4-8-2015

Bobeck v. Idaho Transp. Dept. Appellant's Brief Dckt. 42682

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE DRIVING PRIVILEGES OF	)	SUPREME COURT NO. 42682
JONNA LYNN BOBECK,	)	
Petitioner-Appellant.	)	APPELLANT'S BRIEF IN SUPPORT OF REVIEW BY THE SUPREME COURT
v.	)	
STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION,	)	
Respondent	)	

APPEAL FROM JUDICIAL REVIEW

THE HONORABLE JEFF M. BRUDIE
District Judge

IDAHO TRANSPORTATION DEPARTMENT HEARING OFFICER,
SKIP CARTER

Paul Thomas Clark
Clark and Feeney
1229 Main Street
Lewiston ID 83501
(208) 743-9516
Attorney for Petitioner-Appellant

Edwin L. Litteneker
Special Deputy Attorney General
Idaho Transportation Department
322 Main Street
(208) 746-3466
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and other Authorities **Page**

3. Statement of Facts:

In the early evening of December 4, 2013, Appellant, Mrs. Jonna Bobeck, got herself and her four (4) year old son ready for bed. It was just Mrs. Bobeck and her son at home at the time, as her husband, David Bobeck, was working a 24-hour shift with the Lewiston Fire Department. Mrs. Bobeck took her prescribed nightly medications and climbed into bed with her 4 year old son. At approximately 9:40pm, Mrs. Bobeck was involved in an automobile accident at the intersection of 13th Street and Idaho street. Prior to the accident, Mrs. Bobeck's vehicle struck a power pole. After the accident at the intersection, Mrs. Bobeck's vehicle continued at a creeping speed and came to rest after striking Officer Eylar's patrol car on or about 9th street. At the time of the accidents, Mrs. Bobeck was wearing just her bathrobe, underwear and slippers. R., p. 211, Ll. 2-4. Tr., p. 28, Ll. 2-4. Her 4 year old son was also in his pajamas and strapped into his car seat in the back of Mrs. Bobeck's car. Mrs. Bobeck was taken by ambulance to St. Joseph's Medical Center for treatment from her injuries. While in a semi-unconscious and sleepy state, Idaho State Police Trooper Travis Hight read the ALS advisory form to Mrs. Bobeck prior to Mrs. Bobeck's blood draw to check for intoxicating substances. R., p. 197, Ll. 7-8. Mrs. Bobeck did not respond or interact at all with Trooper Hight; rather she drifted in and out of sleep with her eyes closed. R., p. 201, Ll. 1-8. R., p. 212, Ll. 1-25. R., p. 213, Ll. 1-9. Mrs. Bobeck has no memory of the events that occurred after climbing into bed with her son, the evening of December 4, 2013 until waking up in bed with her husband early in the morning of December 5, 2013. R., p. 217, Ll. 13-25. R., p. 218, Ll. 8-10.

The results of the evidentiary blood test obtained from Mrs. Bobeck were positive for Zolpidem and Trazodone, both of which Mrs. Bobeck has a lawful prescription for. Mrs. Bobeck's driver's license was suspended pursuant to Idaho Code § 18–8002A(4). She requested a hearing before an ITD hearing officer pursuant to Idaho Code § 18–8002A(7), contending Trooper Travis Hight had not properly advised her of the effect of a refusal. Taking into account the evidence presented at the hearing, including the DVD recording of the incident, the hearing officer issued an order, including findings of fact and conclusions of law, concluding there was substantial evidence that the proper procedures had been followed and upholding the administrative suspension of Mrs. Bobeck's driver's license.

ISSUES ON APPEAL

A) Whether the District Court erred in finding that the record contained substantial evidence to support the hearing officer's determination that Trooper Hight complied with the requirement to give information at the time of evidentiary testing for the presence of drugs or other intoxicating substances pursuant to Idaho Code Section 18-8002A(2) where he read the advisory form to Mrs. Bobeck while she was asleep?

B) Whether the District Court erred in finding that it was unnecessary to decide whether or not Mrs. Bobeck was informed pursuant to Idaho Code Section 18-8002A(2) because compliance with the statute was immaterial when it misapplied its cited case law?

C) Whether the District Court erred in finding that the implied consent statute applicable to when the statute was found unconstitutional?

ARGUMENT

Standard On Review:

In general, judicial review of agency proceedings is limited. The Idaho Administrative Procedures Act (hereinafter "IDAPA") governs the review of department decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. *See* I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. The administrative license suspension statute, Idaho Code §18-8002A, requires the Idaho Transportation Department (hereinafter "ITD") to suspend the driver's license of a driver who fails an alcohol concentration test administered by a law enforcement officer. A hearing under I.C. § 18–8002A results in an "agency action" and is therefore governed by the IDAPA. I.C. § 67–5240. *See also Druffel v. State, Dep't of Transp.*, 136 Idaho 853, 855, 41 P.3d 739, 741 (2002). An ITD administrative hearing officer's decision to uphold the suspension of a person's driver's license is subject to challenge through a petition for judicial review. I.C. § 18–8002A(8); *Kane v. State, Dep't of Transp.*, 139 Idaho 586, 589, 83 P.3d 130, 133 (Ct.App.2003).

