). Thus, the standard of review is abuse of discretion.

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[39] R Vol. II, p. 231.
[40] R Vol. II, p. 234.

B. Under *Eighteen Mile Ranch*, The Crumps Are "By Definition" The Prevailing Party In This Case.

In finding that the Crumps are not the prevailing party, the magistrate court relied on *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716 (2005). Although the magistrate court did not specifically identify its reasons for finding that the Crumps were not the prevailing party, the court in fact did reference *Eighteen Mile Ranch*, calling the analysis in that case "similar" to the magistrate court's analysis in this case.[41] However, *Eighteen Mile Ranch* mandates the conclusion that the Crumps are in fact the prevailing party. In other words, although the Crumps recognize that the court has broad discretion in identifying the prevailing party, "the court's discretion is not unbridled." *Jerry J. Joseph C.L.U. Ins. Associates, Inc. v. Vaught*, 117 Idaho 555, 557 (Ct.App. 1990).

In *Eighteen Mile Ranch*, the plaintiff sued Nord for a debt owed. Nord filed a counterclaim for $12,000. The jury found against the plaintiff awarding the plaintiff zero on its claim and awarding $1,054.38 in favor of Nord on Nord's claim. The trial court found that neither party prevailed and refused to award costs or attorney's fees to either party.

On appeal, this Court reversed and held as a matter of law that the trial court had abused its discretion and that Nord was the prevailing party. This Court held that the district court misinterpreted Idaho law for determining a prevailing party because the district court looked at how the parties prevailed on individual claims, whereas the law requires the court to look at who prevailed "from an overall view, not a claim-by-claim analysis." 141 Idaho at 719. Viewing the success from an overall standpoint, this Court held that Nord was the prevailing party because (1) Nord successfully defended the claim against it; and (2) Nord recovered a judgment even though the recovery was less than 10% of the amount sought. This Court said that these facts

[41] R Vol. II, p. 161.

"by definition" made Nord a prevailing party. Accordingly, this Court reversed the district court's ruling and determined that Nord was the prevailing party.

The Court's analysis in *Eighteen Mile Ranch* applies equally here so that this Court should reverse the magistrate court's decision and remand with instructions for the magistrate court to find that the Crumps are the prevailing party. In other words, in *Eighteen Mile Ranch*, Nord was the prevailing party because (1) Nord successfully defended the claim against it; and (2) Nord did recover on its claim even though it recovered less than 10% of the amount it sought. Similarly, (1) the Crumps successfully defended against Bromley's $400 claim against them; and (2) the Crumps did recover on their claim even though they recovered less than 10% of the amount they sought.[42] Thus, by this Court's definition, the Crumps are the prevailing party. And just as the Court in *Eighteen Mile Ranch* reversed the district court's holding that Nord was not the prevailing party, this Court should reverse the magistrate court's holding that the Crumps are not the prevailing party.

In fact, the magistrate court's decision in this case demonstrates a greater abuse of discretion than the district court's decision in *Eighteen Mile Ranch* that this Court reversed. In *Eighteen Mile Ranch*, the district court held that ***neither*** party was a prevailing party although ultimately this Court held that Nord was the prevailing party even though Nord recovered less than 10% of the amount it sought. Here, the magistrate court did not rule that neither party was a prevailing party, but instead that ***Bromley*** was the prevailing party even though Bromley (1) recovered zero on his counterclaim; and (2) had judgment entered against him for $200 on the Crumps' claim. If the magistrate court had ruled that neither party was a prevailing party, the facts of this case would be the same as in *Eighteen Mile Ranch* and warrant reversal. However,

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[42] Nord recovered about 8% of the amount it sought, and the Crumps recovered about 7% of the amount it sought. The 1% difference between the results is simply not material.

because the magistrate court found Bromley was the prevailing party even though he recovered no judgment on his claim and had judgment entered against him, the magistrate court's decision demonstrates an even greater abuse of discretion than the district court's decision in *Eighteen Mile Ranch* that this Court reversed.

