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# Bonner County v. Cunningham Appellant's Reply Brief Dckt. 40642

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## STANDARD OF REVIEW

Cunningham stands by the Standard of Review contained in his brief. The County argues that the district court should be affirmed as a matter of procedure. However, an award of attorney fees pursuant to I.C. § 12-117 is not a discretionary matter. Idaho Dept. of Law Enforcement v. Kluss, 125 Idaho 682, 684; 837 p.2d 1336, 1339 (Idaho 1994). The district court must review whether there is substantial and competent evidence to support the magistrate's determination that the County acted with a reasonable basis in fact or in law. Id. Furthermore, the appellate court reviews the legal interpretation of a statute freely, without regard for the lower court's decision. In re Daniel W., 45 Idaho 677, 679, 183 P.3d 765, 767 (2008).

## ADDITIONAL ARGUMENT AND AUTHORITY

**1. The magistrate did not find that the thirty-day provision contained in I.C. § 37-2744(e) was ambiguous.**

In this case, the relevant facts surrounding the dismissal of the forfeiture proceeding are well established. It is the magistrate's legal conclusions that are in dispute. The County misstates the legal issue when it continues to claim that the statute is ambiguous. The magistrate did not find that the statute is ambiguous. Instead, the magistrate court surmised that the statute, while perfectly clear in meaning, might not be mandatory. R100, Ll.16-20. The magistrate then concluded that it was reasonable for the County to believe the statute was directory. R100, Ll.11-12. The district court should have determined that the statute is clearly mandatory; therefore, the conclusion does not follow logically, that the County had a reasonable basis for its action.

As stated in the order denying attorney fees, the magistrate concluded that it "may have erred" in dismissing the forfeiture proceeding, because "...the *Willys Jeep* case states that procedural statutes, like I.C. § 37-2744, should be liberally construed to promote a disposition on the merits." R100, LI.16-20. However, the *Willys Jeep* court did not find that the entire statute was procedural. The Supreme Court instead examined two different provisions contained in one subsection of the statute, namely, I.C. § 37-2744(d)(3)(D). State, Dept of Law Enforcement v. One Willys Jeep, V.I.N. 573481691, 100 Idaho 150, 595 P.2d 299 (1979).

The first *Willys Jeep* issue concerned the requirement that the forfeiture hearing must be set on a day not *less* than thirty days from the defendant's answer, where the defendant argued that the legislature must have intended the hearing to be set on a day not *more* than thirty days after the defendant's answer. Willys Jeep, *supra*, at 153. The provision was not found to be procedural, or directory. Instead, the Supreme Court upheld the requirement of, "not less than thirty days," on the grounds that the statute must be presumed to mean what it says. The Supreme Court stated: "The most fundamental premise underlying judicial review of the legislature's enactments is that, unless the result is palpably absurd, the courts must assume that the legislature meant what it said." And again, "Where a statute is clear and unambiguous the expressed intent of the legislature must be given effect." Similarly, in this case, the court should hold that the thirty-day jurisdictional deadline for filing forfeiture actions, is clear, unambiguous, and mandatory.

The second part of the subsection examined in *Willy's Jeep* concerned the requirement that the hearing be given priority over other civil cases. It is only this small portion contained in 37-2744(d)(3)(D), that was found to be directory rather than

mandatory in the *Willys Jeep* case. Willys Jeep, supra, at 154. The Supreme Court first explains that, "Whether a statute is mandatory or directory (is) to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other. *Summers v. Dooley*, 94 Idaho 87, 89, 481 P.2d 318, 320 (1971). See *Craig H. Hisaw, Inc. v. Bishop*, 95 Idaho 145, 504 P.2d 818 (1972)." Id. The Supreme Court then held that the provision regarding the court calendar was directory, as it otherwise "would be disruptive to an orderly administration of justice and would impair the flexibility the courts must have in setting cases for trial." Id.

The *Kluss* court awarded attorney fees because the agency did not have authority to act after the ninety-day deadline for an action in forfeiture of real property had passed. Kluss, supra, at 685. Following the court's directive, consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other, leads to no other conclusion but that the provision presently before the court, is jurisdictional, and therefore, clearly mandatory.

