6-5-2017

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALLEN G. NETTLETON, Plaintiff/Respondent, -vs- CANYON OUTDOOR MEDIA, LLC, an Idaho limited liability company, Defendant/Appellant.	**DOCKET NO. 44416-2016** ADA COUNTY CASE NO. CV-OC-2015-14630

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Samuel A. Hoagland, District Judge presiding.

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STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

This case involves an employment dispute between Plaintiff/Respondent Allen Nettleton ("Nettleton") and his employer Defendant/Appellant Canyon Outdoor Media, LLC ("Canyon Outdoor" or "Defendant") over unpaid commissions due and owing to Nettleton pursuant to an employment contract he had with Canyon Outdoor.

Nettleton filed a two count Verified Complaint against Canyon Outdoor Advertising, LLC alleging: Count I. Wage Claim for unpaid wages in the form of commissions and Count II. Breach of Contract for failure to pay commissions due according to Nettleton's employment contract on August 21, 2015.[1] Later, Nettleton filed an Amended Complaint for the purpose of correcting the name of the Defendant to reflect Canyon Outdoor *Media*, LLC while the remainder of the complaint went unchanged.[2] On September 24, 2015, Canyon Outdoor filed an Answer to the Amended Complaint.[3]

On February 29, 2016 Canyon Outdoor filed a Motion for Summary Judgment moving the trial court to make the determination that: first, Nettleton was not entitled to any compensation from Canyon Outdoor once he resigned and second, that Nettleton's claims for compensation do not arise under Idaho Code, Chapter 6, Title 45.[4] Nettleton filed his Cross-

[1] Clerk's Record ("R"), pp. 10-12.
[2] R. pp. 13-15.
[3] R. pp. 16-21.
[4] R. pp. 22-23.

Motion for Summary Judgment on March 9, 2015[5] and in his Memorandum in support the motion, Nettleton asserted:

1. His employment contract provided for unconditional payment of his commissions when the customer paid;
2. He was an employee of Canyon Outdoor Media at all relevant times;
3. He was entitled to make a wage claim under Chapter 6 of Title 45, Idaho Code, asserting: his commissions constituted "wages," he had a right to collect his wages with the option to bring a civil suit to collect his commissions and is entitled to recover treble damages; [6]
4. He was entitled to 10% of all payments received by Canyon Outdoor after he resigned on all "new" contract procured by him; and
5. He was entitled to damages of $41,850 plus prejudgment interest.[7]

On April 6, 2016, the trial court heard the competing Motions for Summary Judgment filed by each party and took the matter under advisement. On May 18, 2016 the trial court entered its Memorandum Decision and Order Re: Cross Motions for Summary Judgment denying Defendant's Motion for Summary Judgment. The trial court further ordered Plaintiff's Motion for Summary Judgment granted in part and denied in part.[8] On the same date, the trial court entered judgment in favor of Nettleton as follows:

> Plaintiff Alan G. Nettleton shall have and recover a total amount of $21,550.00 from Defendant Canyon Outdoor Media, LLC, plus interest at the lawful rate from the date hereof until paid in full. All upcoming hearings on pending Motions are hereby VACATED.[9]

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[5] R. pp. 86-87.
[6] I.C. §§ 45-601(7), 45-608(1), 45-601(4), 45-614, 45-615(1)(2)
[7] R. pp. 136-141.
[8] R. pp. 194-210.
[9] R. pp. 211-212.

