5-1-2017

Schweitzer Basin v. Schweitzer Fire Dist. Respondent's Brief Dckt. 44249

IN THE SUPREME COURT OF THE STATE OF IDAHO

SCHWEITZER BASIN WATER COMPANY,	)	
Petitioner/Respondent,	)	**Supreme Court Docket No. 44249**
vs.	)	Bonner County Docket No. CV-2015-434
SCHWEITZER FIRE DISTRICT,	)	
Respondent/Appellant.	)	

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and For Bonner County

Honorable Barbara Buchanan,
District Judge, Presiding

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I. STATEMENT OF CASE

A. Nature of the Case.

The respondent, Schweitzer Basin Water Company ("Company"), is incorporated in Idaho for purposes of delivering domestic water to its customers. The Company owns and maintains one of the four (4) private water systems serving water users on Schweitzer Mountain above Sandpoint, Idaho.

The appellant, Schweitzer Fire District ("District") sent to the Company an Ordered [sic] Demanding Repair and Remedy of Deficiencies in Water System ("Order For Remedy") (R. pp. 25-28), ostensibly ordering the Company to remedy and repair private fire hydrants, owned by third parties and installed on the Company's water system, to a level consistent with the standard of 1,000 gpm water flow. The Company was the only water system being pursued by the District even though the other three water systems on Schweitzer Mountain also had fire hydrant flow deficiencies. The Company responded by reminding the District that the fire hydrants were not owned by the Company but were owned by private individuals, and that the District did not have jurisdiction over the Company, which is regulated under the jurisdiction of the Idaho Department of Water Resources ("IDWR") and Idaho Department of Environmental Quality ("DEQ") (R. pp. 79-80), facts which had been communicated to the District by the Company several times in prior years.

The District subsequently informed the Company that the District was going to require the representatives of the Company to come to a hearing before a hearing

board handpicked by the District. The Company again responded that it continued to believe that the District did not have any jurisdiction to do so, and the Company was forced to seek judicial intervention to protect the Company from the District's threatened enforcement action.

B. Course of the Proceedings.

The Company filed its Petition For Writ of Prohibition against the District's threatened actions on March 19, 2015 (R. pp. 10-12), and the district court issued its Order For Alternative Writ of Prohibition on March 20, 2015. R. pp. 54-55. On March 24, 2015, the District made its initial appearance by filing its Motion to Dismiss.

At the Order to Show Cause hearing on March 25, 2015, the district court decided to leave the Alternative Writ of Prohibition in place and scheduled the matter for trial on July 10, 2015. Tr, Order to Show Cause, March 25, 2015, p. 25, l. 13 – p. 26, l. 16. The pretrial conference was scheduled for June 17, 2015.

On April 7, 2015, the District filed its Motion to Disqualify Without Cause (Judge Buchanan). On April 16, 2015, the Disqualification – Judge Buchanan (R. pp. 64-65) was filed, resulting in both the court trial and pretrial conference being vacated.

On April 21, 2015, the Order of Assignment (to Judge Christensen) (R. pp. 66-67) was filed, thereby changing the assigned judge to an out-of-county judge. Shortly after, however, on April 30, 2015, the Order Rescinding Disqualification was entered. The Order Assigning District Judge was thereafter entered on May 1, 2015, re-assigning Judge Buchanan to the case and the file was returned to Bonner County.

Subsequently, in May of 2015, the Company approached the District with the idea of mediating the case. The parties ultimately agreed on mediation, which was conducted on June 15, 2015 with Honorable Steven C. Verby, District Judge retired, as mediator. At the Scheduling Conference on June 19, 2015, the parties advised the district court that they were in the middle of mediation and were confident that it was appropriate for them to continue. The district court decided to set another scheduling conference in about 60 days unless word was received that the case had been settled. Ultimately, the mediation was unsuccessful.

On September 22, 2015, the District filed its Motion to Dismiss and Notice of Hearing. The hearing on that motion was scheduled for October 7, 2015, which was later vacated at the request of the attorney for the District. The hearing on that motion was then rescheduled for December 15, 2015. On October 30, 2015, an Amended Notice of Scheduling Conference changed the setting to December 11, 2015.

On November 17, 2015, the District filed its Amended Notice of Hearing and Motion to Dismiss and Notice of Hearing. The hearing of that motion was scheduled for December 9, 2015.

On November 25, 2015, the Company filed its Statement, Notice of Hearing, Motion For Hearing of Case on Applicant's Papers (R. pp. 129-131), and the Amended Petition For Writ of Prohibition, with supporting affidavits from Mel Bailey (R. pp. 101-119) and Mark Larson (R. pp. 124-128). The hearing on that motion was also scheduled for December 9, 2015.

The District, on December 1, 2015, filed its Response to Petition (R. pp. 132-134), and on December 3, 2015, its Response to Petition For Writ of Prohibition & Amended Petition For Writ of Prohibition. R. pp. 135-137. At the hearing of pending motions on December 9, 2015, the District asked for more time to respond to the Company's documents that requested a hearing on the Company's papers. The district court rescheduled the hearing of the Company's motion for hearing on applicant's papers, and entered on December 10, 2015 the district court's Order Denying Respondent's Motion to Dismiss. R. pp. 138-140. The hearing on the Company's motion for the decision on the applicant's papers was scheduled for January 20, 2016 by the December 17, 2015 Notice of Hearing.

At the hearing on January 20, 2016, the district court heard argument on the Company's motion for a decision on the applicant's papers. By its Memorandum Decision and Order Granting Writ of Prohibition entered on January 22, 2016, the district court granted the Company's motion. R. pp. 162-170

The Company later, on February 4, 2016, filed the Petitioner's Motion For Award of Damages (R. p. 171-172), with supporting affidavit of Mel Bailey. R. pp. 173-228. The District filed its Objection to Motion For Attorney's Fees on February 18, 2016. R. pp. 249-256. Subsequently, the Company filed on February 24, 2016 its Notice of Hearing on its request for attorney's fees and costs.

