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Charney v. Charney Appellant's Reply Brief Dckt. 42165

IN THE SUPREME COURT OF THE STATE OF IDAHO

JUDY L. CHARNEY, Plaintiff-Respondent, vs. DENNIS M. CHARNEY, Defendant-Appellant.	Supreme Court Docket No. 42165-2014

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County.

HONORABLE MICHAEL MCLAUGHLIN, Presiding.

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I.

INTRODUCTION

The magistrate in this case found that Respondent, Judy Charney (hereinafter "Judy") was the prevailing party in a contempt action, even though Appellant, Dennis Charney (hereinafter "Dennis") voluntarily dismissed his remaining claims without prejudice. The magistrate further found that Dennis' partial motion for summary judgment was "frivolous" in the context of a contempt motion, because the magistrate characterized the claims as criminal in nature. Dennis respectfully asks this Court to reverse the district court's decision upholding the magistrate. Dennis also requests that this Court reverse the district court's award of attorney fees on appeal, and its refusal to reconsider or amend that award. Finally, Dennis requests an award of attorney fees on this appeal.

II.

REPLY

A. A Voluntary Dismissal Without Prejudice Cannot Confer Prevailing Party Status.

Judy makes much of the fact that she "reserved" her right to claim attorney fees at the trial court level. However, at the hearing on Dennis' motion to voluntarily dismiss his remaining counts, not one mention was made as to attorney fees by either Judy's counsel or the magistrate. The hearing transcript encompasses just two pages, and all that is discussed is whether the dismissal was with or without prejudice. Tr. (Apr. 9, 2013), pp. 5-6, LL. 4-18. Moreover, a supposed "reservation of rights" to claim attorney fees is certainly not an entitlement to such an award.

As stated in Appellant's Brief, the issue of whether an opposing party can be conferred prevailing party status after a voluntary dismissal without prejudice has not been conclusively determined in Idaho. However, this Court's decision in *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007), contained a very instructive concurring opinion by Justice Eismann.

> Indeed, there can be no prevailing party until the merits of the lawsuit have been decided and there is a final judgment. A dismissal of an action "with prejudice" is simply an adjudication on the merits of the plaintiff's claim. In the instant case, there was no final judgment until the action was dismissed with prejudice. The dismissal of [plaintiff's] action with prejudice was a precondition to the [defendants'] right to recover court costs and attorney fees, not a denial of that right.

Id at 72-73 (internal citations omitted). This concurrence in *Straub* has been followed in the Idaho district court case of *Kugler v. Bohus*, 2009 U.S. Dist. LEXIS 84190 (Sept. 15, 2009), and the same rationale utilized in the Ninth Circuit and other jurisdictions, in numerous cases that were cited extensively in Appellant's Brief.

In contrast, Judy has not cited a single case that reaches a contrary result on similar facts. Rather, the cases cited by Judy involve either judgments on the merits or dismissals *with* prejudice, and she seems to argue that there should be no difference between those scenarios and dismissals without prejudice, in the context of a prevailing party analysis. For instance, in *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718 (2001), one defendant was dismissed by stipulation prior to trial, another dismissed upon a directed verdict, and the remaining two defendants were found not liable at a jury trial. There is no indication that any defendant was dismissed without prejudice, and all other defendants were dealt with on the merits. In *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 688 (Ct.App. 1984), offers of judgment

were made to plaintiffs and accepted. Therefore, final judgments were entered and attorney fees granted to the prevailing parties. These cases are not at all similar to the facts in the instant case, where no final judgment was entered, the dismissal was without prejudice, and there was no decision on the merits.

In citing cases which involve dismissals with prejudice, or decisions on the merits, Judy simply glosses over the very important distinction between a dismissal without prejudice and one without. This distinction between dismissals with and without prejudice can be seen in Rule 41. For instance, under Rule 41(a)(1), a voluntary dismissal made upon notice or stipulation is ordinarily deemed to be without prejudice unless otherwise stated in the order. However, if the plaintiff had previously dismissed an action based on the same claim, the second voluntary dismissal acts as an adjudication on the merits. I.R.C.P. 41(a)(1). Similarly, under Rule 41(a)(2), a voluntary dismissal entered by the court is also deemed without prejudice unless otherwise specified. I.R.C.P. 41(a)(2). In contrast, a Rule 41(b) involuntary dismissal by the court in most instances acts as an adjudication on the merits. I.R.C.P. 41(b). And finally, under Rule 41(d), if an action has been once voluntarily dismissed, upon a refiling of the same claim, the court can require the plaintiff to pay the costs incurred from the previous filing prior to allowing the second case to proceed. I.R.C.P. 41(d).