Idaho Code §67-5279(1) sets out the scope of review. *Bennett v. State, Dep't of Transp.*, 147 Id. 141, 206 P.3d 505 (Ct. App. 2009). As a practical matter, the reviewing court does not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C. § 67–5279(1). Instead, the reviewing court must defer to the agency's findings of fact unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial

competent evidence in the record. *Urrutia v. Blaine Cnty., ex rel. Bd. of Comm'rs*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000). Put another way, the reviewing court may not set aside a Hearing Officer's findings unless those findings are "not supported by substantial evidence on the Record as a whole." Idaho Code §67-5279(3)(d); *Mahurin v. State, Dep't of Transp.*, 140 Id. 65, 99 P.3d 125, (2004); *See also Gibbar v. State, Dep't of Transp.*, 143 Id. 937, 155 P.3d 1176, (Ct. App. 2006). Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion. *Kinney v. Tupperware Co.*, 117 Idaho 765, 769, 792 P.2d 330, 334 (1990). Substantial evidence is more than a scintilla, but less than a preponderance. *Id.*

Under the IDAPA, an agency's decision may be overturned only where its findings: a) violate statutory or constitutional provisions; b) exceed the agency's statutory authority; c) or made upon unlawful procedures; d) are not supported by substantial evidence in the record; or e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *Druffel v. State, Dep't of Transp.*, 136 Id. 853, 41 P.3d 739 (2002). The party attacking the agency's decision must first illustrate the agency erred in a manner specified in I.C. § 67-5279(3), and then establish that a substantial right has been prejudiced. *Druffel* at 855. At that point, the reviewing court is "obliged to reverse a decision if substantial rights of an individual have been prejudiced because the administrative findings and conclusions are in violation of statutory provisions." *Morgan v. Idaho Dep't of Health and Welfare*, 120 Idaho 6, 9, 813 P.2d 345, 348 (1991). The interpretation of a statute is an issue of law over which the reviewing court exercises free review. *Corder v. Idaho Farmway, Inc.*, 133 Idaho 353, 358, 986 P.2d 1019, 1024 (Ct.App.1999).

The Administrative License Suspension statute, I.C. § 18–8002A, requires that the ITD suspend the driver's license of a driver who has failed a blood alcohol concentration test administered by a law enforcement officer. A person who has been notified of such an administrative license suspension may request a hearing before a hearing officer designated by the ITD to contest the suspension. I.C. § 18–8002A(7). The hearing officer must uphold the suspension unless he or she finds, by a preponderance of the evidence, that the driver has shown one of several grounds, enumerated in I.C. § 18–8002A(7)(a)–(e), for vacating the suspension. The burden of proof rests upon the driver to prove any of the grounds to vacate the suspension. I.C. § 18–8002A(7); *Kane,* 139 Idaho at 590, 83 P.3d at 134. Once the driver has made an initial prima facie showing of evidence proving some basis for vacating the suspension, the burden shifts to the state to rebut the evidence presented by the driver. *See Kane,* 139 Idaho at 590, 83 P.3d at 134.

I. THE DISTRICT COURT ERRED WHEN IT FOUND THE HEARING OFFICER'S ORDER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE WHEN THE RECORD IS DEVOID OF FACTS TO SUPPORT A FINDING THAT MRS. BOBECK WAS INFORMED PURSUANT TO IDAHO CODE SECTION 18-8002A(2) WHERE UNCONTROVERTED TESTIMONY WAS PRESENTED THAT THE ALS ADVISORY FORM WAS READ TO MRS. BOBECK WHILE SHE WAS ASLEEP.

Mrs. Bobeck, respectfully argues that her administrative license suspension should have been vacated, first by Hearing Examiner Skip Carter, and subsequently by the District Court upon judicial review. This argument is based on the facts that at her Administrative License Suspension (herein referred to as "ALS") hearing Mrs. Bobeck established, by a preponderance of the evidence, that she was not informed of the consequences of submitting to evidentiary testing as

required in I.C. §18-8002A(2). Specifically, through the uncontroverted testimony of Mrs. Bobeck and two witnesses, the record contains substantial evidence that Officer Travis Hight failed to comply with Idaho Code §18-8002A(2) when he read the ALS advisory form to her while she was asleep. This is in direct conflict with the findings of facts and conclusions of law entered by the hearing officer and sustained by the District Court upon judicial review.

