3-6-2017

Nettleton v. Canyon Outdoor Media, LLC Appellant's Brief Dckt. 44416

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

ALLEN G. NETTLETON, Plaintiff – Respondent, v. Canyon Outdoor Media, LLC, an Idaho limited liability company, Defendant – Appellant.	)	Supreme Court No. 44416-2016 District Court No. CVOC-2015-14630

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada

Honorable Samuel A. Hoagland
District Judge, Presiding

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A. INTRODUCTION

This action arises out of a claim for compensation for which the Plaintiff-Respondent Allen G. Nettleton ("Nettleton") is simply not entitled to. Nettleton sought compensation relating to payments the Defendant-Appellant Canyon Outdoor Media, LLC ("Canyon Outdoor") received from its customers after Nettleton terminated his employment with Canyon Outdoor. The complaint filed by Nettleton sought compensation based on new and renewal contracts even though Nettleton knew that he was not entitled to compensation relating to renewal contracts at the time he filed the complaint. The trial court erred when it granted summary judgment in favor of Nettleton despite the following operative facts:

- Following a conversion from an independent contractor to an employee, Nettleton because dissatisfied, at least in part because of the withholding of taxes from his paycheck, and tendered his resignation to Canyon Outdoor. R. at 64, ¶9; R. at 38, p. 39, ll. 9-11.

- Nettleton received all compensation that was due at the time of his resignation from Canyon Outdoor. R. at 42, p. 62, ll. 23-25 – p. 63, ll. 1-25.

- Nettleton admitted that an entitlement to compensation after he terminated his employment with Canyon Outdoor was not part of the employment agreement between Canyon Outdoor and Nettleton. R. at 35, p. 37, ll. 10-14.

- Nettleton admitted that providing on going customer service and maintaining the relationships with customers, collectively known as "servicing the contract", was required in order to receive the variable portion of his compensation relating to payments Canyon Outdoor received on that contract. R. at 37, p. 45, ll. 16-19, R. at 30, p. 15, ll. 21-25 – p. 16, ll. 1-14., R. at 30, p. 17, ll. 5-13., R. at 37, p. 44, ll. 6-17

- Nettleton admitted that Canyon Outdoor was required to pay someone else to service the contracts he was previously responsible for after he terminated his employment with Canyon Outdoor. R. at 35, p. 37, ll. 15-25 – p. 38, ll. 1-2.

- The February 28, 2014 agreement relied on by the trial court did nothing more than reaffirm that the commission rate on new contracts was ten percent and establish an adjustable scale to determine the percentage of commission on renewal contracts. R. at 112, p. 15; R. at 33, p. 27, ll. 14-25 – p. 28, ll. 1-12.

- Nettleton did not make a claim for the fixed portion of his compensation after he terminated his employment with Canyon Outdoor because he was not performing weekly cold calls required to be entitled to that compensation component. R. at 31, p. 19, ll. 10-25 – p. 20, ll. 1-11. Yet Nettleton made a claim for the variable portion of his compensation after he terminated his employment with Canyon Outdoor even though he was not performing the customer service and relationship maintenance required to be entitled to that compensation component.

B. COURSE OF PROCEEDINGS

On August 21, 2015, Nettleton filed a Verified Complaint seeking to collect unpaid "wages" from Canyon Outdoor relating to payments Canyon Outdoor received from its customers after Nettleton terminated his employment with Canyon Outdoor. R. at 10-12. Nettleton alleged that he was entitled to damages relating to both new and renewal contracts. R. at 10, ¶6. Nettleton filed an Amended Complaint on September 14, 2015 which corrected Canyon Outdoor's name but was otherwise the same as the August 21, 2015 Verified Complaint. R. at 13-15. Canyon Outdoor filed an Answer on September 24, 2015. R. at 16-21. Canyon Outdoor filed a Motion for Summary Judgment on February 29, 2016 and Nettleton filed a Cross-Motion for Summary Judgment on March 9, 2016. R. at 22-23; R. at 86-87. A hearing was held on the motions for summary judgment on April 6, 2016 and the trial court issued its Memorandum Decision and Order Re: Cross Motions for Summary Judgment on May 18, 2016. R. at 194-210. The trial court determined that Nettleton was an independent contractor prior to February 26, 2015. R. at 201-204. During the hearing, Nettleton admitted that he was not entitled

to future income from renewal contracts. Tr., p. 31, ll. 13-18. The trial court also determined that Nettleton was entitled to commission from payments received after he terminated his employment with Canyon Outdoor on new contracts obtained prior to April 10, 2015. R. at 204-207. A Judgment was entered in favor of Nettleton on May 18, 2015. R. at 211-212.

On June 1, 2016, Canyon Outdoor submitted new evidence to the trial court and requested the trial court reconsider its Memorandum Decision and Order Re: Cross Motions for Summary Judgment. R. at 237-354. A hearing on Canyon Outdoor's motion for reconsideration was held on July 13, 2016 and the trial court refused to consider the new evidence presented by Canyon Outdoor. Tr. p. 68, ll. 2-18. The trial court also granted Nettleton's request for an award of attorney's fees and costs and denied Canyon Outdoor's request for an award of attorney's fees and costs. R. at 419-420. On July 25, 2016, a Second Amended Judgment in favor of Nettleton was entered. R. at 418. Canyon Outdoor filed its Notice of Appeal on August 10, 2016. R. at 421-436.

C. STATEMENT OF FACTS

Canyon Outdoor is in the business of selling billboard advertising in southwestern Idaho. R. at 63, ¶4. Nettleton was hired in the fall of 2013 by Canyon Outdoor as an independent contractor to sell billboard advertising. R. at 63, ¶6. When Nettleton was hired, Curtis Massood explained to him during the interview process that the position was an independent contractor position. R. at 63, ¶6. In March of 2015, Robert Hutchings ("Hutchings") began to work for Canyon Outdoor. R. at 64, ¶9. Rather being hired as an independent contractor, Hutchings

requested that he be hired as an employee. *Id.* At that time Canyon Outdoor made the determination to transition Nettleton from an independent contractor to an employee. *Id.*

Canyon Outdoor's salespersons, including Nettleton, were and are required to not only obtain new contracts and renewal contracts, but to provide ongoing customer service relating to those contracts. R. at 63, ¶5. This includes soliciting the renewal of existing contracts, acting as the point of contact for customer questions and complaints, ensuring that billboards are not blocked by trees or other obstacles, ensuring that billboards are properly lit at night, and providing other aspects of customer service and relationship maintenance. R. at 63, ¶; R. at 30, p. 15, ll. 21-25 – p. 16, ll. 1-14.

It was a term of the agreement between Canyon Outdoor and Nettleton throughout his employment with Canyon Outdoor that he was required to service the new and renewal contracts that he was responsible for to be entitled to commissions on those contracts. R. at 67 at ¶19. Nettleton acknowledged that if a salesperson was servicing an account, that the salesperson would be entitled to the commission. R. at 37, p. 45, ll. 16-19. Nettleton also acknowledged during his deposition that he was required to service contracts, not just obtain new customers. R. at 30, p. 15, ll. 21-25 – p. 16, ll. 1-14. In his deposition, Nettleton discussed exactly what he was required to do to service contracts:

21 Q. Once a new customer signed a contract, and you
22 put a billboard advertisement up.
23 A. Uh-huh.
24 Q. Did you remain in contact with that customer?
25 A. Yes.

