11-8-2011

Idaho Wool Growers Ass'n, Inc. v. State Appellant's Reply Brief Dckt. 38743

Docket No. 38743-2011

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO WOOL GROWERS ASSOCIATION, INC., an Idaho corporation, individually and on behalf of its members; FRANK SHIRTS, JR., individually and as a member of the Idaho Wool Growers Association; RONALD W. SHIRTS, LESLIE SHIRTS and JOHN T. SHIRTS, individually and d/b/a SHIRTS BROTHERS SHEEP and as members of the Idaho Wool Growers Association,

Plaintiffs/Appellants,

v.

STATE OF IDAHO; IDAHO FISH & GAME COMMISSION; IDAHO DEPARTMENT OF FISH & GAME; CAL GROEN, Director of Idaho Department of Fish and Game.

Defendants/Respondents.

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Third Judicial District for Adams County State of Idaho

The Honorable Bradly S. Ford, Presiding

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I. STATEMENT OF THE CASE

The Idaho Woolgrowers Association, Frank Shirts, Jr., and the Shirts Brothers ("Woolgrowers"), in reply to the brief by the State of Idaho and the Idaho Department of Fish & Game ("IDFG"), would like to remind the Court what this case involves and what it does not involve. It does not involve an argument regarding the dispute as to whether there is valid scientific proof establishing any means of disease transmission between domestic sheep and bighorn sheep. It does not involve an argument that the United States Forest Service cannot modify Federal grazing permits or that the State of Idaho can prevent the Forest Service from modifying those permits. It does not involve a debate whether reintroduction of bighorn sheep into areas where they have not lived for fifty years at the behest of the Federal Government was a wise decision.

Rather, this case is at bottom an inquiry into whether the State of Idaho and its agencies can be required to live up to a promise they made to certain citizens of the State. It is a case involving interpretation of a statute passed by the Idaho Legislature to endorse a promise the State agency made and implement the agreement it entered into with those citizens. But on a more fundamental level, this appeal involves the question whether a district court can dismiss a claim against IDFG at a very preliminary stage of the litigation without considering any evidence or any testimony.

If this Court does consider the substance of the dispute, it should be aware that the Woolgrowers' argument is not simply that a third party (the U.S. Forest Service) took an action and caused losses and therefore IDFG should remedy the damage, but also that IDFG had an affirmative duty to act. The Letter Agreement obligated IDFG to act when the Forest Service acted so as to

reduce further losses to bighorns without adversely impacting the domestic sheep operators. This activity could have included removal of the bighorns (since the State contends that it owns all wildlife in Idaho), providing alternative grazing for the Woolgrowers, or other action. Instead, IDFG did nothing - in violation of the Letter Agreement.

II. FACTUAL BACKGROUND

The parties are generally in agreement that the Woolgrowers' Amended Complaint sets out the pertinent facts. IDFG admits that the State controls wild animals within the State boundaries and therefore the Federal Forest Service could only engage in the reintroduction of bighorn sheep in Hells Canyon with IDFG's permission. IDFG admits that Idaho "recognizes sheep grazing on federal lands as an important economic activity ...." (Respondents' Brief at 1.) IDFG admits that it engaged in a cooperative project with the Forest Service to introduce bighorn sheep to Hells Canyon and that it signed a Letter Agreement directed to the Idaho Wool Growers Association in March of 1997. IDFG does not dispute that the Letter Agreement was executed in return for the Woolgrowers' agreement to cease opposition to and support the reintroduction effort. IDFG does not dispute that soon after the Letter Agreement was executed by IDFG, the Idaho Legislature enacted and implemented through an emergency clause in 1997 an amendment to Idaho Code § 36-106(e) that states it "is the policy of the state of Idaho that existing sheep or livestock operations in the area of any bighorn sheep transplant or relocation are recognized and that the potential risk, if any, of disease transmission and loss of bighorn sheep when the same invade domestic livestock or sheep operations is accepted. IDFG also admits after the Forest Service

ignored its own promises in the 1997 Letter Agreement and began to modify the Woolgrowers' grazing leases. Finally, IDFG acknowledges that the Idaho Legislature in 2009 recognized its obligations from the Letter Agreement and further amended Idaho Code § 36-106(e) requiring IDFG to develop best management practices for the grazing allotments. *See* the House and Senate Committee minutes, especially http://legislature.idaho.gov/sessioninfo/2009/standing.