The Company's motion for attorney's fees and costs was heard on March 23, 2016. The district court, on March 29, 2016, entered its Order Awarding Attorney's

Fees, Costs and Expenses Under I.C. 12-117; or Alternatively, Damages and Costs Under I.C. 7-312. R. pp. 273-277. A Judgment (R. pp. 281-282), and the Peremptory Writ of Prohibition (R. pp. 283-285), were thereafter entered by the district court on April 21, 2016.

On May 5, 2016, the Company filed its Motion For Reconsideration and to Alter or Amend Judgment. R. pp. 286-289. The District, on May 4, 2016, filed its Motion to Extend Time Re: Motion For Reconsideration, for which the Company signed its statement of no objection. R. p. 300, ¶2. On May 16, 2016, the district court entered its Order Re: Motion to Extend Time Re: Motion For Reconsideration.

Before that motion could be heard, the District, on June 2, 2016, filed its Notice of Appeal. R. pp. 310-313. On June 22, 2016, the hearing on the Company's motion to alter or amend judgment was continued to July 6, 2016.

On June 27, 2016, the district court entered its Order – Petition For Writ of Prohibition Against Defendant – Granted (R. pp. 315-316), and Judgment (R. pp. 317-318), in order to comply with the procedural requirements for those documents.

On July 1, 2016, this Court filed its Order to Withdraw Conditional Dismissal and Reinstate Appeal Proceedings. R. p. 319. The appeal had been suspended during the time needed to revise the writ and judgment.

On July 6, 2016, the district court heard the Company's motion for reconsideration and to alter or amend. The Memorandum Decision and Order Denying Petitioner's Motions For Reconsideration and to Alter or Amend Judgment

was entered by the district court on July 13, 2016. R. pp. 320-327. The Company filed its Notice of Cross-Appeal on August 23, 2016.

Subsequently, both parties supplemented the Clerk's Record with additional documents from the prior proceedings in the district court and signed a Stipulation For Dismissal of Cross-Appeal. This case is therefore being submitted to this Court on the District's appeal of the district court decisions as granting the writ of prohibition and awarding the Company attorney's fees and costs.

C. Statement of the Facts.

In 1989, Mel Bailey purchased the Company. At that time, there were no standard fire hydrants at the Schweitzer Mountain Resort. A few condominiums had two inch or smaller water valves for local fire protection. R. p. 45, ¶2.

In the late 1980's, the District was formed by the CEO of Schweitzer Mountain Resort, a Schweitzer resident, and another Schweitzer resident who also was an employee of Schweitzer Mountain Resort, as the first fire commissioners. The commissioner's appointed a Schweitzer employee as fire chief. *Id.* ¶3.

During formation of the fire district, the Company and the other private water company on Schweitzer Mountain worked together to improve fire protection. The main objectives were to increase the amount of water available and to have fire hydrants installed throughout the Schweitzer Mountain Resort area for the safety of the residents. *Id.* ¶4

Another reason for establishing the fire district was the Schweitzer property owners had problems with insurance companies charging very high rates for insurance, or not being willing to provide insurance at any price. The fire district worked with property owners to have them install their own fire hydrants, at their own expense, using water from the Company's water system. *Id.* ¶5.

Prior to the installation of the fire hydrants, the Company's Rules and Regulations made it clear that it could not be responsible for the private fire hydrants or any fire flow from them, which was agreeable to the fire district and the customers of the water system. *Id.* ¶4 and ¶5.

What the Company has done about allowing private fire hydrants to be placed on its system by property owners has benefited the Schweitzer community. Currently, there are 22 hydrants on the system, flowing from 410 to 1,060 gpm. There are only four fire hydrants flowing less than 500 gpm. The Schweitzer community's fire rating is currently a 5, just like many other similar nearby towns. The Idaho Insurance Rating Bureau ("ISRB") gives full credits for all of the fire hydrants on the Company's system because all fire hydrants flow more than 250 gpm. R. p. 396, ¶7.

Historically, the District has required fire hydrants as part of the conditional use permit process with Bonner County and has approved the construction of buildings served by the private fire hydrants on the Company's water system, all the while knowing that the fire flows were far less than the optimum standard of applicable fire codes. DEQ is fully satisfied with what the Company has done with its water system,

including as that relates to fire flows, and encouraged the District to work together with the Company to have the best fire protection situation available within the confines of the Company's water system design limitations. R. p. 395, ¶6 - p. 396.

When threatened by the District with an administrative enforcement action, the Company offered a plan to continue to improve the fire flows from the private hydrants on its water system. Instead of discussing that plan, the District followed through with its threat to fine the Company with daily fines through an administrative enforcement action until the Company would bring all of the fire flows from the private fire hydrants to 1,000 gpm. R. p. 15, ¶11 - ¶13. The size of the Company's water system pipe over the six miles of distribution mains cannot physically transport that quantity of water (R. p. 47, ¶2), and the District has been asked for, but has never provided, information to the Company showing that the District's equipment and fire planning is even capable of fully utilizing that amount of water for fire suppression purposes.

When the District stridently marched forward with its intended administrative enforcement process, the Company was left with no alternative but to seek a writ of prohibition based upon the District's lack of jurisdiction under the Idaho fire laws. R. p. 11, ¶4-¶8. The district court was correct in issuing the writ of prohibition and in awarding the Company its attorney fees, costs and damages.

II. ATTORNEY'S FEES ON APPEAL

The District has requested attorney's fees on appeal pursuant to Idaho Code §12-117. This request is presumably according to subsection (1) which provides as follows:

> "(1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law."

Idaho Code §12-117.

