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Charney v. Charney Appellant's 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 BRIEF

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

HONORABLE MICHAEL MCLAUGHLIN, Presiding.

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I.

STATEMENT OF THE CASE

A. Nature of the Case.

This case began as a divorce case in 2011, in which a Property Settlement Agreement (hereinafter "PSA") was entered into by the parties. Because of several violations of the PSA, Appellant Dennis Charney (hereinafter "Dennis") brought a motion for contempt for five separate counts against Respondent Judy Charney (hereinafter "Judy"). Dennis brought a partial motion for summary judgment on Counts One and Five of the motion for contempt, which the magistrate found was improper because he construed the contempt counts as criminal rather than civil. After Count Five was dismissed *sua sponte* by the magistrate, Dennis ultimately voluntarily dismissed the remaining four counts without prejudice.

Despite the voluntary dismissal without prejudice, Judy was awarded attorney fees and costs as the prevailing party, and also because the magistrate deemed Dennis' motion for partial summary judgment to be frivolous. Dennis appealed to the district court, which affirmed the magistrate's decision to award attorney fees under Idaho Code § 7-610, but declined to review the magistrate's award under I.C. § 12-123. This appeal followed.

B. Statement of Facts and Course of Proceedings.

On October 28, 2011, a Partial Judgment and Decree Re: Property and Debt was entered. The PSA entered into by the parties was attached thereto as Exhibit 1. On May 11, 2012, Dennis filed a Verified Motion Re: Contempt, and on June 8, 2012, he filed a Verified Amended Motion Re: Contempt. R. Vol. I., pp. 12-19. The amended motion alleged five counts: Count One

involved an unpaid bill to JB Landscaping; Count Two alleged that Judy continued to incur credit card charges on a joint account after the entry of the PSA; Count Three related to Judy's refusal to close the joint credit card account; Count Four alleged that Judy failed to repair the damage that resulted to Dennis' credit rating; and Count Five involved Judy's misappropriation of a Costco rebate check. R. Vol. 1, pp. 74-81.

In the course of the contempt proceedings, Dennis brought a motion for summary judgment for Counts One and Five. As to Count One, Dennis was seeking a requirement that Judy be required to pay the JB Landscaping bill, which is clearly a civil sanction. As to Count Five, even though criminal sanctions might have been appropriate for the misappropriation of the Costco rebate check, Dennis repeatedly indicated in briefing and at the hearing that he was instead seeking an injunction, which is clearly a civil sanction under Idaho law.

In the summary judgment hearing, despite Dennis' repeated insistence that he was seeking merely civil sanctions for contempt Counts One and Five, the magistrate found that the entire contempt proceeding was a criminal, rather than civil, contempt and therefore a motion for summary judgment was inappropriate. The magistrate denied Dennis' motion for partial summary judgment on Counts One and Five, either because they were criminal contempts or because unresolved issues of material fact remained. R. Vol. 1, pp. 400-401, (also contained in the supplemental record pursuant to the Court's Order augmenting the record, dated Oct. 1, 2014). Additionally, the magistrate utilized the summary judgment hearing to dismiss Count Five *sua sponte*, finding that while Judy did violate the PSA in using the Costco rebate check, Dennis had suffered no loss, so the count was *de minimis*. *Id.* In dismissing Count Five, the

magistrate specifically found that neither party was to be considered the prevailing party as to this count. *Id.*

After the summary judgment and prior to trial, Dennis moved to voluntarily dismiss the remaining four counts (Counts One through Four) without prejudice, to which Judy did not object. Because the order of dismissal did not state whether the dismissal was with or without prejudice, the dismissal was deemed without prejudice. R. Vol. pp. 252-253, Tr. Apr. 9, 2013, pp. 5-6, LL. 6-18[1]. There was no discussion at the hearing regarding attorney fees. *Id.* Judy then filed a Motion for Attorneys Fees and Memorandum and Affidavit of Attorneys Fees and Costs in which she requested fees under I.C. §§ 12-121, 12-123, 7-610, and I.R.C.P. 54(e). R. Vol. 1, pp. 254-294.

Over Dennis' objection, the magistrate entered a Judgment for attorney fees and costs of $8,976.10 on July 17, 2013, in favor of Judy as the "prevailing party" under I.C. § 7-610. R. Vol. 1, pp. 348-350. This amount represented all fees incurred by Judy in defending against the contempt proceeding, with the exception of fees incurred specifically regarding Count Five, and for fees incurred in bringing the motion for fees. *Id.*; Tr. Vol. 1, pp. 82-96, LL. 17-12. The magistrate also awarded attorney fees pursuant to I.C. § 12-123 for the fees incurred in defending the "frivolous" motion for summary judgment, although an exact amount was never specified.

[1] The original transcript which was prepared for the appeal to the district court encompasses three separate hearing dates, and is continuously paginated: the hearing on Dennis' motion for partial summary judgment on January 15, 2013; the pretrial conference on March 23, 2013; and the hearing on Judy's motion for attorney fees on July 16, 2013. This transcript will be referred to as "Tr. Vol. 1." Because other hearings were subsequently transcribed individually, and not continuously paginated, these hearings will be referred to by specific date so as to avoid confusion, *i.e.* "Tr. (date)."

R. Vol. 1, pp. 348-350, Tr. Vol. 1, p. 78-79, 7-7. The magistrate declined to award attorney fees under I.C. § 12-121 and I.R.C.P. 54(e), because he determined that some of Dennis' claims had merit. R. Vol. 1, pp. 349, Tr. Vol. 1, pp. 75-78, LL.23-6.

On August 5, 2013, Dennis appealed the magistrate's award of attorney fees under I.C. § 7-610 on the basis that Judy could not have been a "prevailing party" due to Dennis' voluntary dismissal of the remaining four counts without prejudice. Additionally, Dennis appealed the partial award of attorney fees under I.C. § 12-123 because the magistrate incorrectly viewed the contempt action as criminal rather than civil[2].

In its Memorandum Decision and Order of April 14, 2014, the district court affirmed the magistrate's award of attorney fees under Idaho Code Section 7-610, but declined to decide whether the award under I.C. § 12-123 was proper. R. Vol. 1, 484-495. In so declining, the district court allowed the magistrate's decision in this regard to stand. Additionally, in its Memorandum Decision and Order, the district court did not address Judy's request for attorney fees as required under I.A.R. 41(c). *Id.*

Judy then filed a memorandum of attorney fees and costs on April 22, 2014, to which Dennis objected pursuant to I.A.R. 41and 35. The district court declined to award attorney fees under I.C. § 12-121, because the issue of whether Judy could be deemed a prevailing party after a voluntary dismissal without prejudice had not been determined in Idaho. The district court also declined to award attorney fees under I.C. § 12-123, because that statute does not apply on appeal. However, the court did award attorney fees to Judy, in the amount of $9,297.50, based

[2] Other issues were presented on appeal at the district court level which were not pursued here.

on I.C. § 7-610, despite the fact that Judy did not request fees on this basis in her first appellate brief as required by I.A.R. 41 and 35.

Following the order awarding attorney fees, Judy filed a motion to supplement or amend the order, in response to which Dennis objected and filed his own motion for reconsideration. The district court denied both motions on September 4, 2014. Defendant timely filed his notice of appeal.

II.

ISSUES PRESENTED ON APPEAL

A. Whether the district court erred in affirming the magistrate court's determination that a voluntary dismissal without prejudice conferred prevailing party status for purposes of an award of attorney fees under I.C. § 7-610.

B. Whether the district court erred in failing to address, and allowing to stand, the magistrate's determination that a motion for partial summary judgment was frivolous and that an award of attorney fees was appropriate under I.C. § 12-123.