III. LEGAL ARGUMENT

A. Granting the Motion to Dismiss Was Improper.

With that factual background, the district court nevertheless granted IDFG's Motion to Dismiss. The Woolgrowers' opening brief set out the very strict standards imposed on a court considering a motion to dismiss as well as the standard of appellate review. IDFG's response to this procedural argument is to cite the recent decisions of the United States Supreme Court under Federal Rule of Civil Procedure 12(b)(6), which decisions remain controversial even within the Federal system. More importantly, those decisions, *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), have never been adopted by this Court and indeed apparently never have even been cited by this Court. This Court's marching orders remain that the issue that a district court must review is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support its claim. *Allied Bail Bonds, Inc. v. County of Kootenai*, __ P.3rd___, 2011 WL 2652475 (Idaho 2011). As a matter of fact, this Court on July 11, 2011 restated the standard to consider a motion to dismiss under Rule 12(b)(6):

> "[A] district court's dismissal of a complaint under I.R.C.P. 12(b)(6) shall be reviewed de novo." *Taylor v. McNichols,* 149 Idaho 826, 832, 243 P.3d 642, 648 (2010). The Court on appeal must determine "whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief." *Orrock v. Appleton*, 147 Idaho 613, 618, 213 P.3d 398, 403 (2009) (quoting *Rincover v. Dep't of Fin.,* 128 Idaho 653, 656, 917 P.2d 1293, 1296 (1996)). The Court must "[draw] all reasonable inferences in favor of the non-moving party." *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005) (citation omitted). "After drawing all inferences in favor of the non-moving party, the Court then examines whether a claim for relief has been stated." *Id.*

Hoffer v. City of Boise, 151 Idaho 400, ____, 257 P.3d 1226, 1228 (2011).

Nowhere has this Court suggested that it would abandon decades of interpretation of the standard for a motion to dismiss merely because the United States Supreme Court has (by a bare 5 to 4 majority in *Ashcroft*) announced a new interpretation of Federal Rules 12(b)(6) and 8(a).

But even under the *Twombly* and *Iqbal* decisions, the trial court must assume factual allegations are true and merely decide whether the plaintiff has stated a ground for relief that is plausible. The issue is therefore whether the Amended Complaint contains "enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570. The Woolgrowers submit that it does. There is nothing implausible in their claim that IDFG assumed a contractual liability and the State assumed a statutory liability to protect them. There is nothing implausible about the claim that the intent of the 1997 Letter Agreement was to ensure that the members of the industry group whose very livelihoods and ways of life stood to be endangered by the actions taken by IDFG would be protected from economic harm. There is nothing implausible about the claim that IDFG, which had promised to "take whatever action is necessary," was obligated to find grazing alternatives for the Woolgrowers in parts of Hells Canyon so as to reduce further losses to the bighorn sheep without

adversely impacting the Woolgrowers. There is nothing implausible about the assertion that this may be one of the exceptional cases where estoppel against a State agency is appropriate.

IDFG attempts to ignore the issue of the proper standard on which to judge a motion to dismiss. As stated in the Woolgrowers' opening brief, the district court appeared to misunderstand that standard. It now appears that IDFG misunderstands that standard as well or assumes that this Court will blindly follow the misguided decisions of the United States Supreme Court. At the very least this Court should remand the matter to the district court for a ruling using the appropriate standard of review.

B. There Is an Enforceable Contract.

The Woolgrowers assert the existence of an enforceable contract. The existence of the contract may be rejected by the jury. It may even be rejected by the district court on summary judgment, after both parties are permitted to provide evidence on the matter. What the district court should not have done was to deny the possibility that an enforceable contract exists on a motion to dismiss without reviewing evidence or hearing testimony.

While IDFG boldly asserts that the 1997 Letter Agreement is "nothing more than the type of letter commonly sent by agencies to interest groups that may be affected by agency actions," (Respondents' Brief at 12) such unsupported argument is unavailing on a motion to dismiss. The bargain between IDFG and the Woolgrowers is alleged in the Amended Complaint. The Woolgrowers agreed to support the reintroduction of bighorns if IDFG agreed to protect them against economic losses. That is the essence of a bargain between parties, and that allegation

suffices to preclude dismissal of the lawsuit. The Amended Complaint also asserts the consideration from both sides: the Woolgrowers' withdrawal of their opposition and IDFG's agreement to protect the Woolgrowers. The Woolgrowers did not solely agree to forebear lobbing the Legislature; it agreed to withdraw its opposition to the planned bighorn reintroduction in various forums and to support the effort. This constitutes consideration.

