6-27-2017

Nettleton v. Canyon Outdoor Media, LLC Appellant's Reply 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 REPLY 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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III. INTRODUCTION

Plaintiff-Respondent Allen G. Nettleton's ("Nettleton") brief asserts that Defendant-Appellant Canyon Outdoor Media, LLC ("Canyon Outdoor") was not entitled to submit a motion for reconsideration to the trial court. This assertion is contrary to the express language of Idaho Rule of Civil Procedure 11(a)(2)(B). As addressed in Canyon Outdoor's Appellant's Brief, and further addressed below, Canyon Outdoor was permitted to ask the trial court to reconsider its Memorandum Decision and Order Re: Cross Motions for Summary Judgment and the trial court was required to consider the new and additional information presented with Canyon Outdoor's Motion for Reconsideration. In addition, Nettleton's assertion that a February 28, 2014 agreement, which modified the rates at which Nettleton's variable compensation component were paid set forth the entire agreement between the parties is not supported by the record. For these reasons, 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.

IV. ARGUMENT

A. CANYON OUTDOOR WAS ENTITLED TO FILE A MOTION FOR RECONSIDERATION

In this situation, Canyon Outdoor's Motion for Reconsideration was filed after entry of a final judgment and the trial court was required to consider any new admissible evidence or

authority bearing on the correctness of the Memorandum Decision and Order Re: Cross Motions for Summary Judgment. *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). Nettleton's statement that Canyon Outdoor "was precluded from moving for reconsideration of the order for summary judgment" is contrary to Idaho Rule of Civil Procedure 11. *See* Respondent's Brief at p. 13; I.R.C.P. 11(a)(2)(B). Idaho Rule of Civil Procedure 11(a)(2)(B), which was in effect when Canyon Outdoor's Motion for Reconsideration was filed, expressly provided that a motion for reconsideration may be brought after entry of a final judgment. I.R.C.P. 11(a)(2)(B) A motion for reconsideration of any interlocutory order of the trial court may be made at any time before the entry of final judgment, but not later than fourteen days after the entry of the final judgment. *In re Estate of Lanham,* 160 Idaho 89, 93, 369 P.3d 307, 311 (Ct. App. 2016) ("A motion to reconsider any order of the trial court entered before final judgment may be made at any time prior to or within 14 days after the entry of a final judgment.")[1] *In re Estate of Lanham* did not provide a basis for the trial court to decline to rule on Canyon Outdoor's Motion for Reconsideration. The facts presented in *In re Estate of Lanham* are distinct from the facts in this matter and cannot be reconciled. There the Idaho Court of Appeals held that when a trial court fails to rule on a motion for reconsideration filed prior to the entry of a final judgment, the motion for reconsideration is deemed to have been denied. *Id*. *citing State v. Wolfe*, 158 Idaho 55, 61, 343 P.3d 497, 503 (2015). In this situation, Canyon Outdoor's Motion for Reconsideration was filed after the trial court entered the Judgment.

Idaho Rule of Civil Procedure 11(a)(2)(B) allowed two separate approaches to filing

[1] I.R.C.P. 11(a)(2)(B) is similar to I.R.C.P. 11.2(b)(1) which became effective July 1, 2016.

motions to reconsider interlocutory order. *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 911, 332 P.3d 815, 823 (2014). Parties could either file a motion to reconsider before a final judgment was entered or file a motion to reconsider within fourteen days after entry of a final judgment. *Id*. Idaho Rule of Civil Procedure 11(a)(2)(B) provided a party one more chance after entry of a final judgment to ask the court to decide the law and facts correctly. *Id.* at 913, 825. This additional opportunity after entry of a final judgment "ensures the district court decides a case on the proper law and facts." *Id*. Canyon Outdoor's Motion for Reconsideration requested reconsideration of the trial court's Memorandum Decision and Order Re: Cross Motions for Summary Judgment and was filed within 14 days of entry of the trial court's Judgment. Accordingly, Canyon Outdoor's Motion for Reconsideration is similar to the second motion for reconsideration filed by Appellant in *Agrisource, Inc. v. Johnson. See Id*. at 912, 824. The Idaho Supreme Court determined that the Appellant's second motion for reconsideration "was proper because (1) it moved the court to reconsider the court's orders on summary judgment and [Appellant's] first motion to reconsider, which were both interlocutory orders; and (2) [Appellant] made it within fourteen days of the June 14, 2012 Judgment, which was a final judgment." *Id.*

