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Givens Pursley, LLP

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR FREMONT COUNTY**

SMART GROWTH COALITION,
INCORPORATED, an Idaho non-profit
Corporation,

Plaintiff,

v.

FREMONT COUNTY, a political subdivision
of the County of Fremont, State of Idaho,

Defendant.

Case No. CV-07-461

**MEMORANDUM DECISION
ON ATTORNEY FEES AND
COSTS**

INTRODUCTION

On August 13, 2009, the Court issued its Memorandum Decision on Plaintiff's Summary Judgment Motion, which denied Smart Growth's motion for summary judgment on ripeness grounds. Fremont County has now asked the Court to award it attorney fees and costs pursuant to I.R.C.P. 54 and Idaho Code §§12-117 and 12-121. Fremont County claims they are entitled to fees and costs as the prevailing party in this action and are seeking an award totaling \$70,084.12.¹ Smart Growth claims that although they did not prevail at summary judgment, Fremont County cannot be deemed a "prevailing party" in this action.

¹ Fremont County is actually seeking a total of \$73,984.37, which includes additional legal fees related to the "Stoddard Brothers" lawsuit. They claim those fees should also be paid by Smart Growth because they were a "foreseeable result" of this lawsuit. Affidavit of Abbey Mace, ¶¶ 10 and 15 (August 24, 2009).

PROCEDURAL HISTORY AND BACKGROUND

Smart Growth initiated this case when they filed their complaint on August 17, 2007, which was later amended on August 29, 2009. The amended complaint sought to repeal an ordinance known as the “Loosli Amendments.” Smart Growth alleged this ordinance was illegally adopted by Fremont County. They sought not only a repeal of the ordinance, but also an order preventing the Loosli Amendments from being applied to any pending development applications.

During the County Commissioners meeting held January 16, 2008, Chan Atchley, spokesman for Smart Growth, testified as follows:

I would like to remind you, and you know as well as I do, there is in fact a pending lawsuit and we would not, and we will proceed with it, if this is not taken care of. And any developments that might be approved under this amendment are certainly going to be opened to litigation.

...

[W]e have until February 21 to file or serve you. We don't plan on doing that if the LESA Amendment is repealed by then. But there is, there is a lawsuit folks.²

Fremont County argues that they understood these statements to mean Smart Growth would not serve the amended complaint if the ordinance was repealed. Atchley contends that his statement did not mean or imply that Smart Growth would forgo its efforts to require Fremont County to renounce future application of the contested ordinance.³

Fremont County repealed the Loosli Amendments on January 21, 2008. Nevertheless, Smart Growth served the amended complaint shortly thereafter. The record indicates that the status of current subdivision applications under the repealed Loosli Amendments remained a subject of controversy. This subject was discussed during meetings of the Fremont County Planning and Zoning Commission on February 25, 2008, April 21, 2008, April 28, 2008, and May 19, 2008.⁴ There were apparently

² See transcript attached to the Affidavit of Abbie Mace (August 25, 2009).

³ Affidavit of Chan Atchley, ¶ 9 (September 22, 2009).

⁴ Affidavit of Gary G. Allen, Exhibits “A” through “D” (September 22, 2009) and Affidavit of Chan Atchley, Exhibit “B” (September 22, 2009).

several pending subdivision applications, initiated while the Loosli Amendments were still in effect, which were under consideration between February and December of 2008.⁵

On January 20, 2009, Smart Growth filed its Motion for Summary Judgment and Permanent Injunction. The Court denied Smart Growth's motion on August 13, 2009, holding that the issue of applicability of the Loosli Amendments to pending applications was not yet a justiciable controversy. As the Court noted in its earlier opinion:

Although the Court appreciates Smart Growth's concerns, it cannot ignore the fact that this ordinance was repealed 18 months ago. The Court is also mindful that when the County repealed the ordinance in January 2008, it may have been in response to the petition filed by Smart Growth. When Smart Growth initially filed its complaint, it presented the Court with a concrete, justiciable conflict. However, now that the ordinance at issue has been repealed, the controversy is merely hypothetical.