Under Idaho law, the evidentiary standard used for purposes of reviewing an agency's findings to determine whether they are supported by substantial and competent evidence, is "substantial and competent evidence" which is defined as "relevant evidence which a reasonable mind might accept to support a conclusion." *Lane Ranch P'ship v. City of Sun Valley*, 144 Idaho 584, 590, 166 P.3d 374, 380 (2007). A reasonable mind cannot accept the conclusion that Mrs. Bobeck was "informed" or "substantially informed" of the contents of the ALS advisory when it was read to her while she was asleep. Moreover, the record is devoid of any evidence suggesting that Mrs. Bobeck was anything but asleep. In fact, the contention that Mrs. Bobeck was asleep is uncontroverted. The only evidence the hearing officer relied on to support his finding that Mrs. Bobeck was informed pursuant to I.C. § 18–8002A(2) was the fact Trooper Hight read Mrs. Bobeck the ALS advisory form. While there is no question that Officer Hight read the ALS form to Mrs. Bobeck, one cannot reasonably conclude based on the facts contained in the Record that Mrs. Bobeck was "substantially informed" as required under the statute. It is important to note that the hearing officer must consider all the evidence in the record after the hearing, including Mrs. Bobeck's testimony and the testimony of all witness, not just the officer's reports and other

documents. That simply wasn't done in this case. Thus, the hearing officer's determination that Mrs. Bobeck was substantially informed is absolutely not supported by substantial and competent evidence in the record.

At issue here is whether there is sufficient evidence in the record to support the hearing officer's finding that Mrs. Bobeck was "informed" or "substantially informed" when the record contains uncontroverted evidence that Mrs. Bobeck was asleep when the ALS form was read to her. The simple answer to that question is "no" and, as such, the District Court was obligated to vacate Mrs. Bobeck's license suspension. Instead, the District Court sustained the hearing officer's decision and upheld the license suspension. Incredibly, the District Court's result was despite its express acknowledgment and required use of the uncontroverted fact Mrs. Bobeck was asleep when the ALS form was read to her. It doesn't follow that the District Court could have properly found the record contained substantial evidence to support the hearing officer's decision and, therefore, based upon the reasons explained below, it erred.

A. *The Testimony Produced Only Uncontroverted Facts That Mrs. Bobeck Was Asleep When The ALS Advisory Form Was Read To Her.*

As well settled Idaho law, the burden of proof is on Mrs. Bobeck to establish, by a preponderance of the evidence, one of the statutorily enumerated grounds to vacate the suspension of her license under I.C. § 18-8002A(7). Mrs. Bobeck presented evidence that her license suspension must be vacated because she was not informed "of the consequences of submitting to evidentiary testing as required in subsection (2) of [I.C. 18-8002A]." The evidence presented at Mrs. Bobeck's

administrative license suspension hearing included testimony from Idaho State Trooper Travis Hight, testimony from Mr. David Bobeck and Mrs. Bobeck's own testimony. In pertinent part, the hearing officer found Officer Hight administered the statutorily required information to Mrs. Bobeck in compliance with the standards and methods adopted by the Department of Law Enforcement and ITD. R., p. 14. However, Officer Hight testified that as he read Mrs. Bobeck the ALS form, Mrs. Bobeck did not respond and her eyes were closed some of the time "as if she were sleeping." R., p. 197, Ll. 4-8. R., p. 201. Trooper Hight further testified that he was unable to determine Mrs. Bobeck's level of consciousness. R., p. 201. Mrs. Bobeck presented evidence that showed the ALS form was read to her while she was asleep. Mrs. Bobeck testified that she had absolutely no recollection of the events after her retreating to bed on December 4, 2013 and that her next memory occurred at 4:30a.m. on December 5, 2013. R., p. 218. David Bobeck testified to his extensive training as an EMS and through it his ability to assess the consciousness of a person. R., pp. 207-208. He testified further that he was with Mrs. Bobeck at the Emergency Room when Officer Hight was present and that Mrs. Bobeck was not alert during the time Officer Hight read the ALS form to her. R., p. 211, 212, 213. Mr. Bobeck clarified that Mrs. Bobeck was mostly asleep. R., p. 213; R., p. 214.

The hearing officer did not find Mr. Bobeck's testimony to lack credibility. The hearing officer did not find Mrs. Bobeck's testimony to lack credibility. In fact, the hearing officer did not address the testimony of any of the witnesses. Testimonial evidence is part of the record, and the record must be considered as a whole in order to see whether the result is supported by substantial

evidence. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 440, 926 P.2d 213, 216 (Ct. App. 1996). An agency's departures are vulnerable only if they fail to reflect attentive consideration to testimony evidence. *Id.* The ALS case *Bennett v. ITD* is illustrative. In *Bennett*, the Court of Appeals held that evidence before the hearing officer did not support a finding that the officer complied with the proper monitoring period procedures, and the court upheld the district court's order vacating Bennett's license suspension. *Id.* at 145, 206 P.3d at 509. There, the evidence presented to the hearing officer included the officer's affidavit and Ms. Bennett's testimony. *Id.* at 143, 206 P.3d at 507. The affidavit was a computer-generated form and the only indication that the fifteen-minute observation procedure was complied with was a general statement saying, "The test(s) was/were performed in compliance with Section 18-8003 & 18-8004(4) Idaho Code and the standards and methods adopted by the Department of Law Enforcement." *Id.* Ms. Bennett's own testimony contradicted this statement, as she testified that she was coughing throughout the monitoring period and that the observing officer left the room twice during the observation period. *Id.* As such, the Court of Appeals concluded that the generic statement in the affidavit, when contradicted by specific and credible testimony that the observation period procedures were not complied with, was insufficient to support the hearing officer's conclusion that correct observation procedures were employed. *Id.* at 145, 206 P.3d at 509.