1 Q. What did you do for that customer?

A. Making sure their advertisement is still working for them, making sure they were happy, didn't have any concerns. If there was repair issues that got brought to my attention, I would move that up the ladder so we could get service done on those -- those locations. It seemed to be timer issues, things to that nature that we would deal with, as far as changing clocks, things of that nature, as far as when they -- you know, when they would be illuminated at night, that was part of that process.
Q. And you did that on an ongoing basis throughout that term of the contract?
A. Yes.

R. at 30, p. 15, ll. 21-25 – p. 16, ll. 1-14.

Q. Did that remain an essential part of your job duties?
A. Once you got past the sales process -- we had a tendency to sell a lot of annual contracts. So a lot of the time those contracts, you wouldn't see them until their contracts were coming up for renewal next calendar year. Obviously, to try to manage a base, you would be touching base with these customers throughout the year, though.
Q. You were the one that took the calls from the new customers that you brought in?
A. There was a-- we did get some call-ins, but the majority of the new business was generated by being out in the field and generating them yourself.
Q. And once you generated that new business, were you the point of contact for the company?
A. Yes.

R. at 30, p. 17, ll. 5-13. Nettleton testified in his deposition that he serviced contracts on an ongoing, weekly basis:

Q. Were -- was there a -- essentially, a standard weekly meeting?
A. Every Monday morning, I would turn in my

prospect list as far as new potentials, calls that I had made over the week's period of time.
Q. Was there anything else that was discussed at those meetings?
A. You know, if there was something outstanding that we needed to take care of with a customer, that's when we would kind of cover those things, to kind of stage out through the week, so you could set appointments, and work around them.

R. at 37, p. 44, ll. 6-17. Nettleton also testified that after he terminated his employment with Canyon Outdoor someone else would be responsible for servicing the contracts that he previously serviced:

Q. So after you left would someone else then have been responsible for servicing the contracts that you had previously serviced?
A. The same people, Sue was still there. We still had the staff that did the maintenance on the boards, and things to that nature, yes. But as far as calling on the accounts going forward, that would have been to whoever they decided to hire.
Q. Specifically with regard to customer service to current customers, who would have been responsible for that after you left?

A. It probably would have fallen on Sue Martin's shoulders.

R. at 35, p. 37, ll. 15-25 – p. 38, ll. 1-2.

Nettleton's monthly compensation from Canyon Outdoor included a fixed component and a variable component. R. at 65, ¶12. The commission that Nettleton was entitled to was determined on a monthly basis and was based on the payments Canyon Outdoor received during that month from the new and renewal contracts Nettleton was responsible for servicing. R. at 66,

¶17. Nettleton was not entitled to receive commission on new or renewal contracts once he stopped working for Canyon Outdoor. R. at 66, ¶18; R. at 113, p. 21, ll. 13-17; No salesperson of Canyon Outdoor, including Nettleton, was ever told they would be entitled to receive commission on new or renewal contracts once they stopped working for Canyon Outdoor. R. at 66, ¶18; R. at 117, p. 36, ll. 1-10. During his deposition, Nettleton admitted that commissions following separation from employment were not offered or promised to him by Canyon Outdoor. R. at 35, p. 37, ll. 10-14. Nettleton testified as follows:

Q. Did you ever specifically discuss whether you would be entitled to commission for either renewal contracts, or new contracts that you were responsible for servicing, or obtained after you would resign, or were terminated from Canyon Outdoor Media?
A. The primary conversation I had directly with Curt when Emile left, he said that -- like I had mentioned earlier, that he claimed that he -- because of the way Emile quit, he was just kind of out of there in a hurry. He didn't have an opportunity to take care of it.
And I inquired about it directly. I said, why would he walk away from that money? And he goes, well, we just haven't had an opportunity to work it out. A':ld that's what-- how it was referred to me.
Q. So am I correct then, that that was not something that you were promised when you took the position?
A. It wasn't part of the initial conversations, no.

R. at 35, p. 36, ll. 20-25 - p. 37, ll. 1-14. The only source of Nettleton's belief that he was entitled to commissions after he terminated his employment with Canyon Outdoor was a

purported conversation between Nettleton and Canyon Outdoor's owner. In his deposition, Nettleton testified as follows:

Q. Are you aware of any documents, or emails, or any other form of communication that would set forth, that you were entitled to what you referred to as the "outstanding payment stream" after your resignation?

A. That was a verbal conversation between Curt and myself.
Q. And was that -- my recollection is, you said that occurred, approximately, at the time that Emile quit. Is that the conversation you are referring to?
A. Correct.
Q. Was that the only time that matter was discussed?
A. Well, and after the fact, when I was trying to negotiate with him. I had done a little research, and found out that -- that I needed to make a demand notice at the time of resignation as far as for those outstanding commissions. I did put that, and include that as part of my resignation letter. Also, that I was expecting those -- that to be compensated for those contracts that I produced.

R. at 43, p. 67, ll. 22-25 – p. 68, ll. 1-16. In the affidavit Nettleton submitted to the trial court after his deposition was taken, Nettleton revised his recollection of the purported conversation to include the following, "I stated, "So he's entitled to those commissions coming due?" Mr. Massood replied, "Yes, we just haven't got that worked out yet." R. at 89, ¶5. The conversations identified by Nettleton did not relate to the terms of his employment agreement with Canyon Outdoor. R. at 43, p. 67, ll. 22-25 – p. 68, ll. 1-16; R. at 89, ¶5. Curtis Massood stated that he never informed Nettleton that Emile Lemoine or Nettleton were entitled to commissions

following their resignation from Canyon Outdoor. R. at 152. Curtis Massood's declaration provides as follows:

> Following Emile Lemoine's resignation from Canyon Outdoor Media I had a discussion with Allen Nettleton regarding his desire to take over territory previously serviced by Mr. Lemoine. At no time during that conversation did I state that Mr. Lemoine or Mr. Nettleton were or would be entitled to commissions following resignation from Canyon Outdoor Media.

R. at 152, ¶2.

No other salesperson of Canyon Outdoor received commissions once they stopped servicing the new and renewal contracts that they were responsible for. R. at 67, ¶20. The expenses of Canyon Outdoor's business operation, including leases and production costs, are such that Canyon Outdoor would generally lose money on a contract if it paid commissions to former salespersons that were no longer servicing the contract and paid for someone else to continue to service that contract. R. at 67, ¶21. Following the economic downturn in 2008, and a significant portion of Canyon Outdoor's customers not renewing their contracts, Canyon Outdoor made the determination to lay off Jeff Harker ("Harker"), who was employed as a salesperson at the time. R. at 67, ¶22. Canyon Outdoor was simply unable to maintain two salespersons. *Id.* Harker was paid a severance payment of $2,500.00 when he was laid off. *Id.* Harker was not paid commission on any revenues received on the contracts that he was previously responsible for and the amount of the severance payment was not related to the amount of commissions that Harker would have been entitled to if he was not laid off. *Id.*

Initially Nettleton was responsible for servicing Canyon Outdoor's current customers and marketing Canyon Outdoor's advertising services to potential customers in Canyon County. R. at