The *Eighteen Mile Ranch* decision should raise real concerns for this Court as applied to this case. In *Eighteen Mile Ranch*, Nord recovered less than 10% of the amount it sought, yet the Court still held that Nord was the prevailing party. By contrast, the Crumps recovered less than 10% of the amount they sought,[43] yet the magistrate court held that the Crumps were ***not*** the prevailing party citing *Eighteen Mile Ranch* as authority. Moreover, in *Eighteen Mile Ranch*, the Court said that the district court focused too much attention on Nord's "less than tremendous success" on its claim and seemingly ignored the fact that Nord avoided all liability on the claims against Nord. In other words, the district court improperly undervalued Nord's successful defense because avoiding liability is a significant benefit to a party. Similarly, the magistrate court seemingly ignored that Bromley did not recover any affirmative relief or judgment on his $400 counterclaim against the Crumps.

In short, other than the names of the parties and their roles as plaintiff and defendant, *Eighteen Mile Ranch* is directly in point with the facts of this case. Yet, without any specific explanation for it, the magistrate court reached a result directly opposite the result this Court reached in *Eighteen Mile Ranch*. This Court should correct the magistrate's abuse of discretion.

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[43] On summary judgment, the magistrate court ruled that $600 was the cost to fix the Crumps' boat. Giving Bromley full credit of $400 on his claim, the parties stipulated to a judgment of $200 in favor of the Crumps. This means that Bromley recovered zero on his counterclaim and confessed a $200 judgment on the Crumps' claim. The fact that the Crumps waived their loss of use claim without a trial does not necessarily mean that Bromley is a prevailing party for awarding costs and fees. The Court in *Eighteen Mile Ranch* stated that "[m]ere dismissal of a claim without 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." *Eighteen Mile Ranch, supra*, 141 Idaho at 719. Having waived their loss of use claim, the Crumps actually recovered more than 20% of the amount they sought for the damage done to their boat.

C. The Magistrate Court Improperly Applied And Interpreted Rule 68 In Determining The Prevailing Party In This Case.

The magistrate court held that "Bromley, pursuant to his timely offer of judgment under Rule 68, prevailed in the dispute." Specifically, the magistrate court held that "Bromley, as the prevailing party pursuant to Rule 68 where he offered $1,000 and settled for $200 which was less than that which was offered, is entitled to an award of reasonable attorney fees."[44]

The magistrate court's application of Rule 68 in this case constitutes an abuse of discretion and reversible error in two regards. First, Rule 68 has no application to the determination of the prevailing party. Rather, Rule 68 applies to the award of costs and attorney's fees only ***after*** determining the prevailing party in the case. If the prevailing party's "adjusted award" (which Rule 68 defines as the amount recovered, plus attorney's fees and costs incurred up to the date of service of the offer of judgment) is ***greater*** that the offer of judgment, then Rule 68 has no effect. I.R.C.P. 68(b). If the prevailing party's "adjusted award" is ***less*** than the offer of judgment, then Rule 68 requires adjustment of the payment of costs and attorney's fees according to the rule. I.R.C.P. 68(b). Nothing in Rule 68 relates to the determination of the prevailing party. Rather, Rule 68 may affect the award of attorney's fees and costs ***after*** determining the prevailing party in the case.

Second, the magistrate court's application of Rule 68 to the facts of this case ignores the mandatory language of Rule 68(a), which provides in pertinent part as follows:

> "At any time more than 14 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, ***which offer of judgment shall be deemed to include all claims recoverable, including any attorneys fees awardable under Rule 54(e)(1), and any costs awardable under Rule 54(d)(1), which have accrued up to the date of the offer of judgment.***"

I.R.C.P. 68(a) (emphasis added.)

[44] R Vol. II, p. 161.

Importantly, under Rule 68, in comparing the formal offer of judgment against the award, the court ***must*** add to the award all costs and attorney's fees incurred (up to the date of service of the formal offer of judgment) by the party who received the formal offer of judgment. Under Rule 68, a party cannot run up litigation costs and attorney's fees, make a formal offer of judgment that does not include these costs and attorney's fees, and then declare itself the prevailing party when the other party recovers a judgment less than the amount of the formal offer of judgment. To prevent just this sort of unjust result, Rule 68 requires, i.e., ***mandates***, that the court add all costs and attorney's fees (incurred as of the date of the service of the formal offer of judgment) to the award before making the comparison.