...
The parties should not read this opinion as granting judicial *carte blanche* to Fremont County. The Court would likely have found a justiciable conflict had the County not repealed the ordinance. Similarly, Smart Growth's action would be ripe if it appeared likely the County intended to apply Ordinance 2007-03 to any current subdivision applications. However, no intent to apply the ordinances has been expressed by the County, nor can it be inferred from the County's present actions. In fact, the act of repealing the ordinance strongly suggests otherwise. Therefore, at this time the harm Smart Growth seeks relief from is too remote to justify *present* adjudication.⁶

Fremont County now claims they are the prevailing party in this case and are entitled to an award of attorney fees. According to the billing records submitted by Fremont County, of the over \$70,084.12 in attorney fees they incurred in this matter, over \$35,000.00 were incurred before they were served with the amended complaint.⁷

⁵ Affidavit of Chan Atchley, ¶¶ 14 – 30 (September 22, 2009).

⁶ Memorandum Decision on Plaintiff's Summary Judgment Motion, pp. 5-6 (August 13, 2009).

⁷ Affidavit of Joette Lookabaugh, ¶ 5 (October 2, 2009).

DISCUSSION

I. Standards for Awarding Attorney Fees.

The awarding of attorney fees is typically a discretionary function of the Court. All discretionary decisions require the Court to (1) rightly perceive the issue as one of discretion, (2) act within the outer boundaries of the discretion allotted, and (3) reach the decision through the exercise of reason. *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987).

Courts may award attorney fees when authorized by statute or contract. *Heller v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984). In this case, Idaho Code §§ 12-117 and 12-121, as well as Idaho Rule of Civil Procedure 54, are controlling. These provisions require the Court to determine that there is a civil action, a prevailing party, and that the fees requested are reasonable.

The standard for awarding attorney fees in an action involving government agencies, including counties, is set forth in I.C. § 12-117, which provides:

If the prevailing party is awarded a partial judgment and the court finds the party against whom partial judgment is rendered ***acted without a reasonable basis in fact or law***, the court shall allow the prevailing party's attorney's fees, witness fees and expenses in an amount which reflects the person's partial recovery.

(Emphasis added). The use of the word “shall” indicates that awarding fees to the prevailing party is nondiscretionary, if there is a finding the action was pursued unreasonably. *Ralph Naylor Farms, LLC v. Latah County*, 144 Idaho 806, 172 P.3d 1081 (2007).

The standard set forth by I.C. §12-121 (as explained in Rule 54(e)(1)) is similar, but somewhat more nuanced. The Idaho Supreme Court has consistently held that “Idaho Code § 12-121 permits an award of attorney fees in a civil action to the prevailing party if the court determines the case was brought, pursued or defended ***frivolously, unreasonably or without foundation.***” *Goodman v. Lothrop*, 143 Idaho 622, 628, 151 P.3d 818, 824 (2007) (Emphasis added).

The amount of fees awarded is largely a matter of court discretion. *Graham v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 611, 67 P.3d 90 (2003). However, the Court should consider the following factors listed in I.R.C.P. 54(e)(3):

- (A) The time and labor required.
- (B) The novelty and difficulty of the questions.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- (D) The prevailing charges for like work.
- (E) Whether the fee is fixed or contingent.
- (F) The time limitations imposed by the client or the circumstances of the case.
- (G) The amount involved and the results obtained.
- (H) The undesirability of the case.
- (I) The nature and length of the professional relationship with the client.
- (J) Awards in similar cases.
- (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- (L) Any other factor which the court deems appropriate in the particular case.

II. The Court determines that neither party is the “prevailing party” for purposes of awarding attorney fees.

The Idaho Supreme Court has consistently held that “a determination on prevailing parties is committed to the discretion of the trial court.” *Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009). Rule 54(d)(1)(B) provides guidance in exercising this discretion:

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

This issue was reexamined very recently by the Idaho Supreme Court in *Crump v. Bromley*, ___ P.3d ___, 2009 WL 3415745 (October 26, 2009):

This Court has stated that, in considering all of the claims involved in the action, a court examines the prevailing party question “from an overall view, not a claim-by-claim analysis.” *Shore*, 146 Idaho at 914, 204 P.3d at 1125. In addition, when both parties are partially successful, “it is within the court’s discretion to decline an award of attorney fees to either side.” *Id.* Furthermore, the fact that a party receives no affirmative relief does not prohibit it from being deemed the prevailing party. *Israel v. Leachman*, 139 Idaho 24, 27, 72 P.3d 864, 867 (2003).