63, ¶7. In or about January of 2014, another independent contractor, Emile Lemoine ("Lemoine"), who was responsible for servicing Canyon Outdoor's current customers and marketing Canyon Outdoor's billboard advertising services to potential customers in Ada County quit. R. at 64, ¶8. After Lemoine quit, Canyon Outdoor attempted to replace him with a different salesperson. *Id.* During the time that Canyon Outdoor was attempting to replace Lemoine, Curtis Massood serviced Lemoine's new and renewal contracts. *Id.* Susan Martin also helped to service Lemoine's new and renewal contracts during that period, which took away from her other responsibilities and duties. *Id.* A determination was then made for Nettleton to begin servicing some of Lemoine's contracts as customers renewed those contracts and for Nettleton to market potential customers in Ada County and Canyon County, rather than replacing Lemoine with a different salesperson. *Id.* Curtis Massood continued to service several of Lemoine's contracts and customers at those customers' requests, such as Buffalo Wild Wings. *Id.* Most of Lemoine's contracts and customers preceded him. *Id.* Lemoine inherited the servicing of these contracts and customers from previous salespersons. *Id.*

Canyon Outdoor considered a new contract to be 1) a contract with a new customer to Canyon Outdoor or 2) contracts with an existing customer of Canyon Outdoor resulting in additional revenues above the existing contract revenue amount with that customer. R. at 66, ¶16. Nettleton testified that a new contract was a contract with a customer "that had not been up advertising in at least the last six months." R. at 33, p. 28, ll. 1-12. Canyon Outdoor considered a renewal contract to be the renewal of an existing contract that does not result in additional

revenues above the existing contract revenue amount with that customer, even if it results in advertising being placed at a different billboard location. R. at 66, ¶16.

Prior to February of 2014, Nettleton was required to produce 24 months of new contracts each month and make 60 cold calls on prospective new customers each week in order to be entitled to receive the fixed compensation component. R. at 65, ¶13. However, Nettleton initially experienced difficulty meeting the requirement of 24 months of new contracts. *Id.* However, until early 2014 Canyon Outdoor continued to pay Nettleton the base compensation component even when Nettleton did not obtain the required number of new contracts. *Id.* On February 28, 2014 Canyon Outdoor and Nettleton entered into an agreement regarding Nettleton's commission rates on new and renewal contracts and minimum new contract requirements to reach each commission tier for renewal contracts. R. at 65-66, ¶14. The commission rates and minimum new contract requirements to reach each commission tier on renewal contracts set by this agreement were not modified between February 28, 2014 and the date Nettleton tendered his letter of resignation. *Id.*; R. at 33, p. 29, ll. 6-12. The February 28, 2014 agreement did nothing more than reaffirm that the commission rate on new contracts was ten percent and establish an adjustable scale on the percentage of commission on renewal contracts. R. at 112, p. 15; R. at 33, p. 27, ll. 14-25 – p. 28, ll. 1-12. During his disposition, Nettleton did not consider the February 28, 2014 agreement as a document that entitled him to commission payments after his resignation. R. at 43, p. 67, ll. 22-25 – p. 68, ll. 1-16. Nettleton's deposition testimony that the February 28, 2014 agreement did not entitle him to commission payments after he terminated his employment with Canyon Outdoor took place after the significance and effect of the February

28, 2014 agreement had already been discussed R. at 33, p. 27, ll. 14-25 – p. 28, ll. 1-12. Canyon Outdoor and Nettleton entered into the February 28, 2014 agreement in response to Nettleton's low production of new contracts in 2013 and early 2014. R. at 66, ¶15. The agreement allowed Nettleton to continue to receive the base compensation component in exchange for making 60 cold calls a week but required Nettleton to produce a minimum amount of new contracts each month in order to be entitled to commissions on the renewal contracts he serviced. *Id.* This agreement was necessary because of the number of vacant billboards in Canyon Outdoor's inventory at the time. *Id.*

Nettleton was dissatisfied with the transition to employee from independent contractor because it resulted in taxes being deducted from his compensation. R. at 64, ¶9; R. at 38, p. 39, ll. 9-11. Curtis Massood received a letter from Nettleton on April 10, 2015 in which Nettleton tendered his resignation. R. at 64-65, ¶10. Following Nettleton's resignation, Nettleton was paid all of the compensation that he was entitled to as of the date of his resignation by Canyon Outdoor. *Id.* Nettleton was not paid any commission from revenues received by Canyon Outdoor following the date of his resignation because the terms of his employment required him to continue servicing the new and renewal contracts that he was responsible for in order to be entitled to receive commission from those contracts. *Id.* In addition, Nettleton was not paid the fixed compensation component following the date of his resignation because the terms of his employment required him to make 60 cold calls a week in order for Nettleton to be entitled to the fixed compensation component. *Id.*

Following Nettleton's resignation, Susan Martin and Curtis Massood serviced the contracts that Nettleton was responsible for, until a replacement salesperson could be brought on and trained. R. at 65, ¶11. An additional staff member was hired on a part-time basis to allow Susan Martin additional time to service those contracts. R. at 65, ¶11. R. at 242, ¶12 Several salespersons were hired by Canyon Outdoor following Nettleton's resignation, but only stayed with Canyon Outdoor for a limited period. R. at 65, ¶11. Canyon Outdoor was only able to fully replace Nettleton in the fall of 2015. R. at 65, ¶11.

IV. ISSUES PRESENTED ON APPEAL

1. Whether the trial court erred in denying Canyon Outdoor's *Motion for Summary Judgment*.

2. Whether the trial court erred in granting Nettleton's *Cross-Motion for Summary Judgment*;

3. Whether the trial court erred by refusing to consider new evidence presented by Canyon Outdoor and denying Canyon Outdoor's Motion for Reconsideration.

4. Whether the trial court erred in determining that Nettleton was the prevailing party and awarding Nettleton costs and attorney's fees.

5. Whether the trial court erred in denying Canyon Outdoor's request for costs and attorney's fees, including the costs and attorney's fees incurred defending against Nettleton's false claim for compensation.

6. Whether Canyon Outdoor is entitled to an award of costs and attorney's fees on appeal.

V. STANDARD OF REVIEW

The standard for this Court's review of the trial court's ruling on a motion for summary judgment is the same standard as used by the trial court in ruling on the original motion. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360, 93 P.3d 685, 691 (2004). Once a motion for

summary judgment is made, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the Declarations, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law." *G&M Farms v. Funk Irrigation Company,* 119 Idaho 514, 516-17, 808 P.2d 851, 853-54 (1991); I.R.C.P. 56(c). The primary purpose of a summary judgment is to allow the courts the ability to avoid unnecessary litigation. If the facts are not in dispute and they lead to a legal conclusion which cannot be denied, a summary judgment is proper and should be granted to the moving party. *Berg v. Fairman,* 107 Idaho 441, 444, 690 P.2d 896, 899 (1984). The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho at 360, 93 P.3d at 691.

In situations where the court will be the trier of fact and "where there is a conflict as to the meaning or inferences to be drawn from the evidence, it is the function of the trier of fact to make such determination." *Pierson v. Jones*, 102 Idaho 82, 85, 625 P.2d 1085, 1088 (1981). *Pierson* was cited by the Idaho Supreme Court in *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982) when the Idaho Supreme Court stated the following:

> Nevertheless, where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.

Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). Accordingly, the Court is "entitled to arrive at the most probable inferences based upon the undisputed evidence

properly before it and grant the summary judgment despite the possibility of conflicting inferences." *Intermountain Eye and Laser Centers, P.L.L.C. v. Miller*, 127 P.3d 121, 142 Idaho 218 (Idaho 2005).