Here, the magistrate court made no effort to add to the $200 judgment any amount for the Crumps' costs and attorney's fees incurred up to the date of the offer of judgment. The magistrate court simply compared the $1,000 offer to just the $200 judgment. In this regard, Bromley's formal offer of judgment was mailed and therefore served on March 16, 2006. Accordingly, Rule 68 required the magistrate court to add the $200 judgment to all the Crumps' costs as a matter of right incurred as of March 16, 2006, which are itemized as follows:

Date	**Cost**
November 2, 2005	$82.00 filing fee;
November 7, 2005	$35.00 service fee for summons and complaint;
November 7, 2005	$25.00 service fee for summons and complaint;
January 12, 2006	$131.18 deposition transcript of Ted Bromley;
February 16, 2006	$224.72 deposition transcript of Tom Bromley;
February 2, 2006	$25.00 service fee for deposition subpoena;
March 3, 2006	$25.00 service fee for deposition subpoena; and
March 16, 2006	$173.50 deposition transcript of Brent Williams.
Total	**$721.40**[45]

[45] R Vol. II, pp. 146-148 and Second Affidavit of Bryan D. Smith filed 5/4/2007.

Under Rule 68, the magistrate court is to add $721.40 to the $200 judgment for a total of $921.40. Moreover, under Rule 68, the court must add all reasonable attorney's fees incurred (as of March 16, 2006) by the Crumps to the $921.40 amount. Therefore, if the court finds that the Crumps incurred more than $78.60 in reasonable attorney's fees as of March 16, 2006, then the Crumps "adjusted award" exceeds the $1,000 offer, and the Crumps prevailed against Bromley's formal offer of judgment under Rule 68. The Crumps submit that they obviously incurred far more than $78.60 in reasonable attorney's fees as of March 16, 2006 having by that time incurred attorney's fees for preparing a summons and complaint and having taken three depositions.

II.

THE DISTRICT COURT ERRED BY AFFIRMING THE MAGISTRATE COURT'S FINDING BROMLEY WAS THE PREVAILING PARTY IN THIS ACTION.

A. Standard Of Review.

"On review of a decision of the district court, rendered in its appellate capacity, we examine the record of the magistrate court independently of, but with due regard for, the district court's intermediate appellate decision." *State v. Hedges*, 143 Idaho 884, 886 (Ct.App. 2007). Thus, this Court reviews the district court's intermediate appellate decision with "due regard" for its correctness.

B. The District Court Erred By Finding Bromley's Rule 68 Offer Of Judgment Exceeded The Crumps' "Adjusted Award."

1. Rule 68 Does Not Apply In Determining A Prevailing Party.

The district court erred by applying Rule 68 to determine the prevailing party. In fact, Rule 68 has no relevance to the determination of the prevailing party. Rule 68 does not even mention the term "prevailing party." Rather, the purpose of Rule 68 is to allow an "offeror,"

who is ultimately held liable (and who may not be found the prevailing party), to nonetheless avoid liability for that portion of the prevailing party "offeree's" costs and attorney's fees incurred after the date of service of the successful offer of judgment. In fact, a plaintiff-offeree may be the "prevailing party" in the action, but not the "prevailing party" under Rule 68.[46] In short, the "prevailing party" analysis is irrelevant to Rule 68.

A court's application of the wrong law to an issue constitutes reversible error. In *Action Collection Services, Inc. v. Bigham*, 146 Idaho 286 (Ct.App. 2008), the magistrate court wrongfully applied a "prevailing party" standard to an award of attorney's fees under Idaho Code Section 12-120(5) where none existed. The Court of Appeals reversed the magistrate court and held that no such "prevailing party" standard applies to Section 12-120(5). Here, the district court wrongfully applies a Rule 68 standard to determine the prevailing party. This Court should correct the district court's error and hold that Rule 68 does not apply in determining the prevailing party.

2. The District Court Misapplied Rule 68 To Determine That The Crumps Are Not The Prevailing Party.

Relying exclusively on *Payne v. Wallace*, 136 Idaho 303 (Ct.App. 2001), the district court held that the magistrate court properly refused to consider any attorney's fees the Crumps incurred prior to the service of Bromley's Rule 68 offer of judgment in calculating the Crumps' "adjusted award" under Rule 68. The district court misstated the holding in *Payne* wrongly

[46] Example: In a case involving Section 12-120(1), a defendant-offeror makes an offer of judgment of $10,000 to a plaintiff-offeree. At the time of service of the offer of judgment, the plaintiff-offeree has incurred $1,000 in attorney's fees and costs. The plaintiff-offeree rejects the offer of judgment and ultimately recovers $8,000. The plaintiff-offeree is the prevailing party and, as such, is entitled to an award of attorney's fees and costs. However, the plaintiff-offeree's "adjusted award" is only *$9,000 and does not exceed the offer of judgment* of $10,000. As such, the plaintiff-offeree is the prevailing party in the action. However, because he did not beat the offer of judgment, he can recover only his attorney's fees and costs incurred prior to the service of the offer of judgment and cannot recover any attorney's fees and costs incurred after service of the offer of judgment. The plaintiff-offeree prevails in the action, but does not prevail under Rule 68.