In an apparent attempt to somehow qualify for an award of attorney fees and costs on appeal, the District contends that the *Company* acted without a reasonable basis of law and fact by filing for issuance of a writ of prohibition. The District also tries to equate the Company's successful attempt to avoid being forced into the District's administrative enforcement process as having no reasonable basis in fact or law. As detailed in the district court's decision to grant the requested writ, it was the *District*, and not the Company, that was accurately determined as being the one acting without any reasonable basis in fact or law. R. p. 168, ¶2. The District fails to cite this Court to any facts or law that would provide any legitimate justification for the District's efforts to force the Company to have to struggle through "layers of due process" when the District had no jurisdiction whatsoever over the Company's water system. Appellant's Brief, p. 14, ¶3.

The facts of this case require that the Company be awarded its attorney fees and costs on appeal. The stubborn, relentless and unyielding attempts by the District to force the Company into an administrative enforcement action for which the District lacked jurisdiction are the stuff of the government-administrative-agency nightmares of small business owners. The Idaho legislature enacted Idaho Code §12-117 to deter that type of abuse, including the situation of the abuse continuing on into the appellate level: "...in any proceeding involving as adverse parties a ...political subdivision and a person, the...court hearing the proceeding, *including on appeal,* shall award the prevailing party reasonable attorney's fees...if it finds that the nonprevailing party acted without a reasonable basis in fact or law." Idaho Code §12-117(1). (emphasis added)

We have to wonder what is the District's motive? The following inconsistent actions and positions taken by the District belie the District's claimed motive of "safety:"

1. The District singled out one of four water systems, when all of the systems have similar fire flow deficiencies.

2. The District over time has changed its demands from 500 gpm to 1,000 gpm for fire flow purposes.

3. The District has required private owners to add fire hydrants to the Company's water system as a condition of the private owners obtaining construction

approval, while acknowledging in writing that the Company's water system may not be able to provide the fire flow standard that the District would require.

4. The District's fire hydrant requirements for new construction only address hydrant location and accessibility.

While the District seeks to place only "safety" on the balance scale for the decision of what should be done in this case, there are two other countervailing weights still in the bag: Logic and reason. They also need to be placed on the scale, but on the other side, for true balance. No one is against improved safety, but safety at what cost, and with what benefit? Such things as cars, highways and nuclear facilities all have safety cost/benefit criteria. Fire safety can always be improved, but the beneficiaries, such as home owners, and other connected parties, such as their insurance companies or the ISRB, must decide how much should be paid for a reasonable level of safety. The course of conduct of the District in this matter has been unreasonable.

The policy reason as to why a statute, allowing for attorney fees to citizens, should be applied in this case on appeal was well stated as follows:

> "In clear, unambiguous and mandatory language I.C. §12-117 requires an award of reasonable attorney fees merely upon a showing 'that the agency acted without reasonable basis in fact or law.'...(W)e hold that Lockhart is entitled to attorney fees on appeal for the Department's attempt to dispose of this case on a clearly erroneous interpretation...."

Lockhart v. Department of Fish and Game, 121 Idaho 894, 828 P.2d 1299, 1303 (1992).

Here, the District's attempted administrative enforcement action against the Company was based an erroneous interpretation of Idaho Code §41-259, and an award of attorney fees to the Company on appeal is required.

III. ARGUMENT

A. The district court correctly granted the Company's Petition For Writ of Prohibition.

1. Jurisdiction is a question of law over which this Court exercises free review. That is the applicable standard of review unequivocally stated in *State vs. District Court*, 143 Idaho 695, 699, 152 P.3d 566, 570 (2007). The Company believes that the district court's decision on the issue of jurisdiction will pass muster after that type of review.

At the outset of that kind of review, it is instructive to note that the District fails in Section I(A) of its argument to give any supporting citations to the record. Appellant's Brief, p. 4, ¶1 – p. 6, ¶1. Although the District claims that the Company failed to show that the District did not have jurisdiction to order the Company to comply with the IFC, there is no supporting discussion from the record about the evidence and statements on the record at hearings, and how supposedly that evidence and information fell short of being adequate and correct. Instead, the District gives only a vague discussion of legal standards and fails to point to any specific errors on the record. The District says in footnote 19 (Appellant's Brief, p. 6) that the State Fire Marshal has addressed this issue in the Brief of *Amicus Curiae*. But, as argued by the Company in its Reply to Brief of *Amicus Curiae*, the State's arguments are laced with new arguments that should not be considered in this appeal. All of that compromises the District's argument on appeal on this issue, and flies in the face of what the District

would have to do in order to prevail on this appeal: "Appellants who fail to identify error on the record fail to meet their burden of showing error on appeal." *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 582, 329 P.3d 356, 364 (2014) (internal citations omitted).

2. The Company carried its burden of proof to show that the District had no jurisdiction. In reaching its decision that the District did not have jurisdiction over the Company to pursue an administrative enforcement action against the Company under the District's Order For Remedy, the district court correctly began with the review of what it designated as the "...threshold legal issue as to whether the Fire District was proceeding outside the scope of its jurisdiction under Idaho Code §41-259 in issuing the Order For Remedy." R. p. 164. In analyzing the jurisdictional issue, the district court highlighted the following language from that statute:

> "Whenever any of said officers shall find that any building or other structure which, for want of repairs, or lack of or insufficient fire escapes, automatic or other fire alarm apparatus or fire extinguishing equipment, or by reason of age or dilapidated condition, or due to violation of the International Fire Code or from any other cause, is especially liable to fire, and is so situated as to endanger life, other buildings or structures or said building or structure, he or they shall order the same to be remedied or removed, ..."

