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City of Osburn v. Randel Appellant's Reply Brief Dckt. 37965

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CITY OF OSBURN,

Plaintiff-Respondent,

vs.

DAVID C. RANDEL and PAMELA L.
RANDEL, husband and wife,

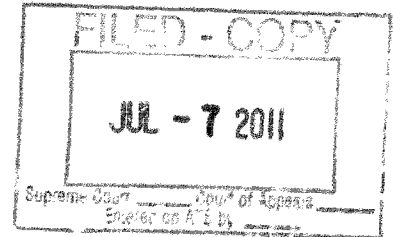
Defendants-Appellants

Supreme Court No. 37965
District Court No. CV-2008-497

REPLY BRIEF OF APPELLANTS

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

HONORABLE FRED M. GIBLER
District Judge



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STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a District Court's judgment denying Defendants' (hereinafter Randels) attorney fees against Plaintiffs (hereinafter Osburn) under Idaho Code §12-117.

B. Course of Proceedings and Statement of the Case

Randels stand by their statement of the course of proceedings and Statement of the Case but would emphasize what has previously been set out and the picture painted by the same-Osburn through its attorneys-first Michael Branstetter then Charlie Cox, admittedly and incredulously relied upon laypersons to file a complaint against the Randels not having read their Ordinance and not having the required supporting documents to support their allegations against Randels-that Randels are the prevailing party.

After moving for summary judgment without a supporting brief and armed simply with the affidavit of Nila Jerkovich whose statements were conclusory, based upon conjecture, and included unsupported improper legal conclusions, Osburn moved to dismiss their claim with prejudice and the Court entered order. (R. V. I, p. 34). Further, it should be noted and emphasized that Osburn's dismissal was at the prompting of the Court. At the status conference held on November 16, 2009 after counsel for the City of Osburn, referring to their denial of motion for summary judgment, stated: "I thought the case was over, but **you ruled in their favor**" the Court stated: "**I guess I kind of**

assumed it was over, too. But nobody ever did any order of request to dismiss or anything. So are you requesting to dismiss it Mr. Cox?” (emphasis added) (Tr. p 19, L. 9-14) and at said hearing a written order was signed by the Court specifically stating “and **the matter having been previously decided by the Court in defendants favor,** the Court being fully advised in the premises and good cause appearing....” (emphasis added) (R. Vol. I, p. 34 & 35). The foregoing indicates that Randels were indeed the prevailing party but if still vague the issue was put to rest when the Court specifically ruled that Randels were the prevailing parties in its order entered June 22, 2010. (R. V. II, p. 308)

ISSUES PRESENTED ON APPEAL

(a) Prevailing Party: Counsel for Osburn argues that the issues should have been broken down further by Randals including more analysis with regard whether Randels were the prevailing party. However, Osburn is under the misperception that Randels were ordered as not having been the prevailing parties. Based upon the above colloquy of the parties and the Court as well as the specific language of the order presented at the status conference, it should be obvious that the prevailing party was the Randels. Further, the Court in its Opinion Re: COSTS AND ATTORNEY FEES, specifically ruled that under Straub v. Smith¹, Randels were the prevailing party. Because the issue of

¹ Straub v. Smith, 145 Idaho 65, 75, 175 P.3d 754, 764 (Idaho, 2007), citing Inland Group of Cos., Inc. v. Obendorff, 131 Idaho 473, 475, 959 P.2d 454, 456 (1998). Further, the court in Straub in citing Eighteen

prevailing party was decided in Randel's favor there was no need for spending time arguing a non-issue.

Randels have requested this Honorable Court for and order remanding this matter to District Court with instructions for further proceedings on the issue of Appellant's attorney fees. Osburn has not cross-appealed with regard the ruling of the Court finding Randels the prevailing party nor have they rephrased Appellant's issue on appeal with regard the Court's order finding in view of Straub that Randels were the prevailing party and since they have not done so, Osburn cannot raise the issue now.²

Further, counsel's arguments that the Court had differentiated the case law and I.C. §12-117 is disingenuous. After, reading the Court's opinion several times, Randels see nowhere in its arguments that the Court ruled that Randels were not the prevailing party. Not unlike the other arguments of Osburn, the record and what Osburn argues the state of the record to be clearly deviates.