In this case, the agency hearing officer "failed to reflect attentive consideration to testimony evidence," wherein he did not outwardly reject the testimony of Mrs. Bobeck and her husband but rather failed to address the testimony all together. The testimony by Mrs. Bobeck and her husband

was specific and credible evidence that demonstrated a violation of proper procedures. Officer Hight's testimony, which provided only generalized statements regarding his reading the ALS form to Mrs. Bobeck and his admission that he didn't assess her level of consciousness or sleepiness, was insufficient to support a finding that proper procedures were followed. Officer Hight merely read the ALS advisory form to a sleeping Mrs. Bobeck; he did not "inform" or "substantially inform" Mrs. Bobeck as required pursuant to I.C. § 18-8002A(2). Collectively, the testimony of Mrs. Bobeck and her husband regarding the level of Mrs. Bobeck's consciousness was substantiated by Trooper Hight's testimony wherein it later contained similar and complimentary facts regarding the level of Mrs. Bobeck's consciousness. This testimony, then, would demonstrate that Officer Travis Hight failed to comply with Idaho Code § 18-8002A, which required he give information to Mrs. Bobeck to the extent that she "shall be informed" of the information contained within paragraph (2) of I.C. § 18–8002A. Proper advisement of the consequences of submitting to evidentiary testing was not followed, and therefore, Mrs. Bobeck was not advised in accordance with the requirements of I.C. § 18–8002A(2). This is uncontroverted. In fact, the District Court correctly confirmed the uncontroverted nature of the evidence presented and directed that its legal analysis of the case must be based on facts that include Mrs. Bobeck was not fully conscious when the ALS form was read to her. R., p. 251.If the hearing officer had truly considered the testimony before him, there is no possible or rational way the hearing officer could have found Mrs. Bobeck was "informed" or "informed substantially" and asleep at the same time. "Informed" and "asleep" are mutually exclusive. Thus, due to the fact the testimonial evidence of Trooper Hight and Mr. And Mrs. Bobeck

is part of the record, and the record must be considered as a whole in order to determine if the findings of facts and conclusion of law are supported by substantial evidence, the hearing officer's finding that Mrs. Bobeck was informed pursuant to I.C. § 18-8002A and in compliance with procedural standards is not supported by substantial evidence in the record where the hearing officer failed to reflect attentive consideration to testimony evidence, the testimony was uncontroverted and the hearing officer's findings were in conflict with the uncontroverted nature of the evidence. As such, the hearing officer's decision was not based on substantial evidence in the record and was required to be vacated upon judicial review.

B. *"Informed" Does Not Mean "Read" or "Substantially Provided" And Mrs. Bobeck Was Not "Informed."*

The District Court missed the point with regard to Mrs. Bobeck's argument. In its Opinion and Order on Petition for Judicial Review, the District Court phrased the issue before it as whether a driver can be substantially informed if, at the time the ALS from is read to them, they lack sufficient awareness or capacity to comprehend the information being presented. R., p. 251. This is in error as the District Court's interpretation of the issue presented by Mrs. Bobeck is beyond that which was stated in both Mrs. Bobeck's briefing and oral argument. The correct issue, and the one again presented by Mrs. Bobeck in this appeal, is whether she (Mrs. Bobeck) was informed of the consequences if she refused to submit or complete the evidentiary testing requested, pursuant to I.C. 18-8002A(2), when Officer Hight read the ALS form to her while she was asleep. The District Court based its decision on a discussion of comprehension insomuch that it erroneously interpreted Mrs.

Bobeck's use of the word "informed" to mean "comprehend." In its opinion, the District Court expressly confirms that Trooper Hight was obligated by statute to inform [Mrs. Bobeck] of the consequences of refusing or failing to complete evidentiary testing. R., p. 252. In the very next sentence, the District Court's error becomes clear whereby it states that Mrs. Bobeck's comprehension is irrelevant and that under the statute law enforcement officers are not required to first ensure a driver comprehends the information. *Id.* Not only was comprehend nor comprehension not part of Mrs. Bobeck's argument, but neither term is referenced in the text of the statute which formed the basis of Mrs. Bobeck's argument. As such, District Court erred in sustaining the hearing officer's final order because it's opinion seeks to resolve an issue not raised by Mrs. Bobeck and failed to issue a ruling on Mrs. Bobeck's actual argument.

It is Mrs. Bobeck's position that she was not informed or substantially informed of the contents of the ALS advisory form because it was read to her while she was asleep. Nowhere in Idaho case law does it state, nor can it be inferred, that a driver is deemed to be "informed" of the information required to be given under I.C. § 18-8002A(2) simply through an officer's act of reading the ALS form. Especially when the motorist is asleep or unconscious. In fact, the unambiguous language of statute uses the term "informed" and "informed substantially" to describe the result of the law enforcement officer's reading of the ALS advisory form. I.C. § 18-8002A(2). If simply reading the ALS form was enough, the statute would have stated so. However, I.C.§ 18-8002A(2) does not use the word "read," it used the word "informed."

