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Petrus Fam. Trust Dated May 1, 1991 v. Kirk Cross-Appellant's Reply Brief Dckt. 44784

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I. INTRODUCTION

Reaching a decision to award attorney fees without an exercise of reason or outside the boundaries of a district court's discretion is an abuse of that discretion. The district court in this case properly understood that awarding fees to Chris Kirk dba Kirk Enterprises ("Kirk") was within its discretion. The district court also properly understood that Kirk was entitled to an award of fees for defending against a frivolous claim. The problem, however, is that the district court's actions, in awarding Kirk a small percentage of the total fees incurred in defending against the frivolous claim, are not logically supported by the explanation provided in the court's written decision. Therefore, because the court explained that the fees incurred by Kirk in defending against both the frivolous and non-frivolous claims were indivisible, the district court did not reach its apportionment decision through an exercise of reason or within the outer boundaries of its discretion.

II. ARGUMENT

A. The logical disconnect between the language and reasoning of the district court's decision and the amount of fees actually awarded to Kirk indicates either a failure to reach the decision through an exercise of reason, a failure to act within the boundaries of the court's discretion, or both.

The district court's apportionment decision was based, at least in part, on the court's subjective belief that because Kirk's counsel did not file an early dispositive motion on the non-frivolous claim, regardless of the ramifications of losing that motion, that Kirk was not deserving of a fee award for the time spent defending against the frivolous claim. R. Vol. 1, p. 1156. Even though the court considered Petrus' argument supporting the non-frivolous claim and his interpretation of the accrual rules and statute of limitations rules to be considerably weaker than Kirk's argument, the court explained that Petrus framed the issue as one of first impression. R. Vol. 1, p. 1154-1155. So, because Kirk did not seek an early dismissal of a non-frivolous claim,

that the district court believed presented an issue of first impression, the court penalized Kirk by severely limiting the fee award he received for the fees incurred defending against the frivolous claim. The logical disconnect between the district court's actual fee award and the reasons expressed in the language of its supporting opinion equates to an abuse of discretion through a failure to exercise reason and failure to act within the boundaries of the court's discretion.

In its fee apportionment to Kirk, the district court explained that fee-shifting under I.C. §12-121 was appropriate with respect to the non-frivolous conspiracy-to-defraud claim. R. Vol. 1, p. 1154. Typically, in any determination of an award of costs and fees, the threshold question is which party prevailed. The district court properly answered that question, Petrus did not appeal the question, and it is not contested at this point. Thus, no further analysis of that threshold question is required. Kirk was the prevailing party and was entitled to an award of fees under I.C. §12-121 for defending against the frivolous conspiracy claim.

The district court properly understood that Kirk was entitled to a fee award for defending against the frivolous claim. R. Vol. 1, p. 1155. The court expressed no confusion over whether fees had been incurred in defending against the frivolous claim. R. Vol. 1, p. 1155. In fact, the court clearly expressed its understanding that “almost all of the work that was necessary to defend against the conspiracy-to-defraud claim to also have been necessary to defend against the implied-warranty claim.” R. Vol. 1, p. 1155. The court also went on to state that “most of the work pertained to both claims indivisibly or to the implied-warranty claim in particular” R. Vol. 1, p. 1155. This language is broad. The use of the phrases “almost all” and “both claims indivisibly” indicate that the court understood that the work was performed defending against both claims. Further, the language used by the district court does not indicate that it perceived the indivisible work to be limited to discovery issues as Petrus suggests. Petrus did not voluntarily drop the conspiracy claim

after discovery unveiled its frivolousness. The claim was successfully defended by Kirk through the filing of a summary judgment motion. Not until the actual summary judgment hearing, after failing to provide any argument supporting the claim in its briefing, was Petrus forced to stop pursuing the frivolous conspiracy claim.

How, then, did the district court conclude that Kirk was only entitled to an award of seven percent of his total fees incurred? Even after the court had concluded that most of the time spent defending Kirk was spent defending both a frivolous claim and a non-frivolous claim, and further, that the defense of the frivolous claim took the litigation process through discovery and the summary judgment stage of this lawsuit. Respectfully, it is submitted that the district court did not reach its decision through an exercise of reason or within the outer boundaries of its discretion.