The determination of the prevailing party in this case is somewhat difficult. Smart Growth did succeed in the major objective of their lawsuit: securing a repeal of the Loosli Amendments. Although the repeal occurred before the amended complaint was served, the record establishes that once it was filed, events were set in motion which led to the repeal. The lawsuit was clearly a major factor in the decision to repeal the ordinance.

On the other hand, Smart Growth was unsuccessful in their secondary objective: securing a permanent injunction barring Fremont County from applying the Loosli Amendments to subdivisions initiated while the ordinance was in effect. They failed to prevail on their motion for summary judgment due to a very narrow and technical procedural ruling by the Court. As this Court has previously held, “Smart Growth’s action would [have been] ripe if it appeared likely the County intended to apply Ordinance 2007-03 to any current subdivision applications.”⁸ However, the record also indicates that Smart Growth’s lawsuit was at least partially responsible for Fremont County’s apparent hesitation to move forward with these applications. Their lawsuit constituted a legal “shot across the bow” which has been, at least temporarily, successful in achieving Smart Growth’s goal of preventing further development under the Loosli Amendments. From this perspective, Smart Growth may have an arguably stronger claim to being the prevailing party than the County does.

⁸ Memorandum Decision on Plaintiff’s Summary Judgment Motion, p. 6 (August 13, 2009).

Based on the Court's review of the overall record, the Court concludes that neither party prevailed in this case. At best, both the County and Smart Growth were only partially successful. While the ordinance was repealed, Smart Growth's motion for summary judgment was denied. However, the pending applications at issue have still not been approved. Therefore, after conducting a reasoned review of the history of this litigation, the Court will exercise its discretion and decline to award the attorney fees requested by Fremont County.⁹

III. Smart Growth Did Not Pursue Their Case Unreasonably.

Even if Fremont County were deemed to be the prevailing party, they must still establish that Smart Growth acted unreasonably. Because "reasonableness" is a component of both legal tests under I.C. §12-117 or §12-121, the Court will first focus on this element. Initially, the Court notes that since "partial judgment was rendered" in the County's favor when Smart Growth's summary judgment motion was denied, they have satisfied the first requirement of the two-part test under I.C. §12-117. However, they must also satisfy the second requirement: that Smart Growth "acted without a reasonable basis in fact or law."

The Court notes that the current version of I.C. §12-117 was adopted in 2000. It differs from earlier versions which focused on protecting private persons from arbitrary and unfair agency actions. *Rincover v. State, Dept. of Finance, Securities Bureau*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999). The current version of I.C. §12-117 applies equally to "prevailing parties," whether they be a private person or government agency.

As previously noted, if the non-prevailing party acted unreasonably, the statute says the court "*shall*" award attorney fees, which makes such a decision no longer discretionary:

⁹ Fremont County's pleadings are inconsistent about requesting costs in this matter. While not specifically enumerated, they are included in many of the billing statements submitted to the Court. Nevertheless, given the Court's determination that Fremont County was not the prevailing party, the Court need not award costs of right or discretionary costs.

Idaho Code § 12-117 is not discretionary, but rather, provides that a court must award attorney fees if the court finds in favor of the person, and the state agency did not act with a reasonable basis in fact or law.

Therefore, the finding of “unreasonableness” is essential to an award of attorney fees under I.C. §12-117. *Canal/Norcrest/Columbus Action Comm. v. City of Boise*, 136 Idaho 666, 671, 39 P.3d 606, 611 (2001). The raising of “legitimate issues” has recently been found to be sufficient grounds to deny attorney fees to a municipality under I.C. §12-117 *Cantwell v. City of Boise*, 146 Idaho 127, 138, 191 P.3d 205, 216 (2008).