The distinctions in Rule 41 would not be necessary if there was no difference between a dismissal with or without prejudice. That distinction *must* mean something in the context of a prevailing party analysis, especially given the delineation between which dismissals constitute an adjudication on the merits and which do not. Indeed, a comparison of this Court's decisions in

Puckett v. Verska, 144 Idaho 161, 158 P.3d 937 (2007), and *Straub* demonstrates this distinction, and indicates that a dismissal with prejudice is necessary for an award of attorney fees on the basis of prevailing party. As stated in *Kugler*, this distinction is crucial. *Kugler*, 2009 U.S. Dist. LEXIS 84190 at *12-14.

Judy now attempts to explain the magistrate's decision to award attorney fees as being imposed as "terms and conditions" of dismissal under I.R.C.P 41(a)(2). Respondent's Brief, p.14. This contention is incorrect. The Order of Dismissal simply states that the motion for contempt is dismissed (R. 252), and there was absolutely no discussion of any terms or conditions of dismissal at the hearing. Tr. (April 9, 2013), pp. 5-6, LL. 4-18. In fact, the only issue discussed at the hearing on Dennis' motion to dismiss was whether the dismissal should be with or without prejudice and the magistrate specifically determined that it was without prejudice. *Id.* Judy certainly did not object to the dismissal in the absence of an award of attorney fees, because she did not mention the issue of attorney fees at all. *Id.*

Judy also argues that if this Court follows Justice Eismann's opinion in *Straub*, it will limit a trial court's discretion under I.C. § 7-610. This is untrue. The trial court would still be free to award discretionary fees under I.C. § 7-610, *so long as there is actually a prevailing party*. Finding that a prevailing party does not exist unless there is a decision on the merits or a dismissal with prejudice merely requires the trial court to apply I.R.C.P. 54(d)(1)(B) as it is already required to do:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the *final judgment or result of the action* in relation to the relief sought by the respective parties. The trial court in its sound

> discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the *resultant judgment or judgments obtained.*

I.R.C.P. 54(d)(1)(B) (emphasis added). The language of the rule requires either a *final* judgment or a *final* result. There was no final judgment or result here, given Dennis' ability to refile the contempt motion if he so chose. Importantly, Judy did not "obtain" any result. The dismissal was not entered as a result of a motion to dismiss or any other action taken by Judy; rather the dismissal was voluntarily undertaken by Dennis.

Moreover, Judy's argument that a plaintiff would be able to intentionally run up the defendant's fees and dismiss on the eve of trial without consequence, is misplaced. A finding that a prevailing party does not exist because there was no decision on the merits or dismissal with prejudice does not leave the opposing party without a remedy, if one is warranted. The defendant could seek attorney fees under I.C. § 12-123 (frivolous conduct), Rule 41(a)(2) ("terms and conditions" for dismissal), or even Rule 41(d), which allows a court to require a party to pay the costs of a previously dismissed claim prior to being allowed to continue after refiling of the same claim.

On the other hand, a litigant who has been forewarned by the trial judge that he is likely to face a large attorney fees award if he does not prevail in the litigation would be less likely to dismiss if he would be faced with such an award regardless of a voluntary dismissal or not. This result is not conducive to judicial economy or the efficient resolution of disputes.

The district court erred in upholding the magistrate's determination that a voluntary dismissal without prejudice conferred prevailing party status on Judy. The district court's decision upholding the magistrate's award of attorney fees should be reversed and vacated.

B. Dennis' Claims Under Counts One Through Four Are Not Barred By The Statute of Limitations.

Judy argues that Dennis' remaining claims contained in Counts One through Four are barred by the criminal statute of limitations. As with the analysis in Section C below, this statement presupposes that the remaining claims are criminal contempt actions, which is certainly incorrect for Count One (see below), and is completely unknown for Counts Two, Three, and Four. The merits of Counts Two, Three, and Four were never before the magistrate, so this determination simply cannot be made.