The court did not state that it was unable to determine from the record which fees were attributable to the defense of the frivolous claim and which fees were attributable to the defense of the non-frivolous claim. If this had been the case, then denying Kirk's fee request in whole, or making a small award, may have been proper. As this Court explained in *Brooks v. Gigray Ranches, Inc.*, if a district court is unable to separate, and determine from the record, which claims the attorney fees were incurred defending, denying a fee request is proper. *See, Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72, 78, 910 P.2d 744, 750 (1996). Our situation is different. The district court explained its approach as a careful review of the record, a determination that equal work was done defending both claims, and then somehow still determined that a seven percent award was proper.

How have other courts defined an abuse of discretion? Courts from around the country have held that in general, a trial court abuses its discretion where its order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful

consideration; where the court has acted arbitrarily without the employment of its conscientious judgment; where there is an unreasonable, arbitrary, or unconscionable attitude on the part of the court; or where the court acts without reference to any guiding rules or principles. Discretion also is abused where manifest injustice has been done, where the appellate court has a definite and firm conviction that the lower court erred, where there has been a deprivation of rights, or where the judgment is the result of partiality, prejudice, bias, or ill will. *5 C.J.S. Appeal and Error § 907*. Using these general definitions as a guide, the district court's decision to award Kirk seven percent of his total fees after explaining that most of the work pertained to both claims indivisibly, but that defense counsel should have filed a dispositive motion earlier in the case on the non-frivolous claim, equates to an abuse of discretion under a number of the above definitions. The district court either failed to reach its decision through an exercise of reason, or through action outside the bounds of the court's discretion, or both. Either way, the issue of apportionment of fees should be remanded so the district court can reanalyze its decision.

Had the district court fairly applied the logic expressed in its opinion, that the services provided by Kirk's counsel in defending against the frivolous claim equaled the services spent defending against the non-frivolous claim, a reasonable attorney fee award to Kirk would have very likely been closer to fifty percent of the fees incurred, not seven. This, coupled with the district court's expression of displeasure with defense counsel's strategic choice of foregoing the early filing of a motion to dismiss the non-frivolous claim, which the court perceived as an issue of first impression, and instead proceed through discovery and summary judgment, equates to the court improperly substituting its judgment for that of the litigants and counsel and imposing a penalty for not viewing the litigation through the same lens as the court.

For these reasons, we respectfully request that this Court take the opportunity to remedy

the error by remanding and allowing the district court the opportunity to reassess its decision and reapportion the fee award to Kirk through a proper exercise of reason within the bounds of its discretion.

B. Fees should be awarded to Kirk.

Petrus has not made a reasoned argument as to why the law should evolve in the direction he suggests. Instead, he has filed an ill-reasoned appeal, for an ill purpose, based on a strained reading of *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The district court properly rejected Petrus' attempt to convert a breach of implied warranty of habitability claim, sounding in contract, into a tort claim to avoid application of the appropriate contract statute of limitations. The argument is entirely self-serving for Petrus. Its acceptance does not advance Idaho warranty law or provide any compelling reason for a change in the law. As previously explained in the *Respondent/Cross-Appellant's Brief*, the economic loss doctrine absolutely stands in the way of Petrus recovering from Kirk. As do other valid legal arguments that were presented below but not considered or written about in the summary judgment decision. Petrus knows this. He chooses to ignore this and argues that none of this applies. That argument fails. This appeal was brought and pursued for frivolous reasons, not in some effort to help Idaho develop the law.

With regard to the cross-appeal, the district court's expressed logic does not match its action. The failure to exercise reason and act within the bounds of its discretion is an abuse of discretion for which this Court should take action. That action should be a remand back to the district court.

For these reasons, we respectfully ask the Court uphold the law expressed in *Tusch*, and not alter the course of Idaho law for years to come so that only Petrus can benefit. An implied warranty claim sounds in contract, not tort. We further ask the Court to remand the fee award back

to the district court for review and reapportionment.

III. CONCLUSION

For the foregoing reasons and the reasons expressed in *Respondent/Cross-Appellant's Brief*, the Court should affirm the decision awarding summary judgment to Kirk, find that the district court abused its discretion and remand the award of attorney fees back to the district court for review and reapportionment, declaring Kirk the prevailing party on appeal.

Respectfully submitted this 3rd day of November, 2017.

ARKOOSH LAW OFFICES



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of November, 2017, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

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