The interpretation of a statute begins with its literal words. Those words must be given their plain, obvious, and rational meaning. *State v. Burnight,* 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written, and without engaging in statutory construction. *Verska v. Saint Alphonsus Reg'l Med. Ctr.,* 151 Idaho 889, 893, 265 P.3d 502, 506 (2011); *In re Estate of Peterson,* 157 Idaho 827, 340 P.3d 1143, 1147 (2014). This Court has consistently held that, "where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993). A statute is ambiguous where the language is capable of more than one reasonable construction. *Porter v. Bd. of Trustees, Preston School Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). Ambiguity is not established merely because different interpretations are presented by the parties. If that were the test then all statutes whose meanings are contested in litigation could be considered ambiguous. "[A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it."*Bonner Cnty. v. Cunningham*, 156 Idaho 291, 295, 323 P.3d 1252, 1256 (Ct. App. 2014); *2007 Legendary Motorcycle*, 154 Idaho at 354, 298 P.3d at 248; *see also In re Permit No. 36–7200 in Name of Idaho Dep't of Parks & Recreation*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992), abrogated on other grounds by *Verska*, 151 Idaho 889, 265 P.3d 502.

Here, the statute is not ambiguous. In fact, a look at the sheer number of judicial opinions written about I.C. § 18-8002A(2) lends to a clear showing that there has been no problem with Idaho

courts understanding that law enforcement officers must give the specified information to drivers prior to subjecting them to evidentiary testing. Common sense lends itself to a clear understanding that one cannot be informed if they are asleep or unconscious. The term "informed" is not a difficult word, nor is it unique to judicial interpretation. In fact, in other areas of the law, the meaning and application of the term "informed" has been judiciously sorted out. Take, for example, the term "informed consent." An informed consent can be said to have been given based upon a clear appreciation and understanding of the facts, implications, and consequences of an action. To give informed consent, the individual concerned must have adequate reasoning faculties and be in possession of all relevant facts. In other words, the information one is asked to base their consent upon must be communicated in a manner that results in possession of the information. Because she was asleep when the ALS advisory form was read to her, Mrs. Bobeck was unable to receive and ultimately possess the information conveyed by Trooper Hight. What if Mrs. Bobeck was deaf? Would it be reasonable to suggest that the act of reading the ALS form to a deaf person amounts to having informed that person as required under the statute? What if Mrs. Bobeck did not speak or read the English language? Would it be reasonable to suggest that the act of reading the ALS form to a person who cannot understand English nevertheless amounts to having informed that person as required under the statute? Under these three scenarios, there is little doubt that it would be absurd to determine each was "informed," which is why it cannot be inferred that "informed" or "informed substantially" actually means "read." Again, if simply reading the ALS form was enough, the statute would have stated so.

In its Opinion and Order, the District Court made another erroneous determination that to be "informed" as required by either I.C. § 18–8002 or I.C. §18-8002A(2), law enforcement need only "substantially provide" the required information to Mrs. Bobeck in order to meet its burden, and that merely reading the ALS advisory form to Mrs. Bobeck was enough to amount to "substantially provide." R., p. 251. Specifically, the District Court held that so long as the required information is "substantially *provided*," a law enforcement officer meets his burden under I.C. § 18-8002A(2).R., p. 235.(emphasis added). Effectually, the District Court materially alters the duty placed upon law enforcement officers as proscribed within the statute by replacing "inform" with "provide." As applied to the facts at bar, the District Court contends that Trooper Hight complied with his duty under I.C. § 18-8002A(2) because he substantially *provided* the information to be given to Mrs. Bobeck because he read the ALS form to her while was asleep. This holding is without merit and erroneous.

If the act of "providing" the information was enough, the statute would have stated so. But it doesn't. The Supreme Court of The United States has found that a plain meaning determination can result from verb tense insomuch that words are to be interpreted according to the proper grammatical effect of their arrangement within the statute. *Ingalls Shipbuilding v. Director*, OWCP, 519 U.S. 248, 255 (1997) (present tense of verb is an element of plain meaning); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) (interpretation required by "plain text" derived from present tense). Here, the Legislature used the word "informed," which as used in the statute and grammatically speaking, is an adjective. By definition, "informed" means having information or

based on possession of information, whereas "inform" means to give information to (someone) or to be or provide the essential quality of (something). "Informed" and "Inform." Merriam-Webster Online Dictionary. 2015. http://www.merriam-webster.com (30 Mar. 2015). "Informed" as used within the text of I.C. § 18-8002A(2), is an adjective and as such, requires a noun that can be described as having information or possession of information. Here, "the person" is the noun in which the adjective "informed" is describing a quality of. The plain language of I.C. § 18-8002A(2) clearly outlines that the noun must be described by the adjective, and a person who is a sleep cannot to be describe as having information or being in the possession of information. Because an asleep person is not able to receive information communicated to them, it cannot logically follow that an asleep person is able to be informed. As previously outlined, Mrs. Bobeck clearly established that she was asleep and unresponsive at the time the ALS advisory form was read to her. Therefore, because Trooper Hight read the ALS form to Mrs. Bobeck while she was asleep, and because she was asleep she was unable to receive or possess information, Mrs. Bobeck was was not properly informed as required under I.C. § 18-8002A(2).

