8-28-2014

Stilwyn, Inc. v. Rokan Corp. Appellant's Brief 2 Dckt. 41451

IN THE SUPREME COURT OF THE STATE OF IDAHO

STILWYN, INC.,

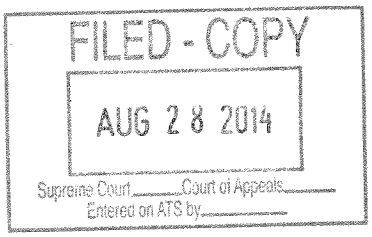
Plaintiff-Appellant,

v.

ROKAN CORPORATION, a Delaware corporation; ROKAN FINANCIAL SERVICES, LLC, a Delaware limited liability company; ROKAN PARTNERS, A LIMITED PARTNERSHIP, an Idaho limited partnership; ROKAN PROPERTY SERVICES, LLC, an Idaho limited liability company; ROBERT A. KANTOR, individual; MICHAEL PAGE, individual; MICHAEL EDWARD PAGE TRUST; MICHAEL PAGE 2008 REVOCABLE TRUST; IDAHO FIRST BANK, an Idaho corporation; GREGORY LOVELL, individual; ANACONDA INVESTMENTS, LLC, a Delaware limited liability company; ANACONDA MANAGERS, LLC, a Delaware limited liability company; PORTFOLIO FB-IDAHO, LLC, a Delaware limited liability company; WALI INVESTMENTS, LLC, an Idaho limited liability company; DAVID WALI, individual; BRYAN FURLONG, individual; JOHN SOFRO, individual; JOHN DOES 1-20,

Defendants-Respondents-Cross–Appellants.

Supreme Court Docket No. 41451-2013
Blaine County No. CV 2011-785



CROSS-APPELLANTS' BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho
in and for the County of Blaine

The Honorable Jonathan Brody, District Judge, Presiding.

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I. STATEMENT OF THE CASE

A. Introduction and Background

The Page Respondents[1] hereby incorporate by this reference the Statement of the Case and all factual and procedural history set forth in their Respondents' Brief in this matter, concurrently filed herewith. In addition, the Page Respondents note the following additional background facts relevant to this Cross-Appeal:

Following the various Defendants' combined motions for summary judgment below, the District Court entered Judgment against Plaintiff Stilwyn Inc. ("Stilwyn") on the basis that:

> The Plaintiff's claims are barred by res judicata, specifically claim preclusion, because the claims should have been brought in the Federal Case where Stilwyn voluntarily subjected itself to the jurisdictional powers of the U.S. District Court for the District of Idaho as an intervener, could have asserted the counterclaim, and did attempt to join the counterclaim with the FDIC.

(R. Vol. 5, p. 1095.) The Court found that Stilwyn could and should have litigated all of its claims in the underlying federal case:

> After intervening, Stilwyn cannot simply pick and choose where and when to file its claims. It chose to join the Federal Case, it assumed it had the ability to assert the claim, it saw there was opposition and apparently tried to maneuver past the opposition. The claim had to be raised there and then.

(R. Vol. 5, p. 1099.)

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[1] For purposes of this brief, "Page Respondents" shall refer to Michael Page, Michael Edward Page Trust, Michael Page 2008 Revocable Trust, John Sofro, Bryan Furlong, Wali Investments, LLC, David Wali, Anaconda Investments, LLC, Anaconda Managers, LLC, Portfolio FB-Idaho, LLC, Rokan Property Services, LLC, Rokan Financial Services, LLC, and Robert A. Kantor.

Based on the District Court's analysis of Stilwyn's claims, including the fact that Stilwyn should have known that its claims may be barred by *res judicata*, and in view of relevant Idaho case law regarding the propriety of attorney fee awards under Idaho Code §§ 12-121 and 123 in cases deemed barred by the doctrine of *res judicata*, the Page Respondents argued that they were entitled to an award of costs and attorney fees for their defense of this frivolous action. (*See* R. Vol. 5, p. 1183.)

On consideration of the Page Respondents' request for an award of attorney fees, the District Court acknowledged (and Stilwyn did not dispute) that the Page Respondents were among the various 'prevailing parties' for purposes of the attorney fee discussion. (R. Vol. 5, p. 1300.) The District Court found unequivocally that Stilwyn's claims were barred by *res judicata*, that Stilwyn "should have raised claims" in the underlying federal action that precedes this litigation, that Stilwyn "arguably did" at least raise those claims in the underlying federal action, and that Stilwyn "chose to join the fray in the Federal Case and must live with the consequences." (*See generally*, R. Vol. 5, p. 1099.) Nonetheless, under the cloak of discretion, the District Court denied the Page Defendants' request on the basis that, despite having determined that Stilwyn and its counsel knew that they had previously raised the exact same claims in a separate action, Stilwyn had presented "fairly debatable" arguments as to the application of *res judicata*. (R. Vol. 5, p. 1300.) The Page Respondents hereby appeal.