On June 1, 2016, Canyon Outdoor filed a Motion for Reconsideration[10] and corresponding memorandum and declaration in support thereof.[11] Nettleton file a Verified Response to Defendant's Motion for Reconsideration[12] on July 8, 2016 and the trial court heard the matter on July 13, 2016. Also heard and decided by the trial court on July 13, 2016 were the parties' respective motions for attorney fees and costs. The trial court denied Defendant's Motion for Reconsideration and application for fees and costs [13] and awarded Nettleton attorney fees in the amount of $22,646.25 and costs of $698.80 for a total judgment of $44,895.05.[14]

B. STATEMENT OF FACTS

For the sake of brevity, Nettleton concurs with the "Undisputed Facts" as set forth by the trial court in its Memorandum Decision and Order Re: Cross Motions for Summary Judgment dated May 18, 2016 as related to the summary judgment portion of Canyon Outdoor's issues on appeal herein. Clearly, the trial court was diligent in its ascertainment and analysis of the facts and evidence presented by both parties and incorporating the same into its undisputed facts from which it was able to enter judgment in the matter.[15] However, rather than work from the same set of facts presented to the trial court during the summary judgment proceedings, Defendant chose to introduce an abundance of "new facts and evidence" to support its Motion for Reconsideration. In its Appellant's Brief, Canyon Outdoor continues to utilize those "new facts and evidence" to bolster its argument the trial court erred in denying its motion for

[10] R. pp. 389-390.
[11] R. pp. 337-354.
[12] R. pp. 403-416.
[13] R. pp. 433-434.
[14] R. pp. 435-436.
[15] R. pp. 195-199.

reconsideration. As such, Nettleton remains resolute in his objection to all of the facts asserted by Canyon Outdoor for the first time in its motion for reconsideration and repeated in its subsequent appeal.

II.

ISSUES ON APPEAL

Defendant submits the following are the issues to be considered by this Court 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.

III.

STANDARD OF REVIEW

A. Summary Judgment Appeal

In *Wright v. Ada County*, the Idaho Supreme Court reviewed the decision to grant summary judgment under the same standard used by the district court used in ruling on the motion. 376 P.3d 58, 62 (2016); *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556, 212 P.3d 982,

986 (2009). Summary judgment under I.R.C.P. 56(c) is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The party moving for summary judgment has the burden of establishing the absence of a genuine issue of material fact. *Finholt v. Cresto*, 143 Idaho 894, 896, 155 P.3d 695, 697 (2007).

> This Court must construe the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences in that party's favor. *Finholt* at 894. If reasonable people could reach different conclusions or inferences from the evidence, the motion must be denied. *Id.* However, the nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *Id.* at 896–97, 155 P.3d at 697–98. A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment. *Id.* at 897, 155 P.3d at 698. Instead, the nonmoving party must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000).
> *Wright v. Ada County*, 376 P.3d 58, 62 (2016).

"When cross-motions have been filed and the action will be tried before the court without a jury, however, the court may, in ruling on the motions for summary judgment, draw probable inferences arising from the undisputed evidentiary facts. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982); *see also Drew v. Sorensen*, 133 Idaho 534, 537, 989 P.2d 276, 279 (1999). Drawing probable inferences under such circumstances is permissible since the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial. *Ritchie*, 103 Idaho at 519, 650 P.2d at 661. Conflicting evidentiary facts, however, must still be viewed in favor of the nonmoving party. *Argyle v. Slemaker*, 107 Idaho 668, 670, 691

P.2d 1283, 1285 (Ct.App.1984)." *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust*, 147 Idaho 117 at 124, 206 P.3d 481 at 488 (2009).

B. Motion for Reconsideration Appeal

The Idaho Supreme Court in *Wickel v. Chamberlain*, held

> [W]hen reviewing a trial court's decision to grant or deny a motion for reconsideration, this Court utilizes the same standard of review used by the lower court in deciding the motion for reconsideration. *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). Thus, when reviewing the grant or denial of a motion for reconsideration following the grant of summary judgment, this Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment. *Id.*; see also *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014).[16]

"On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order." *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012).

"We begin by determining whether Appellant's motion is actually a motion for reconsideration under I.R.C.P. 11(a)(2)(B) or a motion to alter or amend judgment under I.R.C.P 59(e). A motion for reconsideration allows a party to move a court to reconsider an interlocutory order. I.R.C.P. 11(a)(2)(B). An interlocutory order is an order that is temporary in nature or does not completely adjudicate the parties' dispute." *Boise Mode, LLC v. Donahoe Pace & Partners LTD*, 154 Idaho 99, 107, 294 P.3d 1111, 1119 (2013). When an order granting summary judgment is filed before a final judgment, the order granting summary judgment is an interlocutory order. *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 911, 332 P.3d 815, 823 (2014).