C. Whether the district court erred in awarding Judy attorney fees on appeal under I.C. § 7-610.

D. Whether the district court erred in denying Dennis' motion for reconsideration regarding the award of attorney fees under I.C. § 7-610.

E. Whether Dennis is entitled to an award of attorney fees on appeal pursuant to I.C. § 7-610.

III.

STANDARD OF REVIEW

When reviewing the decision of a district court sitting in its appellate capacity, the following standard of review applies:

> The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure.

Pelayo v. Pelayo, 154 Idaho 855, 858-859, 303 P.3d 214 (2013) (quoting *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012) (quoting *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008)).

"Thus, this Court does not review the decision of the magistrate court. 'Rather, [the Court is] "procedurally bound to affirm or reverse the decisions of the district court."'" *Id.* ((quoting *Bailey*, 153 Idaho at 529, 284 P.3d at 973) (quoting *State v. Korn*, 148 Idaho 413, 415 n.1, 224 P.3d 480, 482 n.1 (2009)).

A court's determination of prevailing party status is reviewed under an abuse of discretion standard.

> When examining whether a trial court abused its discretion, this Court considers whether the court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of this discretion and consistently within the applicable legal standards; and (3) reached its decision by an exercise of reason. "A determination on prevailing parties is committed to the discretion of the trial court."

Crump v. Bromley, 148 Idaho 172, 173, 219 P.3d 1188 (2009) (citing *Shore v. Peterson*, 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009)).

A court's award of attorney fees under I.C. § 12-123 is also reviewed under an abuse of discretion standard. *Ackerman v. Bonneville Co.*, 140 Idaho 307, 313, 92 P.3d 557 (Ct.App. 2004) (citing *Sun Valley Shopping Ctr., v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

IV.

ARGUMENT

A. THE DISTRICT COURT ERRED IN AFFIRMING THE MAGISTRATE COURT'S DETERMINATION THAT A VOLUNTARY DISMISSAL WITHOUT PREJUDICE CONFERRED PREVAILING PARTY STATUS FOR PURPOSES OF AN AWARD OF ATTORNEY FEES UNDER I.C. § 7-610.

1. Judy Was Not a Prevailing Party Due to Dennis' Dismissal Without Prejudice.

Under I.C. § 7-610, a prevailing party can be awarded attorney fees in the discretion of the trial court. The question here is whether Judy was in fact a "prevailing party" when Dennis had dismissed his remaining contempt claims voluntarily without prejudice prior to trial.

The term "prevailing party" is addressed in I.R.C.P. 54(d)(1)(B) as follows:

> 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 magistrate concluded that Judy was the prevailing party under I.C. § 7-610, even though Count Five of the motion for contempt had been dismissed *sua sponte* by the court, with

a finding that neither party prevailed, and when the remaining four counts had been voluntarily dismissed without prejudice by Dennis prior to the contempt trial. The district court affirmed this decision.

In his appeal to the district court, Dennis argued that because there was no final judgment or decision on the merits, an award of attorney fees and costs was improper, citing Justice Eismann's concurring opinion in *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

In *Straub*, the parties had reached a stipulated dismissal with prejudice. The dismissal was silent as to the issue of attorney fees. The defendant sought attorney fees as the prevailing party, and the district court denied such an award. *Id.* at 67-68. This Court reversed and remanded, finding that the defendants did not waive their right to seek attorney fees as the prevailing party under I.C. § 12-120(3), and that the district court had abused its discretion in denying an award. In his concurring opinion, Justice Eismann agreed with the Court's decision, but wrote specially to clarify that the dismissal with prejudice could not have waived the defendant's ability to seek an award of attorney fees, but was instead a prerequisite to such an award. Justice Eismann stated:

> 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). Accord, *Gibson v. Ada County Sheriff's Dept.*, 139 Idaho 5, 9, 72 P.3d 845, 849 (2003) ("The ACSD has not prevailed on the merits in this matter...

As a result, the matter is dismissed without prejudice and the ACSD is not a prevailing party entitled to attorney fees on appeal.").

The magistrate here disregarded *Straub*, stating,

> There's no question in my mind that Ms. Charney is the sole prevailing party in this matter. I understand the argument Mr. Shoufler is made – making, based on miss – Justice Eismann's concurring decision, but that just simply can't be the law.

Tr. Vol. 1, p. 75, LL. 6-8. While there is no Idaho Supreme Court or Court of Appeals authority specifically stating that a voluntary dismissal without prejudice does not confer prevailing party status to the defendant, numerous cases in addition to *Straub* adhere to the same result.

The decision in *Straub* was filed in November 2007. Earlier in 2007, this Court had reached the opposite result as that in *Straub*, in analyzing whether fees were appropriate under the prevailing party analysis for I.C.§ 12-121. In *Puckett v. Verska*, 144 Idaho 161, 158 P.3d 937 (2007), a medical malpractice plaintiff had voluntarily dismissed one of her claims without prejudice on the second day of the trial. A mistrial was declared on the remaining claims due to the jury's inability to reach a verdict. After the mistrial, the district court denied the defendant's claim for an award of attorney fees and costs, stating that the defendant was not yet a prevailing party. *Id.* at 165.

At the second trial, the plaintiff prevailed and the district court awarded her claimed discretionary costs. Among other issues, Defendant appealed this award, and also appealed the district court's refusal to award his costs and fees to defend against the dismissed claim after the first trial. This Court upheld the district court's determination that neither party had prevailed

after the first trial because no final judgment had been entered and the plaintiff was still free to pursue the previously dismissed claim. *Id.* at 170.

The difference in results between *Straub* and *Puckett*, which decisions were made less than a year apart, turned solely on whether the voluntary dismissal had been made with or without prejudice. In *Straub*, the stipulated dismissal was *with* prejudice, and the district court's refusal to award fees was reversed. In *Puckett*, the dismissal had been made *without* prejudice, and the district court's refusal to award fees was deemed proper. In both *Straub* and *Puckett*, the dismissals were silent as to an award of attorney fees.

The contrast between *Straub* and *Puckett* was carefully analyzed in the U.S. District Court of Idaho case of *Kugler v. Bohus*, 2009 U.S. Dist. LEXIS 84190 (Sept. 15, 2009). In that case, a *pro se* plaintiff dismissed his complaint based upon a stipulation with the defendant pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii)[3]. The stipulation was silent as to whether the dismissal was with or without prejudice. *Id.* at *4-5. Due to a snafu in the court, the stipulation was initially treated as a motion, and the case dismissed with prejudice under F.R.C.P. 41(a)(2) rather than as a stipulated dismissal pursuant to F.R.C.P. 41(a)(1)(A)(ii). *Id.* at *7. Addressing this error first, the district court indicated that indeed the case had been dismissed pursuant to F.R.C.P. 41(a)(1)(A)(ii), and because the stipulation was silent as to the issue of prejudice, the dismissal was without prejudice. *Id.* at *7-9.

[3] Federal Rule of Civil Procedure 41 is nearly identical to Idaho Rule of Civil Procedure 41.

Next, in addressing the defendant's request for attorney fees,[4] the district court discussed the facts in *Straub* and *Puckett* in detail, and found the distinction between a dismissal with prejudice and without prejudice to be "crucial" in determining whether an award of attorney fees could be made. *Id.* at *12-14. Therefore, because the dismissal in *Kugler* had been without prejudice, and the stipulation did not address an award of fees, the defendant was not entitled to attorney fees as the "prevailing party." *Id.* at *15. The district court indicated that because no final judgment was entered and there was no final adjudication of the claims, the defendant was not a "prevailing party" entitled to attorney fees under I.C. § 12-121. *Id.*

This Court has also recently upheld a district court's denial of attorney fees based upon a prevailing party analysis under I.C. § 12-120(3), after the plaintiffs had been granted a new trial, stating:

> We hold that the district court correctly held that any determination as to a prevailing party is premature until the [plaintiffs'] claim of breach of the implied warranty of habitability is resolved.