The notion that a statute need not be strictly followed because it is directory rather than mandatory, has been argued under the theory that one need only be in 'substantial compliance' with a statutory provision, such as in *Poison Creek*, infra:

Citing to several Idaho cases for the proposition that Idaho courts often allow substantial compliance with applicable statutes, rather than strict compliance, the district court concluded that the LVA "substantially complied" with I.C. § 60-106 such that it "has not ceased to qualify as a newspaper suitable for publishing legal notices." However, none of those cases concern statutes setting forth mandatory deadlines or definite timeframes.

Poison Creek Pub., Inc. v. Central Idaho Pub., Inc., 3 P.3d 1254, 134 Idaho 426 (Idaho App. 2000). As the Court stated: "Enforcement of this provision does not lead to

palpably absurd results, therefore we must assume that the legislature meant what is plainly written in the statute." *Id.* Similarly in the case presently before the Court, the statute involves a mandatory deadline and timeframe, and strict enforcement of the statute does not lead to absurd results. Again, therefore, the Court should conclude that the statute is clearly mandatory.

**2. The thirty-day provision contained in I.C. § 37-2744(c) is not ambiguous.**

A statute is ambiguous when the language is capable of more than one reasonable interpretation. Porter v. Bd. of Trustees, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). However, a statute may not be deemed ambiguous merely because parties present differing interpretations to the court. *Id.* Where a statute is plain, clear and unambiguous, the cardinal rule is that the court must follow that plain meaning and neither add to the statute nor take away by judicial construction. Moon v. Investment Board, 97 Idaho 595, 596, 548 P.2d 861, 862 (1976). In the case presently before the Court, the words of the statute are not capable of more than one reasonable interpretation. The County argues that the statute may be interpreted to permit initiation of forfeiture proceedings after the thirty-day deadline has passed. The County's interpretation is in direct contradiction of the words of the statute. Idaho Code § 37-2744(c) states, in relevant part, as follows:

In the event of seizure pursuant to subsection (b) of this section, proceedings under subsection (d) of this section shall be instituted promptly...

...(3) In the event of seizure pursuant to subsection (b) of this section, proceedings under subsection (d) of this section shall be instituted within thirty days by the director or appropriate prosecuting attorney.

Idaho Code § 37-2744(c). The two provisions are not contradictory, as the County would have the court believe; the paragraph begins with a general statement, then moves on to



the particular in its subsections. Subsection (c)(3) delineates precisely what the legislature intended "promptly" to mean, as it is used in subsection (c).

In order to determine whether a statute is ambiguous, the court first looks at the literal meaning of the words, giving effect to "every word, clause and sentence":

...ambiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous. As the district court stated: ... a statute is not ambiguous merely because an astute mind can devise more than one interpretation of it. The plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover. [The] Rule of construction to consider object and purpose has no place when words of [the] act leave no doubt. *John Hancock Mutual Life Ins. Co. v. Haworth*, 68 Idaho 185, 192, 191 P.2d 359 (1948).

Matter of Permit No. 36-7200 in Name of Idaho Dept. of Parks and Recreation, 828 P.2d 848, 852; 121 Idaho 819, 823 (Idaho 1992). In that case, the agency argued unsuccessfully that the statute was ambiguous, but attorney fees were not awarded, because, in that case, the court determined that the various interpretations were not "groundless or arbitrary agency action", and that the defendant had not been subjected to "unfair and unjustified financial burdens defending against groundless charges." *Id.* at 824. That case is distinguishable from this case, in that the County action was groundless and arbitrary, and Cunningham has indeed borne an unfair and unjustified financial burden.

## CONCLUSION

In this case, the statute has only one reasonable interpretation, and it is not reasonable to presume that it does not mean what it clearly states. It is a jurisdictional statute, and it is not reasonable to presume that it is not mandatory. The County did not

have a reasonable basis in fact or in law for its action in filing a forfeiture proceeding after the time to do so had passed. Cunningham is entitled to an award of attorney fees pursuant to I.C. § 12-117, and Idaho App. R. 41, in order to recover the expense of correcting the mistakes that the County never should have made. Cunningham is further entitled to an award of attorney fees pursuant to I.C. § 12-117, and Idaho App. R. 41, on appeal where the County continues litigating without a reasonable basis in fact or in law.

DATED this 9<sup>th</sup> day of September, 2013.

Val Thornton  
Val Thornton, Attorney at Law

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing were delivered as indicated on the 9<sup>th</sup> day of September, 2013, to:

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Val Thornton