R. p. 164.

The district court then cited the following language from the Affidavit of Mel Bailey in Support of Petitioner's Motion For Hearing of Case on Applicant's Papers, filed November 25, 2015 (the "Bailey Affidavit"):

> "In an effort to support the Schweitzer community's fire-protection efforts, the Company began allowing private fire hydrants to be installed on the Company's system by owners of real property who received their domestic water from the Company's system. The Company made it clear that it could not be responsible for those hydrants or any fire flow from them. As stated in the Company's 1992 rules and regulations under section 5, denominated 'fire hydrants:' 'SBWC (referring to the Company) is without authority to furnish fire protection service and it undertakes to furnish only domestic water. Therefore, SBWC shall not be responsible for loss or damage claimed to have been due to lack of adequate water supply or water pressure and merely agrees to furnish such quantity of water at such pressure as are available in its general distribution system.'"

R. p. 164-165.

The district court then noted that the Company maintained that the District's actions against the Company, purportedly based on Idaho Code §41-259, had been without any reasonable basis in fact, because:

> "The Company's water system does not have any building or other structure which, for want of repairs, or lack of or insufficient fire escapes, automatic or other fire alarm apparatus or fire extinguishing equipment, or by reason of age or dilapidated condition, or due to violation of the International Fire Code or from any other cause, is especially liable to fire, and is so situated as to endanger life, other buildings or structures or said building or structure."

R. p. 165.

The district court further noted the following language from the Affidavit of Mark Larson in Support of Petitioner's Motion For Hearing of Case on Applicant's Papers, filed November 25, 2015 (the "Larson Affidavit"):

> The fire codes adopted as minimum standards for the State of Idaho [i.e., Idaho Code §41-253 through §41-269] have always

> had language that clearly stated that the requirements of the code only apply to structures, facilities and conditions ...
> ...
> Based upon my findings concerning the [Schweitzer Basin Water Company and its water] system, and my knowledge of the applicability of the International Fire Code, the International Fire Code would not apply to the system."

R. p. 165.

Although the District argues that Mark Larson conceded in the Larson Affidavit that an express jurisdictional authority was given to the District by Idaho Code §41-253 through §41-269, it is instructive to note two things: First, the District does not cite this Court to any paragraph of the Larson Affidavit that would support that argument. Secondly, and to the contrary of the District's argument, Mark Larson, who is the immediate past Idaho State Fire Marshal, in paragraph 5 of the Larson Affidavit, which refers to several of those Idaho Code sections, says absolutely nothing about jurisdiction, let alone jurisdiction as it would relate to the facts of this case.

There has never been any reluctance by the Company to shouldering its burden of proof on the threshold issue of jurisdiction. The reason that the Company filed its petition for the writ of prohibition was because the Company firmly believed that the District had no jurisdiction over the Company to attempt to enforce the District's Order For Remedy.

The district court further noted what was the only converse statement on the issue of jurisdiction, which was contained in the following language from the Affidavit in Support of Respondent's Objection to Petitioner's Motion For Hearing of Case on

Applicant's Papers, filed January 6, 2016, from Spencer Newton, the Fire Chief of the District: "The relevant fire codes, adopted by the State of Idaho, have always applied to the water system....the way to measure the water system fire flow rates required for safety is through testing at the hydrants." R. p. 165.

Following that analysis, the district court ruled as follows:

> "Upon consideration of the arguments presented by the parties, together with the sworn testimony in the foregoing affidavits, this Court is not persuaded that the District has jurisdiction over the Company under Idaho Code §41-259. The Court agrees with the testimony in the Bailey and Larsen [sic] affidavits that the that the Company's water system can in no way be construed as a 'building or other structure which, for want of repairs, ...or by reason of age or dilapidated condition, or due to violation of the International Fire Code or from any other cause, is especially liable to fire, ...' I.C. §41-259. Accordingly, the Court finds that the Company has met its burden of proof on the issue of jurisdiction, and that Idaho Code §41-259 does not apply to the Company's water system. It is determined that the District has no jurisdiction over the Company's water system and acted outside the scope of its jurisdiction under §41-259 in issuing the Order for Remedy. As such, exhaustion of administrative remedies is not applicable."

R. p. 166.

The District's concluding argument on the issue of jurisdiction is just a general statement that the language contained in the Idaho Code and IDAPA grants express authority to the District to enforce all aspects of the IFC, including the enforcement of fire flows. Appellant's Brief, p. 5, ¶3. The Company actually does not disagree with that statement. It is consistent with the Larson Affidavit, which made the point well that, while the State Fire Marshal and fire chiefs of fire districts have general

enforcement responsibilities for the fire safety codes and rules (R. p. 126, ¶5), the State Fire Marshal and the District's fire chief just do not have any authority or jurisdiction to prosecute an administrative enforcement action against the Company's water system. R. p. 127, ¶10.

The District wholly fails to give any reason in law or in fact as to why the district court's decision on jurisdiction should not be affirmed. That decision should therefore be affirmed.

3. The Company had no adequate remedy through any administrative process and judicial review. The District next argues that the Company cannot meet its burden of proof regarding the inadequacy of available remedies. Appellant's Brief, p. 6, ¶1. The Company believes that the District is referring to the section in the writ of prohibition statute which states that the provisions of the mandamus procedure apply to proceedings for a writ of prohibition. Idaho Code §7-404. One of those writ of mandate provisions that is applicable to a writ of prohibition states that the writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary court of law. Idaho Code §7-303. The District's argument, that the Company allegedly did not meet its burden of persuasion on this point, is incorrect.

In its Petition For Writ of Prohibition, the Company, at the commencement of this case, stated that the Company had no plain, speedy or adequate remedy in the ordinary court of law, by any proceeding except the issuance of a writ of prohibition as

prayed for in the petition, for the reason that there was no other resource but the district court available to the Company to try to prevent the scheduled hearing from being conducted. R. p. 11, ¶7. In its Affidavit in Support of Writ of Prohibition, the Company chronicled six (6) fatal defects in the District's letter constituting a purported notice of hearing, dated March 6, 2015, for the contested case hearing that the District attempted to schedule on March 20, 2015. R. pp. 15-16, ¶14. The District did not ever offer any rebuttal against those six (6) stated defects.