IDFG contends that it did not agree to protect the domestic sheep operators from economic harm in the 1997 Letter Agreement. Then what was the intent of that Letter Agreement? What was the intent of the language in the Letter stating that IDFG agrees to "take whatever action is necessary to reduce further losses of bighorn sheep without adversely impacting existing domestic sheep operators?" What is the "whatever action" that was contemplated to be necessary to prevent the adverse impact on existing domestic sheep operators?

IDFG appears to make a circular argument: IDFG admits that the 1997 Letter Agreement "recognizes" existing domestic sheep operations; admits that the signatories to the 1997 Letter Agreement "accept" the potential risk of bighorn loss when bighorns invade domestic sheep operations; and admits that the State Wildlife agencies (which included IDFG) "will assume" the responsibility for bighorn losses and further disease transmission in their respective states. Finally, IDFG admits that the Letter Agreement commits IDFG to "take whatever action is necessary to reduce further losses of bighorn sheep without adversely impacting existing domestic sheep operators." Yet despite that language, IDFG appears to argue that if the domestic sheep operators

are adversely impacted because of the reintroduction of bighorn sheep it has no responsibility to do anything.

The IDFG circular argument is that, although it may well have signed that Agreement, it either did not intend to be bound by it or it only agreed to be responsible for its own acts. That is, if another member of the Committee, which was "interested in having the support of the Woolgrowers industry" and which "recognizes the existing domestic sheep operations" in the areas and accepts the potential risks, actually takes the adverse action threatening the domestic sheep operators, IDFG is not obligated to take "whatever action" is necessary to stop the adverse impact on the domestic operators. This is the interpretation the district court erroneously accepted in its decision, but nowhere in the four corners of that contract does it state that IDFG is only responsible for its own acts. Nowhere in the four corners of that contract is it stated that IDFG's responsibility ends if another member of the Committee causes the adverse impact. Moreover, the actions by the United States Forest Service against Shirts were not the product of some non-bighorn sheep related issue, but instead the direct product of the (claimed) need to reduce further losses to bighorn sheep; this action invoked the obligation of IDFG in the Letter Agreement to "take whatever action is necessary" to reduce these losses in a manner that would not adversely impact the Woolgrowers. As stated in the Appellants' Opening Brief, such actions that could have been taken by IDFG were countless, but could have included the removal of the bighorn sheep from the areas in question to ensure no contact between bighorn sheep and the domestic sheep owned by the Woolgrowers. This action would have eliminated losses of the bighorn sheep and maintained the existing grazing use

by the Woolgrowers. However, IDFG did none of these actions, resulting in the damages to the Woolgrowers.

Apparently IDFG is stating that terms in contracts that it signs do not mean anything. It can agree to assume responsibility and can agree to take whatever action is necessary, but under IDFG's interpretation those promises mean nothing. Certainly that cannot be the proper interpretation of the contract or the law, at least at this early stage of this litigation.

C. The 1997 Letter Agreement is Not Void as a Matter of Law.

First of all, this issue is not properly before the Court as the district court did not consider the issue except in dicta. Thus a remand would be appropriate on the issue.

If this Court does consider the substantive issue, there is no basis to dismiss the claim on this ground. It is clear that the Idaho Legislature after execution of the 1997 Letter Agreement passed implementing legislation in March 1997. It is too early in the case to engage in fact finding as to whether there are appropriated sources or other funding sources which would provide for the reimbursement of the Woolgrowers for the losses caused by the reintroduction of bighorn sheep.

As IDFG itself acknowledges, it is not necessary to appropriate a specific sum where moneys are to be paid from a special fund or revolving fund dedicated to a particular purpose. (Respondents' Brief at 20.) This can be seen in this Court's decision in *Leonardson v. Moon*, 92 Idaho 796, 804, 453 P.2d 542, 550 (1969):

> An appropriation within the meaning of Section 13, Article 7, has been defined as "authority from the Legislature expressly given in legal form, to the proper officers, to pay from the public moneys a specified sum, and no more, for a specified purpose,

> and no other." *Herrick v. Gallet, supra,* 35 Idaho 13, 204 P 477, 478. However, from an examination of the authorities it appears that this element of specificness is necessary only when the appropriation is made payable from the general fund and is required solely as a protection against unlimited withdrawals from such fund under authority of a general appropriation. When, as here, the appropriation is made payable from a special fund, it is not necessary to appropriate a specific sum. *Ryan v. Riley,* 65 Cal. App. 181, 223 P. 1027, *Humbert v. Dunn,* 84 Cal. 57, 24 P. 111; *Ristine v. State,* 20 Ind. 328. The Act is clearly an attempt to make a continuing appropriation of all money that any time may be in the adjutant general's contingent fund; and the authorities are unanimous that, in the absence of a constitutional inhibition against continuing appropriations, they are valid. We have no such inhibition.