In fact, to say that Dennis would be prevented from refiling because the statute of limitations had expired is inaccurate. Since Dennis had dismissed Counts One through Four without prejudice, he would be allowed to refile. If Judy thought the statute of limitations acted as a bar to his refiling, she would be required to answer the complaint and assert the statute of limitations as a defense. Then the court would make a determination as to whether the statute of limitations in fact barred Dennis' refiling. Here, there was never an actual determination that the statute of limitations would bar a refiling of Counts One through Four, because that issue was never directly before the magistrate. The magistrate simply made conclusory statements at the hearing that the statute of limitations would bar a refiling. Tr. Vol. 1, pp. 75, LL. 16-17. There is simply no statute of limitations barring a refiling of a civil contempt motion. *See, e.g., State v.*

Schorzman, 129 Idaho 313, 924 P.2d 214 (1996) ("There is no statute of limitations relating to a court's civil contempt powers" (construing I.C. § 1-1603)); *see also Steiner v. Gilbert*, 144 Idaho 240, 159 P.3d 877 (2007) (contempt motion brought ten years after stipulated judgment entered).

The magistrate abused its discretion in making the determination that all four remaining counts were criminal in nature when those counts were not before the court, and in basing his decision to award attorney fees on this erroneous assumption. The district court then erred in upholding the magistrate's award.

C. Dennis' Motion for Contempt Was Incorrectly Characterized as Criminal in Nature.

The magistrate awarded Judy attorney fees due to Dennis' partial motion for summary judgment regarding Counts One and Five. This decision was based upon the magistrate's conclusion that Counts One and Five were criminal rather than civil in nature. Judy's entire argument on this issue also relies on this assumption. However, the argument fails under *Steiner v. Gilbert*, 144 Idaho 240, 159 P.3d 877 (2007), which controls the decision on this issue.

Judy's contentions regarding Count One are all over the map. First, she states, "Count One was pled as a criminal contempt and was cautiously and properly treated as such by the Magistrate." Respondent's Brief, p. 23.

Next, she states,

> It is not clear from the Amended Motion for Contempt whether Count I pertaining to a J.B. Landscape invoice actually sought civil or criminal contempt since paragraph VII of Count I states "Plaintiff should be held in contempt for not paying the J.B. Landscape invoice in her name."

Respondent's Brief, p. 27, n.12. However, she does acknowledge that Dennis characterized Count One as a civil contempt in his Memorandum in support of his partial motion for summary judgment. *Id.* Judy also states, "If this Court were to determine that Count 1 was in fact civil, then the Magistrate's statement is harmless as Dennis would later dismiss his case on Counts 1 through 4." Respondent's Brief, p. 29, n.14.

The reality is that Count One was never pled as a criminal contempt, nor were Counts Two through Five, as reflected in the Verified Amended Motion for Contempt, as well as the transcript of the hearing. For each and every count, Dennis stated "Plaintiff should be held in contempt for..." followed by the behavior alleged to be in contempt. R. 76-78. Additionally, in the prayer section of the motion for contempt, Dennis never specifically sought criminal or civil sanctions for *any* of the counts either. Instead, for each of the five counts, Dennis simply prays that "Plaintiff be held in contempt...." R. 79. In his Memorandum in support of the motion for partial summary judgment, he clearly stated that civil sanctions should be imposed for Count One. R. 191.

Further in his briefing, and at the hearing, Dennis requested that Judy be ordered to pay the J.B. Landscaping bill. The magistrate ultimately determined that factual issues precluded summary judgment because he could not determine as a matter of law whether the PSA required

Judy to have paid the JB Landscaping bill.[1] However, even if this Court agrees that Count Five was a criminal contempt, this does not somehow convert Count One to anything other than a clearly civil contempt. Both the magistrate and district court seem to have completely lost sight of the following discussion on the record, and Judy simply ignores it:

> THE COURT: – if I were to find that you're entitled – or Mr. Charney's entitled to summary judgment of civil contempt on Count 1, what relief would you be asking from the Court?
>
> MR. SHOUFLER: That she pay the bill.
>
> THE COURT: That she pay the bill. So, the bill, at this point, remains unpaid?
>
> MR. SHOUFLER: That is correct.
>
> THE COURT: All right.

Tr. Vol. 1, pp. 12-13, LL. 22-5.

