

3-7-2010

Estate of Dumoulin v. CUNA Mut. Group Order Dckt. 36828

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In the Supreme Court of the State of Idaho

LAW CLERK

THE ESTATE OF JUDY DUMOULIN,
deceased, by and through her personal
representative and JOSEPH DUMOULIN, an
individual,

Plaintiffs-Appellants,

v.

CUNA MUTUAL GROUP, an Iowa
corporation, authorized by the State of Idaho,
Department of Insurance, to transact business
in the State of Idaho,

Defendant-Respondent.

ORDER GRANTING MOTION TO
AUGMENT THE RECORD

Supreme Court Docket No. 36828-2009
Ada County Docket No. 2008-18710

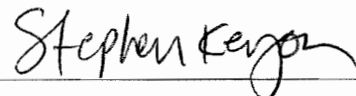
APPELLANTS' MOTION TO AUGMENT THE RECORD and AFFIDAVIT
SUPPORT OF APPELLANTS' MOTION TO AUGMENT RECORD were filed by counsel
Appellants on March 4, 2010. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellants' MOTION TO AUGMENT THE RECORD
and hereby is, GRANTED and the augmentation record shall include the document listed bel
file stamped copies of which accompanied this Motion:

1. Order Denying Attorney Fees, file-stamped November 25, 2010.

DATED this 9th day of March 2010.

For the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record

AUGMENTATION RECORD

ORDER GRANTING MOTION TO AUGMENT THE RECORD – Docket No. 36828-2009

NOV 20 2009
J. LEWIS HOWARD, Clerk
BY: *[Signature]*

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE ESTATE OF JUDY DUMOULIN, by
and through her personal representative, and
JOSEPH DUMOULIN,

Plaintiffs,

Case No. CV-OC-2008-18710

vs.

ORDER DENYING ATTORNEY FEES

CUNA Mutual Group,

Defendant.

On July 22, 2009, the Court granted summary judgment to CUNA Mutual Group. CUNA now seeks attorney fees under I.C. § 41-1839(4) and under I.C. §12-123. CUNA also seeks costs as the prevailing party. The Estate Of Judy Dumoulin and Joseph Dumoulin (collectively "Dumoulin") opposed the motion for fees and costs. The Court heard argument on November 9, 2009, and took the matter under advisement on November 10, 2009.

For the reasons stated below, the Court denies attorney fees to CUNA but grants it costs as the prevailing party.

ANALYSIS

In Idaho, parties pay their own attorney's fees unless a statute or contract provides otherwise. *Rohr v. Rohr*, 128 Idaho 137, 911 P.2d 133 (1996); *Owner-Operator Independent Drivers v. Idaho Public Utilities Com'n*, 125 Idaho 401, 871 P.2d 818 (1994); *Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (Ct.App. 1994) (also called the "American Rule"). The party who claims attorney fees must present the Court either a statute or contract between the parties permitting such an award; if the party does not point the Court to a statute or contract, attorney fees may be denied. *Fournier v. Fournier*, 125 Idaho 789, 74 P.2d 600 (Ct.App. 1994).

CUNA moves for attorney's fees and costs pursuant to I.C. §§ 41-1839(4), 12-121. CUNA contends it is the prevailing party and that it is entitled to fees because Dumoulin filed this

ORDER DENYING ATTORNEY FEES
CASE NO. CV-OC-2008-18710

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BY: _____

1 action frivolously and defended it without foundation. Dumoulin timely objected to the both
2 motions for fees and costs.

3 At the outset the Court must determine which party prevailed within the meaning of
4 I.R.C.P. 54. The determination as to which party, if any, prevailed is within the Court's
5 discretion. *Holmes v. Holmes*, 125 Idaho 784, 787, 874 P.2d 595, 598 (Ct.App. 1994) (citing
6 *Badell v. Badell*, 122 Idaho 442, 450, 835 P.2d 677, 685 (Ct.App.1992)). In determining whether
7 there is a prevailing party, the Court first looks to the Idaho Rules of Civil Procedure. Rule
8 54(e)(1) incorporates Rule 54(d)(1)(B) which provides in part:

9 In determining which party to an action is a prevailing party and entitled to costs,
10 the trial court shall in its sound discretion consider the final judgment or result of
11 the action in relation to the relief sought by the respective parties, whether there
12 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.