Id. (quoting McConnell v. Gallet, 51 Idaho 386, 390, 6 P.2d 143 144 (1931)).

The Woolgrowers have pointed out the various funds which might be dedicated to fulfilling the 1997 Letter Agreement promise and the 1997 statutory intention. Specifically, Idaho Code § 38-408(5)(b) authorizes the issuance of a special bighorn sheep tag to be disposed of by lottery, the proceeds of which shall be deposited in the Fish & Game Expendable Trust Account. The provision goes on: "Monies in the account from the lottery bighorn sheep tag shall be utilized by the department in solving problems between bighorn sheep and domestic sheep, solving problems between wildlife and domestic animals or improving relationships between sportsmen and private landowners." (emphasis added).

Idaho Code § 36-108, the Fish & Game Expendable Trust Account provision, states that the "moneys in the account may be appropriated to the Commission to carry out the terms or conditions of such donation, bequest, devise, or grant ...."

Idaho Code § 36-408(5)(b) is that appropriation as it authorizes IDFG to use the money to solve problems between bighorn sheep and domestic sheep. The statutes simply direct where the

moneys from the bighorn sheep lottery are to be placed while the IDFG determines how best to use those proceeds.

IDFG acknowledges that the Wildlife Restoration Project Fund, Idaho Code § 36-1805, is subject to a continuous appropriation. IDFG then makes a new argument not considered by the district court that money in this Fund is somehow limited by federal law. IDFG also acknowledges that money in the fund is not exclusively derived from federal grants in aid; therefore, any federal limitation should not apply. While these facts appear to rebut IDFG's argument regarding appropriated funds, the reality is that this Court should not be dealing with those questions. First of all, those arguments were not brought up below by IDFG and should not be allowed for the first time on appeal. Next, and more importantly, such arguments are not appropriate at this stage of the litigation before discovery is allowed on such topics as the distribution and expenditure of IDFG funds. For example, where the money from the bighorn sheep lottery has gone is a question that will be pursued in discovery. It is not a question that needs to be answered on a motion to dismiss.

D. IDFG Should Be Estopped.

Again, the Court should recognize, as the district court appeared to forget, that factual issues whether estoppel applies are not suitable for determination on a motion to dismiss. The questions whether there were false representations and whether IDFG was acting in a commercial or sovereign capacity are fact intensive and the Woolgrowers had no opportunity to discover and argue those facts before the district court.

The district court cannot state as a matter of law that the reintroduction of the bighorn sheep was carried out in a sovereign capacity. The Woolgrowers recognize that wild game within the State belong to the people in their sovereign capacity. *Sherwood v. Stephens,* 13 Idaho 399, 403, 90 P. 345, 346 (1907). But that case and all of the Idaho case law cited by IDFG deal with native wild game, not reintroduction of bighorn sheep from out of state and even out of the United States. The sheep put into the Hells Canyon area are not native animals which need to be protected. They are animals placed in Idaho for the purposes of tourism and hunting and other commercial enterprises. IDFG argued those economic benefits when it was attempting to gather support for the reintroduction effort. It cannot now come before this Court denying the commercial aspects of the reintroduction effort.

IDFG cites *Moerman v. State of California,* 21 Cal. Rptr.2d 329 (Cal. App. 1993), for the proposition that reintroduction of wild animals is a sovereign function. (Appellees' brief at 28). IDFG neglects to note that the *Moerman* case is a "physical taking" case; that California as compared to Idaho "does not own wild animals," *id.* at 333; and that the elk involved in *Moerman* were simply relocated from another area in California unlike the bighorn sheep in this case which were relocated from out of state and out of the United States. Moreover, a single decision from a lower appellate court in another state does not constitute precedent for this Court.