[16] *Wickel v. Chamberlain*, 363 P.3d 854 (2015)

Here, Appellant moved the court to reconsider its ruling on Respondent's cross-motion for summary judgment, not the final judgment. Because Appellant filed the motion prior to entry of the final judgment and was only challenging the order granting summary judgment, an interlocutory order, Appellant's motion is a motion for reconsideration under I.R.C.P. 11(a)(2)(B), rather than a motion to alter or amend judgment under I.R.C.P. 59(e). *In re Estate of Lanham*, 369 P.3d 307 (App. 2016).

IV.

ARGUMENT

A. The Trial Court Properly Concluded Nettleton was Entitled to Commission from the New Contracts he Obtained Prior to April 10, 2015.

1. Nettleton's written employment contract provided: "**New Contracts** will be paid at a Rate of 10% of the Monthly Revenue;" compensation after termination was a term of the employment agreement between Canyon Outdoor and Nettleton.

The trial court determined that Nettleton and Canyon Outdoor entered into a written contract on February 28, 2014 setting forth a promise to pay commission on new contracts at a rate of 10% of the monthly revenue.[17] Further, there is nothing in the language of the contract that in any way prohibits, restricts, or prevents the commissions earned upon procuring new contracts from being paid post-employment. Throughout its motion for summary judgment, Defendant continually suggested there was an additional term of the contract requiring Nettleton to "service" the contracts before he was entitled to receive any commissions associated with the contract. At the end of the day the record speaks for itself and the record is void of any evidence

[17] R. p. 197, reference Massood Decl. ¶ 13, Exhibit B.

lending credibility or support for Defendant's claim that Nettleton was responsible for the "servicing of the contract" in order to receive the 10% commission as reflected in the February 28, 2014 written contract.

Rather than acknowledge the plain terms of the written contract as indicated above, Defendant alleges it had a contract with Nettleton which provided he would only be paid his commission during months when he was servicing his accounts and since Nettleton resigned his employment he was obviously no longer servicing any accounts. However, Defendant has failed to present evidence of written or oral contract requiring Nettleton to service the new contracts in order to receive a commission. In the words of the trial court, "Canyon Outdoor Media has presented nothing more than Massood's conclusory testimony that servicing the contract was a requirement for receiving compensation."[18]

2. "Course of Dealing" ~ Snake River Dental Contract commission paid to Nettleton was not dependent upon Nettleton "servicing" the contract.

Not only is there a written contract explicitly setting forth the term by which Nettleton was entitled to commissions earned for procuring new contract, Nettleton presented the trial court with evidence demonstrating "course of dealing" related to the payment of commissions clearly not dependent upon the "servicing" of the contract. Nettleton relied on the Snake River Dental Contract to show payment of commissions were not dependant on Nettleton "servicing" the contract. In November, 2014 Nettleton made a sale to Snake River Dental for 12 months of advertising. Rather than pay monthly, Snake River Dental paid a lump sum upfront and in return,

[18] R. pp. 206

Canyon Outdoor paid Nettleton his commission in full in his next paycheck. Nettleton asserts this proves he was not required to "service" contracts as a condition precedent to receiving commissions.[19] Defendant has offered no evidence disputing Nettleton's evidence of the "course of dealing" or lack of service requirement.

