

10-13-2011

# Fuchs v. Idaho State Police Respondent's Brief Dckt. 38714

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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DANIEL S. FUCHS, Licensee, dba	)	
AUBREY'S HOUSE OF ALE,	)	DOCKET NO. 38714-2011
	)	
Appellant/Petitioner,	)	District Court No. CV-2010-5579
	)	
v.	)	
	)	
IDAHO STATE POLICE,	)	
ALCOHOL BEVERAGE CONTROL,	)	
	)	
Respondent.	)	

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RESPONDENT'S BRIEF

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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 Lansing Haynes, District Judge, presiding.

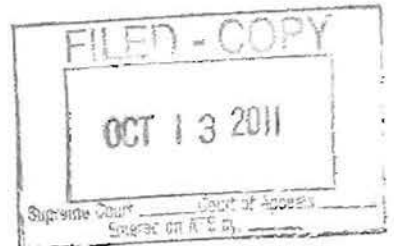
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## I. NATURE OF THE CASE

Daniel S. Fuchs, dba, Aubrey's House of Ale ("Fuchs"), appeals from the district court's decision to deny his request for costs and attorney fees he incurred while engaged in agency administrative proceedings and on a subsequent petition for judicial review thereof against the Idaho State Police, Alcohol Beverage Control.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Respondent is the Bureau of Alcohol Beverage Control ("ABC"), a bureau of the Idaho State Police.

Under IDAHO CODE § 23-902(3), "Director" [for purposes of alcohol beverage control law] means the Director of the Idaho State Police. Under IDAHO CODE § 67-2901(4), "The director shall exercise all of the powers and duties necessary to carry out the proper administration of the state police, and may delegate duties to employees and officers of the state police."

The Director has specific rule making authority for alcohol beverage control purposes. IDAHO CODE § 23-932. By promulgation of IDAPA 11.05.01.011.02, the Director delegated "his authority for the licensing of establishments which sell alcoholic beverages, as contained in Title 23, Chapters 9, 10, and 13, Idaho Code, to the, Alcohol Beverage Control Bureau, Idaho State Police."

The Director has the authority to promulgate rules and regulations necessary to carry out the provisions of IDAHO CODE Title 23, Chapters 6-14, pursuant to IDAHO CODE §§ 67-2901,

23-932, 23-946(b), 23-1330 and 23-1408.

ABC is the state entity charged under IDAHO CODE Title 23, Chapters 8, 9, 10 and 13 with the authority to regulate, enforce and police Idaho's liquor laws pursuant to IDAHO CODE § 23-804.

IDAHO CODE §§ 23-933, 23-1038 and 23-1331 provided the basis and authority for the administrative Complaint for Forfeiture or Revocation of Retail Alcohol Beverage License, which began this agency administrative case.

Appellant Daniel S. Fuchs ("Fuchs"), dba, Aubrey's House of Ale was issued liquor license number 7323.0, which afforded him the privilege of selling beer pursuant to IDAHO CODE § 23-1010, wine by the glass and bottle pursuant to IDAHO CODE § 23-1306, and liquor by the drink at retail pursuant to IDAHO CODE § 23-903. At the time this controversy arose, the license was a newly issued liquor license for the incorporated city of Coeur d'Alene:

23-903. License to retail liquor. The director of the Idaho state police is hereby empowered, authorized, and directed to issue licenses to qualified applicants, as herein provided, whereby the licensee shall be authorized and permitted to sell liquor by the drink at retail and, upon the issuance of such license, the licensee therein named shall be authorized to sell liquor at retail by the drink, but only in accordance with the rules promulgated by the director and the provisions of this chapter. No license shall be issued for the sale of liquor on any premises outside the incorporated limits of any city except as provided in this chapter and the number of licenses so issued for any city shall not exceed one (1) license for each one thousand five hundred (1,500) of population of said city or fraction thereof, as established in the last preceding census, or any subsequent special census conducted by the United States bureau of the census or by an estimate that is statistically valid.

The administrative Complaint for Forfeiture or Revocation of Retail Alcohol Beverage License was served on Fuchs on October 23, 2008, by certified mail, return receipt. Fuchs



received it on October 28, 2008. Fuch's Answer was filed on November 12, 2008. At issue in the administrative proceedings was whether Fuchs had the license in "actual use" and by making "actual sales" of liquor as required by statute and rule.

The statute at issue is:

IDAHO CODE § 23-908(4) – Each new license issued on or after July 1, 1980, shall be *placed into actual use* by the original licensee at the time of issuance and *remain in use for at least six (6) consecutive months or be forfeited to the state* and be eligible for issue to another person by the director after compliance with the provisions of section 23-907, Idaho Code. Such license shall not be transferable for a period of two (2) years from the date of original issuance, except as provided by subsection (5)(a), (b), (c), (d) or (e) of this section.

