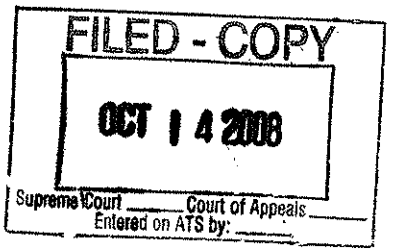
10-14-2008

Grease Spot, Inc. v. Harnes Respondent's Brief Dckt. 35321

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE GREASE SPOT, INC.,	)	
	)	**Supreme Court Docket No. 35321**
Plaintiff/Respondent,	)	
	)	
vs.	)	
	)	
RICHARD AND SHERRY HARNES, husband and wife,	)	
	)	
Defendants/Appellants.	)	
	)	



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RESPONDENT'S BRIEF ON APPEAL

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Appeal from the District Court of the
First Judicial District of the State of Idaho,
In and for the County of Kootenai

****

Honorable Charles Hosack
District Court Judge Presiding

****

MICHAEL E. RAMSDEN
Ramsden & Lyons, LLP
P.O. Box 1336
Coeur d'Alene, ID 83816
Telephone: (208) 664-5818
Facsimile: (208) 664-5884

Attorney for Appellants

MICHAEL B. HAGUE
ISB No. 3574
PAINE HAMBLEN LLP
701 Front Ave., Suite 101
P. O. Box E
Coeur d'Alene, ID 83816-0328
Telephone: (208) 664-8115
Facsimile: (208) 664-6338

Attorney for Respondent

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Whether the Grease Spot is entitled to attorney fees on appeal.

II. ARGUMENT AND AUTHORITY

A. The Harnes are Not Entitled to Recover Attorney Fees Incurred in Arbitration

It is not permissible to award attorney fees in arbitration unless the arbitration agreement expressly so provides. I.C. § 7-910; *Storrer v. Kier Construction Corporation*, 129 Idaho 745, 746, 932 P.2d 373 (Ct. App. 1997). Furthermore, there is no:

> ...basis to conclude that the legislature, in enacting I.C. § 12-120(3), intended to grant parties an independent right of action simply for the recovery of attorney fees incurred in arbitration, when such fees clearly cannot be awarded as part of the arbitration.

Id., 129 Idaho at 747.

Harnes rely heavily on I.C. § 41-1839, and the case law which is developed around that statute, as support for their position here. That reliance is misplaced.

I.C. § 41-1839 is an implied term in every insurance contract. *Emery v. United Pacific Insurance Company*, 120 Idaho 244, 247, 815 P.2d 442 (1991). In *Pendlebury v. Western Casualty and Surety Company*, 89 Idaho 456, 406 P.2d 129 (1965), the court described it as:

> ...axiomatic that the obligation of I.C. § 41-1839 became part and parcel of the contract of insurance to the same effect as though incorporated therein.

89 Idaho at 470.

The axiom referenced in the *Pendlebury* decision arises from numerous cases in which statutes regulating the business of insurance were claimed to unconstitutionally impair contractual obligations. For example, in *Penrose v. Commercial Travelers Insurance Company*, 75 Idaho 524, 275 P.2d 969 (1954), the insurance company challenged the enforceability of an attorney fees statute relative to an insurance policy issued before the statute was passed. With respect to this challenge, the *Penrose* court held:

> The particular statute relates to insurance business carried on in this state; such business is affected with the public interest and the private rights of contract in relation thereto must be and are subjected to the valid exercise of the police power by the legislature. *Intermountain Lloyds v. Diefendorf,* 51 Idaho 304, 5 P.2d 730. It is under the inherent police power vested in the legislature that it saw fit to subject any insurance company, where an action is filed and successfully prosecuted to judgment in any court in this state for recovery on any of its policies issued herein, to the payment of a reasonable attorney's fee.

75 Idaho at 537.

In *Halliday v. Farmers Insurance Exchange*, 89 Idaho 293, 404 P.2d 634 (1965), a successful plaintiff on an uninsured motorist claim against his automobile insurance company was awarded attorney fees under I.C. § 41-1839. The written demand made against the insurance company before the plaintiff filed suit was substantially greater than the verdict rendered by the jury. However, the insurance company did not ever tender any amount "justly due" to the plaintiff. The insurance company appealed the attorney fees awarded under Idaho Code § 41-1839, claiming that because the amount

originally demanded by the plaintiff exceeded the amount of the verdict, the statute did not authorize an award of attorney fees. 89 Idaho at 295-296.