13 See also *Jerry J. Joseph C.L.U. Ins. Associates v. Vaught*, 117 Idaho 555, 789 P.2d 1146 (Ct.App.
14 1990).

15 Here, this Court ruled in favor of CUNA on its motion for summary judgment. Dumoulin
16 succeeded in no way on any matter before this Court. Thus, the Court finds in an exercise of its
17 discretion that CUNA is the prevailing party in this matter. It is entitled to costs and provided a
18 statute applies to its request, it is entitled to a reasonable award of attorney's fees.

19 This is a dispute between an insured, Dumoulin, and the insurer, CUNA, arising out of
20 Dumoulin's insurance policy. Idaho Code Section 41-1839(4) provides the authority for an award
21 of attorney fees when a court finds that the case was "brought, pursued, or defended frivolously,
22 unreasonably or without foundation." *Howard v. Oregon Mut. Ins. Co.*, 137 Idaho 214, 219, 46
23 P.3d 510, 515 (2002). It provides a basis for an award of attorney fees to either the insured or the
24 insurer. *Id.*; *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 711, 979 P.2d 107, 113 (1999).

25 In fact, I.C. §41-1839(4) and I.C. § 12-123 are the exclusive methods by which attorney
26 fees may be granted when a dispute arises under the policy between an insurer and insured.¹
27

28
29 ¹ To the extent CUNA asks for fees under I.C. § 12-121, they are only available under I.C. §§ 41-1839(4) and 12-
30 123.

1 *Trinity Universal Ins. Co. v. Kirsling*, 139 Idaho 89, ___, 73 P.3d 102, 108 (2003) I.C. § 41-
2 1839(4) states in relevant part as follows:

3 Notwithstanding any other provision of statute to the contrary, this section and
4 section 12-123, Idaho Code, *shall provide the exclusive remedy for the award of*
5 *statutory attorney's fees in all actions between insureds and insurers involving*
6 *disputes arising under policies of insurance.* Provided, attorney's fees may be
7 awarded by the court when it finds, from the facts presented to it that a case was
8 brought, pursued or defended frivolously, unreasonably or without foundation.
9 *Section 12-120, Idaho Code, shall not apply to any actions between insureds and*
10 *insurers involving disputes arising under any policy of insurance.*

11 I.C. § 41-1839(4)(emphasis added). The plain terms of this provision limit the availability of an
12 attorney fees award in this case to the application of I.C. § 41-1839 and I.C. § 12-123.
13 *Allstate*, 133 Idaho at 601, 990 P.2d at 1212. Therefore, the Court must analyze this request for
14 attorney fees under I.C. §12-123.²

15 ² **I.C. §12-123. Sanctions for frivolous conduct in a civil case.**

16 (1) As used in this section:

17 (a) "Conduct" means filing a civil action, asserting a claim, defense, or other position in connection with a civil
18 action, or taking any other action in connection with a civil action.

19 (b) "Frivolous conduct" means conduct of a party to a civil action or of his counsel of record that satisfies *either*
20 of the following:

21 (i) It obviously serves merely to harass or maliciously injure another party to the civil action;

22 (ii) It is not supported in fact or warranted under existing law and cannot be supported by a good faith
23 argument for an extension, modification, or reversal of existing law.

24 (2) (a) In accordance with the provisions of this section, at any time prior to the commencement of the trial in a civil
25 action or within twenty-one (21) days after the entry of judgment in a civil action, the court may award reasonable
26 attorney's fees to any party to that action adversely affected by frivolous conduct.