(emphasis added).

The administrative rule is:

IDAPA 11.05.01.010.03. New Licenses. For purposes of Section 23-908(4), IDAHO CODE, a "new license" is one that has become available as an additional license within a city's limits under the quota system after July 1, 1980. *The requirement of Section 23-908(4), Idaho Code, that a new license be placed into actual use by the licensee and remain in use for at least six (6) consecutive months is satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week.*

(emphasis added).

The underlying issue in this case was the interpretation of the term "actual use" as that term is used in IDAHO CODE § 23-908(4) and the interpretation of the language in IDAPA 11.05.01.010.03 that such "actual use" of a newly issued city priority list liquor license is "satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week." Having found the "actual use/actual sales" rule ambiguous, the Director of the Idaho State Police ultimately decided that requirement was

satisfied if the establishment makes at least one sale of a liquor drink each day it is open for eight hours per day, no fewer than six days per week. Having found that neither Fuchs nor ABC prevailed in their respective interpretations of the “actual use/actual sales” requirement, the Director declined an award of attorney fees to either party. He also did not revoke or force forfeiture of Fuchs’ license even though Fuchs had violated the “actual use/actual sales” requirements. The Director’s decision not to revoke or force forfeiture was due to the confusion surrounding the meaning of the “actual use/actual sales” requirement.

Fuchs then filed a petition for judicial review in the district court, which affirmed the Director’s decision and declined Fuchs’ request for costs and attorney fees under IDAHO CODE § 12-117. As the district court found, there is nothing in this record to support an argument that the Director abused his discretion, but the record did support the conclusion that the Director viewed his decision as discretionary and acted within the perimeters of that discretion in a reasonable manner.

This appeal by Fuchs ensued.

### **III. ISSUE ON APPEAL**

The issue on appeal is whether Fuchs is entitled to costs attorney fees under IDAHO CODE § 12-117 for his efforts litigating in the administrative proceedings before the agency, his petition for judicial review in the district court, and now on appeal before this Court.

### **IV. STANDARD OF REVIEW**

“The interpretation of a statute is a question of law over which this Court exercises free review.” *Smith v. Washington County Idaho*, 150 Idaho 388, 247 P.3d 615, 617 (2010), *citing*

*Doe v. Boy Scouts of Am.*, 148 Idaho 427, 430, 224 P.3d 494 497 (2009). Determining the meaning of an attorney-fee statute and whether it applies to the facts are issues of law that this Court freely reviews. *Smith v. Washington County*, 247 P.3d at 617, citing *J.R. Simplot Co. v. W. Heritage Ins. Co.*, 132 Idaho 582, 584, 977 P.2d 196, 198 (1999).

## V. ARGUMENT AND ANALYSIS

Fuchs' only goal in this appeal is to secure an award of attorney fees. He accuses the Director of Idaho State Police of bias and argues repeatedly that "Rule 10.03 was ambiguous, hence void" (with no citation to authority), that he is the prevailing party and that ABC acted without a reasonable basis in fact or law. Whether out of convenience, oversight or purposeful avoidance, Fuchs ignores several rules of law that controls the issue of whether he is entitled to an award of attorney fees in this case under IDAHO CODE § 12-117.

First, until this dispute arose, there had been no interpretation of either IDAHO CODE § 23-908(4) or IDAPA 11.05.01.010.03, which are the code section and administrative rule at issue. In *Wheeler v. Idaho Dept. of Health and Welfare*, 147 Idaho 257, 266-67, 207 P.3d 988, 997-98 (2009), the crux of that case was the interpretation of the term "property interest" as that term is used in IDAHO CODE § 7-1402(5)(d). The issue had never been addressed by an Idaho appellate court and was therefore a matter of first impression. In *Purco Fleet Services, Inc. v. Idaho State Department of Finance*, 140 Idaho 121, 90 P.3d 346 (2004), this Court denied the Idaho Department of Finance's request for attorney fees on appeal under IDAHO CODE § 12-121 because one of the central issues on appeal was the interpretation of the word "claim" as that term is used in IDAHO CODE § 26-2223(2) was an issue of first impression. *Purco Fleet Services*, 140 Idaho

at 126-27, 90 P.3d at 351-52. The Court stated: “A case of first impression does not constitute an area of settled law; therefore, the request for attorney fees should be denied.” *Id.*

The same reasoning and rule of law controls the present question of an award of attorney fees. It cannot be said that ABC acted without a reasonable basis in fact or law when a matter of first impression regarding the interpretation of the statute and administrative rule was involved. As this Court held in *Saint Alphonsus Regional Medical Center v. Ada County*, 146 Idaho 862, 863, 204 P.3d 502, 503 (2009), where issues of first impression are raised, attorney fees will not be awarded under IDAHO CODE § 12-117(1). *Wheeler*, 147 Idaho at 267, 207 P.3d at 998; *Employers Resource Management Co. v. Department of Ins.*, 143 Idaho 179, 185, 141 P.3d 1048, 1054 (2006).