As aptly stated by the Court in its Memorandum and Decision and Order Re: Cross Motions for Summary Judgment, "When the court will be the fact-finder at trial, as it will be in this case, 'it is permissible for the court on a summary judgment motion to draw the inferences that it deems most probable from the undisputed evidence and grant summary judgment despite the possibility of conflicting inferences.' *Johnson v. McPhee*, 147 Idaho 455, 469, 210 P.3d 563, 577 (Ct. App. 2009)." [20] Moreover, the lump sum payment of Plaintiff's entire 10% commission on the Snake River Dental contract when the advertiser paid in full is "evidence of how the parties intended the contract to be interpreted." *Pocatello Hospital, LLC v. Quail Ridge Med. Investor LLC*, 156 Idaho 729, 721, 330 P.3d 1067, 1079 (2014). *See also Mountainview Landowners Coop. Assoc., Inc, v. Cool*, 142 Idaho 861, 865, 136 P.3d 332, 336 (2006). The interpretation: Plaintiff gets his 10% commission out of the advertiser's payment when the advertiser pays, not as he "services" the contract over its terms of months.

Defendant has failed to produce any evidence that the "servicing" requirement was a term in the contract. Further, there is no evidence in the record establishing the "service" requirement or lack of entitlement to post-resignation commissions was ever communicated to or agreed to by Nettleton. Had Defendant intended for commissions to be dependent upon continued "servicing"

[19] R. p. 206, reference Nettleton Aff. ¶¶ 6-7.
[20] R. p. 206.

of contract, the language should have been included in the contract. Clearly, there can be no meeting of the minds about unspoken and unwritten requirements which are contrary to a course of dealing and other evidence before the court. A party's nonverbalized subjective intent is not part of the contract and therefore the trial court correctly found in favor of Nettleton summary judgment. *J.R. Simplot Company v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (Idaho 2006).

While Defendant was right in its assertion there was no meeting of the minds on a material term of the parties' contract, Defendant was wrong about the particular term at issue. Clearly, the material term never mutually agreed to by the parties was: that Nettleton would not get commissions otherwise due him after he resigned because he was not there to ***service*** his contracts. There is no admissible evidence to prove the term, not to mention Defendant admits servicing the contracts was not even discussed, and the parties' course of dealing belies its existence. Ultimately, in light of the evidence presented by the parties in their cross-motions for summary judgment, the trial court found, "In light of such undisputed evidence, the reasonable inference to be drawn is that there was no 'servicing' requirement in the contract between Canyon Outdoor Media and Nettleton."[21] Therefore, Defendant's summary judgment was properly denied by the trial court.

B. The Trial Court Properly Denied Defendant's Motion for Reconsideration and Request to Consider New Evidence.

At the conclusion of the hearing on Defendant's Motion for Reconsideration, the trial court denied Defendant's motion for the following reasons:

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[21] R. pp. 206-207.

1. The contract was memorialized in writing.

2. The "servicing the contract" term Canyon Outdoor Media claimed to exist was not in writing, nor did Defendant present sufficient evidence at the motion for summary judgment to support the claim.

3. There was sufficiently persuasive evidence on Nettleton's behalf to support the conclusions made at the summary judgment hearing as to the existence of the agreement to pay commission according to the terms of the February 28, 2014 contract and to the inferences drawn therefrom. [22]

"[W]hen the district court grants summary judgment and then denies motion for reconsideration, this Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment. This means the Court reviews the district court's denial of a motion for reconsideration de novo." *Massey v. Conagra Foods, Inc.*, 156 Idaho 476, 480, 328 P.3d 456, 460 (2014) (quoting *Bremer, LLC v. E. Greenacres Irrigation Dist.*, 155 Idaho 736, 744, 316 P.3d 652, 660 (2013)). Here, the trial court's denial of Defendant's motion for reconsideration and consideration of new evidence requires additional analysis due to the fact the trial court's order granting summary judgment was filed at the same time as final judgment. Because the judgment was filed contemporaneous with the order granting Plaintiff's Motion for Summary Judgment and order denying Defendant's Motion for Summary Judgment, there was no *interlocutory order* remaining for Defendant to seek reconsideration of.

There being no interlocutory order, the governing standard relied upon by Defendant in his Memorandum in Support of Motion for Reconsideration is not applicable in this case because final judgment was entered on May 18, 2016:

[22] T. p. 68, ll. 4-19.