Goodspeed v. Shippen, 154 Idaho 866, 873, 303 P.3d 225 (2013) (internal citations omitted). This decision is consistent with *Straub, Puckett*, and *Kugler*, and reiterates the necessity for a final judgment of some sort, or a decision on the merits, prior to an award of attorney fees based on a prevailing party determination.

Recent cases from other federal and state jurisdictions have also applied a similar analysis as that in *Straub*, *Puckett*, and *Kugler*. For instance, even though the defendant had

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[4] The federal district court was sitting in diversity in *Kugler*, and applied the law of the forum state, Idaho, regarding the award of attorney fees. *Id.* at *10.

been successful in obtaining a dismissal without prejudice of the plaintiff's claim due to plaintiff's failure to comply with a mandatory mediation provision, a court held that defendant was not a prevailing party under the North Carolina statutes, and therefore not entitled to attorney fees. This was true because the court "did not determine a claim or issue in the case." *Hometown Servs. v. EquityLock Solutions, Inc.*, 2014 U.S. Dist. LEXIS 148613, **5-7 (W.D.N.C. October 20, 2014).

In *Sparks Pita Store #1, LLC v. Pita Pit, Inc.*, 2010 U.S. Dist. LEXIS 6720 (U.S. Dist. Ct. D. Nev. January 14, 2010), the Nevada federal district court was faced with an attorney fees request by defendants who had prevailed in their motion to dismiss due to improper venue. The court found that the laws of both Idaho and New York governed such an award. The court found that under neither Idaho nor New York statutes could the defendants be considered prevailing parties, because the dismissal was without prejudice. *Id.* at *7-8. In construing Idaho law, the court specifically cited the concurring opinion in *Straub* for the proposition that "[g]enerally, there is no prevailing party unless the merits of the lawsuit have been decided and there is a final judgment." *Id., citing Straub*, 145 Idaho at 72, 175 P.3d at 761. The court found that "[t]here has been no final judgment or final adjudication of Plaintiffs' claims," and thus no prevailing party. *Id.*

In *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (Wash. 2009), the court also determined that a voluntary dismissal without prejudice is not a final judgment. *Id.* at 492. The court stated:

> No substantive issues are resolved, and the plaintiff may refile the suit. Because a voluntary dismissal is not a final judgment rendered in favor of the defendant, the Court of Appeals correctly concluded that [defendant] cannot be considered a prevailing party under [the Washington statute].

Id. Therefore, the defendant was not entitled to an award of attorney fees. *Id.*

Cases from the Ninth Circuit have made a similar distinction in analogous situations. For instance, in *Oscar v. Alaska Dept. of Education*, the Ninth Circuit Court decided that a dismissal without prejudice did not confer prevailing party status upon the defendant in an Individuals With Disabilities Education Act case, for two reasons: (1) a dismissal without prejudice does not constitute a judgment on the merits; and (2) a dismissal without prejudice does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing. *Oscar,* 541 F.3d 978, 981-982 (9th Cir. 2008) (citing *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.,* 532 U.S. 598, 600, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) ("prevailing party status requires that a party 'received a judgment on the merits, or obtained a court-ordered consent decree.'")). Similarly, in *Cadkin v. Loose*, 569 F.3d 1142 (9th Cir. 2009), the Ninth Circuit followed *Buckhannon* and held that a voluntary dismissal without prejudice does not confer prevailing party status for a claim brought under the Copyright Act. *Id.* at 1150.

Based on the above analysis, the magistrate erred in determining that a voluntary dismissal without prejudice conferred prevailing party status on Judy for purposes of an award of attorney fees under I.C. § 7-610.

2. The Magistrate Wrongly Determined that Dennis' Claims Were Barred by the Statute of Limitations.

As stated above, the determination of the prevailing party is a matter left to the discretion of the trial court. However, that discretion cannot be based upon a misperception and misapplication of the law. As stated above, the magistrate incorrectly determined that the voluntary dismissal without prejudice conferred prevailing party status on Judy. However, the magistrate also incorrectly concluded that a statute of limitations would prevent Dennis from bringing the contempt claims again.

> When a case is concluded, and the conclusion is that – that every part of the case is dismissed as to the plaintiff, the plaintiff is clearly a – a prevailing party. And while it's without dis – without prejudice in fact Mr. Charney could not bring these motions again because all of them involve allegations of criminal contempt that took place more than a year ago. So, the statute of limitation would prevent him from refiling them, if nothing else.
>
> So it is, in my view, a final conclusion of the dispute as to these contempt matters, and Ms. Charney is the only party who win [sic]. Mr. Charney didn't win a single part of a single one of his contempt motions. Ms. Charney is the prevailing party.

Tr. Vol 1, p. 75, LL. 22.

But there was no final judgment. Aside from the mischaracterization of the contempt proceeding as criminal rather than civil, which is discussed in Section B below, the voluntary dismissal was without prejudice, and Dennis could have refiled Counts 1 through 4 for civil contempt sanctions at a later time. *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).

This error stands out, because there is nothing in the record that would give the court the basis to make this determination, other than the court's own conclusory statements. And while it is true that Dennis did not "win" on his contempt motion, neither did Judy, because there was no final determination on the merits or a dismissal with prejudice. Indeed, at the hearing on Judy's motion for attorney fees, the magistrate indicated that some of Dennis' claims might have had merit, Judy's behavior had not been "laudable," and Judy may have ultimately been found in contempt. Tr. Vol. 1, pp. 77-78, LL. 23-2. The magistrate also recognized that "[i]n a contempt matter, the determination of attorney's fees is always much easier if there's a trial on the merits." Tr. Vol. 1, p. 80, LL. 3-5. This is precisely why a prevailing party should not be declared following a voluntary dismissal without prejudice. However, despite the lack of a decision on the merits, the magistrate forged ahead and awarded attorney fees to Judy based on incorrect legal standards, thereby abusing his discretion.

3. If Attorney Fees Can be Awarded Upon a Dismissal Without Prejudice Under a Prevailing Party Analysis, Plaintiffs Will be Inclined to Continue to Trial Regardless of Merits or Economic Feasibility.

At the pretrial conference, the magistrate warned Dennis as follows:

> THE COURT: If – in a contempt action, it is within the Court's discretion to grant attorney's fees in favor of either party. If I were to find that Ms. Charney is not in contempt, I can certainly imagine circumstances where I would order attorney's fees in Ms. Charney's favor. On the other hand, if I find that she is in contempt, it's possible I would order attorney's fees against her, but, frankly, not likely because I've already determined that one of the counts of contempt has no – no basis, frankly – the – the Costco credit card and I've dismissed that – because what I think were absolutely unreasonable attorneys' fees were incurred in connection with a summary judgment motion. There's no authority to grant summary judgment of conviction. So, there have

been unnecessary expenses incurred in this matter for counts that, on their face, appear to be pretty thin and pretty frivolous[5].

MR. SHOUFLER: Well, the – with all due respect, Your Honor, you haven't heard the –

THE COURT: I haven't –

MR. SHOUFLER: – the conduct.

THE COURT: – heard it. I haven't heard it. I – all I've got so far is I've got affidavits.

Tr. Vol. 1, pp. 50-51, LL. 20-18.