On appeal, the Supreme Court quoted with approval portions of the analysis set forth in *Penrose v. Commercial Travelers Insurance Company*, 75 Idaho 524, 275 P.2d 969 (1954):

> ...The parties entered into the insurance contract charged with the knowledge of the reserved police power of the state which may at any time be invoked in the promotion of the general welfare by enlarging from time to time the remedies and procedures in connection with insurance contracts....

89 Idaho at 299 (*quoting* 75 Idaho at 539).

As the above authorities indicate, the nature of the insurance business is unique, rendering insurance companies subject to legislative authority not ordinarily applicable to businesses in general. One manifestation of this circumstance is that I.C. § 41-1839 is rendered part of every insurance policy in Idaho.

It is because I.C. § 41-1839 is an implied contractual provision of every insurance policy that I.C. § 7-910 and I.C. § 41-1839 were reconciled and reconcilable in *Emery v. United Pacific Insurance Company*, 120 Idaho 244, 815 P.2d 442 (1991). In *Emery*, the insurance policy required arbitration of disputes between the company and its insured. The policy required the expenses of arbitration to be shared equally between the company and the insured, "unless they agree otherwise". 120 Idaho at 246-247.

The trial court awarded attorney fees to the insured under I.C. § 41-1839. The insurance company appealed, relying on *Bingham County Commissioners v. Interstate*

Electric Company, 105 Idaho 36, 665 P.2d 1046 (1983), for the proposition that under I.C. § 7-910 it is beyond the scope of an arbitrator's powers to award attorney fees to one of the parties absent a contractual agreement to do so. 120 Idaho at 246.

The Supreme Court upheld the trial court's award of attorney fees. In doing so, the Supreme Court left intact the holding of *Bingham County, supra*, ruling instead:

> However, that limitation upon an arbitrator does not extend to the authority of the district court to award attorney fees pursuant to I.C. § 41-1839.

120 Idaho at 246.

The analysis of the *Emery* court as to why it upheld the award of attorney fees was as follows:

> This Court has previously held that the provisions of I.C. § 41-1839 become part of the insurance contract to the same effect as though incorporated therein. *Pendlebury v. Western Casualty and Surety Company*, 89 Idaho 456, 406 P.2d 129 (1965). I.C. § 41-1839 provides in pertinent part:
>
> > 41-1839. **Allowance of Attorney Fees in Suits Against Insurers.**—(1) *Any insurer* issue any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, *which shall fail for a period of thirty (30) days after proof of loss* has been furnished as provided in such policy, certificate or contract, *to pay to the person entitled thereto the amount justly due* under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state for recovery under the terms of the policy, certificate or contract, *pay such further amounts as the court shall adjudge reasonable as attorney's fees in such action.*

> Pursuant to this implied term in the insurance contract, the parties agree that the insurer is obligated to pay attorney fees if the insured is compelled to file suit to recover under the insurance policy. As an implied term in the insurance contract, the statutory language of I.C. § 41-1839 modifies the general American Arbitration Association rule that parties must bear equally all expenses of arbitration, except those associated with the presentation of witnesses. Where the insured is required and compelled to file a lawsuit by reason of an insurer's refusal to pay in order to recover under her insurance contract, we hold it is implicit in I.C. § 41-1839 that the court shall adjudge a reasonable award of attorney fees against the insurer.

120 Idaho at 247 (*emphasis original)*

Because of the nature of the insurance business, I.C. § 41-1839 is an implied contractual part of every insurance policy. As such, every insurance policy which requires disputes between insurance companies and their insureds to be resolved by arbitration include "in the agreement to arbitrate", consistent with I.C. § 7-910, the fee shifting requirements of I.C. § 41-1839. That such is the case in Idaho, however, is unique to the subject of the law pertaining to insurance. The same does not hold true in other areas.

Harnes advocate that I.C. § 12-120(3) should be deemed an implied term of the contract at issue in this case. In *Storrer v. Kier Construction Corp.*, 129 Idaho 745, 932 P.2d 373 (Ct. App. 1997), that same argument was rejected by the Court of Appeals. Idaho Code § 12-120(3) is not a required or implied term in any contract of a commercial nature. If it were, the court in *Storrer* would not have affirmed the ruling of:

> ...the district court [which] rejected Storrer's contention that a right to recover attorney fees under I.C. § 12-120(3) is implied into every contract involving a commercial transaction.