> '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 'I Bank of N Idaho,* 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)) (emphasis added). [23]

In re Estate of Lanham, 369 P.3d 307 (App. 2016), the Idaho Supreme Court was asked to address the denial of appellant's motion for reconsideration when final judgment was entered prior to the filing of the motion. The Court's analysis below is applicable to the appeal filed by Defendant herein:

> A final judgment is 'an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. It must be a separate document that on its face states the relief granted or denied.' *T.J.T., Inc. v. Mori*, 148 Idaho 825, 826, 230 P.3d 435, 436 (2010). The purpose of a rule requiring that every judgment be set forth on a separate document is to eliminate confusion about when the clock for an appeal begins to run. *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 619, 226 P.3d 1263, 1266 (2010). A final judgment that does not dispose of outstanding issues in a case does not fulfill its purpose. Therefore, where a trial court fails to rule on a motion for reconsideration filed prior to the entry of a final judgment, we presume the district court denied the motion when it entered a final judgment. *See State v. Wolfe*, 158 Idaho 55, 61, 343 P.3d 497, 503 (2015).

While the trial court in this case did hear the Motion for Reconsideration despite there being a final judgment, the court could have just as easily declined to rule on the motion as the Court did *In re Estate of Lanham.* Nonetheless, Nettleton maintains when the trial court entered its final

[23] R. p. 338.

judgment Defendant was precluded from moving for reconsideration of the order for summary judgment. *Id.*

The trial court properly denied Defendant's request to present additional evidence which Defendant claimed was necessary to determine the correctness of the court's interlocutory order. Contrary to Defendant's assertion, the court's order for summary judgment was not an interlocutory order based on the fact the court issued a final judgment on the matter simultaneously. The facts presented by Defendant in its motion for reconsideration and again, in its appeal were never asserted in the summary judgment proceeding. Because Defendant failed to "set forth specific facts showing there is a genuine issue for trial" at the summary judgment proceeding Nettleton was entitled to summary judgment. *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000); IRCP Rule 65(e) ("If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."). Defendant's motion for reconsideration, accompanying declarations and exhibits in this case is Defendant's attempt to introduce a late, after-the-fact, summary judgment declaration and argument, in violation of the orderly scheduling required by IRCP Rule 56(c).

Defendant's presentation of new evidence related to payments and request for offset against the judgment in its Motion for Reconsideration are improper. Nettleton's motion for summary judgment sought recovery of $13,950 in unpaid commissions plus statutory treble damages, etc.[24] Defendant opposed Plaintiff's summary judgment on the grounds that he is not

[24] R. pp. 136-141.

entitled to any commissions or alternatively, that he is not entitled to statutory treble damages.[25] At no time did Defendant question the amount of the commissions claimed by Nettleton ($13,950) in any papers opposing the summary judgment. In fact, Defendant's own motion for summary judgment takes the same position as its opposition to Plaintiffs motion: Plaintiff is not entitled to any commissions and even if he is, he is not entitled to statutory treble damages.[26] Defendant did not dispute $13,950 figure. The only time prior to the motion for reconsideration did Defendant has disputed the amount of commissions due was at oral argument on the summary judgment. At that time, Defendant's attorney claimed various amounts less than the full contract amount due Defendant had been paid by Idaho Bourbon Distillers, and therefore Plaintiff's commission due had to be discounted. However, these representations were presented in argument, not under oath. *Camp v. Jiminez*, 107 Idaho 878, 882, 693 P.2d 1080, 1084 (Idaho App. 1984)(unsworn statements are not probative in summary judgment).