The fact that the trial court's Memorandum Decision and Order Re: Cross Motions for Summary Judgment and the Judgment were entered on the same day does not change the interlocutory nature of the Memorandum Decision and Order Re: Cross Motions for Summary Judgment. "When an order granting summary judgment is filed before a final judgment, that order is an interlocutory order." *Id*. at 911, 823. In addition to the Memorandum Decision and Order Re: Cross Motions for Summary Judgment and the Judgment being two separate

documents, the Memorandum Decision and Order Re: Cross Motions for Summary Judgment cannot be considered a final judgment by itself. Pursuant to Idaho Rule of Civil Procedure 54(a), a final judgment is not permitted to contain the court's legal reasoning, findings of fact, or conclusions of law. I.R.C.P. 54(a). The trial court's Memorandum Decision and Order Re: Cross Motions for Summary Judgment consists of the very elements that a final judgment is prohibited from containing. R., pp. 201-208.

In addition, Canyon Outdoor was not required to assert or present facts in the summary judgment proceeding in order for the trial court to be required to consider those facts when Canyon Outdoor presented them in conjunction with its Motion for Reconsideration. Whether the information submitted by Canyon Outdoor with its Motion for Reconsideration would have been timely pursuant to Idaho Rule of Civil Procedure 56(c), is not the appropriate standard for consideration of whether the trial court was required to consider the information submitted by Canyon Outdoor. *See Kepler-Fleenor v. Fremont Cty.*, 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012). In *Kepler-Fleenor v. Fremont Cty.*, the Idaho Supreme Court determined that it was improper to strike an affidavit submitted in support of a motion for reconsideration on the basis that it was untimely under Idaho Rule of Civil Procedure 56. *Id*. Rather, Idaho Rule of Civil Procedure 11(a)(2)(B) governed the submission of the affidavit. *Id.* As such, Idaho Rule of Civil Procedure 11(a)(2)(B) rather than Idaho Rule of Civil Procedure 56(c) governed the trial court's consideration of the new and additional information Canyon Outdoor brought to the trial court's attention in conjunction with Canyon Outdoor's Motion for Reconsideration. *Id*. In addition, Nettleton did not move to strike the new and additional information Canyon Outdoor brought to

the trial court's attention in the Plaintiff's Verified Response to Defendant's Motion for Reconsideration and is not entitled to do so now. R., pp. 403-409.

B. THE FEBRUARY 28, 2014 COMMISSION RATE MODIFICATION AGREEMENT DID NOT CONSTITUTE THE ENTIRE AGREEMENT BETWEEN THE PARTIES

Nettleton mischaracterizes the significance of the February 28, 2014 Agreement. The February 28, 2014 Agreement modified a single term of the employment agreement between Nettleton and Canyon Outdoor, the rates at which the variable portion of Nettleton's compensation was determined. R., p. 65 at ¶14. The February 28, 2014 Agreement was not the entire agreement between Canyon Outdoor and Nettleton, it did not address the base component of Nettleton's compensation and it did not address Nettleton's duties with Canyon Outdoor. *Id.* The February 28, 2014 Agreement could not have been the entire agreement between Canyon Outdoor and Nettleton because it did not address the services Nettleton actually performed for Canyon Outdoor and for which Canyon Outdoor paid Nettleton a significant portion of his overall compensation, at least $38,000.00 over the course of Nettleton's time with Canyon Outdoor. R., pp. 63-65. More importantly, the February 28, 2014 Agreement did not create an obligation for Canyon Outdoor to pay Nettleton commission relating to "new contracts" after Nettleton terminated his employment with Canyon Outdoor. R., p. 65 at ¶14.

It is important to carefully use the word "commission" when analyzing whether Nettleton is entitled to post-termination compensation. Nettleton received a fixed component of compensation and variable component of compensation. R., p. 65 at ¶12. The variable component of compensation was not a commission in the sense that Nettleton could obtain an

advertiser for Canyon Outdoor and then never interact with that advertiser again. R., pp. 30, 37, 45, and 63-65. At a minimum, there was an evidentiary conflict regarding this issue that could not be resolved without the consideration of witness credibility.