Even if IDFG were not acting in a proprietary capacity, estoppel may nevertheless be applicable under certain limited circumstances against a governmental entity acting in its sovereign capacity. *Brandt v. State of Idaho,* 126 Idaho 101, 878 P.2d 800 (Ct.App. 1994); *see also City of*

Sandpoint v. Sandpoint Independent Highway Dist., 126 Idaho 145, 151, 879 P.2d 1078, 1084 (1994) (estoppel may be used against a highway district in order to prevent manifest injustice). The Woolgrowers assert that here "justice and fair play" require the application of estoppel in order to prevent "manifest injustice." Specifically, IDFG and the State cannot represent to the Woolgrowers in 1997 that the Woolgrowers will be protected from economic hardship arising from the reintroduction of bighorn sheep in return for the Woolgrowers' support of the reintroduction effort and then ten years later when the economic hardship actually occurs assert there really was no agreement and in any event they really do not need to live up to their promises.

The IDFG brief does not deal with these cases or with the exception to the general rule that estoppel cannot be applied against the government in its sovereign capacity. The district court did not consider whether the exception applied either.

Instead, IDFG in its brief attempts to argue that the application of estoppel in this case would "bind the state to promises or commitments that are not authorized by statute." (Appellees' Brief at 29). This argument ignores the fact that the Idaho Legislature at the time the 1997 Letter Agreement was being executed was aware of that agreement and passed legislation relating to that Letter Agreement. How can IDFG ignore the amendment to Idaho Code § 36-106(e)(5)(D)? There can be no doubt that that statute was intended to embody the agreement from the Letter Agreement and also to authorize the commitments made by IDFG to the Woolgrowers.

E. The Amended Complaint States a Valid Statutory Claim.

As already discussed, the Idaho Legislature enacted an amendment to the Code upon execution of the Letter Agreement between IDFG and the Woolgrowers. That statute, Idaho Code § 36-106(e)(5)(D), announces the policy of the State of Idaho recognizing domestic sheep operations and accepting on behalf of the State of Idaho the risk when bighorn sheep invade domestic sheep operations. What does "recognizing" existing domestic sheep operations mean? What does "accepting" the risk of the bighorn sheep relocation mean? The statute can only mean that the State of Idaho agreed either to forestall economic harm to the Woolgrowers or that the State of Idaho through IDFG would provide remedies for any such harm that occurred. Whether those remedies are provided through a new appropriation, through one of the custodial funds held for the benefit of IDFG or by provision of forage or alternative grazing areas, it is clear that the Legislature intended to protect the Woolgrowers.

F. IDFG is Not Entitled to Attorney's Fees.

The Woolgrowers believe that they are entitled to an award of attorneys' fees as IDFG has unreasonably attempted to escape its contractual and statutory responsibilities. Even if the Court disagrees that the 1997 Letter Agreement actually means something, the Woolgrowers submit that IDFG is not entitled to attorneys' fees as the Woolgrowers did not act without a reasonable basis in fact or law. Certainly the Woolgrowers have a strong factual argument regarding the Agreement and the statutes passed in conjunction with that Agreement. The Woolgrowers also submit that their

legal arguments are reasonably sound. At the least, they present a reasonable argument both regarding the appropriate standard of review that the district court ignored and the substantive issues regarding the contractual and statutory obligations of IDFG. Accordingly, the prerequisites for an award of attorneys' fees under Idaho Code § 12-117 against the Woolgrowers have not been met.

IV. CONCLUSION

This case is before this Court on review of a grant of a Rule 12(b)(6) motion to dismiss. Much of what IDFG argued in its brief is irrelevant, as the trial court's role in considering a motion to dismiss is narrow and circumscribed by the pleadings. The case should be remanded to allow the parties to develop a factual record to enable a fact finder to determine the meaning and implication of the 1997 Letter Agreement and the statutory duties imposed by the Idaho Legislature. The Woolgrowers respectfully request the Court to reverse the district court's decision and remand the case for further proceedings.

DATED this 8 day of November, 2011.

EBERLE, BERLIN, KADING, TURNBOW & McKLVEEN, CHARTERED

By: _____
Samuel A. Diddle, of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of November, 2011, a true and correct copy of the within and foregoing document was served as follows:

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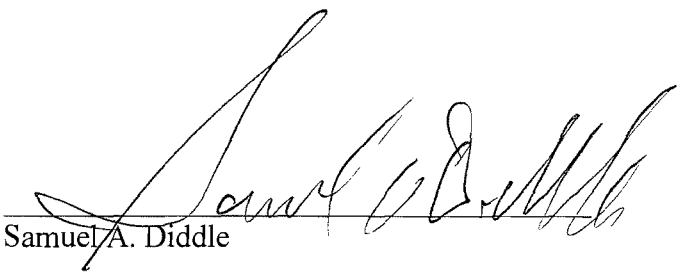

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