It is undisputed that the facts Defendant presented in its motion for reconsideration and Appellant's Brief were *never* asserted by Defendant in the summary judgment proceeding. Instead, in its Motion for Reconsideration Defendant for the first time alleges facts to its Eighth Affirmative Defense, "offset."[27] Additionally, in Section D of his Memorandum Defendant, raised the affirmative defense of "payment," also not addressed in the summary judgment proceeding. Without question, Defendant had the burden of supporting his claimed affirmative

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[25]R. pp. 147-151.
[26]R. pp. 22-23, pp. 74-85.
[27] R. pp. 16-21.

defenses in the summary judgment. *Chandler v. Hayden*, 147 Idaho 765, 771, 215 P.3d 485, 491 (2009). Having failed to do so, he has waived them.

Further, Defendant did not produce in discovery some of the evidence it now cites in support of its affirmative defenses until at least May 12, well after the April 6 oral argument on the summary judgment, if at all. This despite Plaintiff's discovery requests served September 28, 2015, which included the following:

> INTERROGATORY NO. 16: Please state every fact you rely upon in support of your FIRST through TENTH AFFIRMATIVE DEFENSES.
> INTERROGATORY NO. 17: Please state the amount Plaintiff owes Defendant and every fact supporting any such claimed offset.
> REQUEST FOR PRODUCTION NO. 21: Please produce every document or thing which evidences any fact you rely upon in support of your FIRST through TENTH AFFIRMATIVE DEFENSES.
> REQUEST FOR PRODUCTION NO. 22: Please produce every document or thing evidencing the amount Plaintiff owes Defendant and every fact supporting any such claimed offset.

And despite the deadline for final supplementation of discovery responses being May 2 (35 days before the June 6 trial; Order Setting Trial, etc., November 23, 2015, para. 8(c)). Yet Defendant claims that it overpaid Plaintiff and that "equity requires" that these alleged overpayments be deducted from Plaintiff's recovery.[28] Defendant has not cited any legal theory or authority to support its novel claim, and none are known. If Plaintiff overpaid Defendant, it did so for its own good and sufficient reasons or because of poor management, through no fault of Plaintiff. It is estopped to recover that money, which has been spent by Plaintiff due to his wholly reasonable "detrimental reliance."

[28] R. pp. 349-351.

Further, Defendant claims that it had to pay additional wages for staff to service Plaintiff's contracts after he left, which should also be deducted from his recovery.[29] Again, Defendant cites no legal theory or authority for its novel theory. Then, Defendant claims that Plaintiff was not entitled to commissions on certain contracts (Contracts #14 and #16) because they were "renewal contracts" not "new contracts."[30] Defendant classifies those contracts as "renewal" contracts, yet Defendant failed to dispute Nettleton's identification of those contracts "new" until after judgment was entered in this case. In fact, in its Response to Request for Admission No. 2: Defendant did not deny contracts #14 and #16 were "new" contracts.[31] Clearly, the time to have made such distinction would have been during summary judgment and not later when Defendant was unsatisfied with judgment entered by the trial court.

For the reasons provided herein and those set forth by the trial court in its Memorandum Decision and Order Re: Cross Motions for Summary Judgment[32] and Judgment [33] Defendant's motion for reconsideration and request to present new evidence was properly denied. The Motion for Reconsideration was Defendant's attempt to take another bite at the apple after losing on summary judgment. Defendant apparently made a strategic decision on how to handle the summary judgment which did not work out. The trial court reiterated that at the time of summary judgment oral arguments, there were no arguments or objections presented by Defendant as to the amounts or math presented by Nettleton in his requested relief. There being no objections,

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[29] R. pp. 352-353.
[30] R. pp. 346-347.
[31] R. pp. 415-416.
[32] R. pp. 194-209.
[33] R. pp. 211-212.

the court relied on the amounts paid on the contracts as provided by Defendant to Nettleton and submitted to the Court as evidence in the summary judgment proceeding. The trial court found there were no issues of material fact regarding such amounts and determined the amount of the judgment therefrom.[34] It is not fair to Plaintiff to relitigate the summary judgment, ignoring all of the procedural safeguards of that process, depriving Plaintiff of a fair opportunity to respond, and depriving him of due of process. Further the grounds asserted by Defendant in its motion were without merit, including its underlying claims for offset and recoupment.