129 Idaho at 747.

Insurance policies are adhesion contracts and the parties do not have the ability to negotiate the terms included in those policies. As such, the state reserves extensive police powers to require, on behalf of insureds, that certain provisions must be included in the policies. I.C. § 41-1839 is such a provision.

Ordinary contracts of a commercial nature are not susceptible to the same concerns that exist relative to contracts of insurance. The parties are, as they were here, generally able to negotiate the various terms of their contracts. The jurisprudential bases for imposing, as a contractual provision, the terms of I.C. § 41-1839 into every contract of insurance do not exist for ordinary commercial contracts and the provisions of I.C. § 12-120(3).

Had the parties here desired a fee shifting provision like that in I.C. § 12-120(3) to be part of their contract, they could have easily included it. They did not do so, however. Their agreement nowhere states that one party would be liable for the other's attorney fees in the event of a dispute. The parties' agreement did, however, make express provision for disputes to be resolved in arbitration. Under I.C. § 7-910, each party is to bear its own expenses in the arbitration in the absence of an agreement to the contrary. There was no such agreement to the contrary here. As such, Judge Hosack's

holding is correct, and should be affirmed, with respect to attorney fees incurred in arbitration by the Harnes.

B. Attorney Fees Incurred Before Arbitration and Attorney Fees Incurred After Arbitration.

Harnes argue that *Deelstra v. Hagler*, 145 Idaho 922, 188 P.3d 864 (2008) mandates an award of all the attorney fees incurred by Harnes both before and after the arbitration proceeding below. That argument is misplaced.

Deelstra is limited in application to the issues addressed there. Specifically, the Supreme Court noted that:

> Deelstra does not challenge the District Court's prevailing party determination, nor the amount of the fee award.

188 P.3d at 866.

In this case, with respect to attorney fees claimed for legal work done before arbitration, Judge Hosack correctly addressed both the issue of prevailing party and the amount of the award:

> The Court finds that Harnes prevailed in the civil litigation with regard to the issue of compelling arbitration. The Grease Spot commenced the civil litigation and Harnes attempted to move the matter into arbitration. Harnes was successful in doing that. The attorney fees incurred in context of civil litigation over a commercial transaction in obtaining the order of a court compelling arbitration should be properly recoverable in the civil litigation. However, attorney fees incurred in defending or prosecuting the civil claims itself are not necessarily issues upon which a party prevailed in the civil litigation. Since the matter went into arbitration, a court would have to refer to the arbitration proceeding to conduct an analysis of the prevailing party. Instead, this court looks to the issues upon which the party

> prevailed in civil litigation itself. The issue upon which Harnes prevailed was the issue compelling arbitration. Harnes is therefore entitled to an award of attorney fees incurred in compelling arbitration. The court finds that 16.9 hours of attorney time prior to March 20, 2006 to be appropriately attributable to compelling arbitration.

R. 80.

Determining the issue of "prevailing party" requires analysis of three principle factors: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. *Sanders v. Lankford*, 134 Idaho 322, 325, 1 P.3d 823 (Ct. App. 2000). The determination of prevailing party is one of discretion for the trial court. *Id.*; *Bream v. Benscoter*, 139 Idaho 364, 79 P.3d 723, 727 (2003).

The trial court correctly determined that the only issue upon which Harnes prevailed before the court was the issue of compelling arbitration. R. 80. Armed with counsel's time entries [R. 64-67] the trial court was able to determine an appropriate award for the time counsel spent before arbitration on the subject of compelling arbitration. R. 80. The trial court correctly acted in its discretion and should be affirmed with respect to the issue of attorney fees allowable prior to the commencement of arbitration.

Harnes also seek attorney fees for events following issuance of the arbitrator's award. The trial court correctly observed that proceedings for confirmation of arbitrator's awards under the Uniform Arbitration Act are designed to be summary. R. 79. Indeed,

under I.C. § 7-911, an award is automatically confirmed upon presentation thereof absent a timely objection.

