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Fuchs v. Idaho State Police Supplemental Appellant's Brief Dckt. 38714

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**DANIEL S. FUCHS, Licensee, dba
AUBREY'S HOUSE OF ALE,**

Petitioner-Appellant

v.

**IDAHO STATE POLICE,
ALCOHOL BEVERAGE CONTROL,**

Respondent-Respondent.

DOCKET No. 38714-2011

District Court No. CV-2010-0005579

APPELLANT'S SUPPLEMENTAL BRIEF: IAR 41

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TABLE OF CONTENTS

	<i>Page(s)</i>
TABLE OF POINTS AND AUTHORITIES.....	ii
CHRONOLOGY.....	1
DISCUSSION.....	1
APPENDIX	
S.B. 1332 before the Sixty-First Legislature, State of Idaho, 2012	

**TABLE
OF
POINTS AND AUTHORITIES**

CASES

Rammell v. Idaho State Dept. of Agriculture, 147 Idaho 415 (2009).....2
Smith v. Washington County, 150 Idaho 388 (2010).....1, 2
Stewart v. Dept. of Health & Welfare, 115 Idaho 820 (1989).....2

STATUTES

I.C. 12-117.....1, 2, 3

RULES

I.A.R. Rule 41.....3

OTHER AUTHORITIES

Senate Bill 1332 before the Sixty-First Legislature, State of Idaho, 2012.....2, 3

**FUCHS REQUESTS AN AWARD OF ATTORNEY FEES AND COSTS INCURRED
PURSUING THE PETITION FOR JUDICIAL REVIEW AND THIS APPEAL UNDER
I.C. 12-117, AS AMENDED BY S.B. 1332 AND SIGNED INTO LAW BY THE
GOVERNOR ON MARCH 27, 2012.**

CHRONOLOGY

Director's Final Order: June 8, 2010

Notice of Appeal/Petition for Judicial Review to District Court: July 1, 2010

Appellant's Brief filed: October 15, 2010

Smith v. Washington County, 150 Idaho 388 (December 15, 2010)

Decision on Appeal: February 10, 2011

Notice of Appeal to Supreme Court: March 11, 2011

Date of Senate Bill 1332 signed by Governor: March 27, 2012

Supreme Court hearing: May 11, 2012

DISCUSSION

Appellant Daniel S. Fuchs dba Aubrey's House of Ale ("Fuchs") filed this Appeal originally seeking attorney fees and costs before Idaho State Police, based on the grounds that he was the prevailing party before the agency and that the ISP's pursuit of revocation was without a reasonable basis in fact or law. (See Appellant's Brief at 1-2). Fuchs sought attorney fees and costs incurred for the Petition for Judicial Review filed in the District Court, (Appellant's Brief in Support of Petition for Judicial Review at 33; Appellant Fuchs' Reply Brief in Support of Petition for Judicial Review at 2) but not in his Appeal to the Idaho Supreme Court. Fuchs' decision not to seek fees on Appeal before the Idaho Supreme Court was based upon this Court's ruling filed December 15, 2010 in *Smith v. Washington County*, 150 Idaho 388 (2010), which preceded the Notice of Appeal in this case of March 11, 2011 (See Appellant's Reply Brief at 11-

13).

In *Smith*, this Court had held that I.C. 12-117, as amended, did not provide authority for an award of attorney fees in “administrative judicial proceedings,” which included petitions for judicial review and appeals from agency actions. As the Idaho Legislature has now again amended I.C. 12-117, this time to provide that attorney fees may be awarded in any “proceeding” involving the state where the non-prevailing party acted without a reasonable basis in fact or law, Fuchs seeks to amend his appeal to include an award of fees and costs incurred pursuing the Petition for Judicial Review before the District Court and in this Appeal before the Idaho Supreme Court under I.C. 12-117, as amended.

The *Smith* case contained an analysis and review of an earlier legislative amendment made to I.C. 12-117, after this Court’s decision in *Rammell v. Idaho State Department of Agriculture*, 147 Idaho 415 (2009). In *Rammell*, this Court overruled *Stewart v. Dept. of Health & Welfare*, 115 Idaho 820 (1989), holding that only courts were authorized to award attorney fees under I.C. 12-117. Then, on March 3, 2010, the Idaho Legislature amended I.C. 12-117, providing that administrative officers and agencies could award attorney fees in administrative proceedings. House Bill 421, Sixtieth Legislature, Second Regular Session, 2010. Thereafter, this Court held in *Smith* that parties may only seek attorney fees in “administrative proceedings,” not in “administrative judicial proceedings.” *Smith*, 150 Idaho 388, 392 (2010).