C. Trial Court Correctly Awarded Costs and Attorney Fees to the Prevailing Party in the Action.

1. Nettleton was clearly the prevailing party.

The determination of a prevailing party status is committed to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Oakes v. Boise Heart Clinic Phys., LLC* at 540, 512. The reviewing court will reverse the trial court's determination of which party prevailed "only in the rarest of circumstances." *Id.* at 543, 515. The prevailing party determination is examined and determined from an overall view, not a claim-by-claim analysis. *Advanced Medical Diagnostics, LLC v. Imaging center of Idaho, LLC*, 154 Idaho 812, 814, 303 P.3d 171, 173 (2013).

The Court found summary judgment in favor of Nettleton and thus, identified Nettleton as the "prevailing party" in the matter. Defendant's argument challenging the trial court's determination that Nettleton was not the prevailing party relies upon an inaccurate account of

[34] T. p. 68-70.

Nettleton's case and the issues brought before the court at summary judgment. The record is clear; Nettleton initiated this litigation under two legal theories, 1. Wage claim and 2. Breach of contract.[35] Contrary to Defendant's assertions, Nettleton's did not raise a specific claim for compensation in the form of commissions due from "renewal contracts." Not only did Nettleton's complaint not allege such relief, neither did Nettleton's motion for summary judgment. Further, the trial court at the time set for hearing on the parties' cross-motions for summary judgment confirmed Nettleton was not requesting relief related to commissions associated in any way with "renewal" contracts. It appears Defendant is attempting to insert an imaginary claim, never made by Nettleton to bolster its contention of being the prevailing party. There having been no such claim asserted in Nettleton's Complaint, nor such relief sought in his Motion for Summary Judgment, Defendant cannot claim to be the prevailing party on an issue not before the trial court. The trial court's findings as follows were proper:

- Nettleton was the prevailing party in the action
- Defendant was not the prevailing party and as such there was no basis upon which to award fees or costs to Defendant.
- There is a basis to award fees and costs to Nettleton, the cost claimed by Nettleton are allowable as a matter of right.

Plaintiff sued for wages due and owing and Defendant prayed for dismissal of his suit, with prejudice.[36] The trial court awarded Plaintiff wages due and owing and imposed a statutory penalty on Defendant. Frankly, the argument by Defendant that Plaintiff was not the prevailing party in this action is without merit and contrary to basic logic. *Oakes v. Boise Heart Clinic*

[35] R. pp. 10-12, pp. 13-15.
[36] R. pp. 16-21.

Phys., LLC, 152 Idaho 540, 272 P. 3d 512 (2012); *Bates v. Seldin*, 146 Idaho 772, 203 P.3d 702 (2009); *Collins v. Jones*, 131 Idaho 556, 961 P.2d 647(1998).

2. The award of fees and costs to Plaintiff was proper.

The trial court properly exercised its discretion in granting Plaintiff's request for attorney fees and costs. When reviewing a trial court's award of attorney fees, the reviewing court applies and abuse of discretion standard, and the party appealing an award of attorney fees bears the burden of establishing a clear abuse of discretion. *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 80, 278 P.3d 943, 950 (2012). Idaho Rules of Civil Procedure 54(e)(3), provides that the trial court should consider the following factors in determining the amount of attorney fees:

> (A) The time and labor required.
> (B) The novelty and difficulty of the questions.
> (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
> (D) The prevailing charges for like work.
> (E) Whether the fee is fixed or contingent.
> (F) The time limitations by the client or the circumstances of the case.
> (G) The amount involved and the results obtained.
> (H) The undesirability of the case.
> (I) The nature and length of the professional relationship with the client.
> (J) Awards in similar cases.
> (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
> (L) Any other factor which the court deems appropriate in the particular case.

