4-3-2009

Crump v. Bromley Appellant's Reply Brief Dckt. 35666

IN THE SUPREME COURT OF THE STATE OF IDAHO

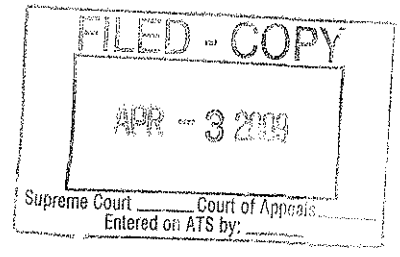
DOUG CRUMP and AMY CRUMP, husband and wife,

Plaintiffs/Appellants,

v.

TED BROMLEY dba RHINO LINING,

Defendant/Respondent.



Supreme Court Docket No. 35666

APPELLANTS' REPLY 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.

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ARGUMENT

I.

THE CRUMPS SUCCESSFULLY AVOIDED ALL LIABILITY TO BROMLEY AND BROMLEY DID NOT "RECOVER" ON HIS COUNTERCLAIM.

Bromley engages in a purely semantic argument that the Crumps "obvious[ly] and intentional[ly]" misstate the facts of this case by stating that they "successfully avoided all liability."[1] *Without any basis in the record*, Bromley further argues that he "recovered" the entire amount he sought in his counterclaim.[2] Neither argument is accurate. The undisputed record shows that the court entered judgment for the Crumps and entered no judgment for Bromley. The fact that the parties stipulated to this result does not change the legal effect of the result. As a matter of law, the Crumps recovered on their claim against Bromley and in fact avoided any liability to Bromley on his counterclaim. The court entered no judgment in favor of Bromley on his counterclaim against the Crumps. Thus, the Crumps correctly state that they successfully avoided all liability on Bromley's counterclaim and Bromley incorrectly claims he "recovered" on his counterclaim.

II.

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

The Crumps recognize that the court has broad discretion in identifying the prevailing party, but "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). Here, the magistrate court abused its discretion by misinterpreting and misapplying *Eighteen Mile Ranch v. Nord Excavating & Paving, Inc.*, 141 Idaho 716 (2005) to conclude that Bromley was the prevailing party. In fact, as explained in the

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[1] See p. 5 of Respondent's Brief.
[2] See p. 5 of Respondent's Brief.

Crumps' initial brief, 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. Again, 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, 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.

Bromley fails to provide any substantive discussion of *Eighteen Mile Ranch* or any argument to distinguish this case from that one. Instead, Bromley merely recites the abuse of discretion standard and—without offering any analysis—makes the conclusory statements that the magistrate recognized the issue as one of discretion, acted within the outer boundaries of its discretion, and reached its decision in an exercise of reason.[3] Specifically, Bromley does not explain how the court's exercise of discretion falls within the outer boundaries established by *Eighteen Mile Ranch.*

Moreover, Bromley provides no justifying excuse for the magistrate court's abuse of discretion in erroneously interpreting and applying Rule 68 in its prevailing party analysis. First, nothing in Rule 68 relates to the determination of the prevailing party. Second, the magistrate erred by comparing Bromley's offer of judgment to the judgment and not the adjusted award as required by Rule 68. 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. Bromley offers no rebuttal to either of these errors.

[3] See pp. 3-5 of Respondent's Brief.

III.

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

The district court erred by applying Rule 68 to determine the prevailing party. The purpose of Rule 68 is to allow an "offeror," who is ultimately held liable (and, importantly, 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. In short, the "prevailing party" analysis is unrelated to Rule 68.

Bromley offers no facts or law to justify the district court's errors in this regard. Bromley's contention that "an offer of judgment is one factor which the court may consider in reaching a prevailing party determination"[4] is unsupported by the single case he relies on. In *Polk v. Larrabee*, 135 Idaho 303, 313 (2000), the issue on appeal was whether the offer of judgment should be compared to the jury's verdict or the final judgment. The Court determined that the judgment to be considered in an offer of judgment analysis is the final judgment, not the jury's verdict. *Id.* The *Polk* court did state or imply that a Rule 68 offer of judgment is a factor that the court may consider in determining the prevailing party. As such, Bromley's reliance on *Polk* is entirely misplaced.