concluding "that costs and attorney fees to be factored into an adjusted award under Rule 68 refer only to costs and attorney fees ***actually awarded*** as part of the judgment."[47]

Payne involved a personal injury claim for which attorney's fees are generally not recoverable. The district court determined the plaintiffs were the prevailing party, but refused to award attorney's fees under Idaho Code Section 12-121 because the defense was not "entirely frivolous." *Id.* at 309. Then, because the defendant had served an offer of judgment in the course of the case, the district court applied Rule 68 in awarding costs. In calculating the plaintiffs' "adjusted award," the district court refused to include any attorney's fees because the court had determined that attorney's fees were not awardable. Absent these attorney's fees, the plaintiffs' "adjusted award" was less than the rejected offer of judgment. Thus, the district court applied Rule 68 and ordered the plaintiffs to pay the defendant's costs incurred after service of the offer of judgment, and ordered the defendant to pay the plaintiffs' costs incurred before service of the offer of judgment. *Id.* at 310. On appeal, the Idaho Court of Appeals "upheld the district court's denial of the [plaintiffs'] request for attorney fees" under Section 12-121 and explained that the Rule 68(b) requirement to include attorney fees incurred before service of the offer of judgment in computing the "adjusted award" "applies only if attorney fees have been granted." *Id.* at 311. Thus, because the plaintiffs had no entitlement to attorneys fees, the district court properly refused to consider attorney's fees in its calculation of the plaintiffs' "adjusted award" under Rule 68. *Id.* at 311.

Payne is readily distinguishable from the facts and law applicable here. In *Payne*, the plaintiffs sought attorney's fees based on a "frivolous defense" standard in Idaho Code Section 12-121 and Idaho Rule of Civil Procedure 54(e)(1). The district court determined that fees were not awardable to the plaintiffs. To the contrary, this case involves a mandatory award of

[47] R Vol. II, p. 230 (emphasis added).

attorney's fees under Section 12-120(1) because this case involves an action "where the amount pleaded is twenty-five thousand dollars ($25,000) or less." In other words, in *Payne* no attorney's fees were awardable because the plaintiffs could not satisfy the requirements of Section 12-121 and Rule 54(e)(1) to be entitled to an award of attorney's fees. Here, however, the Crumps can satisfy the requirements of Section 12-120(1) for a mandatory award of attorney's fees. Because the Crumps can establish entitlement to attorney's fees, these attorney's fees should be factored into the "adjusted award." The Crumps submit that the district court erred in this case because it believes that only "attorney fees actually awarded as part of a judgment" are to be factored into an adjusted award rather than attorney fees that are "awardable" whereas, in fact, Rule 68 by its express terms refers only to "awardable" attorney's fees, not fees actually "awarded."

The district court's reasoning is actually circular conjuring up the image of a "dog chasing its own tail." To determine whether the Crumps are the prevailing party and therefore entitled to an award of attorney's fees, the district court here relies on Rule 68. However, finding that the magistrate court had not "actually awarded" the Crumps attorney's fees that it could factor into its Rule 68 analysis, the district court concludes that the Crumps are not the "prevailing party" under Rule 68 and therefore not entitled to attorney's fees. In other words, the district court relies on Rule 68 to determine whether a party is "prevailing" and therefore entitled to attorney's fees. However, the district court will not consider attorney's fees under a Rule 68 analysis unless the court first actually awards them. The court will not first actually award attorney's fees unless it first finds that the plaintiff is the prevailing party under Rule 68. And so it goes *ad infinitum*.

The district court's analysis imposes two competing "first" conditions precedent that result in a circular conundrum. To determine whether to award the Crumps' attorney' fees, the district court decided it must "first" determine whether the Crumps are the prevailing party. However, to determine whether the Crumps are the prevailing party, the district court decided to apply Rule 68 under which the district court must "first" determine whether the Crumps are entitled to an award of attorney's fees, which is exactly the same question the district court set out to answer in the "first" place.