The District then argues that the district court's decision should be reversed because the issue of an adequate remedy at law was not addressed. Appellant's Brief, p. 6, ¶1. Not only is that allegation of the District incorrect, but also the page of the district court's decision cited by the District as authority expressly shows that the district court fully considered the issue of adequacy of remedy.

At the beginning of the show cause hearing on March 25, 2015, the district court identified the problem that the District had with trying to rely on Idaho Code §41-259 as a basis for its attempted administrative enforcement action against the Company:

> "MS. MARSHALL: In 41-259 does talk about it shall order a remedy. The - - the water company has a system that delivers water to the hydrants but that is for the protection of the homes. The hydrants, even though they're individually owned by the people, they use the hydrants to check the water pressure. So its not whether the hydrants are individuals or Mel Bailey's or anyones. Its just they use that as a tool to check the water system and the flow coming out of it. And the fire marshal is the one that governs the flow of water that is needed to come out of the hydrant for the safety of the residences. So that is basically the hydrants are used as that tool.

> THE COURT: I see that. But how do you have - - read the code section. I need case law or I need - - because the code section doesn't give, that I can see, the fire marshal any - - I mean this is a draconian remedy. Your telling - - you gave - - issued an Order that said if they don't remedy this within so many days, they were gonna start charging them daily fees."

Tr. Order to Show Cause Hearing, p. 7, Ll. 6-25.

Later on in that hearing, the district court questioned the District's counsel about the administrative hearing that the District's counsel was arguing was an adequate alternative remedy for the Company. The district court specifically zeroed in on how the District had handpicked the members of the hearing board that the Company would have supposedly had to face:

> "THE COURT: Whose [sic] your hearing people? I can't tell. You just ordered them to come to a contested hearing with who?
> MS. MARSHALL: There's a set Board of four people and that was discussed. That was actually disclosed a year ago.
> THE COURT: Well, because I'm just reading your - - the hearing notice that was filed with the court, it just said they'll [sic] be a hearing. It doesn't say who the – who the panel of three people are.
> MS. MARSHALL: That's not - - anything that's uncommon. And we actually - - actually have an alternate as well, in case they do not like one of the hearing people. But the hearing people had been suggested over a year ago for the hearing people and I believe there was an objection to one person who we then replaced. But that's again not unusual in administrative practice that one office is a hearing officer but has two or three different people that hear hearings for 'em. And its just listed as the appeals Board. And pretty much, unless you have a conflict when you get there, you get the judge that they've - - that they've assigned.
> THE COURT: Ok. So who is - - I mean what Board? That's what I can't tell from your - -

> MS. MARSHALL: Oh. It's a Board that is chosen and it is - - we have a list.
> THE COURT: Chosen by who? I mean you - - I would assume that, you know, normally you go to a hearing officer. They're a hearing officer. That's their position. I'm just trying to figure out who these people are.
> MS. MARSHALL: Well they're people that have been chosen and they've been chosen - -
> THE COURT: By who?
> MS. MARSHALL: By the fire chief.
> THE COURT: So he just gets to get [sic] pick?
> MS. MARSHALL: Yes. Yes. According to the rules, he just gets to pick. This is very low level getting the issues out there administrative hearing. This is not - - this goes so many more steps. There's other remedies. There's appeals. And the writ of prohibition, that is not supposed to be used as an appeal as a step, unless everything else has been exhausted and, frankly, we're just getting started. And we've tried to resolve it prior to just starting but we still need to have our first hearing."

Id. p. 11, l. 17 – p. 13, l. 13.

Secondly, contrary to the contention of the District, the district court not only addressed the issue of adequacy of remedy, but also made an express finding in its Memorandum Decision and Order Granting Writ of Prohibition:

> "Further, the Court rejects the District's argument that the Company has an alternative and adequate legal remedy. According to the District, '[p]etitioner has an ability to argue this matter on the merits to the hearing board first. If one of the parties is not satisfied with the decision, it may be appealed to the State Fire Marshal. If one of the parties is still not satisfied, a petition for judicial review may be filed.' *Brief in Support of Respondents [sic] Objection to Petitioner's Writ of Prohibition and Motion for Hearing of Case on Applicant's Papers* (filed January 6, 2015) at p. 6; *see also Newton Affidavit*, at p. 3, ¶11.
> At the January 20, 2016, motion hearing, the District's attorney argued that, regarding the issue of jurisdiction, the

> Company should be required to first exhaust the administrative process of 'hearing board --› appeal to State Fire Marshal --› judicial review,' before praying to this Court for judicial relief. However, the District has offered absolutely no legal authority to support such an administrative process, and this Court finds that it is not an alternative and adequate legal remedy. The District has no jurisdiction over the Company, and thus, no authority to demand that the Company come before the District for such a hearing."

R. p. 166, ¶2 through 167.

The district court could not have been more clear. It rejected the District's argument that the administrative procedure, which it wanted to force upon the Company, would be an adequate alternate remedy. The district court specifically found that was not an alternate and adequate legal remedy.

The District fails to point to any error on the issue of alternate and adequate remedies. The Company carried its burden of showing initially that the Company had no alternate adequate remedy. R. p. 11, ¶7. The burden then shifted to the District to sustain its defense on that issue, or at the very minimum to preserve any error on that issue for appeal. The District wholly failed to do so. It is not enough for the District to make general arguments about burdens of proof and court errors. Appellant's Brief, p. 7, ¶1 – p. 8, ¶1. The District has failed to show that it raised arguments about alternate adequate remedies in the district court and that the district court erred in considering them. This is another attempt to raise arguments for the first time on appeal, which should not be allowed.

In this case, the Company had no alternate and adequate legal remedy, especially since the District refused to deal with the issue of jurisdiction. There was no remedy in the administrative procedure threatened by the District that would have allowed the Company to have a determination of the jurisdiction of the District before having to go through a time-consuming and costly administrative process, including the peril of potentially of having to go through various appeals of any adverse ruling.