II. THE DISTRICT COURT ERRED WHEN IT RELIED ON *STATE v. DEWITT* WHERE THE HOLDING WAS OVERRULED AND OTHERWISE NOT APPLICABLE TO THIS CASE.

Mrs. Bobeck, respectfully argues that her administrative license suspension should have been vacated, first by Hearing Examiner Skip Carter, and subsequently by the District Court upon judicial review. This argument is based on the fact both the hearing officer and the District Court rely upon

the holding in *State v. DeWitt* to form the foundation for their respective decisions. Specifically, both misinterpret the holding in *DeWitt* and its applicability to the facts of this case.

The District Court's reliance on *State v. DeWitt* is inherently problematic because it misapplies the holding in *DeWitt* to the facts of this case. The sometimes parallel prosecution of drivers under the criminal statute for driving under the influence often interjects confusion surrounding the applicability of case law stemming from a criminal prosecution to an administrative license suspension. Together, the two administrative license suspension statutes and the criminal DUI statute, unfortunately lead to an interpretation so intertwined with case law from both the administrative arena and criminal arena that the without a clear grasp of the facts, a misapplication of case law and a convoluted analysis can result. That is precisely what happened in this case when both the hearing officer and the District Court relied upon the holding in *State v. DeWitt* as the foundation for the decision. In its opinion rendered in *State v. DeWitt*, the Court of Appeals addresses whether the effect of the defendant's unconsciousness at the time the ALS form was read to him, though in violation of I.C. §18-8002A(2), should also effect the admissibility of the result of the test results in a criminal proceeding. 145 Idaho 709,714, 184 P.3d 215, 220 (Ct.App.2008). The *DeWitt* Court, in applying the holding from *State v. Woolery*, 116 Idaho 368, 370, 775 P.2d 1210, 1212 (1989), and a then-valid implied consent theory determined that the evidence obtained from DeWitt's blood draw was admissible at in the criminal prosecution for driving under the influence because "a drunken driver has no legal right to resist or refuse evidentiary testing" and "whether or not a police officer gives the required warnings bears nothing on the issue of consent."

See DeWitt, 145 Idaho at 714, 184 P.3d at 220. Importantly, the *DeWitt* Court made clear that "the failure to advise a suspect of the consequences of refusal would be significant only with regard to the administrative suspension of the suspect's license following a refusal." *Id.* The Court did not address the issue of whether DeWitt was "informed" or "substantially informed" to the extent it would survive a challenge to any Final Order as administered in an administrative hearing. As such, the holdings in *DeWitt* and *Woolery* cannot be read as a declaration that despite what the statutory language provides, under the implied consent laws, there is no right to refuse an evidentiary test and therefore it doesn't matter whether or not a driver is informed pursuant to I.C. §18-8002 or §18-8002A(2). If that were the case, it wouldn't follow that Idaho could have numerous court decisions subsequent to *DeWitt* and *Woolery* wherein the very issue of an officer's compliance in rendering an advisory under I.C. §18-8002 or §18-8002A(2) determined the outcome.

For example, in an appeal from the decision in an administrative license suspension case *Cunningham v. State*, the Court of Appeals found that there was improper advisement of rights. 150 Idaho 687, 689-90, 249 P.3d 880, 882-83 (Ct. App. 2011). As a result of the improper advisement, the refusal was dismissed. *Id.* In the *Cunningham* decision, the Court of Appeals set out the following cases to support its position: *Kling v. State*, 150 Id 188, 245 P.3d 499, (Ct. App.) (2010), *In Re Griffiths*, 113 Id 364, 744 P.2d 92, (1987), *In Re Beem*, 119 Id 289, 805 P.2d 495, (Ct. App.) (1991), *In Re Virgil*, 126 Id 946, 849 P.2d 182, (Ct. App.) (1995). The *Cunningham* Court also outlined the controlling rule from *Halen v. State*, 136 Idaho 829, 834, 41 P.3d 257, 262 (2002), where our Supreme Court held that "[m]otorists who refuse to submit to requested tests are entitled

to have their licenses reinstated if they can establish at the refusal hearing that they were not *completely advised* according to these code sections." *Id.* And, pursuant to *Griffiths, Virgil,* and *Beem,* a driver must *only* show that he or she was not properly advised of the required information. As stated in *Beem,* this Court "has emphatically discountenanced interjection of judicial gloss upon the legislature's license suspension scheme." *Beem,* 119 Idaho at 292, 805 P.2d at 498.