The nonmoving party may not rest upon mere allegations or denials to avoid summary judgment. I.R.C.P. 56(c); *Theriault v. A.H. Robbins Company*, 108 Idaho 303, 698 P.2d 365 (1985); *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). Rather, the nonmoving party's response must set forth specific facts showing there is a genuine issue for trial. I.R.C.P. 56(c). If the moving party asserts that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact. *Smith v. Meridian Joint Sch. Dist. No. 2,* 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999). Mere speculation or a scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact. *McCoy*, 120 Idaho at 769, 820 P.2d at 364.

VI. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT COMPENSATION AFTER TERMINATION OF EMPLOYMENT WAS A TERM OF THE EMPLOYMENT AGREEMENT BETWEEN CANYON OUTDOOR AND NETTLETON

There was never a meeting of the minds between Canyon Outdoor and Nettleton regarding payment of commissions to Nettleton following Nettleton's separation from Canyon

Outdoor and as a result no enforceable contract was formed. Wages under the Idaho Wage Claims Act ("IWCA"), Idaho Code Section 45-601, et seq., must be a component of the compensation bargained for in the agreement of employment. *Huber v. Lightforce USA, Inc.,* 159 Idaho 833, 367 P.3d 228, 237 (2016). No salesperson of Canyon Outdoor, including Nettleton, was ever told they would be entitled to receive commission on new or renewal contracts once they stopped working for Canyon Outdoor. R. at 66, ¶18; R. at 117, p. 36, ll. 1-10.

During his deposition, Nettleton admitted that commissions following separation from employment were not offered or promised to him by Canyon Outdoor. R. at 35, p. 37, ll. 10-14. An enforceable contract requires a meeting of the minds. *Barry v. Pac. W. Const., Inc.*, 140 Idaho 827, 831-32, 103 P.3d 440, 444-45 (2004)(internal citations omitted). This "meeting of the minds" is required on all material terms of the contract. *Id.* Moreover, this "meeting of the minds" must be evidenced by a manifestation of intent to contract taking the form of an offer and acceptance. *Id.* The payment of commissions following separation is certainly a material term of Nettleton's contract of employment. Here it is clear that payment of commissions following separation was not offered or promised to Nettleton while he was employed by Canyon Outdoor and was never a term of Nettleton's contract of employment. R. at 35, p. 37, ll. 10-14.

Rather the source of Nettleton's "belief" that he was entitled to commissions after separation was a purported conversation with Curtis Massood regarding another one of Canyon Outdoor's former salesmen, Emile Lemoine. R. at 35, p. 36, ll. 20-25 - p. 37, ll. 1-14; R. at 43, p. 67, ll. 22-25 – p. 68, ll. 1-16. While Curtis Massood had a conversation with Nettleton following Emile Lemoine's resignation from Canyon Outdoor, that conversation was focused on

Nettleton's desire to take over Emile Lemoine's territory and contracts and did not include a discussion of whether Emile Lemoine was entitled to commissions after he resigned. R. at 152, ¶2. Following Emile Lemoine's resignation, Nettleton assumed the responsibility for Emile Lemoine's territory. R. at 32, p. 23, ll. 13-17. Even if the purported conversation took place, there was never the "meeting of the minds" required to create an enforceable contract regarding the payment of commissions to Nettleton following his resignation. The purported conversation itself had nothing to do with agreement between Nettleton and Canyon Outdoor. There is nothing in either version of the purported conversation that would indicate that Nettleton would be entitled to compensation after separation from employment with Canyon Outdoor. The purported conversation was focused on Emile Lemoine and did not reference Nettleton's agreement of employment with Canyon Outdoor. The record before the trial court does not reflect that an entitlement to compensation after separation from employment was a negotiated term of Nettleton's employment agreement with Canyon Outdoor.

The trial court's determination that the February 28, 2014 agreement between Canyon Outdoor and Nettleton established a promise to pay new contracts at the rate of ten percent after Nettleton's resignation was contrary to the evidence in the record before the trial court. R. at 206. The February 28, 2014 agreement did nothing more than reaffirm that the commission rate on new contracts was ten percent and establish an adjustable scale on the percentage of commission on renewal contracts. R. at 112, p. 15; R. at 33, p. 27, ll. 14-25 – p. 28, ll. 1-12. During his disposition, Nettleton did not consider the February 28, 2014 agreement as a document that entitled him to commission payments after his resignation. R. at 43, p. 67, ll. 22-25 – p. 68, ll. 1-

16. Nettleton's deposition testimony that the February 28, 2014 agreement did not entitle him to commission payments after he terminated his employment with Canyon Outdoor took place after the significance and effect of the February 28, 2014 agreement had already been discussed R. at 33, p. 27, ll. 14-25 – p. 28, ll. 1-12. Canyon Outdoor and Nettleton entered into the February 28, 2014 agreement in response to Nettleton's low production of new contracts in 2013 and early 2014. R. at 66, ¶15. The February 28, 2014 agreement allowed Nettleton to continue to receive the base compensation component in exchange for making 60 cold calls a week but required Nettleton to produce a minimum amount of new contracts each month in order to be entitled to the variable compensation component related to revenue Canyon Outdoor received from the renewal contracts Nettleton serviced. R. at 66, ¶15.

When Nettleton's testimony regarding the lack of documents supporting his contention that he was entitled to compensation after he terminated his employment with Canyon Outdoor is considered together with Nettleton's testimony he was never promised compensation after he separated from employment, it is evident that compensation following Nettleton's resignation was a not a mutually agreed upon term of the employment agreement between Nettleton and Canyon Outdoor. R. at 33, p. 27, ll. 14-25 – p. 28, ll. 1-12 and R. at 35, p. 36, ll. 20-25 – p. 37, ll. 1-14.

In this situation, Nettleton had the burden of establishing the lack of a genuine issue of material fact with regard to his entitlement to compensation after he terminated his employment with Canyon Outdoor. *See Nw. Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 838, 41 P.3d 263, 266 (2002). Nettleton was required to present evidence that the terms of the employment

agreement between Nettleton and Canyon Outdoor provided that he was entitled to compensation after he terminated his employment with Canyon Outdoor. *See Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho at 719, 918 P.2d at 588. However, Nettleton failed to do so and instead argued that Canyon Outdoor was required to show that he was not entitled to compensation after Nettleton terminated his employment with Canyon Outdoor. Nettleton failed to establish that he was actually entitled to compensation after he terminated his employment with Canyon Outdoor and was not entitled to summary judgment.

The trial court erred when it determined that an entitlement to compensation after Nettleton's separation from employment was an agreed upon term of the employment agreement between Nettleton and Canyon Outdoor. R. at 206. The evidence in the record before the trial court did not establish the required meeting of the minds between Nettleton and Canyon Outdoor regarding this material term. *Barry v. Pac. W. Const., Inc.*, 140 Idaho at 831, 103 P.3d at 444. Nettleton's subjective belief that he was entitled to commissions following his resignation is not sufficient. *See J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006).

B. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT A SINGLE CUSTOMER'S PAYMENT IN ADVANCE WHILE NETTLETON WAS EMPLOYED BY CANYON OUTDOOR ESTABLISHED A COURSE OF DEALINGS RELATING TO NETTLETON'S ENTITLEMENT TO COMPENSATION AFTER SEPARATION FROM EMPLOYMENT

In November of 2014, Snake River Dental paid for 12 months of advertising services from Canyon Outdoor in advance and ten percent of the amount paid by Snake River Dental was included in the variable portion of Nettleton's compensation the following month. R. at 89, ¶¶6-7. There are two key factors when evaluating whether how Canyon Outdoor addressed the Snake

River Dental contract created a "course of dealing" between Canyon Outdoor and Nettleton: 1) this was a onetime occurrence and 2) Nettleton was entitled to receive ten percent of amount paid on new contracts each month during the time he was employed by Canyon Outdoor. The Snake River Dental contract was the only occurrence identified by Nettleton where one of Canyon Outdoor's customers paid in advance. This was not a regular occurrence for Canyon Outdoor and the amount of variable compensation was only $540.00. More importantly, in the month that Snake River Dental made the advanced payment Nettleton was employed by Canyon Outdoor and was servicing the contract with Snake River Dental.