II. ISSUES PRESENTED ON APPEAL

1. Did the District Court err in denying the Page Respondents' request for attorney fees on the basis that the Plaintiff knew or should have known its action would be barred

by the doctrine of *res judicata*, and determining that the Plaintiff's action was not brought frivolously, unreasonably, and/or without foundation despite having brought an action that was barred by *res judicata*?

2. Are the Page Respondents entitled to attorney fees on appeal?

III. STANDARD OF REVIEW

The decision to award attorney fees is generally left to the sound discretion of the trial court. *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 592, 917 P.2d 737, 749 (1996). However, in the exercise of that discretion, the Court must act consistently with the legal standards set forth in Idaho Rule of Civil Procedure 54. *Kelly v. Hodges*, 119 Idaho 872, 811 P.2d 48 (Ct. App. 1991). Pursuant to that Rule, "the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract." I.R.C.P. 54(e).

The Page Respondents assert that they ought to have been awarded attorney fees in the proceedings below pursuant to Idaho Code §§ 12-121 and 123. "Trial courts may award attorney fees under I.C. § 12-121 if the case was 'brought, pursued or defended frivolously, unreasonably or without foundation.'" *Burns v. Baldwin*, 138 Idaho 480, 487, 65 P.3d 502, 509 (2003) (quoting I.R.C.P. 54(e)(1). Similarly:

> I.C. § 12–123 allows for such an award to a party adversely affected by frivolous conduct, which is defined as conduct that "obviously serves merely to harass or maliciously injure another party to the civil action" or "is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law."

Berkshire Investments, LLC v. Taylor, 153 Idaho 73, 86, 278 P.3d 943, 956 (2012) (quoting I.C. § 12-123).

The test to determine whether the trial court abused its discretion has been well-settled by this Court:

> When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason.

Sunnyside Indus. & Prof'l Park, LLC v. E. Idaho Pub. Health Dist., 147 Idaho 668, 674, 214 P.3d 654, 660 (Ct. App. 2009) (emphasis added) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

The Page Respondents submit that an award of costs and fees in their favor should have been granted, pursuant to Idaho Code §§ 12-121 and/or 12-123, on the basis that this action was brought and pursued frivolously, given that Stilwyn had previously and voluntarily abandoned its opportunity to litigate the issues presented in this case during the underlying federal action, and was thus barred by the doctrine of *res judicata*. The District Court abused its discretion when it denied the Page Respondents their requested fees, in view of the weight of relevant legal authority that deems actions barred by *res judicata* frivolous as a matter of course.

IV. ARGUMENT

A. Page Respondents were Prevailing Parties.

In the proceedings below, following the entry of Summary Judgment in favor of these

collective Respondents, the District Court by its Memorandum Decision found that all of the Respondents were prevailing parties for purposes of evaluating costs and fees under Rule 54. (R. Vol. 5, p. 1300.) Similarly, "[t]he Plaintiff [did] not dispute that the Defendants [were] the prevailing party." (*Id.*) Thus, the only question is whether the District Court erred in determining that Stilwyn's barred claims did not give rise to a finding of frivolous or unreasonable claims and/or conduct for purposes of attorneys fees under Idaho Code §§ 12-121 and/or 12-123.

B. Page Respondents Were Entitled to Recover their Attorney Fees in the District Court Pursuant to Idaho Code §§ 12-121 and/or 12-123.

According to Idaho Code § 12-121, "[i]n any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties." Rule 54(e)(1) limits the instances in which attorney's fees may be awarded pursuant to Idaho Code § 12-121: "attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation . . . ." I.R.C.P. 54(e)(1). Similarly, Idaho Code § 12-123 permits an award of attorney fees "to any party to [an] action adversely affected by frivolous conduct," defined as "conduct of a party to a civil action or of his counsel of record that . . . is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." I.C. § 12-123. Under these standards, because Plaintiff brought and pursued an action that it and its counsel knew or should have known was barred by the doctrine of *res judicata* in view of its prior attempts to litigate the same issue(s) in federal court, an award of attorney fees should have been granted to the Page Respondents for defending

against this action.