It is inexplicable that the magistrate could have read Dennis' brief, taken part in the above discussion, understood *Steiner*, and still believed himself bound by a single sentence in the

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[1] Judy states that since Dennis has not addressed the magistrate's second basis for denial of his motion for partial summary judgment in his Appellant's Brief, i.e. that genuine issues of fact remained, he cannot now address the summary judgment with this Court. Respondent's Brief, p. 26. This statement demonstrates a fundamental misunderstanding of Dennis' appeal in this regard. Dennis is not appealing the denial of the motion for summary judgment, nor could he. The denial of a motion for summary judgment is not directly appealable as of right. *Mattox v. Life Care Ctrs. of America, Inc.*, -- Idaho --, 337 P.3d 627, 639, 2014 Ida. LEXIS (2014) (citing *Dominguez ex rel. Hamp v. Evergreen Res., Inc.*, 142 Idaho 7, 13, 121 P.3d 938, 944 (2005)). Further, Dennis voluntarily dismissed his remaining counts and is certainly not trying to somehow resurrect them here. Rather, Dennis is appealing the award of attorney fees for having brought a motion for summary judgment in the context of a contempt proceeding.

motion for contempt.[2] The magistrate disregarded the allegations pled for all five counts, disregarded Dennis' briefing, and relied solely upon a one sentence paragraph in the motion that simply provided notice of potential criminal sanctions for contempt. Based on that one sentence, the magistrate disregarded his own authority to determine whether a contempt action would be deemed civil or criminal in nature, disregarded his own authority to impose an injunction as a sanction, and indicated that he was bound by the notice of penalties in the motion for contempt, all contrary to *Steiner*.

The magistrate erred in disregarding *Steiner*, and in finding that both Counts One and Five were criminal contempt claims, for which a motion for summary judgment was impermissible.[3] These legal errors resulted in an abuse of discretion in awarding Judy attorney fees under I.C. § 12-123, and the district court erred in allowing this decision to stand.

D. Judy Failed to Comply with I.A.R. 41 and 35 in the District Court Appeal.

Judy acknowledges that she failed to cite I.C. § 7-610 in her "Respondent's Request for Attorney Fees on Appeal" in her district court brief, and only sought attorney fees under I.A.R.

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[2] Judy's statement that even if Count One was in fact for civil contempt, no harm would follow given that Dennis ultimately dismissed Counts One through Four, is disingenuous. Respondent's Brief, p. 29, n.14. The magistrate's award of attorney fees under I.C. § 12-123 was based in large part on his mischaracterization of Count One as a criminal contempt, which most certainly caused harm to Dennis.

[3] Under Rule 75(n), the Rules of Civil Procedure, rather than the Rules of Criminal Procedure, apply to a motion for contempt, unless otherwise in conflict. Rule 56, regarding summary judgment motions, does not conflict with a contempt proceeding in which civil sanctions are sought. Judy does not cite a single statute, rule, or case that would preclude a motion for summary judgment in a civil contempt action.

40 and 41, I.C. § 12-121, I.C. § 12-123(b)(ii), and I.R.C.P. 54(e)(1). Respondent's Brief, p. 36. Moreover, the argument that she offered for this request was that the appeal was "pursued frivolously or unreasonably or without foundation," *id.*, and that theme continued throughout the attorney fees section. At no point in this seven page section did Judy cite I.C. § 7-610 *as a basis* for her request for attorney fees *on appeal*. Judy did offer a one-sentence conclusory statement in the final paragraph of her brief, indicating that attorney fees should be awarded under I.C. § 7-610 "for the same reasons granted below." R. 455.

The only true argument offered in support of an award of attorney fees was directed at Judy's insistence that Dennis' appeal to the district court was frivolous. The district court correctly held that I.C. § 12-123 did not apply on appeal, and that an award of attorney fees was not warranted under I.C. § 12-121. R. 526-27. It is important to note that Judy's frivolousness argument has now been abandoned on this appeal.

Despite her failure to comply with I.A.R. 41 and 35, Judy contends that compliance with the appellate rules is not necessary if "notice" is given to the opposing party. Respondent's Brief, p. 37. Judy relies on *Beco Construction Co., Inc., v. J-U-B Engineers, Inc.*, 145 Idaho 712 (2008), as did the district court. The problem with *Beco Construction* is that it only addressed attorney fees at the trial court level, and has absolutely no relevance to a failure to comply with I.A.R. 41 and 35 when requesting attorney fees on appeal. *Id.* at 725-26.