Ultimately, the law in Idaho with regards to the significance of a failure to inform a person consequences pursuant to I.C. § 18–8002 or § 18–8002A(2) limits its significance to the administrative suspension of the suspect's license following a refusal. *DeWitt,* 145 Idaho at 714 n. 4, 184 P.3d at 220 n. 4. The hearing officer and the District Court further erred when both relied upon the misinterpretation and application of *State v. DeWitt. DeWitt* does not stand for making the § 18–8002A(2) advisory immaterial to an administrative hearing as both the hearing officer and the District Court have interpreted from the *DeWitt* decision. Rather, *DeWitt* supports the materiality of the § 18–8002A(2) advisory in the administrative proceeding arena while also limiting its significance to the administrative suspension of the suspect's license following a refusal or failure. Importantly, *DeWitt* also did not stand for any determination or rule that by simply reading the ALS advisory form, an unconscious person is considered "informed."

It is clear from the extensive Idaho case law on the issue that the law in Idaho regarding the significance of a failure to inform a person consequences pursuant to I.C. § 18–8002 or § 18–8002A(2) is limited to the administrative license suspension proceeding. Because this case is a proceeding relating to the administrative suspension of Mrs. Bobeck's license, whether or not Mrs.

Bobeck was "informed" or "substantially informed" prior to performance of the evidentiary test is relevant and material, especially when the ultimate outcome of the administrative proceeding can be affected by an officer's failure to properly advise a driver pursuant to I.C. §18-8002 or §18-8002A(2). Consequently, both the hearing officer and the District Court's reliance on *DeWitt* was misplaced. A review of the record in this matter, specifically of the uncontroverted testimony of Officer Hight, Mr. Bobeck and Mrs. Bobeck clearly shows that Mrs. Bobeck was not informed of the consequences of submitting to evidentiary testing as required in I.C. §18-8002A(2). Therefore, because this is an administrative suspension and the fact Mrs. Bobeck was not informed pursuant to § 18–8002A(2) is significant, the District Court erred in sustaining the license suspension of Mrs. Bobeck's where it misapplied the holding of *DeWitt* and disregarded the necessity of finding Mrs. Bobeck was informed pursuant to § 18–8002A(2).

III. THE DISTRICT COURT ERRED WHEN IT BASED ITS DECISION ON THE APPLICABILITY OF THE IMPLIED CONSENT STATUTE BUT THE STATUTE WAS OVERRULED AND MRS. BOBECK DID NOT CONSENT TO THE EVIDENTIARY BLOOD DRAW.

The District Court's reliance on *State v. DeWitt* is further problematic because *DeWitt* and as its progeny *State v. Woolery*, are no longer good law after this Court declared the implied consent statute unconstitutional. *State v. Wulff*, 157 Idaho 416, 337 P.3d 575 (2014). Both the hearing officer and the District Court expressly base their respective decisions on a theory of implied consent, despite the fact Mrs. Bobeck was not informed as required under I.C. §18-8002A(2), did not consent

to the evidentiary test and the evidentiary blood draw was done without a warrant. Because of this, both the hearing officer and the District Court erred in not vacating the administrative license suspension of Mrs. Bobeck

The District Court erred by relying on the implied consent statute to further support its decision that whether or not Mrs. Bobeck was informed pursuant to I.C. §18-8002A(2) was irrelevant. The implied consent statute relied upon by the District Court is codified at Idaho Code section 18–8002 and provides that a person gives "implied consent" to evidentiary testing, including blood draws, when that person drives on Idaho roads and a police officer has "reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of [Idaho's DUI statute]." *State v. Wulff*, 157 Idaho 416, 337 P.3d 575 (2014). In this case, the blood obtained from Mrs. Bobeck was done without a warrant, and under *Wulff*, was in violation of Mrs. Bobeck's constitutional rights. As such, the District Court erred in basing its decision upon a violation of Mrs. Bobeck's constitutional rights and the now overruled implied consent statute, Mrs. Bobeck did not consent to the blood draw because she was unable to receive the information contained on the ALS advisory as Trooper Hight read it to her while she was asleep, and the blood draw was warrantless.

Until recently, it was long standing law in Idaho that law enforcement officers do not need to obtain a search warrant to force a blood draw of a suspect's blood stemming from an arrest for driving under the influence. This was the product of this Court's holding that forced blood draws fell within either of two exceptions to the warrant requirement: (1) forced blood draws fall within the

exigent circumstances exception as in *State v. Woolery;* and (2) forced blood draws are valid as consent searches under Idaho's implied consent law as in *State v. Diaz.* Both of these cases, and especially the implied consent law are, as discussed below, no longer "good law" having been expressly overruled by this Court in *State v. Wulff.*

The theory which underlined the holding of *State v. Woolery* and *State v. Diaz,* was that the warrant requirement for forced blood draws was excepted due to the exigent circumstance related to the dissipation of blood alcohol level and that Idaho's implied consent statute allows warrantless blood draws under the consent exception. *State v. Woolery*, 116 Idaho 368, 370, 775 P.2d 1210, 1212 (1989); *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007). However, the theory that a warrantless blood draw is an exigency exception to the warrant requirement based upon the natural dissipation of alcohol in the bloodstream was discussed and effectually dismissed, with reliant holdings therefore overruled, by the United States Supreme Court in *Missouri v. McNeely. Missouri v. McNeely*, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). Following the decision in *Missouri v. McNeely*, this Court in *State v. Wulff* extended the *McNeely* holding finding that the "application of the implied-consent statute as a per se exception to the warrant requirement as to blood draws violates the Fourth Amendment." *State v. Wulff*, 157 Idaho 416, 337 P.3d 575 (2014).