The parties' actions relating to the Snake River Dental contract do not give rise to a "course of dealing" between the parties in this situation. In order for a "course of dealing" to arise, the parties have previously applied the term of the contract at issue. *Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC*, 156 Idaho 709, 721, 330 P.3d 1067, 1079 (2014). In *Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC,* the failure to seek a rent increase did not constitute a course of dealings with regard to the parties' intent under a section of a lease agreement because the parties never applied the language at issue. *Id.* This situation is analogous because prior to Nettleton's resignation the parties had never faced the situation of whether Nettleton would be entitled to commissions after a separation from employment. It would be a different situation if Nettleton had resigned in the past, been paid commissions, became employed again and the Court was then asked to apply a "course of dealing."

The only course of dealing that was established by Canyon Outdoor was that salespersons were not entitled to commissions once they voluntarily separated from employment. R. at 34, p.

31, ll. 2-22. Nettleton was aware that Emile Lemoine was not paid any commissions after Emile Lemoine resigned and therefore Emile's resignation should not have created any form of an expectation that Nettleton was entitled to commissions after Nettleton resigned. *Id.* In this situation, the trial court erred when it determined that the manner in which the prepayment by Snake River Dental was addressed by Canyon Outdoor created a course of dealing relating to Nettleton's entitlement to compensation after he terminated his employment with Canyon Outdoor.

C. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT NETTLETON WAS NOT REQUIRED TO SERVICE CONTRACTS TO BE ENTITLED TO COMPENSATION

a. There was no undisputed evidence in the record from which the trial court could base an inference that a servicing requirement was not communicated to Nettleton

The trial court was only permitted to resolve the conflict between conflicting inferences in situations where evidentiary facts upon which those inferences are based are not disputed. *Riverside Dev. Co. v. Ritchie*, 103 Idaho at 519, 650 P.2d at 661. Inferences must be based on undisputed evidence and conflicting evidentiary facts must be viewed in favor of the nonmoving party even when the matter is not heard before a jury. *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009). In this situation, the trial court acknowledged that there was a question of fact regarding whether there was a "servicing" requirement in the agreement between Canyon Outdoor and Nettleton. However, the evidentiary facts, specifically the testimony of Curtis Massood and Nettleton regarding existence of a "servicing" requirement, are in dispute. R. at 66-67 and R. at 89, ¶4.

Like the situation addressed by the Idaho Supreme Court in *Losee v. Idaho Co.*, the record before the trial court contained factual disputes that precluded summary judgment even though the trial court was the trier of fact. *See Losee v. Idaho Co.*, 148 Idaho at 222, 220 P.3d at 578 (2009). Given that the record contains disputed testimony regarding the existence of a "servicing" requirement it was necessary for the trial court as the trial of fact in this situation to assess the credibility of Curtis Massood and Nettleton. However, it is not permissible for the assessment of credibility necessary in this situation to take place without a trial. *See Baxter v. Craney*, 135 Idaho 166, 172, 16 P.3d 263, 269 (2000).

b. Nettleton's own testimony establishes that he understood the requirement to service an account to be entitled to commission on that account.

Not only did the evidence in the record before the trial court not support an inference that a "servicing" requirement was not communicated to Nettleton, but Nettleton's own testimony acknowledged a "servicing" requirement. Accordingly, the trial court erred when it determined that Nettleton was not required to provide customer service and otherwise service his contracts in order to be entitled to compensation relating to those contracts. Specifically, Nettleton acknowledged that if a salesperson was servicing an account, that the salesperson would be entitled to the commission. R. at 37, p. 45, ll. 16-19. Most importantly Nettleton admitted during his deposition that he was required to service contracts, not just obtain new customers. R. at 30, p. 15, ll. 21-25 – p. 16, ll. 1-14; R. at 30, p. 17, ll. 5-13. Nettleton was responsible for ensuring Canyon Outdoor's customers were satisfied with their advertising, providing customer service, and maintaining the relationship with Canyon Outdoor's customers

throughout the term of each customer's contract. *Id.* Nettleton planned his work week around this essential portion of his responsibilities with Canyon Outdoor. R. at 37, p. 44, ll. 6-17. Nettleton also admitted that after he terminated his employment with Canyon Outdoor that someone else would be responsible for servicing the contracts that he had previously serviced:

15 Q. So after you left would someone else then have
16 been responsible for servicing the contracts that you
17 had previously serviced?
18 A. The same people, Sue was still there. We
19 still had the staff that did the maintenance on the
20 boards, and things to that nature, yes. But as far as
21 calling on the accounts going forward, that would have
22 been to whoever they decided to hire.
23 Q. Specifically with regard to customer service
24 to current customers, who would have been responsible
25 for that after you left?

1 A. It probably would have fallen on Sue Martin's
2 shoulders.

R. at 35, p. 37, ll. 15-25 – p. 38, ll. 1-2. Not only was Nettleton aware of a requirement to service a contract in order to receive commissions but that he acted pursuant to that understanding throughout the time he provided services to Canyon Outdoor.

D. THE TRIAL COURT ERRED WHEN IT REFUSED TO CONSIDER THE NEW EVIDENCE PRESENTED BY CANYON OUTDOOR

As addressed above, Nettleton was not entitled to summary judgment in this situation. Even if Nettleton was entitled to summary judgment, the trial court erred when it refused to consider new evidence presented by Canyon Outdoor. Tr. p. 68, ll. 2-18. "The district court has no discretion on whether to entertain a motion for reconsideration pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B)." *Fragnella v. Petrovich*, 153 Idaho 266, 281 P.3d 103, 113 (2012),

reh'g denied (Aug. 1, 2012). "On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order." *Id.*; *see PHH Mortg. Servs. Corp. v. Perreira*, 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009) (citing *Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)). The new information presented by Canyon Outdoor had a direct bearing on the correctness of the trial court's Memorandum Decision and Order Re: Cross Motions for Summary Judgment, specifically the amount compensation the trial court determined Nettleton was entitled to. R. at 237-354

a. The trial court erred when it failed to consider whether Nettleton was entitled to compensation relating to uncollectible accounts.

On February 24, 2015, Canyon Outdoor implemented a policy that any contract which went 180 days uncollected was considered in default. R. at 242-243, ¶13; R. at 134; R. at 125, p. 66, ll. 23-25 – p. 67, ll. 1-5; p. 33, ll. 10-25 – p. 34, ll. 1-10. Once an account was in default, Nettleton was no longer entitled to receive a commission on that account and was required to refund commission that were previously paid on that account to Canyon Outdoor. *Id.* Three of the contracts for which Nettleton was awarded compensation were in default. Canyon Outdoor's contract with Idaho Bourbon Distillers, Contract #4 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton, Canyon Outdoor's contract with TVR Heating & Cooling, Contract #12 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton, and Canyon Outdoor's contract with Aaron Tribble Law, Contract #17 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton, each went more than 180 days uncollected

despite attempts by Canyon Outdoor to collect from these customers. R. at 238-243, ¶4, ¶5, ¶7, ¶10 and ¶14. Accordingly, the trial court erred when it awarded Nettleton $7,290.00 relating to these contracts.

b. The trial court erred when it failed to consider whether Nettleton was awarded commissions based on amounts that exceeded what Canyon Outdoor actually received from its customers.