Judy simply ignores the depth of caselaw cited in Dennis' opening brief that indicates the failure to properly assert a request for attorney fees in the attorney fees section of the first appellate brief precludes an award of attorney fees to that party. Instead she calls the

requirements of I.A.R. 41 and 35 "form over substance," evidently disregarding the long line of cases cited by Dennis. Respondent's Brief, p. 37. She states, "Rule 35(b)(5), I.A.R., should not be read to require that Respondent's claim for attorneys fees on appeal must appear in a particular section." Respondent's Brief, p. 40. It is quite clear in the numerous cases cited in Appellant's Brief that in fact, I.A.R. 41 and 35(b)(5) *are* read, and have been read for quite some time, to require exactly that—a proper citation, in the proper location, with supporting argument, in the first appellate brief. Certainly this Court's entire line of cases on this issue cannot be dismissed as form over substance.

Judy has offered no caselaw to support her contention that a district court sitting in an appellate capacity can disregard its obligation under I.A.R. 41(c) to address the issue of attorney fees in its decision on appeal, and then allow a belated memorandum of attorney fees to request attorney fees on a different basis than argued in the first appellate brief.

Finally, in awarding attorney fees to Judy, the district court did not base its award on any supposed latitude under I.A.R. 41(a) (Respondent's Brief, p. 39), but instead relied on *Beco Construction*, which is not relevant to the issue of compliance with proper appellate procedure and only applies at the trial court level. The district court abused its discretion in not properly applying I.A.R. 41 and 35, and its award of attorney fees should be reversed.

E. Dennis Should be Awarded Attorney Fees on Appeal Under I.C. § 7-610.

It is not clear why Judy considers Dennis' request for attorney fees on appeal to be either "aggressive" or "ironic." Respondent's Brief, p. 41. The issue is simple. If Dennis prevails on appeal, pursuant to I.C. § 7-610, he is entitled to seek attorney fees on appeal, just as Judy is free

to seek attorney fees if she prevails. It is then within this Court's discretion to determine whether an award to the prevailing party is appropriate under the circumstances, which award does not depend on whether Dennis sought attorney fees below. Judy has not cited any argument or case law that would preclude an award of attorney fees to Dennis if he prevails in this appeal.

Citing *Armand v. Opportunity Management Co., Inc.,* 155 Idaho 592, 600 (2013), Judy also states, "Even if the Supreme Court were to reverse the magistrate decision and the District Court affirmance, that would not make Dennis a prevailing party in the contempt action. Since he is not a prevailing party, Dennis cannot be awarded attorneys fees." This issue is misperceived by Judy. *Armand* simply found that the plaintiffs had not stated the specific subsection of I.C. § 12-120 under which they sought attorney fees, and because the defendants had only partially prevailed on a counterclaim, they were therefore not deemed prevailing parties. *Id.* at 602. *Armand* certainly does not stand for the proposition that a party who did not prevail below is not entitled to seek attorney fees on appeal if he prevails.

Further, if this Court reverses the district court, Judy would no longer be entitled to attorney fees below, as she would no longer be the prevailing party below. *Bridge Tower Dental, P.A. v. Meridian Computer Ctr., Inc.*, 152 Idaho 569, 575 (2012); *Wohrle v. Kootenai Co.*, 147 Idaho 267, 276, 207 P.3d 998 (2009). This issue was not addressed by Judy.

Dennis respectfully requests an award of attorney fees under I.C. § 7-610 if he prevails in this appeal.

III.

CONCLUSION

Dennis respectfully asks this Court to reverse the district court's decision upholding the magistrate's award of attorney fees under I.C. § 7-610. Dennis also requests that this Court reverse the magistrate's award of attorney fees under I.C. § 12-123, as the district court did not review this decision and simply allowed it to stand. This Court should reverse the district court's award of attorney fees on appeal, and its refusal to reconsider or amend that award. Finally, Dennis requests an award of attorney fees on this appeal pursuant to I.C. § 7-610.

RESPECTFULLY SUBMITTED this 27th day of January, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2015, I caused **two (2) copies** of the foregoing Appellant's Opening Brief to be served by the method indicated below and addressed to each of the following:

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