Since the interpretations of IDAHO CODE § 23-908(4) and IDAPA 11.05.01.010.03 are issues of first impression in Idaho, it cannot be said that ABC brought this case frivolously, unreasonably, and without foundation. Therefore, this Court should deny Appellant’s request for attorney fees.

Secondly, and definitely dispositive since this case began as an agency administrative action, neither the district court on petition for judicial review nor this Court on appeal can award attorney fees under IDAHO CODE § 12-117. This was made quite clear in this Court’s recent decision in *Smith v. Washington County Idaho*, 150 Idaho 388, 247 P.3d 615, 617-620 (2010). In *Smith*, the Court discussed this history of its decisions and legislative activity involving IDAHO CODE § 12-117 and acknowledged the most current legislative amendment:

In response to *Rammell v. Idaho State Department of Agriculture*, 147 Idaho 415, 210

P.3d 523 (2009), the Legislature amended I.C. § 12-117, applying it retroactively to cases filed and pending as of June 1, 2009, the date the opinion was released. Act of March 4, 2010, ch. 29, 2010 Idaho Sess. Laws 49, 49–50. Idaho Code § 12-117(1) now provides:

Unless otherwise provided by statute, *in any administrative proceeding or civil judicial proceeding* involving as adverse parties a state agency or political subdivision and a person, *the state agency or political subdivision or the court, as the case may be*, 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.

(emphasis in the original).

Thus, as amended, I.C. § 12-117 does not allow a court to award attorney fees in an appeal from an administrative decision...Even if this were an administrative proceeding, the amendment does not allow courts to award attorney fees anyway. It empowers *only* “the state agency or political subdivision, or the court, as the case may be,” to award the fees. As described above, no mechanism exists for courts to intervene in administrative proceedings to award attorney fees. By using the phrase “as the case may be,” the Legislature indicated that only the relevant adjudicative body—the agency in an administrative proceeding or the court in a judicial proceeding—may award the attorney fees. *Smith*, 247 P.3d at 618.

As in *Smith*, the present case is also not a “civil judicial proceeding,” because it was not “commenced by the filing of a complaint with the court.” *Id.*, citing I.R.C.P. 3(a)(1). “Since this is a petition for judicial review, a proceeding that does not commence with a complaint filed in court, the courts cannot award fees.” *Id.*; *Sanchez v. State*, 143 Idaho 239, 243, 141 P.3d 1108, 1112 (2006) (holding that a petition for judicial review is not a civil action); *Neighbors for Responsible Growth v. Kootenai County*, 147 Idaho 173, 176 n. 1, 207 P.3d 149, 152 n. 1 (2009) (same). Chief Justice Eismann distinguished the two as: “[a] civil judicial proceeding would be a

civil lawsuit filed in court, and an administrative judicial proceeding would be the appeal of an administrative proceeding to a court.” *Lake CDA Invs., LLC v. Idaho Dep’t of Lands*, 149 Idaho 274, 285 n. 6, 233 P.3d 721, 732 n. 6 (2010).


Under the clear mandate of *Smith*, Fuchs is not entitled to an award of attorney fees on a petition for judicial review to the district court, nor on further judicial review and appeal to this Court.

## VI. CONCLUSION

Based on the foregoing, the Court should deny Fuchs request for costs and attorney fees and dismiss this case accordingly.

Dated this 13 day of October 2011.

OFFICE OF THE ATTORNEY GENERAL  
STATE OF IDAHO

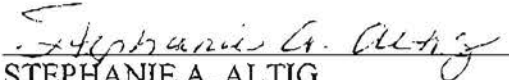
  
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CERTIFICATE OF SERVICE

I hereby certify that on this 13 day of October 2011, I caused to be served a true and correct copy of the foregoing RESPONDENT'S BRIEF in the above-referenced matter by United States Mail, Postage paid, and addressed to the following:

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 by HAND DELIVERY  
 by FACSIMILE  
 by OVERNIGHT MAIL

  
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