The trial court erred when it awarded compensation to Nettleton that was not based on the actual amount of payments Canyon Outdoor received from its customers after Nettleton's resignation. Even if Nettleton was entitled to compensation relating to Contract #4 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton, Contract #12 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton, Contract #14 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton and Contract #17 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton, the trial court erred when it awarded Nettleton $4,130.00 on these contracts. With regard to the Idaho Bourbon Distillers contract, Canyon Outdoor only received $2,500.00 from Idaho Bourbon Distillers. R. at 238, ¶4 and ¶5. With regard to the TVR Heating & Cooling, Canyon Outdoor only received $5,200.00 from TVR Heating & Cooling after Nettleton's resignation. R. at 238-239, ¶4 and ¶7. With regard to the City of Caldwell contract, Canyon Outdoor only received $2,600.00 from the City of Caldwell's agent after Nettleton's resignation. R. at 238-240, ¶4 and ¶8. It is also important to note that the City of Caldwell contract was only a two month contract with monthly rent in the amount of $1,300.00. R. at 240, ¶8. With regard to the Aaron Tribble Law contract, Canyon Outdoor only received $8,400.00 from Aaron Tribble Law. R. at 238-241 ¶4 and ¶10.

c. The trial court erred when it failed to consider whether Nettleton was awarded commissions for which he had previously been paid.

Nettleton admitted that he was paid everything he was owed at the time of his resignation. R. at 42, p. 62, ll. 23-25 – p. 63, ll. 1-25. However, Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton included commissions for which Nettleton was previously paid. R. at 238-242, ¶4, ¶6, ¶7, and ¶11. Accordingly, the trial court erred when it awarded compensation related to the following contracts:

- With regard to Canyon Outdoor's contract with Middle Creek Dental, Contracts #9 and #10 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton, Canyon Outdoor received the $7,200.00 shown on Exhibit B (Annotated) prior to Nettleton's resignation and Nettleton was previously paid the $720.00 of commission awarded by the Court. R. at 238-239, ¶4 and ¶6.

- Even if Nettleton was entitled to commission on the TVR Heating and Cooling contract, Contract #12 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton, Nettleton was previously paid commission relating to TVR Heating and Cooling's March 2015 payment, Check #30951. R. at 238-239, ¶4 and ¶7.

- With regard to Canyon Outdoor's contract with Idaho Wrecker Sales, Contract #19 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton, Canyon Outdoor received the $6,000.00 shown on Exhibit B (Annotated). R. at 238-242, ¶4 and ¶11. However, Allen Nettleton was previously paid commission in the amount of $300.00 on Idaho Wrecker Sales' March 9, 2015 payment, Check #30396. *Id.*

d. The trial court erred when it failed to consider whether Nettleton was awarded commission on "renewal" contracts by the Court.

The contracts with the City of Caldwell and the City of Meridian, Contracts #14 and #16 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton, were not new contracts as the contracts were entered into within six months of the City of Caldwell and the city of Meridian advertising with Canyon Outdoor. R. at 238-240, ¶4 and ¶8. Outdoor Nettleton testified

that a new contract was a contract with a customer "that had not been up advertising in at least the last six months. R. at 33, p. 28, ll. 1-12. The City of Caldwell, through its agent Kelly Amos, contracted to advertise on Sign 31RHR between May 1, 2014 and July 31, 2014. On January 28, 2015, the City of Caldwell, through its agent Kelly Amos, again contracted to advertise on the same sign, Sign 31RHR, between April 15, 2015 and June 14, 2015. R. at 238-240 ¶4 and ¶8. As the January 28, 2015 contract with the City of Caldwell was entered into within 6 months of the City of Caldwell advertising on the same billboard, it was not considered a new contract but rather it is a renewal contract for which Nettleton conceded he is not entitled to commissions. The City of Meridian, through its agent Kelly Amos, contracted to advertise on Sign 25LHR between May 1, 2014 and August 31, 2014. On January 28, 2015, the City of Meridian, through its agent Kelly Amos, again contracted to advertise on the same sign, Sign 25LHR, between April 14, 2015 and July 13, 2015. As the January 28, 2015 contract with the City of Meridian was entered into within 6 months of the City of Meridian advertising on the same billboard, it was not considered a new contract but rather it is a renewal contract for which Nettleton conceded he is not entitled to commission. Accordingly, the trial court erred when it awarded $780.00 in compensation relating to these contracts to Nettleton.

e. The trial court erred when it failed to consider whether Canyon Outdoor was entitled to an offset for the amounts Nettleton was previously overpaid.

In multiple occasions in 2014 and 2015, Nettleton claimed that he was entitled to commissions even though he did not meet the criteria to actually be entitled to those commission. The equitable doctrine of setoff requires that the debts of two parties who are mutually indebted

be set off and that only the balance is recoverable. *Int'l Equip. Serv., Inc. v. Pocatello Indus. Park Co.*, 107 Idaho 1116, 1119, 695 P.2d 1255, 1258 (1985). The trial court erred when it refused to consider whether Canyon Outdoor was entitled to set off the compensation awarded to Nettleton by the amounts Canyon Outdoor previously paid Nettleton for which Nettleton was not actually entitled.

Bank of the Cascades

In 2014 and 2015, Nettleton claimed that a contract with Bank of the Cascades for Sign 07LHR, Contract #6 on Exhibit B (Annotated) attached to the Affidavit of Allen G. Nettleton, was a "new" contract rather than a "renewal" contract. R. 238-244 at ¶4 and ¶15. Between January 1, 2014 and March 31, 2014, Home Federal Bank contracted to advertise on Sign 07LHR. *Id.* On April 2, 2014, Bank of the Cascades, contracted to advertise on Sign 07LHR from April 1, 2014 to March 31, 2015. *Id.* Bank of the Cascades was the successor in interest of Home Federal Bank as the result of Bank of the Cascades merging with Home Federal Bank and the two contracts were with the same entity. R. 244 at ¶15. As a result of claiming the Bank of the Cascades contract as a "new" contract instead of a "renewal" contract, Nettleton was overpaid $845.00 as follows:

- Between 3/26/14 and 4/25/14, Allen Nettleton was only entitled to 5% commission on $9,700.00 of renewal payments rather than 7.5%, resulting in a $215.00 overpayment.
- Between 4/26/14 and 5/25/14, Allen Nettleton was not entitled to a 10% commission on the $1,400.00 Bank of the Cascades payment, resulting in a $140.00 overpayment.
- Between 7/25/14 and 8/25/14, Allen Nettleton was not entitled to a 10% commission on the $700.00 Bank of the Cascades payment, resulting in a $70.00 overpayment.

- Between 8/26/14 and 9/25/14, Allen Nettleton was not entitled to a 10% commission on the $700.00 Bank of the Cascades payment, resulting in a $70.00 overpayment.

- Between 9/26/14 and 10/23/14, Allen Nettleton was not entitled to a 10% commission on the $1,400.00 of Bank of the Cascades payments, resulting in a $140.00 overpayment.

- Between 11/27/14 and 12/24/14, Allen Nettleton was not entitled to a 10% commission on the $1,400.00 Bank of the Cascades payment, resulting in a $140.00 over payment.