(b) Osburn acted without a reasonable basis in fact or law: Osburn spends a great deal of time creating a labyrinth of generalized quotes from case law in its attempts to draw this court from the true issue of the case-that of fairness. More concisely framed: Were Osburn's actions groundless and arbitrary so that attorneys fees should be awarded to Randels whom have borne unfair and unjustified financial burdens defending against

Mile Ranch, LLC v. Nord Excavating & Paving, Inc., 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) stated that "...a party dismissed before trial can be a prevailing party because it was the most favorable outcome that could have been achieved"

² I.A.R. 11(g); I.A.R. 15; I.A.R. 35(b)(4); State v. Jensen, 149 Idaho 758, 758-64, 241 P.3d 1, 1-7 (Idaho Ct. App. 2010)

groundless charges or attempting to correct mistakes it should never have made³. Further, nowhere in the foregoing quote is the term “capricious” used nor has the term been associated as a standard underlying I.C. §12-117.

In defense of the forgoing statutory purpose underlying I.C. §12-117, Osburn argues that the statute was vague and therefore, even though the city clerk made a “mistake”, (notwithstanding the fact that a city clerk is making statutory interpretation for its city attorney) Osburn is immune from the penalties of I.C. §12-117. Further in defense, Osburn tells this Honorable Court to disregard the comments of the District Court wherein it held through a clear reading of the statute into the record that the ordinance was not applicable to the circumstances as set out by Randels through affidavits in support by the Randels, the Shoshone County Assessor’s Office, and a professional land surveyor, Chris Pfahl⁴.

Nowhere in the record does the Court make findings that the ordinance in question is vague, it simply states that based upon the affidavits as applied to the ordinance summary judgment is not appropriate. Thereafter, all comments by the Court as well as counsel for Osburn, including their motion to the Court for dismissal with prejudice and the language of said order(which it should be noted that Osburn drafted),

³ See Bogner v. State Dep't of Revenue & Taxation, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984); Fox v. Boundary County, 121 Idaho 686, 693, 827 P.2d 699, 706 (Ct. App. 1991)(“...the district court concluded that the award of fees under Idaho Code § 12-117 would serve as a deterrent to arbitrary action and also would provide a remedy for a person (Fox) who had incurred unfair and unjustified financial burdens attempting to correct mistakes that should never have been made. We uphold the court's conclusion.”); Fox v. Boundary County, 121 Idaho 686, 827 P.2d 697 (1992).

⁴ Affidavits in Support of Brief in Opposition to Plaintiff’s Motion For Summary Judgment, Pamela Randel, David Randel, Chris Pfahl, and Jerry White Augmented Record dated March 21, 2011.

made it clear that by its interpretation of the ordinance, the Court had ruled as to the merits of the case.

Again, Osburn has not appealed the order of dismissal and therefore has waived any issue as to the language contained therein- that of “the matter having been previously decided by the Court in defendants' favor”⁵

This Court has previously held where a state agency had no authority to order a particular action, it acted without a reasonable basis in fact or law⁶. Randels, having pleaded with Osburn to review their ordinance and let them alone both preliminary to their filing their enforcement action and through their counsel in answer to Osburn’s complaint and subsequent hearings thereafter, have been unfairly subject to incurring attorney fees and cost as a result of Osburn’s arbitrary actions. Osburn has ignored the plain and unambiguous language of their ordinance, which led to the award of attorney fees⁷.