So, without even without hearing all of the evidence on the remaining Counts One through Four, the magistrate forewarned Dennis that if he lost at trial, he would be subject to an award of attorney fees because the magistrate had essentially pre-determined that the claims were likely frivolous. At the same time, he indicated that if Judy was actually found in contempt, she would not likely receive the same fate. Dennis heeded this warning and was punished anyway.

If a litigant is going to be subject to an award of attorney fees whether he voluntarily dismisses without prejudice prior to trial or continues to trial, there would be no incentive to dismiss claims that have become economically infeasible to pursue. In this case, Dennis chose to voluntarily dismiss what he felt were meritorious claims after he received clear signals from the magistrate to the contrary. However, if a plaintiff is subjected to this catch-22, *i.e.* at risk of an attorney fees award whether heeding the magistrate's warning or not, why wouldn't the plaintiff

[5] The issue of the magistrate's erroneous conclusions regarding the motion for summary judgment are discussed in detail in Section B below.

just roll the dice? Judicial resources will thus be expended unnecessarily, because the plaintiff has virtually nothing to lose by continuing to trial. As the magistrate would say, this simply cannot be the law.

4. The District Court Abused its Discretion in Affirming the Magistrate's Decision.

In affirming the magistrate's decision to award Judy attorney fees as the prevailing party under I.C. § 7-610, the district court stated:

> The court finds that Judge Day did not abuse his discretion . . . The dismissal of the contempt motions meant that no order remained to be entered to adjudicate the claims in those motions and that the Respondent received all of the relief which was available to her.

R. Vol. 1, p. 490. The district court then cited two Idaho Supreme Court cases that have absolutely nothing to do with a prevailing party analysis,[6] and an Idaho Court of Appeals case which is an unpublished opinion, and "shall not be cited as authority."[7] R. Vol. 1, p. 491.

The district court is incorrect. First, no claims were adjudicated at all. Second, Judy did not receive "all of the relief which was available to her." She did not receive a decision on the merits, nor did she receive a dismissal with prejudice, both of which would have prevented Dennis from refiling his contempt claims. The district court simply affirmed the legal errors

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[6] *Eby v. State*, 148 Idaho 731, 734-736, 228 P.3d 998 (2010) (post-conviction case in which a Rule 40(c) dismissal for inactivity was deemed a "final order" for purposes of seeking relief under Rule 60(b)); *Castle v. Hays*, 131 Idaho 373, 373-374, 957 P.2d 351 (1998) (discussion of dismissal under Rule 4(a)(2) and whether a subsequent reinstatement was proper). The words "prevailing party" do not appear anywhere in these cases.

[7] *Wisdom v. Mallo*, 2010 WL 9590206 (Idaho Ct.App. 2010) ("Notice: THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY") (emphasis in original).

made by the magistrate. In so doing, the district court abused its discretion in affirming the magistrate's award of attorney fees, and its decision should be reversed, with instructions to the magistrate to vacate the award.

B. THE DISTRICT COURT ERRED IN FAILING TO ADDRESS, AND ALLOWING TO STAND, THE MAGISTRATE'S DETERMINATION THAT A MOTION FOR PARTIAL SUMMARY JUDGMENT WAS FRIVOLOUS AND THAT AN AWARD OF ATTORNEY FEES WAS APPROPRIATE UNDER I.C. § 12-123.

Motions for contempt are governed by Rule 75 of the Idaho Rules of Civil Procedure. Because the alleged violations of the PSA occurred outside the court's presence, this is considered a nonsummary proceeding, initiated by a motion and affidavit by the complaining party. I.R.C.P. 75(c). Either criminal or civil sanctions may imposed in a civil contempt proceeding. I.R.C.P. 75(a)(6) and (7). If a civil sanction is imposed, the contempt must be proven by a preponderance of the evidence. I.R.C.P. 75(j). If a criminal sanction is to be imposed, the contempt must be proven beyond a reasonable doubt, I.R.C.P. 75(j), and certain trial rights afforded to the alleged contemnor. I.R.C.P. 75(i). Rule 75(n) states that 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, is one such rule, and does not conflict with a contempt proceeding in which civil sanctions are sought.

In *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 55 P.3d 304 (2002), this Court adopted the U.S. Supreme Court definitions distinguishing between civil and criminal contempt proceedings, as set forth in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827, 114 S.Ct. 2552, 2557 (1994). "Under this definition, an unconditional

penalty is a criminal contempt sanction, and a conditional penalty is a civil contempt sanction." *Camp*, 137 Idaho at 863, 55 P.3d at 317. "A penalty is unconditional if the contemnor cannot avoid any sanction by complying with the court order violated." *Id.* Additionally, in order for criminal sanctions to be imposed, the alleged contemnor must be afforded certain constitution protections such as the requirement that the contempt be proven beyond a reasonable doubt, the right to call witnesses, etc. On the other hand, if civil contempt sanctions will be imposed, the alleged contemnor need only be afforded notice and an opportunity to heard. *Id.* at 861 (numerous internal citations omitted).

1. The Magistrate Incorrectly Characterized Counts One and Five as Claims for Criminal Contempt Sanctions.

Prior to the contempt trial, Dennis had filed a motion for partial summary judgment regarding Counts One (non-payment of JB Landscaping bill) and Five (improper use of Costco rebate check) of his amended motion for contempt. The magistrate incorrectly characterized Counts One and Five as criminal contempt claims, and found that summary judgment in that context was therefore improper. He then awarded attorney fees to Judy on the basis of I.C. § 12-123 due to Dennis' "frivolous" motion for summary judgment.

This issue is directly controlled by the Court's recent decision in *Steiner v. Gilbert*, 144 Idaho 240, 159 P.3d 877 (2007), which is based upon quite similar facts to the case at bar. The *Steiner* case began in 1994, and resulted in a stipulated judgment between the parties entered in 1995, which granted an easement across certain property. In 2005, a contempt proceeding was

brought upon allegations that the easement had been blocked by Steiner. By the time of the hearing, however, Steiner had removed all obstructions from the road. *Id.* at 243.

In *Steiner*, the order to show cause stated that the alleged contemnor was subject to "'any and all punishments allowable by law..., including but not limited to five days in the Owyhee County Jail and a fine not exceeding $5,000.00 or both.'" *Id.* at 246. However, the district court treated the claim of contempt as a civil contempt proceeding, and simply imposed an injunction against the contemnor, forever enjoining him from interfering with the use of the road. *Id.*

The contemnor appealed, contending that the district court failed to apply the correct burden of proof, and that the court should have required the complaining party to prove the contempt beyond a reasonable doubt. This Court upheld the decision to treat the contempt as civil, and to impose an injunction, stating:

> While the relief requested in the order to show cause in this case was for "punishment," including a fine and jail time, that was not the sanction imposed. The district court characterized the contempt action as civil in nature, explaining that the contemnor (Steiner) "should be given the opportunity to purge himself of the contempt by complying with the Stipulated Judgment ...." Again, the real question in determining whether the contempt is criminal or civil in nature is not what the parties label it, but rather, what form of relief is actually sought and imposed.

Id. Therefore, as a civil contempt, neither a jury trial nor proof beyond a reasonable doubt were required. *Id.* at 247.

The Court went on to state:

> This Court has held that § 7-611 (which addresses permissible sanctions to compel compliance) "does not preclude alternative civil sanctions under the common law or I.C. § 1-1603." Idaho Code § 1-1603(4) provides: "Every court has the power...[t]o compel obedience to its judgments, orders and process...." This Court has recognized that I.C. § 1-1603 "does not attempt to delimit the power recognized therein." Therefore, a court

> does not abuse its discretion by merely imposing reasonable sanctions that are not specifically articulated in Title 7, Chapter 6. This does not give courts unfettered authority to impose unreasonable and inappropriate sanctions; however, the focus of civil contempt is to ensure that orders are complied with and an injunction imposed for this purpose should be upheld.