- Between 12/26/14 and 1/25/15, Allen Nettleton was not entitled to a 10% commission on the $700.00 Bank of the Cascades payment, resulting in a $70.00 over payment.

R. at 238-244, ¶4 and ¶15. Accordingly, the trial court erred when it failed to consider whether Canyon Outdoor was entitled to reduce the damages awarded to Nettleton by $845.00.

September 26, 2014 and October 23, 2014 Overpayment

Between September 26, 2014 and October 23, 2014, Allen Nettleton claimed that he had obtained 24 or more months of "new" contracts and claimed that $363.75 in renewal commission was owing. R. at 244, ¶ 16. During the September 26, 2014 to October 23, 2014 period, Nettleton obtained two six month contracts with Middle Creek Dental, a two month contract with Delta Dental, and two one month contracts with Maximus Federal Services. R. at 238-244, ¶4, ¶6, and ¶16. However, Nettleton admitted that he was required to obtain 24 months of "new" contracts in order to be entitled to commission on "renewal" contracts. R. at 33, pp. 27-29. As Nettleton only obtained 16 months of new contracts during the September 26, 2014 to October 23, 2014 time period he was not actually entitled to receive commission on renewal payments

and was overpaid $363.75. Accordingly, the trial court erred by refusing to consider whether Canyon Outdoor was entitled to reduce the compensation awarded to Nettleton by $363.75.

Mile High Power Sports

Allen Nettleton claimed that he obtained a contract with Mile High Power Sports during the May 26, 2014 to June 25, 2014 period and claimed that the Mile High Power Sports contract made him entitled to $1,032.37 in renewal commissions. R. at 238-245, ¶4 and ¶17. Nettleton did not fax the contract to Mile High Power Sports until June 30, 2014, despite the contract being dated June 23, 2014. R. at 245, ¶17. More importantly Canyon Outdoor received an email from Sam Worley of Mile High Power Sports stating that he had just returned the signed contract on June 30, 2014. *Id.* In addition, Canyon Outdoor's July 16, 2014 CenturyLink bill shows a phone call to Mile High Powersports being made on June 30, 2014 at 11:02 and a fax being sent to Mile High Powersports on June 30, 2014 at 11:35. *Id.* The contract with Mile High Power Sports was not actually obtained until June 30, 2014 and should not have been applied to the May 26, 2014 to June 25, 2014 period. Had the Mile High Power Sports contract been applied to the June 26, 2014 to July 25, 2014 time period, Nettleton would not have been entitled to commission on renewal contracts in the May 26, 2014 to June 25, 2014 time period. R. at 238, ¶4. Accordingly, the trial court erred when it refused to consider whether Canyon Outdoor was entitled to reduce the compensation awarded to Nettleton by the amount of "renewal" commissions that Nettleton was overpaid, $1,032.37.

f. The trial court erred when it failed to consider whether Canyon Outdoor was entitled to an offset for expenses incurred continuing to service Nettleton's accounts following his resignation.

Following Nettleton's resignation, Susan Martin and Curtis Massood serviced the contracts that Nettleton was responsible for, until a replacement salesperson could be brought on and trained. R. at 242, ¶12; R. at 35-36, pp. 37-38; R. at 125, p. 69, ll. 23-25 – p. 71, ll. 3-8. An additional staff member, Tina Grant, was hired on a part-time basis to allow Susan Martin additional time to service those contracts. R. at 126, p. 70, ll. 14-24; R. at 242, ¶12. The only reason Tina Grant was hired was to allow Susan Martin time to service the contracts that Allen Nettleton had been responsible for servicing. R. at 242, ¶12. In this situation, the trial court erred when it refused to consider whether it would be inequitable to allow Nettleton to retain the benefit of commissions relating to payments received by Canyon Outdoor after his resignation when Canyon Outdoor incurred expenses that it was only required to incur as a result of Nettleton's failure to continue to service the contracts at issue. *See Beco Const. Co. v. Bannock Paving Co.*, 118 Idaho 463, 466, 797 P.2d 863, 866 (1990). In this situation, Susan Martin was paid an additional $1,400.00 on November 30, 2015 that would not have been paid to her had she not serviced the contracts that Allen Nettleton was responsible for servicing. R. at 126, p. 71, ll. 3-8; R. at 242, ¶12, Ex. I, Bates DEF000634. In addition, Tina Grant was paid $4,519.48 in 2015 and $4,076.96 in 2016. R. at 242, ¶12, Ex. I, Bates DEF000630-DEF000631. Here, the Court found that Nettleton was entitled to commissions on payments that Canyon Outdoor received from its customers. However, Canyon Outdoor only received those payments because it acted to continue to service the same accounts that the Court found Nettleton entitled to commission on.

It would be unjust to allow Nettleton an award of damages that is not reduced by the amounts incurred by Canyon Outdoor to service the accounts at issue. *See Beco Const. Co. v. Bannock Paving Co.*, 118 Idaho at 466, 797 P.2d at, 866.

E. THE TRIAL COURT ERRED IN AWARDING COSTS AND ATTORNEY'S FEES TO NETTLETON

a. Nettleton was not a prevailing party.

In this situation, summary judgment in favor of Nettleton was not appropriate and therefore Nettleton was not entitled to an award of costs and attorney's fees. *See Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 637 (2001) (vacating an award of attorney's fees after reversing the grant of summary judgment). Even if this Court were to determine that the trial court did not err when it granted summary judgment in favor of Nettleton, the trial court erred when it determined that Nettleton was a prevailing party. When this action is viewed as a whole, Nettleton was not a prevailing party and was not entitled to an award of costs and attorney's fees. "In order to be awarded attorney's fees, one must be a prevailing party." *Smith v. Whittier*, 107 Idaho 1106, 1108, 695 P.2d 1245, 1247 (1985). Idaho Rule of Civil Procedure 54(d)(1)(B) provides, in part, "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." I.R.C.P. 54(d)(1)(B). The trial court was required to look at the overall action to determine whether Nettleton is a "prevailing party," rather than "the mere fact that a party is successful in asserting or defeating a single claim." *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 693, 682 P.2d 640, 646 (Ct. App. 1984).

In this situation, the action brought by Nettleton against Canyon Outdoor was based on a claim for compensation relating to payments Canyon Outdoor received from its customers for new contracts and renewal contracts after Nettleton terminated his employment with Canyon Outdoor. R. at 13-14, ¶¶ 4-14. The issue is not that Nettleton presented separate legal theories on a single claim against Canyon Outdoor. Rather Nettleton presented two distinct claims, one of which he knew to be false when he brought the action, with approximately equal importance to Nettleton's action. However, as Nettleton conceded at the hearing on the parties' cross motions for summary judgment, Nettleton was not entitled to any compensation relating to renewal contracts pursuant to a February 28, 2014 agreement between Nettleton and Canyon Outdoor. Tr., p. 31, ll. 13-18; R at 34, p. 30, ll. 23-25 – p. 31, l. 1. When this matter is viewed as a whole, Canyon Outdoor successfully defended one of Nettleton's two claims and there was no overall prevailing party. This situation is similar to the facts addressed in *Ruge v. Posey*, 114 Idaho 890,761 P.2d 1242 (Ct. App. 1988). There the trial court did not abuse its discretion when it acknowledged that both parties had prevailed on claims and determined that there was no overall prevailing party. Ruge v. Posey, 114 Idaho 890, 892, 761 P.2d 1242, 1244 (Ct. App. 1988). The key difference in this situation is that the trial court abused its discretion when it failed or refused to consider Canyon Outdoor's successful defense of one of two distinct claims brought by Nettleton. Tr., p. 70, ll. 18-25 – p. 71, ll. 1-16. The reasoning and factors set forth by the trial court pursuant to Idaho Rule of Civil Procedure 54(e)(6) during the July 13, 2016 hearing does not reflect any consideration of the false claim brought by Nettleton for compensation relating to renewal contracts. Tr., p. 64, ll. 9-21; Tr., p. 70, ll. 18-25 – p. 71, ll. 1-16; *See* I.R.C.P. 54(e)(6).

b. The trial court erred when it awarded costs and attorney's fees relating to the false claim for compensation brought by Nettleton.