The reason why the *Payne* court's reasoning worked and did not result in a circular conundrum is because the district court in *Payne* did not rely on Rule 68 to determine the prevailing party and award attorney's fees like the magistrate court and district court did in this case. Rather, the district court in *Payne* first determined the prevailing party, then applied Section 12-121 to determine whether to award fees, and then applied Rule 68 and calculated the "adjusted award" to apportion costs between the parties. In this case, the magistrate court and district court erred by applying Rule 68 to determine the prevailing party instead of relegating Rule 68 to its intended and limited purpose of apportioning costs and limiting (not awarding) attorney's fees between parties. For this reason, the district court erred by affirming the magistrate court's finding based on an erroneous application of Rule 68 that Bromley was the prevailing party.

C. The District Court Erred By Comparing The Relief Sought With The Parties' Reasons For Stipulating To Judgment Instead Of Comparing The Relief Sought With The Final Judgment Itself.

"Idaho R. Civ. P. 54(d)(1)(B) guides courts' inquiries of the prevailing party question." *Eighteen Mile Ranch, supra*, 141 Idaho at 719. Rule 54(d)(1)(B) directs courts to "consider the ***final judgment or result of the action*** in relation to the relief sought by the respective parties."

I.R.C.P. 54(d)(1)(B) (emphasis added). This rule further guides courts in determining the prevailing party "after considering all of the issues and claims involved in the action and ***the resultant judgment or judgments*** obtained." *Id.* (emphasis added). Importantly, in a court's determination of the prevailing party, Rule 54(d)(1)(B) does not direct or permit a court to consider "why" the parties obtained a particular result or "how" a particular judgment is entered. To avoid the arbitrariness and uncertainty of a court's inquiry into "why" a particular result obtained, Rule 54(d)(1)(B) directs courts to compare the "final judgment or result of the action" with the relief sought by the parties and not with the history or purported reasons behind a final judgment or result.

Here, it is undisputed that the parties stipulated to a $200 in favor of the Crumps against Bromley and no judgment for Bromley against the Crumps.[48] This is the only "final judgment" and "result of the action." However, the district court erroneously states that Bromley "fully recovered" on his $400 counterclaim.[49] In affirming the magistrate court's finding that Bromley was the prevailing party, the district court seems to have improperly looked beyond the "final judgment or result of the action" and impermissibly considered the ***reasons*** for the judgment rather than the judgment itself.

Just like the district court in *Eighteen Mile Ranch*, the district court in this case has "used language that could be interpreted as a message that its sense of justice might be at issue," 141 Idaho at 720, by incorrectly treating a negotiated credit for Bromley's counterclaim as a "full[] recover[y]" on that counterclaim. The district court stated that the Crumps' contention that Bromley "did not recover on his counterclaim is not accurate" and that the Crumps "failed on

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[48] R Vol. II, p. 142.
[49] R Vol. II, p. 229.

their defense of [Bromley's] counterclaim."[50] These conclusions are not correct and are contrary to the record. Bromley did not "recover" anything on his counterclaim. The only judgment in this case is $200 for the Crumps against Bromley. The district court's language suggests it seeks to "vindicate his sense of justice beyond the judgment rendered." *Eighteen Mile Ranch, supra,* 141 Idaho at 720. As such, the district court erred in considering factors beyond the scope permitted by Rule 54(d)(1)(B).

Parties must be allowed to rely on the plain language of our rules and laws in order to guide their considerations of whether to pursue settlement or continue litigating. This reliance in decision-making is the rationale behind legal principles like *stare decisis* and requiring the "plain language" construction and application of statutes, rules, and contracts. Parties need to know that courts will not "change the rules halfway through the game." Because Rule 54(d)(1)(B) directs courts to consider the "final judgment or result of the action" and not the underlying reasons or history behind a judgment or result, the Crumps agreed to a $200 judgment against Bromley and reserved the issue of their reasonable attorney's fee award for the court. In doing so, the Crumps exchanged the opportunity to recover a larger judgment against Bromley (including a court-acknowledged $1,125 for lost use damages[51]) for the certainty of a smaller judgment against Bromley, for the certainty that Bromley would obtain no judgment against them on his counterclaim, and for the court's fair consideration of their right to an award of attorney's fees and costs under Idaho Code Section 12-120(1). By looking beyond the plain language of Rule 54(d)(1)(B), the district court erred by "changing the rules halfway through the game." This Court should correct this error.

