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Bailey v. Bailey Appellant's Reply Brief Dckt. 38760

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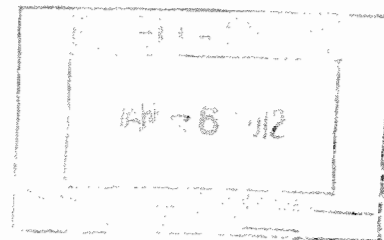
IN THE SUPREME COURT OF THE STATE OF IDAHO

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| IN THE MATTER OF THE ESTATES OF | } |
| CAROL BAILEY and FRANCIS ANDREW | } |
| BAILEY, Deceased, | } |
| ----- | } |
| F. KIM BAILEY, Personal Representative of | } |
| THE ESTATES OF CAROL BAILEY and | } Supreme Court Docket No.- 38760-2011 |
| FRANCIS ANDREW BAILEY, | } Bonneville County Docket No. - CV-2006-6496 |
| | } |
| Plaintiff- Appellant, | } |
| v. | } |
| | } |
| KERRY BAILEY, KYLE BAILEY, and | } |
| TAMARA BAILEY SIPE, | } |
| Defendants-Respondents. | } |
| ----- | } |

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the
Seventh Judicial District
for Bonneville County



Honorable Jon J. Shindurling, District Judge, Presiding

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ARGUMENT

Respondents erroneously cite the rules to support their contention that the awarding of fees is a matter within the discretion of the court.

The discretionary portion of the IRCP 54(e)(1) refers specifically to the inclusion of paralegal fees.

The claim of respondents (at Lines 8, 9, ff.) that IRCP 54(e)(3) contains language stating that the award of fees is discretionary, is erroneous, as no such language appears in that rule.

Whether or not the awarding of fees is discretionary, no exercise of discretion justifies the ignoring of the other provisions of IRCP 54(e)(3), which require the court to consider “[a]ny other factor,” which should include a contract.

The binding effect of a contract is further recognized in IRCP 54(e)(8), which states that IRCP 54(e) shall be followed where not inconsistent with a contract.

In *Logosz v. Childers*, 105 Idaho 173, 174, the Court of Appeals reiterated that all of the factors in IRCP 54(e)(3) must be considered.

The Court of Appeals having stated, in *DeWils v. Dines*, 106 Idaho 288, 290, that IRCP 54(e)(3)(L) may not be considered to the exclusion of other factors, logically, it must have intended that IRCP 54(e)(3)(A) may not be considered to the exclusion of IRCP 54(e)(3)(L) and other items listed.

While holding that the trial court was free to determine the reasonableness of “time and labor,” the Court of Appeals also required that the court give “adequate consideration to the proper factors.” [Emphasis Added.] Spidell v. Jenkins, 111 Idaho 857,859.

In Associates v. Beets, 112 Idaho 603, 605, the Court of Appeals held that the district court improperly exercised its discretion, and remanded, where, as here, the record showed that the judge failed to apply the proper legal standard, re awarding fees. See also, Kelly v. Hodges, 119, Idaho 872,876.

The Supreme Court, in Sun Valley Potato Growers v. Texas Refinery, 139 Idaho 761, 769, also required that the trial court consider all of the factors in IRCP 54(e)(3). Had it been applicable (despite IRCP 54(e)(8), it is reasonable to assume that had the trial court considered IRCP 54(e)(3)(L), and the other factors, the outcome would have been different.

The work performed was detailed in the memorandum provided.

The court considered only the “time and labor required,” to the total exclusion of the other provisions of the rules, which provisions the record does not indicate that the court considered. Thomas v. Thomas, __Idaho __.

Here, the reasonableness and time were immaterial, because of the contract.

The trial court was not making an “award” of attorney’s fees, but was merely called upon to respond to a challenge made to fees already billed, pursuant to a contract.

Although the brief of respondents repeatedly refers to the fee question herein as being “controlled by statute,” the thrust of their argument is solely the issue of the applicability of a rule, IRCP 54(e)(3)(A).

The claimed “exercise of discretion” was erroneous, as the court singled out one portion of one rule, to the exclusion of the remainder of that rule.

If fees should be denied, despite the contract, and the theory of quantum meruit, the respondents would be unjustly enriched, a fact recognized by the Supreme Court, in *Farrell v. Whiteman*, 146 Idaho 604, in holding that fees might be allowed even in the event of an illegal contract, since “the central focus must be whether the law will be furthered or defeated by granting the relief requested.” The court noted that “excellent service” might have been rendered, thus making noncompliance with the statute “nearly harmless.” Although recognizing the applicability of the theory of quantum meruit in some cases, the court denied relief thereunder, but remanded, for consideration of recovery under unjust enrichment. *Id.* 611-613.

The Supreme Court approved “actual attorney fees and costs pursuant to contract,” rather than as might be determined under rules governing the award of reasonable attorney fees and costs, “since contract did not limit attorney fee award to merely ‘reasonable’ fees and costs.” *Zenner v. Holcomb*, 147 Idaho 444, 445, hn,10.

The Zenner court held that “[t]he application of [a] procedural rule is a question of law on which we exercise free review.” Id. 450. Rule 54(e)(3) was held to be “inapplicable because it is inconsistent with the language of the contract.” Counsel in that case recognized (and stated) that “the contract language says what it says.” Id. 451.

CONCLUSION

The appellant should be granted the relief requested and justified in his opening brief herein.

Respectfully submitted, this January 5, 2012.

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Cambridge Law Center
Idaho Falls, Idaho

CERTIFICATE OF SERVICE

[IRCP 5(f)]

I HEREBY CERTIFY That on this day I served the foregoing upon the designated parties, by handing copies, as follows:

RESPONDENTS

MICHAEL J. WHYTE, ESQ.
2635 Channing Way
Idaho Falls ID 83404

January 5, 2012


M. BIRD