Even if Nettleton was a prevailing party, the award of attorney's fees granted to Nettleton by the trial court was not reasonable because it included the attorney's fees incurred by Nettleton pursing a false claim against Canyon Outdoor. The protections provided to employers by Idaho Code Section 45-612, primarily that an employee who knowingly makes a false claim for compensation is liable for the employers' expenses incurred defending against the false claim, would be meaningless if an employee who knowingly makes a false claim is entitled to the attorney's fees incurred relating to the false claim. I.C. § 45-612. The issue is not whether Nettleton's reasonable attorney's fee was required to be limited to the claim upon which he prevailed. *See Advanced Med. Diagnostics, LLC v. Imaging Ctr. of Idaho, LLC*, 154 Idaho 812, 815, 303 P.3d 171, 174 (2013)("Where one party has been determined to be the overall prevailing party in the litigation and by statute or contract the prevailing party is entitled to an award of attorney fees on all claims asserted in the litigation, the award of reasonable attorney fees is not required to be limited to the claims upon which the prevailing party prevailed."). The issue is whether it is reasonable to award attorney's fees relating to a knowingly false claim for compensation. In this situation, the trial court erred by awarding Nettleton the full amount of the attorney's fees requested, without segregating the attorney's fees relating to Nettleton's claim that he was entitled to compensation based on renewal contracts. It is important to note that the adjustment factor applied by Nettleton in the Verified Memorandum of Costs and Fees was entirely unrelated to the issue of Nettleton's false claim for compensation based on renewal

contracts. R. at 230-236; Tr., p. 65, ll. 8-25 – p. 66, ll. 1-5.

F. THE TRIAL COURT ERRED WHEN IT REFUSED TO AWARD COSTS AND ATTORNEY'S FEES TO CANYON OUTDOOR FOR DEFENDING AGAINST NETTLETON'S FALSE CLAIM FOR COMPENSATION BASED ON RENEWAL CONTRACTS

The trial court lacked the discretion to refuse an award of attorney's fees and costs to Canyon Outdoor for defending against Nettleton's claim for compensation based on renewal contracts. I.C. § 45-612(2). In this situation, the action brought by Nettleton against Canyon Outdoor was based on a claim for compensation relating to payments Canyon Outdoor received from its customers for new contracts and renewal contracts after Nettleton terminated his employment with Canyon Outdoor. R. at 13-14, ¶¶ 4-14. However, as Nettleton conceded at the hearing on the parties' cross motions for summary judgment, Nettleton was not entitled to any compensation relating to renewal contracts pursuant to a February 28, 2014 agreement between Nettleton and Canyon Outdoor. Tr., p. 31, ll. 13-18; R at 34, p. 30, ll. 23-25 – p. 31, l. 1. As such, Nettleton's claim for compensation relating to the renewal contracts was a false claim under Idaho Code Section 45-612. Nettleton cannot claim that he did not know his claim for compensation relating to the renewal contracts was false because he agreed to the change in how the portion of his monthly compensation relating to renewal contracts was determined and signed the February 28, 2014 agreement. R at 33, p. 27, ll. 14-25 – p. 29, ll. 1-19. It is also important to note that Nettleton continued to make a claim for commissions on renewal contracts throughout the litigation until Canyon Outdoor filed its motion for summary judgment. R. at 376, ¶ 6; R. at 378-388. Idaho Code Section 45-612 requires an award of costs and attorney's when an

employee initiates a lawsuit to collect compensation based upon a false claim. Nettleton did not concede that he was not entitled to commissions on renewal contracts until the hearing on the parties' cross motions for summary judgment. Tr., p. 31, ll. 13-18. Accordingly, Canyon Outdoor was and remains entitled to an award of the attorney's fees and costs it incurred in defending against Nettleton's claim for commissions on renewal contracts.

G. CANYON OUTDOOR IS ENTITLED TO AN AWARD OF COSTS AND ATTORNEY'S FEES ON APPEAL

This court should award costs and attorney's fees to Canyon Outdoor on appeal. The trial court erred when it denied summary judgment for Canyon Outdoor, granted summary judgment to Nettleton, and refused to consider the new evidence presented by Canyon Outdoor. Nettleton failed to meet his burden of proof that payment of commissions after he terminated his employment with Canyon Outdoor was a component of compensation bargained for in his agreement of employment with Canyon Outdoor. Moreover, the trial court's inference that Nettleton was not required to service contracts in order to receive compensation was not based on undisputed evidence. Accordingly, the trial court's decision should be reversed and this Court should award Canyon Outdoor costs and attorney's fees as the prevailing party. *See Meridian Bowling Lanes, Inc. v. Meridian Athletic Ass'n, Inc.*, 105 Idaho 509, 670 P.2d 1294 (1983) (awarding costs to the appellant who successfully challenged the trial court's grant of summary judgment).

Canyon Outdoor is entitled to an award of costs and attorney's fees on appeal pursuant to Idaho Code Section 12-120(3). I.C. § 12-120(3). . Actions on employment contracts, including

the agreement between Canyon Outdoor and Nettleton, are subject to the provisions of Idaho Code Section 12-120(3). *Atwood v. W. Const., Inc.*, 129 Idaho 234, 241, 923 P.2d 479, 486 (Ct. App. 1996). Attorney fees pursuant to Idaho Code § 12-120(3) are available to the prevailing party on appeal. *Triad Leasing & Fin., Inc. v. Rocky Mountain Rogues, Inc.*, 148 Idaho 503, 515, 224 P.3d 1092, 1104 (2009). Canyon Outdoor is also entitled to an award of costs and attorney's fees on appeal pursuant to Idaho Code Section 45-612 relating to its appeal of the trial court's determination that Canyon Outdoor was not entitled to an award of costs and attorney's fees for successfully defending against Nettleton's false claim for compensation based on renewal contracts. I.C. § 46-612(2).

VII. CONCLUSION

Canyon Outdoor respectfully requests that the Court reverse the trial court's determination that Canyon Outdoor was not entitled to summary judgment, the trial court's determination that Nettleton was entitled to summary judgment, the trial court's determination that Canyon Outdoor was not entitled to an award of costs and attorney's fees, and the trial court's determination that Nettleton was entitled to an award of costs and attorney's fees. Canyon Outdoor also requests an award of its costs and attorney's fees on appeal as the prevailing party on appeal.

DATED this 6th day of March, 2017.

WORST, FITZGERALD & STOVER, PLLC

By: _____
Louis V. Spiker

VIII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of March, 2017, I caused two true and correct copies of the foregoing **APPELLANT'S BRIEF** to be served by the method indicated below, and addressed to the following:

Kevin E. Dinius, ISB No. 5974
Dinius & Associates, PLLC
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Nampa, ID 83687

☒ U.S. Mail
☐ Hand Delivered
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Louis V. Spiker