In determining the amount of a "reasonable attorneys fee," the court is required to consider the existence and applicability of the factors set forth in the rule but is not required to make specific findings demonstrating how it employed any of the factors in reaching the award amount. *Irwin Rogers Inc. Agency v. Murphy*, 122 Idaho 270, 833 P.2d, 128, 135 (1992). It is the appellant's

burden to demonstrate that the trial court failed to consider or apply the appropriate criteria. *Id.* Further, when a party is determined to be the prevailing party, the award of reasonable attorneys' fees is not required to be limited to the claims upon which the prevailing party prevailed. *Advanced Medical Diagnostics, LLC v. Imaging Center of Idaho*, LLC, 154 Idaho 812, 303 P.3d 171(2013). In this case, the trial court determined Plaintiff's requested fees and costs were reasonable and in accordance with the rules, and thus awarded the fees and costs as requested by Plaintiff.

3. Plaintiff is entitled to his attorney's fees and costs on appeal.

Plaintiff requests his attorney's fees and costs associated with responding to the appeal pursuant to Idaho Code §§ 12-120, 12-121 and 45-615 because the prevailing party is entitled to recover its attorneys' fees on appeal pursuant if the appeal was brought or pursued frivolously, unreasonably, or without foundation. *Downey v. Vavold*, 144 Idaho 592, 166 P. 3d 382, 386 (2007). Based on the record and the argument presented herein, Defendant's appeal was brought and pursued unreasonably and frivolously.

D. The Trial Court Correctly Determined Defendant was not the Prevailing Party and was not Entitled to an Award of Costs and Fees.

For the same reasons and analysis above, Defendant was not the prevailing party. Defendant claims Nettleton filed a claim "which the employee knew to be false at the time the employee brought the action," as required by Idaho Code § 45-612(2). However, Defendant offers no proof of Plaintiff's knowledge at the time this action was filed on August 21, 2015. Similarly, there is no proof Nettleton understood the February 28, 2014, rate schedule to

preclude post-separation commissions on his "renewal" contracts. Aside from the lack of proof by Defendant that Nettleton ever made a claim he knew to be false, Defendant's claim it defended against such false claims is wholly without merit based on the record herein.

First, Plaintiff's Complaint[37] and subsequent Amended Complaint filed September 14, 2015[38] does not expressly make a claim for commissions on "renewal" contracts. Rather the claim was for commissions due on his contracts, whatever the commissions due are determined to be. Nettleton made no "claim" as to the "renewal" contracts within the meaning of Idaho Code § 45-612, and therefore no "false claim" as alleged by Defendant. Secondly, Plaintiff "conceded" that he was only entitled to commissions on his "new" contracts before the summary judgment oral argument on April 6, 2016. Nettleton's summary judgment motion claimed he was due commissions totaling $13,950 as related to "new contracts."[39] This claim was further supported by Nettleton's affidavit, filed the same day, showing his summary judgment claim to be for commissions on his "new" contracts only.[40] Plaintiff clearly did not seek commissions on his "renewal" contracts in his summary judgment. Additionally, during the hearing for summary judgment, the trial court confirmed Plaintiff was seeking recovery only on the "new" contracts and not on "renewal" contracts.[41] For the reasons stated above, Defendant's claim for attorney fees and costs, brought pursuant to Idaho Code § 45-612(2), were properly denied by the trial court. Likewise, Defendant will not be the prevailing party on appeal and not entitled to attorney

[37] R. pp. 10-12.
[38] R. pp. 13-15.
[39] R. pp. 136-141, IV.
[40] R. pp. 88-99, ¶¶ 12, 13, 14, Exhibit B.
[41] T. p. 9, l. 22- p. 10, l. -2.

fees and costs on appeal.

V.

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that the trial court's judgment in favor of Plaintiff should be affirmed. The trial court's award of Plaintiff's fees and costs should likewise be affirmed, and Plaintiff awarded his fees and costs on appeal.

DATED this 5th day of June, 2017.

DINIUS LAW

By: _____
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 5th day of June, 2017, a true and correct copy of the above and foregoing document was served upon the following by:

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for DINIUS LAW

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