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[50] R Vol. II, p. 229.

[51] R Vol. I, p. 120 and the Affidavit of Doug Crump filed 6/26/2006. This sum is calculated at $75 per day to rent a drift boat for the 15 days the Crumps had already planned for their fishing vacations.

III.

THIS COURT SHOULD AWARD THE CRUMPS THEIR ATTORNEY'S FEES AND COSTS ON APPEAL.

The law in Idaho concerning an award of attorney's fees on appeal is clear and provides as follows:

> The mandatory attorney fee provisions of I.C. § 12-120 govern on appeal as well as in the trial court. *Cheney v. Smith*, 108 Idaho 209, 211, 697 P.2d 1223, 1225 (Ct.App.1985); *Boise Truck & Equip., Inc. v. Hafer Logging, Inc.*, 107 Idaho 824, 826, 693 P.2d 470, 472 (Ct.App.1984). This Court has held that the statute does not apply to an appeal that challenges only the amount of an award below, but that it does apply if the appeal is concerned with the entitlement to an award below. *Building Concepts, Ltd. v. Pickering*, 114 Idaho 640, 645, 759 P.2d 931, 936 (Ct.App.1988); *Spidell v. Jenkins*, 111 Idaho 857, 861, 727 P.2d 1285, 1289 (Ct.App.1986); *Cheney, supra; DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 291-93, 678 P.2d 80, 83-85 (Ct.App.1984).

Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc., 134 Idaho 259, 263 (Ct.App. 2000) (emphasis added); *see also Eighteen Mile Ranch, supra*, 141 Idaho at 721.

Here, the Crumps seek their attorney's fees under Idaho Code Section 12-120(1).[52] As such, the Crumps are entitled to an award of their attorney's fees incurred on appeal because they are challenging Bromley's "entitlement to an award below" and not "the amount of the award below." *Daisy, supra*. Specifically, the Crumps contend Bromley is not entitled to any attorney's fees in the underlying case because he is not the prevailing party. As the Crumps' appeal challenges Bromley's entitlement to attorney's fees and not the amount awarded, this Court should award the Crumps their attorney's fees on appeal under Idaho Appellate Rule 41.

Further, Idaho Rule of Civil Procedure 54(d) provides for an award of costs to the prevailing party "as a matter of right." Idaho Appellate Rule 40(a) sets forth the same rule,

[52] R Vol. I, p. 10. The Crumps' complaint includes a typographical error, citing to "12-121(1) and (3)" as authority for an attorney's fee award. However, the magistrate court acknowledged the correct basis for attorney's fees under Section 12-120(1) and (3), not Section 12-121. *See* R Vol. II, p. 160. The district court likewise acknowledged the request for fees under Section 12-120(1) and (3). *See* R Vol. II, p. 227. Bromley has never contested this issue.

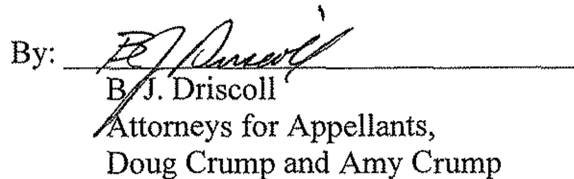
providing an award of costs to a prevailing party "as a matter of course." Here, the Court should award the Crumps their costs incurred on appeal as the prevailing party.

CONCLUSION

For the foregoing reasons, this Court should reverse the magistrate court's finding that Bromley is the prevailing party and the district court's decision affirming the magistrate court's finding. The Court should award the Crumps their attorney's fees and costs incurred on appeal.

RESPECTIVELY SUBMITTED this 6 day of February, 2009.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 
B. J. Driscoll
Attorneys for Appellants,
Doug Crump and Amy Crump

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of February, 2009, I caused a true and correct copy of the foregoing **APPELLANTS' BRIEF** to be served, by placing the same in a sealed envelope and depositing it in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

[✓] U.S. Mail
[ ] Facsimile Transmission
[ ] Overnight Delivery
[ ] Hand Delivery
[ ] Courthouse Mail Box

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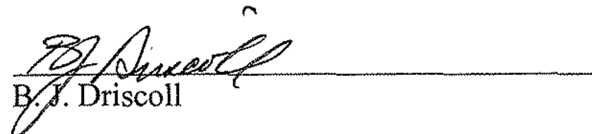
B. J. Driscoll