Nettleton had the burden of proving that his agreement with Canyon Outdoor included a term that required payment of the variable portion of compensation after Nettleton terminated his employment. However, the only evidence in the record was Nettleton's subjective belief that he was entitled to receive compensation after he terminated his employment. R., p. 35 and 43. Nettleton testified that the February 28, 2014 agreement did not entitled him to the variable portion of his compensation after his resignation. R., p. 43. Nettleton also testified that post-separation payment of the variable portion of his compensation was not offered or promised to him by Canyon Outdoor. R., p. 35. Yet Nettleton asserts that because he believed he was entitled to post-separation compensation that he is entitled to it. Nettleton's subjective belief that he was entitled to compensation following his resignation is not sufficient. R. p. 89; *See J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006). As previously addressed in Appellant's Brief, the trial court erred when it determined that Nettleton had established a "course of dealing" that established Nettleton was entitled to post-separation compensation. R. p. 207. In this situation, the parties had not previously applied the term of the employment agreement upon which Nettleton seeks to enforce and as such could not create a "course of dealing." *Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC*, 156 Idaho 709, 721, 330 P.3d 1067, 1079 (2014)

Even if Nettleton was able to demonstrate from the record that he was entitled to post-separation compensation, it was improper for the trial court to infer that there was no

requirement for Nettleton to service contracts in order to be entitled to compensation. R., p. 207. The information before the trial court was the written testimony of Curtis Massood that Nettleton was required to service contracts and the written testimony of Nettleton that he was not required to service contracts. R. pp. 62-67, 88-91, 152-153. This constitutes an evidentiary conflict analogous to the evidentiary conflict addressed by the Idaho Court of Appeals in *Argyle v. Slemaker*. *Argyle v. Slemaker*, 107 Idaho 668, 670, 691 P.2d 1283, 1285 (Ct. App. 1984). There the Idaho Court of Appeals determined that summary judgment was inappropriate when an evidentiary conflict could not be resolved without the consideration of witness testimony. *Id*. Specifically, the Idaho Court of Appeals held that "such a determination should not be made on summary judgment if credibility can be tested by testimony in court before the trier of fact." *Id.* The conflicts between Curtis Massood and Nettleton's testimony could not be resolved without the trial court implicitly considering the witnesses' credibility. Accordingly, it was not appropriate for the trial court to resolve this evidentiary conflict at summary judgment.

C. THE TRIAL COURT FAILED TO ACT PURSUANT TO IDAHO CODE SECTION 45-612

Canyon Outdoor was required to defend against Nettleton's false claim for compensation based on "renewal contracts." Not only did the trial court err by failing to award Canyon Outdoor its attorney's fees and costs incurred defending against Nettleton's claim for compensation based on "renewal contracts", but the trial court awarded Nettleton attorney's fees which included attorney's fees incurred by Nettleton pursuing a false claim. R., p. 433. Idaho Code Section 45-612(2) did not allow the trial court the discretion to deny Canyon Outdoor an

award of the attorney's fees and costs incurred defending against Nettleton's false claim. I.C. § 45-612. Idaho Code Section 45-612(2) provides as follows:

> Any employee initiating a civil proceeding to collect unpaid wages or other compensation, which is based in whole or in part on a false claim which the employee knew to be false at the time the employee brought the action, shall be liable for attorney's fees and costs incurred by the employer in defending against the false claim.

I.C. § 45-612(2). Regardless of whether Nettleton had a subjective belief that he was entitled to post-separation compensation, Nettleton signed the February 24, 2014 Agreement. R., p. 33. Moreover, Nettleton received compensation from Canyon Outdoor for over a year utilizing the tiered rate structure set forth by the February 24, 2014 Agreement. R., pp. 248-271. There were several months during that time in which Nettleton was not entitled to commission relating to "renewal contracts" pursuant to that tiered rate structure. R., pp. 252, 256, 258, 264, 265, and 266. Any argument that he was somehow unaware of how the commission tier structure set forth by the February 24, 2014 Agreement operated when he filed the Verified Complaint is disingenuous.

Nettleton's assertion that he "did not raise a specific claim for compensation in the form of commissions due from 'renewal contracts'" in the Respondent's Brief does not reflect the actual language of Nettleton's Verified Complaint or Amended Verified Complaint. Respondent's Brief at 18. Paragraphs 4 to 9 of Nettleton's Verified Complaint and Amended Verified Complaint allege as follows:

> 4. During such employment, Employee was a salesman for Employer, **procuring new and renewing contracts** with third-party advertisers for advertising on Employer's billboards.