To award fees under Idaho Code § 12-117 would comply with the declared policies of Idaho Code § 12-117 which are “to serve as a deterrent to groundless or arbitrary agency action and to provide a remedy for persons who have borne unfair and

⁵ (R. V. I, p. 34); I.A.R. 11(g); I.A.R. 15; I.A.R. 35(b)(4); State v. Jensen, 149 Idaho 758, 758-64, 241 P.3d 1, 1-7 (Idaho Ct. App. 2010)

⁶ See, Moosman v. Idaho Horse Racing Com'n, 117 Idaho 949, 793 P.2d 181 (1990)

⁷ See, Gardiner v. Boundary County Board of Commissioners, 148 Idaho 764, 769, 229 P.3d 369, 374 (2010); Lane Ranch P'ship v. City of Sun Valley, 145 Idaho 87, 88-91, 175 P.3d 776, 778-80 (2007), and Fischer v. City of Ketchum, 141 Idaho 349, 352, 109 P.3d 1091, 1094 (2005)

unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never had made.”⁸

(c) Randels should be granted their attorney fees and costs on appeal if they are successful based upon I.C. 12-117: Again, rather than recognizing their mistake in arbitrarily and without reasonable foundation applying their ordinance to one of their citizens-the Randels, Osburn hires yet another attorney in attempts to substantiate their wrongdoing rather than simply reimbursing the Randels a reasonable sum for having to defend against their conduct.

(d) Osburn should not be awarded its attorney fees and cost pursuant to I.C. §12-117: As stated by Osburn in its reply brief, the same tests apply to the granting of attorney fees on appeal as originally applied to the District Court below. Randels have accurately depicted the nature and statement of the case both in their Original Brief and herein. The record is clear that the Court found that Randels were the prevailing party. It was further clear that prior to the Randels moving for attorney fees and costs there was no dispute as to the interpretation and clear meaning of the statute.

Osburn, now, in defense, make points as to the record which are clearly disingenuous as set out above and therefore based upon the rules and purpose underlying I.C. 12-117 , wherein Randels argue from a record in support of their attorney fees and costs which clearly is not a basis to argue that Randels’ appeal here today was brought

⁸ Bogner v. State Dep't of Revenue & Taxation, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984); Fox v. Boundary County, 121 Idaho 686, 693, 827 P.2d 699, 706 (Ct. App. 1991)

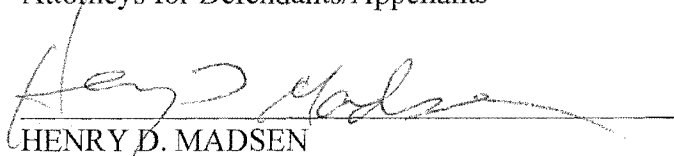
without foundation and unreasonable and, further, in contradiction to the purpose of the statute, Osburn should be denied their attorney fees and cost.

CONCLUSION

Based on the foregoing, it is clear the Osburn Municipal Code upon which Osburn relied in harassing one of its citizens did not authorize and or support the remedies and arguments of Osburn. Osburn acted without a reasonable basis of fact and law and, throughout the process above set out, never propounded any supporting argument therefore. The District Court's decision was not based on an exercise of reason and therefore the Court's order denying Randel's attorney fees should be reversed and this Court remand the matter to District Court with an order for entry of Randel's attorney fees pursuant to Idaho Code §12-117. Further, if this Court rules that Randels are not the prevailing party on appeal for an order denying Osburn's attorney fees and costs for the reasons set out above.

Respectfully submitted this 5th day of July, 2011.

MADSEN LAW OFFICES, PC
Attorneys for Defendants/Appellants



HENRY D. MADSEN

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on this 5th day of July, 2011, two bound, true and correct copies of the foregoing *REPLY BRIEF OF APPELLANTS* were delivered to the party shown below by regular mail, addressed as follows:

CHRISTOPHER D. GABBERT
Ramsden & Lyons, LLP
P. O. Box 1336
Coeur d'Alene, ID 83816

A handwritten signature in black ink, appearing to read "Alex M. Mase", is written over a horizontal line.