The District then argues that writs of prohibition are disfavored because of the District envisioning smart litigants trying to circumvent administrative processes by filing for a writ in district court. The District attempts to draw an analogy between this case and real estate developers, who may not like requirements imposed by a city planning commission and city council, seeking to bypass the city altogether by filing for a writ in district court. That analogy fails because, unlike this case, there would be no question that the city, through its planning commission, would have jurisdiction over a developer seeking to develop real property within the boundaries of that city. If, instead, the planning commission of one city attempted to impose requirements upon a developer who was developing real property within the boundaries of a totally different city, there would be some analogy with this case. The analogy, however, would show that a writ of prohibition *would* be appropriately sought by the developer because of the lack of jurisdiction of the first city.

The District also argues that there is a policy in land use and administrative law whereby all administrative remedies must be exhausted before seeking relief from the

court. Appellant's Brief, p. 6, ¶3 – p. 7, ¶1. In this case, however, the principle of exhaustion of administrative remedies is not applicable. This case falls into one of the exceptions to the exhaustion requirement: "Specifically the requirement will be dispensed with when 'the interests of justice and require' or when the agency has acted outside its authority." *Park v. Banbury*, 143 Idaho 576, 580, 149 P.3d 851, 855 (2006).

The District finally contends that the Company had the ability to argue this matter on the merits to the District's hearing board first and then, if it was not satisfied with the decision, that decision could be appealed to the State Fire Marshal. Appellant's Brief, p. 7, ¶1. The District also contends that such a procedure would develop a record with expert technical information and would be less expensive of a procedure. All of those contentions have no application in this case because the District had no jurisdiction over the Company and can only speculate about the record or the cost. The bottom line is that the District cites no factual or legal authority to draw into question either the district court's decision rejecting the District's argument that the administrative process was an alternate and adequate legal remedy for the Company, or the district court's finding that the administrative process that the District tried to force upon the Company was not an alternate and adequate legal remedy.

B. The district court was correct in its award of attorney's fees and costs to the Company.

1. The district court correctly determined that the District had no proper basis in law or fact for its attempted administrative enforcement action against the Company. The review of an award of attorney fees and costs in this action would be as follows:

> "The awarding of attorney fees and costs under I.C. §12-121, I.R.C.P. 54(e)(1), and I.R.C.P. 54(d)(1) is within the discretion of the trial court and subject to an abuse of discretion standard of review. *O'Boskey v. First Fed. Sav. & Loan Ass'n,* 112 Idaho 1002, 1008, 739 P.2d 301, 307 (1987), *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 374, 973 P.2d 142, 145 (1999). The burden is on the party disputing the award of attorney fees to show an abuse of discretion. *Nampa & Meridian Irr. Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 525, 20 P.3d 702, 709 (2001)."

Burns v. Baldwin, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003).

The district court's award of attorney fees here was not an abuse of discretion. This is clear from the application of the three-factor test from *Sun Valley Shopping Center*: "(1) Whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and; (3) whether the trial court reached its decision by an exercise of reason." *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

The district court correctly perceived that it had discretion to decide on the issue of attorney fees for the Company. R. p. 167, ¶(B). The district court also expressly found that the Company was the prevailing party, as defined in I.R.C.P. 54(d)(1)(B), and that, as such, the Company was entitled to costs under I.R.C.P. 54(d)(1)(A). *Id.* The district court further determined that the Company would therefore be awarded its costs as a matter of right under I.R.C.P. 54(d)(1)(C) and discretionary costs under I.R.C.P. 54(d)(1)(D) upon a showing that the costs were necessary and exceptional costs reasonably incurred, and should in the interests of justice be assessed against the District under I.R.C.P. 54(d)(1)(D). *Id.* After the district court noted that the Company had requested reasonable attorney fees and expenses under Idaho Code §12-117, the district court stated its agreement "...with the Company that the District has acted without reasonable basis in fact and law." R. p. 168, ¶2. The district court went on to find that "...the Company is entitled to reasonable attorney's fees, witness fees and other reasonable expenses under Idaho Code §12-117." *Id.* It is therefore clear that the district court exercised reason in arriving at its award of attorney fees. The District has failed to show any basis in fact or law that the decision of the district court was an abuse of discretion.

Contrary to the contention of the District, this Court has made it clear that Idaho Code §12-117 is subject to the standard of review for an abuse of discretion. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). That case expressly overruled the prior holdings to the contrary in *Rincover v. State, Dep't of*

Fin., 132 Idaho 547, 548-49, 976 P.2d 473, 474-75 (1999) and its progeny. The first case cited by the District in support of its argument in this regard, *Payette River Prop. Owners Ass'n v. Bd. Of Comm'rs of Valley Cnty.*, 132 Idaho 551, 558, 976 P.2d 477, 484 (1999) was one of those listed as progeny that was overruled. *Ralph Naylor Farms, LLC v. Latah County*, 144 Idaho 806, 172 P.3d 1081 (2007).

Also, the *Urrutia v. Blaine County* case cited by the District was a 2000 decision applying the standard of free review according to the *Payette River Prop. Owners Ass'n* case. *Urrutia v. Blaine County*, 134 Idaho 353, 361, 2 P.3d 738, 746 (2000). As such, the *Urrutia* case should be considered as having been impliedly overruled by the decision in the *City of Osburn* case, *supra*.

Rather than being distinguishable from this case, as argued by the District, the decision in *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091 (2005), is virtually on all fours with this case, and should therefore be considered controlling. Although it was a "free review" standard decided prior to the *City of Osburn* case, supra, which changed the standard to "abuse of discretion," the analysis in *Fischer* is helpful. That analysis began with a recognition that a court must award attorney fees where an agency does not act with a reasonable basis in fact or law in a proceeding involving a person who prevails in the action, and the analysis included a further acknowledgment that the purposes of that section were to provide a remedy for persons who had borne an unfair and unjustified financial burden attempting to correct mistakes agencies should never have made. 141 Idaho at 356, 109 P.3d at 198.