Id. (quoting *Marks v. Vehlow*, 105 Idaho 560, 567, 671 P.2d 473, 480 (1983); I.C. § 7-611.

In language very similar to that in *Steiner*, the amended motion for contempt here set forth the maximum possible penalties under I.C. § 7-610, as $5,000.00 or five days in jail for each count, in a section entitled "Penalty." R. Vol. 1, p. 79. In the section entitled "Prayer for Relief," Dennis simply prayed "[t]hat Plaintiff be held in contempt" on each of the five counts, but without distinguishing as to whether a civil or criminal sanction should be imposed. R. Vol. 1, pp. 79-80. However, the magistrate treated the "Penalty" section as dispositive and ignored his own authority to actually determine whether a contempt action is criminal or civil in nature, governed by which sanction was imposed. This is contrary to *Steiner*.

a. Count Five.

Dennis' counsel indicated at the hearing multiple times that a civil sanction, that of a civil injunction, was being sought for Count Five of the amended motion for contempt. However, the magistrate continued to indicate that he was bound by the possible penalties set forth in the amended motion for contempt and was constrained to characterize the contempt as criminal rather than civil.

> THE COURT: Okay. So, as to Count 5, how can that be civil contempt? For civil contempt, the party has to have the ability – present ability to comply with the order. How are you alleging that there was a – a – a failure to comply with the order and a present ability to comply?

MR. SHOUFLER: Well, the failure to comply was the misappropriation. I – I believe this – it is within this Court's power, and I submit to you that you have the power, to just issue an injunctive relief to have her not do that again. That – that is the –

THE COURT: I disagree.

MR. SHOUFLER: Okay.

THE COURT: I don't have the power to do that as a civil contempt remedy. You can certainly bring an action for an injunction, and – and that has a completely separate burden of proof, and I think it would ordinarily be brought in a separate action.

But if you're asking the Court to find contempt, I can find either criminal contempt or civil contempt. And for civil contempt, I have to find that there was a – I have to find, by a preponderance of the evidence, *that there was a willful violation* of the Court's order and that the party has – continues to have the ability to comply with the order. And I can then enter sanctions forcing compliance with the order. . .

Okay. So – so, in – in my view, it cannot be a civil contempt as to Count 5; it can only be a criminal contempt since it's not something on which I can order compliance.

Tr. Vol. I, pp. 5-7, LL. 21-3 (emphasis added).

The magistrate applied two incorrect legal standards in his assessment of the nature of Count Five. First, the magistrate completely disregarded the ability to impose a civil injunction as was done in *Steiner*, a case which was cited in Dennis' Reply to Plaintiff's Opposition to Defendant's Memorandum in Support of Partial Summary Judgment. R. Vol. 1, pp. 222, 225-226. Second, he stated an incorrect standard for the imposition of civil sanctions. "The failure to comply with a court order need not be intentional or willful to impose a civil sanction." *Chavez v. Canyon Co.*, 152 Idaho 297, 304, 271 P.3d 695 (2012) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 695 S.Ct. 497 (1949)); I.R.C.P. 75(c)(3).

Dennis' counsel reiterated at least two more times at the hearing that civil sanctions were being sought for Count Five, to no avail. Tr. Vol. 1, p. 9, LL8-9 ("We're not asking for criminal penalties."); Tr. Vol. 1, p. 12, LL. 15-16 ("With respect to Count 5, I would ask the Court to issue injunctive relief.").

In continuing to characterize Count Five as criminal contempt, the court focused on the fact that Judy could not undo her actions in improperly using the Costco rebate check as alleged in Count Five. However, Steiner could not "unring" the bell and unblock the road, either, but the district court there did not impose a criminal sanction upon him and elected to simply enjoin him from similar conduct in the future. Similarly, the magistrate had the authority to impose a civil injunction upon Judy requiring her to comply with the PSA in the future. Instead, the magistrate disregarded *Steiner*, erred in his legal characterization of the contempt, discounted his authority to determine whether the contempt was civil or criminal, and applied the wrong legal standard to the analysis.

Oddly enough, even though the magistrate found that filing a motion for summary judgment in the context of a "criminal" contempt proceeding was frivolous, the magistrate utilized the summary judgment hearing to *sua sponte* dismiss Count Five. Order, Jan. 23, 2013, R. Vol. 1, pp. 400-401, (also contained in the supplemental record pursuant to the Court's Order augmenting the record, dated Oct. 1, 2014). In so doing, the magistrate found that Judy's

conduct as alleged in Count Five was improper, however, because Dennis was not actually harmed by the conduct, the court was dismissing this count as "*de minimis*."[8]

b. Count One.

Even after being told that the JB Landscaping bill remained unpaid and that the civil sanction sought was for Judy to be ordered to pay it, the magistrate continued to characterize Count One as a criminal contempt.

> 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.

* * *

> THE COURT: . . ."That leaves Count 1. Even if it could be construed as a civil contempt, which it can't. . . ."

Tr. Vol. 1, p. 28, LL. 4-5.

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[8] Dennis is not directly appealing the magistrate's *sua sponte* decision to dismiss Count 5, but addresses this issue to demonstrate the multiple legal errors upon which the magistrate based his determination to award fees under I.C. § 12-123. The magistrate essentially employed a "no harm, no foul" standard that appears nowhere in the statutes or rules governing contempt proceedings.

Importantly, as to Count One, this was clearly a request for a civil contempt sanction. The court certainly had the power to impose a civil sanction, requiring Judy to pay the landscaping bill, and could have even imposed a daily fine as a civil penalty until she complied. *Marks*, 105 Idaho at 567. Judy never indicated she had the "present inability to comply" with the PSA in this regard, only that she disagreed with the assessment that she was required to pay it. *Camp*, 137 Idaho at 865, 55 P.3d at 319; I.R.C.P. 75(h)(1). Given the most logical sanction for Count One, *i.e.* requiring payment of the unpaid bill, it is perplexing that the magistrate would have mischaracterized this count in particular as one for criminal contempt.

2. A Motion for Partial Summary Judgment is Not Improper in the Context of Civil Contempt Proceedings.

The magistrate's incorrect determination that a summary judgment was inappropriate in this case was clearly based upon his mischaracterization of Counts One and Five as criminal counts of contempt.

> THE COURT: – my position – it is my position that the Court cannot grant summary judgment of conviction on a criminal contempt –

Tr. Vol. 1, p. 18, LL. 21-23.

* * *

> THE COURT: So, if it is a criminal contempt, it – it is my position, as a matter of law, summary judgment of conviction cannot be granted.

Tr. Vol. 1, p. 19, LL. 6-8.

* * *

> THE COURT: To – to start with, it is clear to me that the Amended Motion for Contempt is a motion solely for criminal contempt. While the prayer itself is ambiguous,

> the paragraph that says penalty is not ambiguous. The only penalty requested is criminal penalty. It is purely a criminal contempt and it – for the reasons I already stated, I think it's inappropriate to grant summary judgment of conviction in a criminal contempt.
>
> So for that reason, I would deny the Motion for Partial Summary Judgment.

Tr. Vol. 1, p. 25, LL. 8-17. The court utterly disregarded *Steiner*, ignored repeated assertions in the record and at the summary judgment hearing that only civil sanctions were being sought, and instead based his decision solely upon a label entitled "Penalty" in Dennis' amended motion for contempt. The magistrate abused his discretion.