Harnes relied below on *Driver v. SI Corp.*, 139 Idaho 423, 80 P.3d 1024 (2003) for the proposition that "disbursements" under I.C. § 7-914 include attorney fees. *See* R. 79. However, *Driver* was concerned with "non-meritorious protracted confirmation challenges". 139 Idaho at 429. Here, as the trial court noted, no objection to confirmation was raised by The Grease Spot. Harnes never sought modification or correction of the award relative to the question of attorney fees pursuant to I.C. § 7-913.

Review of the record reflects that the Harnes' attorney fees incurred after the arbitrator's initial award determination were incurred in an unsuccessful attempt to persuade the arbitrator to change his mind, and otherwise incurred pursuing attorney fee awards. *See* R. 64-67. Attorney fees incurred for activities directed at the arbitrator are not, as discussed above, recoverable under the circumstances of this case. Attorney fees incurred pursuing attorney fees are likewise not recoverable.

For example, in *Koelker v. Turnbull*, 127 Idaho 262, 899 P.2d 972 (1995), the Koelkers sought and were awarded attorney fees incurred quieting title clouded by breach of the warrant of seizen. The trial court awarded those attorney fees, plus attorney fees incurred by the Koelkers in their attempts to recover those attorney fees after title was quieted.

The Supreme Court reversed the judgment as to the attorney fees incurred after title was quieted, holding that "the only attorney fees which are recoverable as damages

are those which are directly attributable to quieting title in the property". 127 Idaho at 266.

In *Allison v. John M. Biggs, Inc.*, 121 Idaho 567, 826 P.2d 916 (1992), the Supreme Court held that the then existing version of I.C. § 12-120 "does not provide for a post-judgment award of attorney fees". 121 Idaho at 568. The current version of I.C. § 12-120(5) does allow for post-judgment awards of attorney fees, but only where such fees are "incurred in attempting to collect on the judgment".

Review of the record in this case reveals that the arbitrator's award was rendered June 25, 2007. R. 42-49. Review of counsel's time entries [R. 66] reveals that the attorney fees incurred by Harnes from that date forward were directed at further proceedings before the arbitrator, and attempts to recover a judgment from the court for attorney fees. The obtainment of quiet title in the *Koelker* case is analogous to the entry of the arbitrator's award in the present case. The Koelkers were entitled to recover the attorney fees they incurred obtaining quiet title as damages. However, once quiet title was obtained, the legal bases upon which attorney fees could be awarded ceased to exist. In the absence of some other statutory or contractual basis for an award of attorney fees thereafter, the Koelkers were not entitled to recover such fees.

In this case, the contest over the merits of the parties' dispute over their "commercial transaction" was resolved upon entry of the arbitrator's Memorandum Decision. From that point forwarded, Harnes' legal efforts have been directed at not the merits of the underlying case, but on their quest to recover attorney fees. I.C. § 12-120(5)

clearly indicates that post-judgment attorney fees are awardable only with respect to attempts to collect on a judgment. Such is not an allowable basis for an award of attorney fees.

Judge Hosack's ruling on the subject of attorney fees incurred after arbitration is consistent with the above. Under the circumstances of this case, the only "necessary" step required for Harnes to reduce the arbitrator's award to a judgment was the ministerial act described in I.C. §§ 7-911 and 7-914. In the words of Judge Hosack:

> It is this Court's finding that in a normal confirmation of arbitration proceedings pursuant to 7-914, an award of attorney fees is unnecessary. The Court finds that this is true in the instant case as well.

R. 79.

It is clear that Judge Hosack perceived the issue before him as one within his discretion. It is also clear that Judge Hosack correctly perceived that the summary ministerial task of reducing the arbitrator's award to a judgment did not warrant an assessment of attorney fees. The work done was secretarial in nature and Judge Hosack was correct in his ruling.

III. CONCLUSION

The trial court's assessment of costs and attorney fees was correct in all respects.

This court is respectfully requested to affirm the District Court.

DATED this 9th day of October, 2008.

PAINE HAMBLEN LLP

By _____
Michael B. Hague
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of October, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael Ramsden
Ramsden & Lyons LLP
P.O. Box 1336
Coeur d'Alene, ID 83816-1336

✓ U.S. MAIL
__ HAND DELIVERED
__ OVERNIGHT MAIL
__ TELECOPY (FAX) to:

_____
Michael B. Hague