The record indicates that there has been no purely *substantive* ruling in this case which has found Smart Growth’s positions to be incorrect as a matter of fact or law. While Fremont County repealed the ordinance before the Court had an opportunity to rule on the legal issues raised by Smart Growth, even the County appears to concede that the repeal was at least partially the result of their lawsuit.¹⁰ The Court notes that the issues raised by Smart Growth in their amended complaint were reasonable and legitimate concerns. If their allegations had been proved at trial, the County’s ordinance could have been overturned by the Court, rather than by their own repeal. While the Court denied the motion for summary judgment for very narrow *procedural* reasons, this was a close and difficult question which the Court wrestled with for some time before ultimately dismissing the motion on ripeness grounds.

Fremont County has made much of a statements made by Mr. Atchley that suggested a repeal of the ordinance would result in the dismissal of the entire lawsuit. The Court does not agree with the County’s interpretation of Atchley’s remarks. The record is abundantly clear that Atchley and Smart Growth were seeking far more than just a repeal of the contested ordinance, they also wanted the ordinance deemed inapplicable to pending development applications. After serving their amended complaint, the record

¹⁰ “Mr. Atchley threatened to serve and pursue Smart Growth’s lawsuit if Fremont County did not repeal the Loosli Amendment before February 21, 2008. Fremont County went on to repeal the Loosli Amendment on January 28, 2008, however, Smart Growth pursued this action anyway . . .” Memorandum in Support of Defendant’s Motion for Attorneys’ Fees, p. 2 (August 26, 2009).

shows Smart Growth waited almost a year before filing their summary judgment motion.¹¹ During this time, the meeting minutes and billing records provided to the Court show Smart Growth was actively seeking a nonjudicial resolution of its remaining concerns about future application of the repealed ordinance. The County had numerous opportunities to either disavow the ordinance or reassure Smart Growth of their intentions, but failed to do so.¹² After waiting almost a year while seeking relief from the County, it was not unreasonable for Smart Growth to eventually seek a summary judgment from the Court. Although their motion was ultimately denied, the Court cannot find that Smart Growth's effort to obtain a summary judgment was inherently unreasonable under the circumstances.

Therefore, the Court specifically finds and concludes that Smart Growth did not "act without a reasonable basis in fact or law" for purposes of I.C. §12-117. Similarly, the Court also finds and concludes that Smart Growth did not pursue this matter "frivolously, unreasonably or without foundation" under I.C. §12-121 and Rule 54(e)(1).

IV. The Court Need Not Determine Whether the \$70,084.12 Fee is Reasonable.

Inasmuch as the Court has just determined that Fremont County was not the prevailing party, and that Smart Growth did not pursue this matter unreasonably, it is unnecessary for it to rule on the reasonableness of the attorney fees sought by Fremont County. Similarly, there is no reason for the Court to address the propriety of Fremont County's request for additional attorney fees from the Stoddard Brothers lawsuit.

¹¹ The Court erroneously stated in its earlier Memorandum Decision (p. 7) that Smart Growth filed its motion for summary judgment prior to the repeal of the contested ordinance. While the Court acknowledges and regrets that error, it also notes that removal of the erroneous phrase would have no bearing on its legal analysis in that decision.

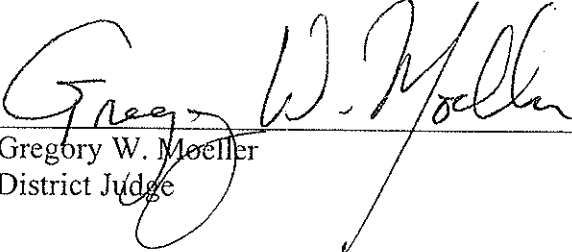
¹² Even during oral argument on the motion for summary judgment, the County was noncommittal about its intentions.

CONCLUSION

For the reasons set forth above, Fremont County's request for attorney fees and costs against Smart Growth is DENIED.

So ordered.

Dated this 5th day of November, 2009.



Gregory W. Moeller
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Decision was this 6 day of November, 2009, served upon the following individuals via U.S. Mail, postage prepaid, unless otherwise indicated:

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