On March 27, 2012, the Governor signed Senate Bill 1332, which amended I.C. 12-117 to provide attorney fees shall be awarded in any “proceeding” involving a state agency in which the non-prevailing party acted without a reasonable basis in fact or law. “Proceeding” is defined in the amended statute, I.C. 12-117 (5) (c), as follows:

"Proceeding" means any administrative proceeding, administrative judicial proceeding, civil judicial proceeding or petition for judicial review or any appeal

from any administrative proceeding, administrative judicial proceeding, civil judicial proceeding or petition for judicial review. I.C. 12-117 (5) (c).

(A copy of S.B. 1332 is attached as an Appendix to this Supplemental Brief).

Section 2 of S.B. 1332 declares an emergency and that “the act shall be in full force and effect on and after its passage and approval.” S.B. 1332, Section 2.

Accordingly, Fuchs seeks to amend his Appellant’s Brief to include a request for an award of attorney fees and costs incurred pursuing the Petition for Judicial Review and the instant Appeal under I.C. 12-117 and I.A.R 41 (a). The original basis for appeal of denial of attorney fees and costs by the agency, that failure to find Appellant the prevailing party and that such constitutes an abuse of discretion remains as stated.

DATED this 20 day of April, 2012.

Respectfully submitted,



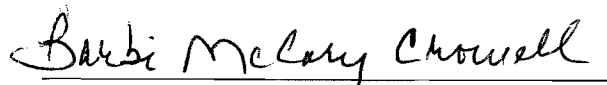
Brian Donesley
Attorney for Petitioner-Appellant,
Daniel S. Fuchs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of April, 2012, I caused an accurate copy of the foregoing document to be delivered as noted below to:

Lawrence Wasden, Attorney General
Stephanie A. Altig, D.A.G.
Idaho State Police
700 S. Stratford Drive
Meridian, ID 83642

U.S. Mail
 Hand-Delivered
 Overnight Mail
 Facsimile (884-7228)



Barbi McCary Crowell
Legal Assistant

IN THE SENATE

SENATE BILL NO. 1332

BY JUDICIARY AND RULES COMMITTEE

AN ACT

RELATING TO ATTORNEY'S FEES, WITNESS FEES AND EXPENSES AWARDED IN CERTAIN INSTANCES; AMENDING SECTION 12-117, IDAHO CODE, TO REVISE WHEN ATTORNEY'S FEES, WITNESS FEES AND EXPENSES MAY BE AWARDED, TO REVISE DEFINITIONS, TO DEFINE A TERM AND TO MAKE A TECHNICAL CORRECTION; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 12-117, Idaho Code, be, and the same is hereby amended to read as follows:

12-117. ATTORNEY'S FEES, WITNESS FEES AND EXPENSES AWARDED IN CERTAIN INSTANCES. (1) Unless otherwise provided by statute, in any ~~administrative proceeding or civil judicial~~ proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, ~~or~~ political subdivision or the court hearing the proceeding, as the case may be including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

(2) If a party to an ~~administrative proceeding or to a civil judicial~~ proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, as the case may be including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

(3) Expenses awarded against a state agency or political subdivision pursuant to this section shall be paid from funds in the regular operating budget of the state agency or political subdivision. If sufficient funds are not available in the budget of the state agency, the expenses shall be considered a claim governed by the provisions of section 67-2018, Idaho Code. If sufficient funds are not available in the budget of the political subdivision, the expenses shall be considered a claim pursuant to chapter 9, title 6, Idaho Code. Every state agency or political subdivision against which litigation expenses have been awarded under this act shall, at the time of submission of its proposed budget, submit a report to the governmental body which appropriates its funds in which the amount of expenses awarded and paid under this act during the fiscal year is stated.

(4) ~~For the purposes of this section:~~ In any civil judicial proceeding involving as adverse parties a governmental entity and another governmental entity, the court shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses. For purposes of this sub-

1 section, "governmental entity" means any state agency or political subdivi-
2 sion.

3 (5) For purposes of this section:

4 (a) "Person" shall means any individual, partnership, limited liabil-
5 ity partnership, corporation, limited liability company, association
6 or any other private organization;

7 (b) "Political subdivision" shall means a city, a county, or any taxing
8 district- or a health district;

9 (c) "Proceeding" means any administrative proceeding, administrative
10 judicial proceeding, civil judicial proceeding or petition for judi-
11 cial review or any appeal from any administrative proceeding, adminis-
12 trative judicial proceeding, civil judicial proceeding or petition for
13 judicial review.

14 (d) "State agency" shall means any agency as defined in section
15 67-5201, Idaho Code.

16 (56) If the amount pleaded in an action by a person is ~~two~~ twenty-five
17 thousand ~~five hundred~~ dollars (\$2,50025,000) or less, the person must sat-
18 isfy the requirements of section 12-120, Idaho Code, as well as the require-
19 ments of this section before he or she may recover attorney's fees, witness
20 fees or expenses pursuant to this section.

21 SECTION 2. An emergency existing therefor, which emergency is hereby
22 declared to exist, this act shall be in full force and effect on and after its
23 passage and approval.