First, in *Missouri v. McNeely,* the United States Supreme Court held "warrantless blood draws are not always permitted under implied consent statutes" and that "the natural metabolization of alcohol in the bloodstream" does *not* "presen[t] a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving

cases." 133 S.Ct. at 1556. Instead, courts must use a "totality of the circumstances" approach to determine exigent circumstances. *Id.* Further, the natural dissipation of alcohol in blood is just one circumstance, and it must be considered with other factors, such as the ease and speed with which the police could get a warrant in the particular case. *Id.* at 1562-1563. Effectually, *McNeely* rejects the state-court decisions that upheld warrantless blood draws under the "per se exigency" theory. Among the rejected state-court cases that the *McNeely* Court cited was this Court's decision in *Woolery. Id.* at 1558 n.2. Consequently, *McNeely* abrogated *Woolery's* holding that the natural dissipation of alcohol always creates an exigency exception in drunk-driving cases and *Woolery* is no longer good law. *State v. Wulff*, No. 41179, 2014 WL 5462564, at 4 (Idaho Oct. 29, 2014). Because *McNeely* rejected the per se exigency theory, the exigent circumstances exception cannot justify all warrantless, forced blood draws authorized by Idaho's implied consent law.

The question thus arises: Can the warrantless, forced blood draws that aren't justified by exigent circumstances be justified, instead, by the implied-consent theory upon which this Court relied in *Diaz* and upon which the District Court relied upon in this case? The answer to this question, in light *State v. Wulff*, is no. Prior to *State v. Wulff*, this Court held that under the implied consent statute, warrantless forced blood draws fell within the consent exception to the warrant requirement as valid consent serches. *State v. Diaz,* 144 Idaho 300, 302, 160 P.3d 739, 741 (2007). Although *Missouri v. McNeely* did not directly address whether warrantless forced blood draws could be justified by implied consent statutes, the argument that *McNeely* applies only to exigency requires a narrow reading of *McNeely's* holding and one which this Court rejected in *State v. Wulff.*

State v. Wulff, 157 Idaho 416, 420, 337 P.3d 575, 580 (2014). There, this Court expressly disagreed with a narrow reading of *McNeely* and instead determined that *McNeely's* overall discussion suggests a broader application. *Id.* This broader application results in this Court finding that reliance on implied consent as a valid consent search is no longer acceptable when it operates as a per se exception to the warrant requirement. *Id.* Ultimately, this Court held that Idaho's implied consent statute is an unconstitutional per se exception to the warrant requirement because the statute does not recognize a driver's right to revoke his implied consent, and effectually overruled *Diaz*. *State v. Wulff*, 157 Idaho 416, 422, 337 P.3d 575, 582 (2014).

This Court's holding in *Wulff* not only invalidates the implied consent statute, but it is now the new legal standard to be used when evaluating the constitutionality of a warrantless forced blood draw. The holding in *Wulff* also annihilates the legal foundation used by both the hearing officer and the District Court where both relied on *State v. DeWitt* and the implied consent statute to declare whether or not Mrs. Bobeck was asleep when the ALS advisory was read to her was immaterial because she could not refuse the blood draw, and where Trooper Hight did not obtain a warrant prior to directing the extraction of Mrs. Bobeck's blood. Not only was Trooper Hight required to give the ALS advisory to Mrs. Bobeck in a way that she "shall be informed" of its contents, but now, under *State v. Wulff*, Mrs. Bobeck did in fact have the option to revoke her implied consent. However, because Trooper Hight read Mrs. Bobeck the ALS advisory while she was asleep in violation of I.C. §18-8002A(2) she was not given the opportunity to revoke her consent, and a warrantless blood draw commenced.

CONCLUSION

For the reasons stated herein, Appellant Jonna Lynn Bobeck, respectfully requests that this Court reverse the findings of the Hearing Officer and remand the matter back to the State with instructions to vacate the suspension of Mrs. Bobeck's driving privileges.

DATED this 10 day of April, 2015.

CLARK and FEENEY

By_____
Paul Thomas Clark, a member of
the firm. Attorneys for Petitioner

I hereby certify that on the 10
day of April, 2015, a true copy of
the foregoing instrument was:

__✓__ Mailed
_____ Faxed
_____ Hand Delivered
_____ Overnight Mailed to:

Edwin L. Litteneker
Special Deputy Attorney General
Idaho Transportation Department
322 Main Street
P.O. Box 321
Lewiston, ID 83501

CLARK and FEENEY

By_____
Attorneys for Petitioner