> 5. Employee was paid a base salary and commissions on his sales.
>
> 6. Employee's commissions were based on a percentage of the gross revenue from each of the **new or renewing contracts** he procured, and paid on a monthly basis as each advertiser paid on its contract over its term.
>
> 7. The terms of some of the contracts Employee had procured had not expired at the time of his separation, and the advertisers have continued to make monthly payments thereon to Employer after Employee's separation.
>
> 8. Employee is entitled to his commissions on these contracts, in at least the total amount of $24,047.50; and such portion thereof as is attributable to the advertisers' payments made on such contracts to date is due and payable now, and the remainder shall be due and payable upon receipt by Employer.
>
> 9. Such commissions are part of Employee's financial compensation for his labor and services on behalf of Employer and constitute "wages" within the meaning of Idaho Code Section 45-601.

R., pp. 10-11(emphasis added). Nettleton's Verified Complaint and Amended Verified Complaint specifically alleged that he was entitled to post-separation compensation based on the new and renewing contracts he procured. *Id*. Moreover, the discovery requests Nettleton submitted to Canyon Outdoor incorporated two exhibits, one that addressed "renewal contracts" and one that addressed "new contracts". R., p. 233; R., pp. 386-387; R., p. 410. Exhibit A was a list of "renewal contracts" that Nettleton asserted were contracts he procured with existing customers of Canyon Outdoor and from which he sought compensation from Canyon Outdoor. R. pp. 382-385; R., p. 410. Nettleton required Canyon Outdoor to provide information relating to payments received from Canyon Outdoor's advertisers for the "renewal contracts" listed on Exhibit A. R., pp. 386-387; R., p. 410. Nettleton continued to deny that he was not entitled to commissions relating to "renewal contracts" in January of 2016. R, pp. 376 and 388. Nettleton's

counsel finally conceded at the hearing on the motion for summary judgment that Nettleton was not entitled to commission on renewal contracts and that they were there "just to talk about the new contracts". Tr., pp.9-10, ll. 23-25 and 1-2.

Whether or not Nettleton sought compensation for "renewal contracts" in his Cross Motion for Summary Judgment, does not alter the fact that $24,047.50 sought in the Verified Complaint and Amended Verified Complaint included $8,433.75 in compensation relating to renewal contracts or Canyon Outdoor's successful defense of Nettleton's false claim. R., pp. 379-388; R., p. 392; R., p. 410. Nettleton did not acknowledge that he was not entitled to compensation based on "renewal contracts" until after Canyon Outdoor's motion for summary judgment was filed. It is also important to consider that Nettleton's counsel responded only that he was in agreement with Canyon Outdoor's position as to renewal contracts. Tr., pp.9-10, ll. 23-25 and 1-2. Nettleton's counsel did not deny that Nettleton had previously been seeking compensation based on the renewal contracts." *Id.* Regardless of the Court's determination as to whether Nettleton prevailed on his claim for compensation relating to "new contracts", Canyon Outdoor prevailed as to Nettleton's false claim for compensation relating to "renewal contracts" and was entitled to an award of its attorney's fees and costs incurred in defending against the false claim. I.C. § 45-612(2).

In addition, it was an abuse of the trial court's discretion to enter an award of attorney's fees in Nettleton's favor that included attorney's fees incurred relating to the pursuit of the claim for compensation relating to "renewal contracts." This position is not based on Nettleton's failure to segregate attorney's fees for the claim relating to new contracts for which the trial court

determined that Nettleton prevailed. Rather, this position is based upon the policy set forth by Idaho Code Section 45-612(2). I.C. § 45-612(2). Idaho Code Section 45-612 would not provide its intended effect of reimbursing employers for the successful defense of a false claim if the employee that brought the false claim is awarded attorney's fees incurred in bringing the false claim. *Id*. The issue before this Court is whether the trial court properly exercised its discretion. This Court "must consider (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Smith v. Mitton*, 140 Idaho 893, 902, 104 P.3d 367, 376 (2004)(internal citations omitted). In this situation, the trial court was required to consider Idaho Code Section 45-612 in addition to the factors set forth in Idaho Rule of Civil Procedure 54(e).

V. 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 27th day of June, 2017.

WORST, FITZGERALD & STOVER, PLLC

By: /s/ Louis V. Spiker
Louis V. Spiker

VI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June, 2017, I caused two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

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/s/ Louis V. Spiker
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