After Dennis dismissed the remaining four counts of contempt without prejudice, Judy moved for an award of attorney fees under I.C. §§ 12-121[9], 7-610 (discussed above), and 12-123. Regarding attorney fees under § 12-123, the magistrate stated at the hearing:

> As to 12-123, I cannot see any good faith basis for a motion for partial summary [sic] in a criminal contempt matter. I've mulled this over in my mind, I've looked into it, I – I recognize that this is something that has been discussed in some cases from other jurisdiction [sic]. But the fact is, the burden of proof in a criminal contempt is proof beyond a reasonable doubt. And the criminal – the alleged contemnor has the right to confront and cross-examine witnesses, and – and the right to a trial, and a summary judgment takes away all of those rights. . . I find that the motion for partial summary judgment fits 12-123(B)(II) [sic].
>
> I can't think of any logical argument for a partial summary judgment of conviction of contempt. And I think that bringing that motion, and filing all of the affidavits in support of that motion, and requiring a hearing on that needlessly added to the costs of this litigation.

Tr. Vol. 1, p. 78-79, LL. 7-7.

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[9] The magistrate declined to award attorney fees under I.C. § 12-121, stating:

> And while I strongly suspect I would not ultimately have found Ms. Charney in contempt to a criminal standard, there were acts on her part which were not laudable, and may have resulted in a colorable contempt claim.

Tr. Vol. 1, pp. 77-78, LL. 23-2.

The most logical option available to the magistrate would have been simply to take the possibility of any criminal sanctions off the table as a result of Dennis proceeding under a summary judgment motion, and apply the burden of proof appropriate for a civil sanction. Indeed, Dennis repeatedly asked that only civil sanctions be considered for Counts One and Five on summary judgment. Instead, the magistrate seemed determined to find some error in procedure by constraining the analysis to the "Penalty" section in the amended motion for contempt. In doing so, he erred by limiting his own authority to determine the nature of the contempt by the sanction imposed. He compounded this error by awarding attorney fees to Judy under I.C. § 12-123 on this basis.

3. No Idaho Statute, Rule, or Caselaw Precludes Summary Judgment in a Civil Contempt Proceeding.

Dennis has been unable to locate any statute, rule, or binding caselaw that would specifically preclude utilization of a motion for partial summary judgment in the context of a civil contempt proceeding. Moreover, the I.R.C.P. 75 would seem to specifically allow such a motion in the context of a civil contempt proceeding, given that the Rules of Civil Procedure, rather than the Rules of Criminal Procedure, govern, and where specific distinctions and protections are made for criminal versus civil contempts.

Additionally, while there are no published opinions in Idaho specifically addressing whether summary judgment is appropriate in a motion for contempt proceeding, courts in other jurisdictions have allowed parties to utilize motions for summary judgment in civil contempt proceedings. For example, in *Wilkinson v. Wilkinson*, 2013 Tenn. App. LEXIS 107, *5-6

(Ct.App. 2013), after a divorce, the ex-wife filed a motion for contempt against her ex-husband for failure to pay alimony. In that contempt proceeding, the ex-wife filed a motion for partial summary judgment. *Id.* In *Stonehedge Farm Condo. Trust v. Am. Stonehedge, Inc.*, 12 LCR 481, *6 (Mass. Land Ct. 2004), the court specifically stated, "[s]ummary judgment is an available means of disposing of an action for civil contempt." And in *Beugnot v. Coweta Co.*, 231 Ga.App. 715, 718, 723 (Ct.App. 1998), the plaintiff brought a motion for partial summary judgment on tortious interference with business relations and civil contempt claims. *See also Deliddo v. Matvieshen,* 2012 U.S. Dist. LEXIS 163849 *23 (E.D. Cal. 2012) (if "the affidavits offered in support of a finding of contempt are uncontroverted, we have held that a district court's decision not to hold a full-blown evidentiary hearing does not violate due process") (quoting *Peterson v. Highland Music,* 140 F.3d 1313, 1324 (9th Cir. 1998)); and *Scruggs v. Vance,* 2012 U.S. Dist. LEXIS 15625, *5-6 (E.D. Cal. 2012) ("[w]ithout an issue of material fact, the district court is only required to give notice and an opportunity to be heard") (quoting *U.S. v. Ayres,* 166 F.3d 991, 996 *(9th Cir. 1999)).*

There does not appear to be any legal impediment to filing a motion for partial summary judgment in the context of contempt proceedings in which civil sanctions are sought. However, after mischaracterizing the nature of the contempt sanctions sought, the magistrate determined as a matter of law that a summary judgment motion was improper. Therefore, the magistrate's award of attorney fees under I.C. § 12-123, which was solely based on the filing of a "frivolous" motion for summary judgment, was based on errors of law, which caused an abuse of discretion.

4. Given the Unusual Procedural Posture Below, the Magistrate's Decision Should be Directly Reviewed by this Court.

The district court did not review the decision of the magistrate to award attorney fees under I.C. § 12-123 based on the filing of the motion for partial summary judgment. In its Memorandum Decision and Order of April 14, 2014, the district court stated:

> The court finds that since Judge Day did not abuse his discretion in awarding the Respondent attorney fees as the prevailing party, pursuant to I.C. § 7-610, and since the motion for partial summary judgment was part of the litigation related to the contempt motions filed by the Appellant, it is not necessary to address this argument.

R. Vol. 1, p. 492. Ordinarily this Court would not review the magistrate's decision directly, per *Losser*. However, the district court failed to address this issue and therefore caused the magistrate's decision to stand, leaving this Court without a district court appellate decision to review.

In *Pelayo,* both parties had incorrectly asked this Court to directly review the decisions of the magistrate. This Court stated:

> This presents a potential problem because under *Losser* we are procedurally bound to focus our review on the decision of the district court. However, since the issues raised on appeal are primarily based on factual determinations made by the magistrate court and because under *Losser* we still review the magistrate record to determine whether substantial, competent evidence supports the challenged factual determinations of the magistrate, we will proceed to consider the appeal. Litigants who fail to properly comprehend the standard of review for an appeal from the district court should not assume that this will always be the case.

Pelayo, 154 Idaho at 859. The question then becomes, if the district judge has declined to review the magistrate's decision to award attorney fees to Judy pursuant to I.C. § 12-123 because he deemed it not necessary given his affirmance of the award of fees under I.C. § 7-610, what

decision is Dennis asking this Court to review? This presents a bit of a conundrum, and one which the post-*Losser* caselaw does not seem to address.

At any rate, given that there is no district court decision to review on the I.C. § 12-123 attorney fee issue, Dennis has no choice but to request that this Court directly review the magistrate's decision in this regard. The magistrate disregarded controlling caselaw and applied the wrong legal standard in determining that contempt Counts One and Five were both criminal in nature, and that a motion for partial summary judgment was therefore improper. In so doing, the magistrate abused his discretion in awarding attorney fees to Judy based a "frivolous" motion for summary judgment pursuant to I.C. § 12-123. This Court should reverse the magistrate's order of attorney fees.

C. THE DISTRICT COURT ERRED IN AWARDING JUDY ATTORNEY FEES ON APPEAL UNDER I.C. § 7-610

1. The District Court's Award of Attorney Fees Based on Affirming the Magistrate's Prevailing Party Determination Should be Reversed.

Pursuant to I.C. § 7-610, "the court in its discretion may award attorney's fees and costs to the prevailing party." Judy was awarded attorney fees on appeal by the district court under I.C. § 7-610 after the district court affirmed the magistrate's award of attorney fees at the trial level under the same statute. However, as explained above, Dennis contends that the district court erred in affirming the magistrate, because the magistrate abused its discretion in finding Judy a prevailing party after a voluntary dismissal without prejudice. If this Court agrees and reverses the district court's decision, Judy would no longer be the prevailing party and the district court's award of attorney fees must be vacated. *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).