27 (b) An award of reasonable attorney's fees may be made by the court upon the motion of a party to a civil action,
28 but only after the court does the following:

29 (i) Sets a date for a hearing to determine whether particular conduct was frivolous; and

30 (ii) Gives notice of the date of the hearing to each party or counsel of record who allegedly engaged in
31 frivolous conduct and to each party allegedly adversely affected by frivolous conduct; and

(iii) Conducts the hearing to determine if the conduct was frivolous, whether any party was adversely
affected by the conduct if it is found to be frivolous, and to determine if an award is to be made, the amount of that
award. In connection with the hearing, the court may order each party who may be awarded reasonable attorney's
fees and his counsel of record to submit to the court, for consideration in determining the amount of any such award,
an itemized list of the legal services necessitated by the alleged frivolous conduct, the time expended in rendering the
services, and the attorney's fees associated with those services. Additionally, the court shall allow the parties and
counsel of record involved to present any other relevant evidence at the hearing.

(c) The amount of an award that is made pursuant to this section shall not exceed the attorney's fees that were
both reasonably incurred by a party and necessitated by the frivolous conduct.

(d) An award of reasonable attorney's fees pursuant to this section may be made against a party, his counsel of
record, or both.

(3) An award of reasonable attorney's fees pursuant to this section does not affect or determine the amount of or the
manner of computation of attorney's fees as between an attorney and the attorney's client.

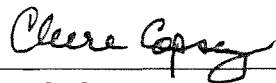
1 Pursuant to I.C. § 12-123, the Court held a hearing at which the parties presented
2 argument, in addition to the previously filed documents, about the frivolous nature of the
3 litigation. The Court finds that awarding attorney fees for frivolous litigation under I.C. § 12-123
4 is problematic and rarely done. It is reserved for those rare cases where the overall litigation was
5 "not supported in fact or warranted under existing law and cannot be supported by a good faith
6 argument for an extension, modification, or reversal of existing law."

7 Fees should not be easily or routinely awarded, and a court should carefully consider
8 whether such fees are appropriate. This case involved only one fairly straightforward claim and
9 the Court carefully considered the entire course of the litigation. *Pocatello Auto Color, Inc. v.*
10 *Akzo Coatings, Inc.*, 127 Idaho 41, 48, 896 P.2d 949, 956 (1995) (quoting *Turner v. Willis*, 116
11 Idaho 682, 685, 778 P.2d 804, 807 (1989). An award of attorney fees to a prevailing party or as a
12 sanction for a frivolous case is discretionary. See *Ackerman v. Bonneville County*, 140 Idaho 307,
13 313, 92 P.3d 557, 563 (2004). While the Court found that the policy clearly did not provide
14 coverage, the Court finds, after careful consideration of the entire course of the litigation, attorney
15 fees are not appropriate. It cannot rule that the litigation was brought or pursued frivolously.
16 Therefore, the Court denies the Motion for Attorney Fees in an exercise of discretion.

17 However, under I.R.C.P. 54 the Court does award costs to CUNA as the prevailing party
18 in the amount of \$58.00 for the filing fees. While any discretionary costs were clearly necessary,
19 the Court does not find them to be exceptional and, therefore, does not award them to CUNA.

20 **IT IS SO ORDERED.**

21 Dated this 24th day of November 2009.

22
23 
24 Cheri C. Copsey
25 District Judge
26
27

28 (4) The provisions of this section do not affect or limit the application of any civil rule or another section of the Idaho
29 Code to the extent that such a rule or section prohibits an award of attorney's fees or authorizes an award of attorney's
30 fees in a specified manner, generally, or subject to limitations.
I.C. §12-123, added 1987, ch. 278, sec. 8, p. 580.

31 **ORDER DENYING ATTORNEY FEES**
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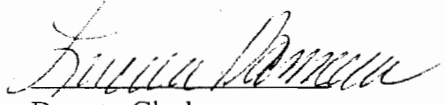
CERTIFICATE OF MAILING

I hereby certify that on this 25th day of November 2009, I mailed (served) a true and correct copy of the within instrument to:

THOMAS G. MAILE, IV
380 WEST STATE STREET
EAGLE, IDAHO 83616

J. KEVIN WEST
SALLY J. REYNOLDS
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
P.O. BOX 1271
BOISE, IDAHO 83701

J. DAVID NAVARRO
Clerk of the District Court


Deputy Clerk