In exercising free review, which arguably is a more strict standard than abuse of discretion, the Court found that the agency had ignored the plain language of an ordinance, and then stated the following: "Where an agency has no authority to take a particular action, it acts without a reasonable basis in fact or law. *Moosman v. Idaho Horse Racing Commission*, 117 Idaho 949, 954, 793 P.2d 181, 186 (1990)." *Id.* The Court there went on to award attorney fees to the party against whom the agency had attempted to take action for which it had no authority. That is exactly the situation here. In making its finding to award attorney fees to the Company, the district court stated the following:

> "Upon consideration, the Court agrees with the Company that the District has acted without a reasonable basis in fact and law. As early as the show cause hearing, nearly one year ago, this Court signaled to the District that it might lack jurisdiction in this case; and yet, to this day, the District has failed to present any factual or legal basis supporting its claim of jurisdiction, causing the Company to continue accruing its attorney's fees litigating this matter. Accordingly, the Court finds that the Company is entitled to reasonable attorney's fees, witness fess and other reasonable expenses under Idaho Code §12-117."

R. p. 168, ¶2.

The District attempts to argue that the decision in *Fischer, supra*, is distinguishable from this case because here "...there is no controlling ordinance or statute preventing the actions of the SFD (District)." Appellant's Brief, p. 10, ¶2. As expressly stated in *Fischer, supra,* the crucial question is whether the agency had no authority *to take* a particular action, not, as argued by the District, whether there was

an ordinance or statute *preventing* the District's action. The District attempts to paint with a very broad brush an image of the IFC giving the District authority for what it tried to do to the Company, yet the District fails to cite this Court to any such provision from the IFC.

The District argues that, had it conceded that it had no jurisdiction over the Company, such a concession essentially would have been a message to the homeowners of Schweitzer that there was no fire protection available. *Id.* The Appellant's Brief is not the first time that contention has been made by the District. That argument is a falsehood that the Company could not allow to stand without the truth being made known. The Company has made it clear that the district court's ruling in this case has had no negative impact whatsoever on the safety of homeowners from fire at Schweitzer Mountain: "At no time, nowhere, has the Company ever told the Schweitzer Fire District (the "District") not to use the fire hydrants on the system owned by the Company for fighting fires." R. p. 257, ¶3.

The District refers to as "disingenuous" what the District contends is an argument made at various times by the Company, that homeowners should be responsible for maintaining adequate fire flows. *Id.* Keeping in mind the definition of "disingenuous," meaning "unfair, not open, frank and candid" (American Dictionary of the English Language, Noah Webster, 1828), it is actually the District's contention that lacks candor. The District fails to cite this Court to anything in the record, or in a transcript of any hearing in this case, supporting that contention. While the owners of

the hydrants on the Company's system are responsible for maintaining the hydrants, such as snow removal, operational capability, etc., the Company continues to provide water to those hydrants as agreed to by the private hydrant owners (R. p. 46, ¶5) and as accepted and credited by the ISRB. R. p. 47, ¶5. The water provided by the Company is acceptable to the primary governmental agency with jurisdiction over the Company, including the water available for use out of the private fire hydrants. R. p. 73.

The District cannot try to shield itself from an award of attorney fees in this case by a broad contention that there is Idaho case law that the writ of prohibition is an extraordinary remedy and not be lightly granted by a court. Appellant's Brief, p. 11, ¶2. A plain reading of I.R.C.P. 74 and Idaho Code §7-312, which contain the elements of the writ of prohibition procedure, makes it evident that those authorities were designed for just a case such as this.

The District also generally contends that it should have been able to force the Company through the District's administrative enforcement hearing to determine whether the District had jurisdiction over the Company's water system. The District however fails to cite this Court to any remedy in that administrative procedure threatened by the District that would have allowed the Company to have a determination of the jurisdiction issue before having to go through a time-consuming and costly administrative process, including the peril of potentially having to go through various appeals of any adverse ruling, which could have included daily fines.

The Company sought the writ of prohibition remedy as a means of preventing the administrative enforcement proceeding from going forward, which is exactly what that writ is supposed to do.

The District attempts to dispute one of Mark Larson's affidavits by suggesting that he did not acknowledge that there has been what the District characterized as "...an enormous amount of building on Schweitzer in the past 20 years." Appellant's Brief, p. 12, ¶1. The District's contention is not accurate. What Mr. Larson did say was as follows: "The area served by the system has had no significant changes in the growth, type of construction, housing density and accessibility *that would create a distinct hazard to life or property.*" (emphasis added) R. p. 127, ¶9(C). The District goes on to contend that the Company has argued that the IFC applies solely to buildings, and the District further contends that such an argument would be overly narrow and in fact, not reasonable. Appellant's Brief, p. 12, ¶1. Not only does the District not cite this Court to any portion of the record or any transcript containing such an argument by the Company, but also the Company has never made any such argument. The point made by the Company, from the very beginning of this case, has been that Idaho Code §41-259, which the District tried to use against the Company's water system, refers to "buildings" and "structures" but not to water systems.

Contrary to the allegation of the District, that the communication between the parties through the years does not show a pattern of abuse by the District, the Company agrees with the assessment of the district court, that the actions by the

District have been "draconian." Tr. March 25, 2015 Order to Show Cause Hearing, p. 7, l. 22. The Company has documented in the record the continuing draconian attitude of the District as demonstrated by additional actions that it has taken against the Company. R. pp. 174-175, ¶7 and R. pp. 198-228.

In its argument, the District implies that the Company did not want its water system to be used for fire suppression, which could not be further from the truth. Since the Company was first purchased in 1989 by Mel Bailey and Marsha Bell, its current principals, they have cooperated, coordinated and innovated to support the fire safety of all of the owners and recreational users of the Schweitzer Mountain area. R. p. 45, ¶2 – p. 48, ¶4.