2. Judy Did Not Comply with I.A.R. 41 and 35.

Even if the district court's decision to affirm the magistrate's award of fees under I.C. § 7-610 is upheld by this Court, the district court's decision to award fees on appeal should be reversed because Judy failed to comply with the Idaho Appellate Rules.

After having correctly found that Ms. Charney failed to comply with I.A.R. 35(b)(5) by failing to cite I.C. § 7-610 as a basis for her attorney fees request in her Respondent's Brief, the district court nevertheless awarded attorney fees on appeal to Judy, based on her subsequent Memorandum and Affidavit of Attorneys Fees and Costs. In its June 11, 2014 Order, the district court cited *Beco Construction Co. v. J-U-B Engineers Inc.*, 145 Idaho 719, 725-26 (2008), for the proposition that an award of fees on a statutory basis that was not cited in the prevailing party's original motion for attorney fees, but was cited in a later memorandum of fees and costs, was sufficient to support an award on that previously uncited basis. However, *Beco Construction* is easily distinguishable, as it does not even discuss attorney fees on appeal. The issue here is not one of notice at the trial level, as it was in *Beco Construction*, but one of proper appellate procedure, as required by the Idaho Appellate Rules. *Beco Construction* was simply an award of fees by the trial court, not a request for fees on appeal, and it does not lend support for the magistrate's decision.

Idaho Appellate Rule 41 requires a party seeking an award of attorney fees on appeal to make that request in their first appellate brief: "Any party seeking attorney fees on appeal must

assert such 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) . . . ." I.A.R. 41. As the respondent, Judy's first appellate brief was her Respondent's Brief. I.A.R. 35(b). 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.*" I.A.R. 35(b)(5) (emphasis added). Rules 83(u) and 83(v) of the Idaho Rules of Civil Procedure make the Idaho Appellate Rules applicable to appeals of decisions from the magistrate's division of the district court.[10] Pursuant to I.A.R. 41(c) the court shall address a claim for attorney fees in its decision.[11]

In her Respondent's Brief to the district court, Judy begins the section in her brief entitled "Respondent's Request for Attorney's Fees on Appeal," with the following statement:

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[10] Upon an appeal from the magistrate's division of the district court, not involving a trial de novo, the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court under the statutes and laws of this state, and the appellate rules of the Supreme Court. I.R.C.P. 83(u).

"Briefs shall be in the form and arrangement and filed and served within the time provided by rules for appeals to the Supreme Court unless otherwise ordered by the district court; . . . ." I.R.C.P. 83(v).

[11] The district court's first error was in failing to address Judy's request for attorney fees in its memorandum decision and order, which was silent on this issue. *Eacret v. Bonner County*, 139 Idaho 780, 788, 86 P.3d 494 (2004) (overruled on other grounds by *City of Osburn v. Randel,* 152 Idaho 906, 908 and n.3 (2012) ("The district judge erred when he did not follow I.A.R. 41(c))"; *Griffin v. Griffin*, 102 Idaho 858, 862, 642 P.2d 949, 953 (Ct.App. 1982) (citing I.R.C.P. 83(u)(1)).

> In order to be made whole, Judy requests her attorneys fees on this appeal pursuant to Rules 40 and 41, I.A.R., I.C. § 12-121, I.C. § 12-123(b)(ii) and Rule 54(e)(1), I.R.C.P., in that the appeal particularly is pursued frivolously or unreasonably or without foundation.

Despite continuing for seven more pages, Judy does not cite I.C. § 7-610 a single time *as a basis* for her claim for attorney fees *on appeal*. The only mention of I.C. § 7-610 in this section is on page 13, where she discusses the magistrate's basis for an award of attorney fees at the trial level. Merely quoting the magistrate regarding his rationale for awarding attorney fees under I.C. § 7-610 at the trial level, however, is completely distinct from providing a rationale as to why an award of attorney fees at the appellate level is appropriate.

Recall that the magistrate awarded attorney fees upon Dennis' voluntary dismissal without prejudice prior to any contempt trial, holding (improperly) that Judy was the prevailing party without a decision on the merits or a dismissal with prejudice. This is an entirely separate issue from whether the district court should award attorney fees on appeal from that decision. Judy did not request fees on appeal under I.C. § 7-610, and she certainly did not support such a request with any argument, authority, or propositions of law.

This Court has consistently been quite strict in its interpretation of I.A.R. 41 and 35. In *Bingham v. Montane Res. Assoc*,. 133 Idaho 420, 427, 987 P.2d 1035 (1999), neither party was awarded attorney fees on appeal due to their failures to comply with appellate procedure. First, the Court refused to consider respondent's request for an award of fees because he had merely asserted it in his "Issues Presented on Appeal" without supporting the request with "propositions of law, authority or argument." *Id.* Next, the appellants' request was also deemed deficient in that they had neglected to request attorney fees in their initial brief, and instead raised the issue

only in their reply brief. Because appellants failed to comply with I.A.R. 41, the Court refused to consider their request as well. *Id.* Accord *Kohring v. Robertson*, 137 Idaho 94, 44 P.3d 1149 (2002) (this Court denied fees to the prevailing party because the requirements of I.A.R. 41(a), 35(a)(5), and 35(b)(5) were not followed) (citing *Bingham*, 133 Idaho at 427, 987 P.2d at 1042).

A similar result was reached in *Sheridan v. Jambura*, 135 Idaho 787, 792, 25 P.3d 100, 105 (2001). In *Sheridan*, the prevailing respondents' request for attorney fees consisted of two conclusory sentences that were not supported by propositions of law, authority, or argument. The Court stated it "will not consider issues cited on appeal that are not supported by propositions of law, authority, or argument." *Id.* (citations omitted). Accord *Liponis v. Bach*, 149 Idaho 372, 374, 234 P.3d 696, 698 (2010) ("If an issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court.").

Continuing this trend, in the more recent case of *Elliott v. Verska*, 152 Idaho 280, 291, 271 P. 3d 678 (2012), the Court once again indicated it would not consider the appellant's request for attorney fees because she did not make the request in her first appellate brief. *Id.* at 291 (citing *Bingham* 133 Idaho at 427, 987 P.2d at 1042).

Similarly, this Court, in *Bald, Fat & Ugly, LLC v. Keane*, 154 Idaho 807, 812, 303 P.3d 166 (2013), denied attorney fees on appeal to the prevailing party when the incorrect statute was cited. In that case, the parties had both cited I.C. § 12-120(3) as the basis for an award of attorney fees, however, since it was an appeal from a judgment of contempt, the proper basis was under I.C. § 7-610. *Id.* Finally, in a very recent case, the appellant was not entitled to an award

of attorney fees under I.C. § 7-610 because she failed to provide any argument or support for her claim. *Carr v. Pridgen*, -- Idaho --, 335 P.3d 585 (2014).

From this line of cases, the following propositions can be gleaned: 1) if attorney fees are not requested in the first appellate brief, the appellate court should not even consider the request; 2) if attorney fees are requested in a subsequent brief, *i.e.* a reply brief, they should not be granted; 3) if the wrong statute is cited, the appellate court should not grant attorney fees; and 4) if the request for attorney fees is not supported by statutes, law, authority, or argument, the request should be denied.