Under these standards, the District Court abused its discretion when it did not follow the legal standard set forth in the uniform case law available, as presented by the Page Respondents and not countered by Stilwyn, which sets forth that a *res judicata* barred claim necessarily gives rise to an award of attorney fees under the standards governing frivolity in litigation. Ample case law in the state of Idaho supports an award of attorney fees under Idaho Code §§ 12-121 and/or 12-123 in situations in which the claims asserted are barred by *res judicata*. Where a lawsuit is brought as "simply an attempt to re-litigate an issue that had already been decided," this Court has held that such an action "lacked reasonable basis in fact or law," and a district court's award of attorney fees pursuant to Idaho Code § 12-123 is proper on that basis. *See Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 278 P.3d 943 (2012). Similarly, where a party has been found, as here, to "voluntarily dismiss" its claims against a defendant, any later attempt to revive the same claims in a different forum constitutes a "frivolous" claim sufficient to justify an award of attorney fees under Idaho Code § 12-121. *See Davidson v. Davidson*, 150 Idaho 455, 248 P.3d 242 (2011). It has therefore long been held as a rule in Idaho that litigation over claims barred by *res judicata* is frivolous, justifying an award of attorney fees, and the District Court abused its discretion when it failed to apply those legal standards.

In the seminal case on this issue, *Cole v. Kunzler*, 115 Idaho 552, 768 P.2d 815 (Ct. App. 1989), the Idaho Court of Appeals summarized the problem similar to how the District Court should have decided the issues presented here: "The court decided that after Cole and Taylor had lost on their lien claim in Cassia County, the appropriate remedy would have been to perfect an

appeal in that proceeding; and that subjecting the Kunzlers to further litigation in another county on the same issue was unreasonable." 115 Idaho at 558. The District Court similarly determined that the proper remedy for Stilwyn, if dissatisfied with the entry of final dismissal in the federal case, would have been to object to and/or appeal that determination. (R. Vol. 5, p. 1100-1101.) Following *Cole*, then, "subjecting the [Page Respondents] to further litigation in another [forum] on the same issue was unreasonable." The Idaho Court of Appeals determined that such an unreasonable litigation, specifically barred by *res judicata*, was "frivolous," noting that it had "no hesitancy in stating that the trial court's decision [was] fully supported by the record" and that an award of attorney fees under Rule 54(e)(1) was therefore appropriate. 115 Idaho at 558. *See also Burns v. Baldwin*, 138 Idaho 480, 65 P.3d 502 (2003) (Idaho Supreme Court following *Cole* and upholding an award of attorney fees under Rule 54(e)(1) where the claims asserted were barred by *res judicata* and therefore were "frivolous" as set forth in Idaho Code § 12-121); *Kahre-Richardes Family Foundation, Inc. v. Village of Baldwinsville, New York*, 953 F.Supp. 39 (N.D. New York 1997) (awarding attorney fees where claims were barred by *res judicata*); *Surface v. Commerce Bank of Hutchison*, 1990 WL 129218, *4 (D. Kansas 1990) ("The imposition of fees and sanctions in a case obviously barred by the doctrine of res judicata and collateral estoppel is clearly appropriate.") (citing *Uithoven v. U.S. Army Corps of Engineers*, 884 F.2d 844, 847 (5th Cir.1989); *Damino v. Barrell*, 702 F.Supp. 954, 957 (E.D.N.Y.1988), *aff'd without pub. opinion*, 875 F.2d 307 (2d Cir.1989), *cert. denied*, 110 S.Ct. 69 (1989); *Lind–Waldock & Co. v. Caan*, 121 F.R.D. 337, 342 (N.D.Ill 1988); *Lee v. Criterion Insurance Co.*, 659 F.Supp. 813, 820–22 (S.D.Ga.1987); *Columbus v. United Pacific Insurance Co.*, 641

F.Supp. 707, 711–12 (S.D.Miss.1986), *aff'd without pub. opinion*, 833 F.2d 1007 (5th Cir.1987); *Lewis v. East Feliciana Parish School Board*, 635 F.Supp. 296, 302 (M.D.La.1986), *aff'd*, 820 F.2d 143 (5th Cir.1987)).