The District attempts to characterize Mark Larson's affidavit as relating to an alleged argument by the Company that its water system is "grandfathered." Appellant's Brief, p. 12, ¶2. Not only is that term not even used in his affidavit, but also he recounts the historic situation of the Company's water system as a part of the basis of his findings that the IFC would not apply to the Company's water system. R. p. 127, ¶9 - ¶10. That attempted characterization by the District is therefore incorrect.

In an attempt to support this portion of the appeal of the district court's award of attorney fees and costs, the District argues that its interpretation of the Idaho statutes, IFC and mandate of the mission of the fire districts, was reasonable and therefore the district court's award should be overturned. Appellant's Brief, p. 13. As discussed more fully above, the standard of review is that of whether the district court's

decision was an abuse of discretion. The District has not even alleged, let alone proved, that there was any such abuse.

2. The district court correctly awarded the Company its attorney's fees and damages incurred in defense of the attempted administrative enforcement action by the District. Although the District generally complains about some of the attorney fees awarded to the Company by the district court, the District totally fails to support its appeal on this issue with any statutory or case law authority. The District again fails to even mention, let alone prove, any abuse of discretion by the district court evidenced in the record. The District fails to discuss or reference the actual attorney fee motion and award process. There is no specific reference to any invoice being questioned by the District. There is no specific challenge by the District as to anything in the record that would question the reasonableness of the damages requested by the Company. The arguments by the District are too vague to be considered on appeal. "...(I)ssues raised on appeal without argument or authority are deemed waived by this Court, and this Court does not search the record for errors." *State v. Abdullah*, 158 Idaho 386, 414, 348 P.3d 1, 29 (2015).

It is clear from the Order Awarding Attorney Fees, Costs and Expenses, that the district court recognized that it had discretion, and then carefully exercised that discretion. R. p. 274-276, ¶ II. The district court in its concluding paragraph of that order, ordered that "...petitioner Schweitzer Basin Water Company is awarded reasonable attorney's fees, costs and expenses [or alternatively damages and costs

under Idaho Code §7-312] against respondent Schweitzer Fire District...." R. p. 276, ¶ III. The District has wholly failed to either allege or prove any reason to overturn the district court's award given as damages to the Company and against the District. Damages were warranted because the District's own meeting minutes and correspondence from the District to the IPUC showed that the District took deliberate and aggressive action to discredit and cause economic harm to the Company. R. pp. 198-228. What the District has *said* about its actions against the Company has been an attempt to cloak those actions under the guise of safety. Based upon what the District has *done,* however, we must wonder about the District's real motive.

In a case such as this, the trouble given the Company, and the time and money expended by the Company in procuring the writ of prohibition, are legitimate items of damages. *Reed v. Brandenburg*, 143 P. 989 (Oregon, 1914) noted as one of the authorities cited by the appellants' counsel in *Pattee v. Mahaffey*, 48 Idaho 200, 280 P. 1038, (1929). Even though the Company appreciates the district court awarding the Company its attorney fees and costs in obtaining the writ of prohibition, even that award does not compensate the Company for the loss of productive time, fear and stress that the owners have endured while the District has bullied the Company for nearly two decades.

IV. CONCLUSION

The District wants this Court to render a decision that would allow the District to levy daily administrative fines against the Company until the Company would spend its money to tear out most of its existing water system and replace it with piping that would carry the 1,000 gpm fire flow maximum standard of the IFC. The cost to the Company for the engineering, removal of the old system, and installation of the new system, with the attendant excavation and repaving of streets, would be in the millions of dollars. Not only would such a decision cripple the Company from even being able to continue to operate, but it would also set a precedent that could similarly be used by any fire chief against any private water company in the State of Idaho. To make matters worse, the District has continued to try to force such an unthinkable scenario even though the District has made no effort whatsoever to show to either the Company or this Court that the fire flow being demanded by the District would do anything to improve the safety of life or property on Schweitzer Mountain. The ISRB has already given the Company's water system 100 percent credit for the private fire hydrants. If the cost of changing the main lines of the Company's water system were passed on to the Company's customers, they would suffer greatly increased charges for water with no countervailing reduction in insurance premiums from a better insurance rating.

As with any business, the Company is entitled under the constitutional concepts of due process and equal protection to operate without interference by public administrative agencies that have no jurisdiction over it. For the last 19 years, the

District has sporadically threatened the Company with enforcement action. The Company has consistently responded by communicating its belief that the District had no jurisdiction over the Company.

Throughout those 19 years of threats, the District has been wasting taxpayers' dollars. Adding insult to injury, the District has forced the Company to spend its hard earned money fighting for its economic survival.

Once those threats rose to the level of criminal prosecution of the Company and its representatives, it became incumbent upon the Company to file this case seeking a writ from the District court that would permanently put those threats to an end. Instead of taking a reasonable course of action, the District has stubbornly maintained its threats and forced the Company to seek judicial relief in this case.

The Idaho legislature established the limits of the jurisdiction to enforce Idaho fire laws when the legislature enacted Idaho Code §41-259. The legislative intent of that statute should be followed. To do so, the decision of the district court should be affirmed, and costs and attorney fees on appeal should be awarded to the Company.

RESPECTFULLY SUBMITTED this 28th day of April, 2017.

Steve Smith

Steve Smith

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Angela R. Marshall, Attorney at Law Marshall Law Office P.O. Box 1133 Sandpoint, Idaho 83864	_____ U.S. Mail __✓__ Hand Delivered _____ Overnight Mail _____ Telecopy (Fax)
Judy L. Geier, Deputy Attorney General Idaho State Department of Insurance P.O. Box 83720 Boise, Idaho 83720-0043	__✓__ U.S. Mail _____ Hand Delivered _____ Overnight Mail _____ Telecopy (Fax)

Steve Smith