In this case, while Ms. Charney certainly briefed the issue of attorney fees under I.C. §§ 12-123 and 12-121 in her Respondent's Brief, under both of which statutes fees were denied, she did not preserve a request for fees pursuant to I.C. § 7-610, and should not have been allowed to belatedly seek such fees under this statute. Similar to the appellants in *Bingham*, Judy failed to cite I.C. § 7-610 in her first appellate brief *as a basis for attorney fees on appeal*, thus failing to comply with I.A.R. 41(a), 35(a)(5), and 35(b)(5). Judy only belatedly sought attorney fees under I.C. § 7-610 in her subsequent Memorandum and Affidavit of Attorneys Fees and Costs. The appellants in *Bingham* were not permitted to request attorney fees for the first time in their reply brief, and Judy should not be allowed to request them in a later Memorandum.

Secondly, just like in *Bald, Fat, & Ugly*, Judy requested fees under the wrong statutes and rules in the attorney fees section of her Respondent's Brief (*i.e.* I.C. § 12-123, which does not apply on appeal; I.R.C.P. 54(e), which does not apply on appeal; I.A.R. 40, which governs taxation of costs on appeal, not attorney fees; and I.A.R. 41, which governs the procedure for

claiming attorney fees on appeal, but does not provide a basis for attorney fees on appeal). The only basis under which she claimed attorney fees that actually applies on appeal was I.C. § 12-121, which claim was denied by the district court because not all of Dennis' claims were frivolous. R. 526-527. This was the correct decision, given that the issue of whether a defendant who had been voluntarily dismissed without prejudice could be deemed a prevailing party under I.C. § 7-610 has not been conclusively determined in Idaho.

Finally, as did the respondents in *Sheridan* and *Liponis*, Judy failed to support her so-called request for attorney fees under I.C. § 7-610 (*i.e.* one cursory sentence in her conclusion and nothing in her section on attorney fees) with propositions of law, authority, or argument. Judy should not have gotten a second bite of the apple when she did not follow the correct procedure originally. Her request for attorney fees pursuant to I.C. § 7-610 should have been denied and she should not have been able to file a subsequent motion for attorney fees. The district court's award of attorney fees pursuant to I.C. § 7-610 should be reversed as an abuse of discretion.

D. THE DISTRICT COURT ERRED IN DENYING DENNIS' MOTION FOR RECONSIDERATION REGARDING THE AWARD OF ATTORNEY FEES UNDER I.C. § 7-610.

1. Standard of Review.

When presented with a motion to reconsider, the same standard of review must be applied as was applicable to the underlying order under reconsideration. *Fragnella v. Petrovich*,

153 Idaho 266, 276, 281 P.3d 103, 113 (2012). Here, the underlying order awarding attorney fees is reviewed under an abuse of discretion standard.[12] *Crump v. Bromley*, 148 Idaho at 173.

The denial of a motion to alter or amend is also reviewed under an abuse of discretion standard. *Reed v. Reed*, 137 Idaho 53, 61, 44 P.3d 108, 1116 (2002).

2. The District Court's Summary Dismissal of Dennis' Motion was an Abuse of Discretion.

Judge Michael McLaughlin was originally assigned as the appellate judge for this case. After Judge McLaughlin entered his June 4, 2014, Order Re: Attorney Fees on Appeal, Judy filed a Motion to Supplement and Amend Order, to which Dennis objected. In conjunction with his Objection, Dennis also filed a Motion for Reconsideration.

At some point after the June 11, 2014, Order was filed and both motions were pending, Judge Gerald F. Schroeder was evidently assigned to this case.[13] At hearing on September 3, 2014, Judge Schroeder heard both parties' argument, and issued his Order Denying Motions on September 4, 2014. In the Order, Judge Schroeder summarily denied both motions, and as to Dennis' motion, stated:

> The motion for reconsideration filed by the Defendant/Appellant requests that the Court change the opinion and order made by the prior judge. Again, the issue raised is preserved for appeal to the Supreme Court and the Court declines to reconsider the prior decision.

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[12] Dennis' Motion for Reconsideration would probably have been better characterized as a motion to alter or amend judgment pursuant to I.R.C.P. 59(e), rather than a motion for reconsideration; however, the time periods for filing a motion for reconsideration under I.R.C.P. 11(a)(2) are the same, as are the standards of review on appeal.

[13] At hearing, upon inquiry by Judy's counsel, Judge Schroeder indicated that Judge McLaughlin is no longer handling any appellate matters. Tr. Sept. 3, 2014, p. 9, LL. 14-22.

Order Denying Motions, Sept. 4, 2014, p. 2 (contained in the supplemental record pursuant to the Court's Order augmenting the record, dated Oct. 1, 2014).

Without completely restating the same reasons cited above in Section C, the district court should have reconsidered or altered or amended its decision awarding attorney fees on appeal to Judy. The district court correctly acknowledged that Judy failed to comply with I.A.R. 41 and 35(b)(5) by neglecting to cite I.C. § 7-610 as a basis for an award of attorney fees in her Respondent's brief. *Beco Construction* is easily distinguishable and was an improper basis to allow Judy to make an after-the-fact request for attorney fees.

Therefore, the district court's decision denying Dennis' motion should be reversed as an abuse of discretion, because Judge Schroeder declined to actually consider the motion, electing instead to simply ensure that the underlying issue of Judge McLaughlin's order granting attorney fees to Judy was preserved for appeal. Therefore, as with the underlying order awarding attorney fees to Judy on the basis of I.C. § 7-610, this Court should reverse Judge Schroeder's September 4, 2014, Order Denying Motions.

E. DENNIS IS ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL PURSUANT TO I.C. §7-610.

Idaho Code § 7-610 allows a court to make a discretionary award of attorney fees to the prevailing party in a contempt proceeding. This statute is applicable on appeal. *State Dept. of Health and Welfare v. Slane*, 155 Idaho 274, 279, 311 P.3d 286 (2013); *Carr*, 335 P.3d at 585.

In this case, genuine questions of law exist which have not previously been determined by this Court, such as whether a defendant can be deemed a prevailing party for purposes of an

award of attorney fees under I.C. § 7-610, and whether bringing a partial motion for summary judgment during civil contempt proceedings is frivolous, subjecting a movant to an award of attorney fees under I.C. § 12-123.

Dennis has pursued his appeals in good faith in an effort to obtain a final determination on these issues. If he prevails before this Court, he requests that this Court exercise its discretion and award his attorney fees and costs incurred in pursuing this contempt appeal, pursuant to I.C. § 7-610.

V.

CONCLUSION

The district court erred in upholding the magistrate's award of attorney fees under I.C. § 7-610, which was based on an error of law that a voluntary dismissal without prejudice could confer prevailing party status on a defendant. The district court's order affirming the magistrate's award of attorney fees under I.C. § 7-610 should be reversed with instructions to the magistrate to vacate the award of attorney fees.

The district court also erred in declining to review the magistrate's partial award of attorney fees pursuant to I.C. § 12-123, where the magistrate had erroneously characterized the contempt proceeding as criminal rather than civil, and found that bringing a summary judgment motion in the context of criminal contempt proceedings was frivolous. Because the district court did not review this decision, the magistrate's order awarding attorney fees should be reversed.

If this Court reverses the district court's affirmance of the magistrate's award of attorney fees under § 7-610, the district court's award of attorney fees on appeal to Judy must be vacated

because Judy will no longer be the prevailing party. The district court's affirmance of the magistrate's award was also an abuse of discretion because Judy failed to comply I.A.R. 41 and 35 on appeal to the district court. The district court's order awarding attorney fees on appeal pursuant to I.C. § 7-610 should be reversed.

The district court erred in failing to reconsider its June 11, 2014, Order re: Attorney Fees on Appeal. The order denying Dennis' motion for reconsideration (or to alter or amend) should be reversed.

Dennis should be awarded attorney fees under I.C. § 7-610 as the prevailing party on appeal.

RESPECTFULLY SUBMITTED this 26th day of November, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of November, 2014, 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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