The District Court improperly denied attorney fees to the Page Respondents on the basis that it was "fairly debatable" whether the Plaintiff's claims were barred by *res judicata*. (R. Vol. 5, p. 1300.) A cursory review of applicable Idaho case law, however, demonstrates a common premise: if the *res judicata* defense is clearly applicable, as here, attorney fees are appropriately awarded under Idaho Code §§ 12-121 and/or 12-123, *supra*. There is no case law available (none cited by either Stilwyn or the District Court) to suggest that a "fairly debatable" test is applicable to the determination of attorney fees in a case barred by operation of *res judicata*; the attorney fee analysis remains uniform and intact where a plaintiff's claims are barred by *res judicata* but the plaintiff improperly and unreasonably pursues them, nonetheless. In *Berkshire Investments, LLC*, the court dismissed the plaintiff's entire action on summary judgment (1) because the plaintiff "attempted to re-litigate an issue that had already been decided," and (2) because the plaintiff's suit "was based on identical facts" as in the underlying action. *Berkshire Investments, LLC*, 153 Idaho at 86, 278 P.3d at 956. The court found that attorney fees were warranted under Idaho Code § 12-123 because the plaintiff's claims "lacked reasonable basis in fact or law." *Id.* There was no discussion as to whether the plaintiff in *Berkshire* had made any sort of good faith mistake based upon fairly debatable interpretations of the issues it had attempted to "re-litigate." The District Court here therefore abused its discretion in applying a test and a legal standard for which there is no legal precedent to do so.

In *Davidson*, this Court held that the plaintiff's attempt to re-raise claims on appeal that were voluntarily dismissed against a defendant at the trial level was frivolous, and, therefore, attorney fees were awardable under Idaho Code § 12-121. *Davidson*, 150 Idaho at 255, 248 P.3d at 468. Again, the decision is devoid of any discussion about a "fairly debatable" analysis of the plaintiff's claims that, by its involvement in the earlier litigation, it knew or should have known would be barred by operation of *res judicata*. The Court of Appeals in *Cole* similarly affirmed the trial court's findings (1) that the plaintiffs should have appealed their lien claim rather than subjecting the defendants to "further litigation in another county on the same issue," which was "unreasonable"; and, (2) that "'once the *res judicata* defense became so blatantly apparent,' further litigation became frivolous." *Cole*, 115 Idaho at 558, 768 P.2d at 821 (emphasis added). Based upon the clear application of the *res judicata* defense, the *Cole* court held that there was no abuse of discretion in awarding attorney fees pursuant to Rule 54(e)(1) and Idaho Code § 12-121. *Id.* Finally, in *Burns*, this Court determined that the trial court did not abuse its discretion in awarding attorney fees under Idaho Code § 12-121 because the plaintiff "clearly knew . . . that the issues he raised would be barred by . . . *res judicata*." *Burns*, 138 Idaho 480, 65 P.3d 502 (citing *Cole*, 115 Idaho at 558, 768 P.2d at 821). The same analysis applies here, and there was no cognizable legal justification for the District Court to apply a legal standard for which there is no basis on this issue.

Plainly stated, the forgoing case law stands for the propositions that Idaho courts do not perform a "fairly debatable" analysis when the *res judicata* defense has been found to be applicable on summary judgment, and Idaho courts do not examine each and every fact of a *res*

judicata case to determine whether attorney fees are warranted. Rather, if a trial court finds that the *res judicata* defense is clearly applicable, then attorney fees are awarded as a matter of course. Here, the District Court held that the Plaintiff's claims were barred by *res judicata* because (1) "[the Plaintiff] chose to join the Federal Case, [(2) the Plaintiff] assumed it had the ability to assert the claim, [and, (3) the Plaintiff] saw there was opposition and tried to maneuver past the opposition. The claim had to be raised there and then." (R. Vol. 5, p. 1099.) Based on the District Court's observations regarding the Plaintiff's conduct, it is abundantly clear that the Plaintiff knew or should have known that its claims would be barred by *res judicata*. Accordingly, the Page Respondents should have been awarded the attorney fees they incurred for being forced to hire counsel to defend this frivolous litigation, and the District Court abused its discretion by failing to apply that legal standard.

C. The Page Respondents are Entitled to an Award of Attorney Fees on Appeal.

"Attorney fees may be awarded pursuant to I.C. § 12-121 on appeal if this Court is left with an abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." *Burns v. Baldwin*, 138 Idaho 480, 487, 65 P.3d 502, 509 (2003) (citing *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979)). For the same reasons as articulated above, with respect to the Page Respondents' entitlement to an award of attorney fees below, the Page Respondents respectfully request an award of attorney fees from this Court for Stilwyn's frivolous appeal of this action, and specifically based upon the frivolity of Stilwyn's objection and opposition to the Page Respondents' entitlement to attorney fees under the clear and well-settled case law cited herein.

V. CONCLUSION

Based on the foregoing, the Page Respondents respectfully request that this Court reverse the District Court's denial of attorneys fees, and remand this case back to the District Court to determine the amount of attorney fees justly due.

RESPECTFULLY SUBMITTED this 28th day of August, 2014.

GREENER BURKE SHOEMAKER OBERRECHT P.A.

By _____
Richard H. Greener
Thomas J. Lloyd III
Attorneys for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 2014, two (2) true and correct copies of the within and foregoing instrument was served upon:

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