Further, Bromley offers no justification for the district court's misapplication of *Payne v. Wallace*, 136 Idaho 303 (Ct.App. 2001). Instead, Bromley simply recites the district court's erroneous statement that a Rule 68 analysis may include only attorney's fees "actually

[4] See p. 6 of Respondent's Brief.

awarded."[5] Both Bromley and the district court fail to recognize the plain language of Rule 68 that the court consider attorney fees that are "awardable," not fees actually "awarded." In *Payne*, attorney's fees were not awardable to the plaintiff, so the court properly refused to consider them in its Rule 68 analysis. To the contrary, in this case attorney's fees are in fact "awardable," so the district court erred by refusing to consider the Crumps' attorney's fees in its Rule 68 analysis.

Additionally, Bromley does not refute the Crumps' contention that 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. Bromley does not and cannot make sense of the district court's circular error in this regard.

Finally, Bromley offers no justifiable reason for the district court's failure to consider the "final judgment or result of the action" as expressly required by Idaho Rule of Civil Procedure 54(d)(1)(B). The law does not permit the court to consider the reasons, motives, fears, hopes, or dreams of the parties that led a judgment. Rather, the law requires the district court to consider "***the resultant judgment or judgments*** obtained." *Eighteen Mile Ranch, supra*, 141 Idaho at 719 (emphasis added). To avoid the arbitrariness and uncertainty of a court wandering into an inquiry of "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. The district court seems to have improperly looked beyond the "final judgment or result of the action" and impermissibly considered the underlying ***reasons*** for the judgment rather than the judgment itself. Again, parties must be allowed to rely on the plain language of our rules and laws in order

[5] See p. 7 of Respondent's Brief.

to guide their considerations of whether to pursue settlement or continue litigating. By looking beyond the plain language of Rule 54(d)(1)(B), the district court erred by "changing the rules halfway through the game." Bromley offers no reason why the district court's decision should stand.

IV.

BROMLEY WAIVED HIS RIGHT TO SEEK ATTORNEY'S FEES AND COSTS ON APPEAL.

Idaho Appellate Rule 41(a) provides, "Any party seeking attorney fees on appeal must assert such a claim ***as an issue presented on appeal*** in the first appellate brief filed by such party as provided by Rules 35(a)(5) and 35(b)(5)." (Emphasis added.) Moreover, Idaho Appellate Rule 35(b)(5) provides, "If the respondent is claiming attorney fees on appeal ***the respondent must so indicate in the division of additional issues on appeal*** that respondent is claiming attorney fees and state the basis for the claim." (Emphasis added.)

This Court has been particularly strict in requiring parties' adherence to these rules. For example, in *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 750-751 (2000), the Court explained as follows:

> The Idaho Appellate Rules require that an appellant's brief be filed and that it ***state the issues presented upon appeal***, the contentions of the appellant with respect to the issues presented on appeal, the reason therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon. *See* I.A.R. 34, 35. ***Absent compliance with these rules, the Court will not search the record for error***. *See Woods v. Crouse*, 101 Idaho 764, 765, 620 P.2d 798, 799 (1980).
>
> In its brief, Idaho Power states that its cross-appeal for denial of attorney fees will be addressed in a brief in support of cross-appeal. This Court has not received such a brief and Idaho Power's assignment of error has not been supported by argument within the time period required by the appellate rules. We therefore hold that ***Idaho Power has waived this issue on appeal.***

Further, in *Weaver v. Searle Bros.*, 129 Idaho 497, 503 (1996), this Court noted that although the party had identified attorney's fees on appeal in its statement of issues, the party failed to address the issue in the argument section of its brief as required by the appellate rules. As such, the Court denied the party's request for attorney's fees.

Here, Bromley failed to assert his claim for attorney's fees and costs in the statement of issues on appeal.[6] Primarily, this Court should deny Bromley's request for attorney's fees and costs on appeal because this Court should reverse the lower courts. Nonetheless, this Court should deny Bromley's request for attorney's fees and costs on appeal because he failed to assert his claim in his statement of issues on appeal as expressly required by I.A.R. 35 and 41.

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 2 day of April, 2009.

SMITH, DRISCOLL & ASSOCIATES, PLLC

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

[6] See p. 1 of Respondent's Brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of April, 2009, I caused a true and correct copy of the foregoing **APPELLANTS' REPLY 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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