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Sanders v. Board of Trustees Cross Appellant's Reply Brief Dckt. 40013

IN THE SUPREME COURT FOR THE STATE OF IDAHO

TERRI M. SANDERS Plaintiff-Respondent Cross-Appellee, v. BOARD OF TRUSTEES OF THE MOUNTAIN HOME SCHOOL DISTRICT NO. 193, Defendant-Appellant Cross-Respondent	Supreme Court Case No. 40013-2012 District Court Case No. CV-2009-315 RESPONDENT CROSS-APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

HONORABLE LYNN NORTON, DISTRICT JUDGE

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

The District Court incorrectly perceived that it had discretion to reimburse the Defendant School District as discretionary costs what was, in fact, the consideration paid by the District for its contract with the Mountain Home School District. The District Court's error was compounded by incorrect statements of fact (as the District now admits) contained in its memorandum of costs and affidavit in support. Regardless of the reason, the award of discretionary costs should be reversed.

Plaintiff Terri Sanders is entitled to her fees on appeal because there is no reasonable basis in law for the School District's appeal.

I. The District Court Exceeded its Power in Awarding the Defendant the Costs of Complying with the Contract It Voluntarily Entered.

The costs of complying with a contract, voluntarily entered, are not costs of the action for a breach of that contract which should be awarded by a court. It is apparent from Defendant School District's brief, that the only item of cost awarded as "discretionary costs" was the price the District agreed to pay as part of its consideration for a bilateral agreement.

The School District admits that District Court was incorrect when it concluded that "the School District paid total arbitration costs of $4,609.00." R., Vol. 1, p. 39. This was not the District Court's error alone, it was an error that arose because the School District (1) filed a memorandum of costs which stated that it sought "$2,304.50" in arbitration costs, which represented the total paid by the School District, not half of what was paid (as the District now claims), R., Vol. 1, p. 102, and (2) filed an affidavit of counsel which the District claimed supported its claim that it should recover as "one half" of its arbitration costs an amount that actually represented all of its arbitration costs, R. Vol. 1, p. 63. The District Court's ruling was actually largely correct on the facts, except as to those items on which the record presented by

the School District was misleading, and except in concluding that it had discretion to reimburse the School District for the cost of complying with its contract.

The District Court correctly held that it should enforce a contract regarding how costs will be paid, if one exists[1]. R., Vol. 1, p. 139. The District Court correctly held that "In this case, the contract provided that the parties would split arbitration costs." *Id.* The District Court erred, however, when it held that "the School District paid total arbitration costs of $4,609.00." *Id.* An error the School District now admits. Appellant's Reply and Response, p. 23. The District also now seeks a remand to allow the District Court to correct this error, *Id.*, but a remand would correct only the erroneous finding of fact. Reversal is required to correct the District Court's errors of law.

The cost incurred by the School District, one half of the arbitrator's fee, is a portion of the consideration that the School District offered in its contract with the Mountain Home Education Association. R., Exhibits, 102 (pp. 15-16). The School District admits that participation in the arbitration process (including payment of that fee) was required if it was to comply with the contract it had entered, and that failure to participate would have been a breach of contract. Appellant's Reply and Response, p. 22. The School District thus urged the District Court and now this Court to award it as an item of discretionary costs the cost of consideration it paid for its contract. Idaho statutes only allow the District Court to award costs incurred in a civil action or proceeding, I.C. §12-101, it does not permit the courts to award costs incurred pursuant to a contract (except pursuant to an express claim for breach of that contract). The

[1] Plaintiff Sanders sets aside, for the moment, the fact that the District never brought any counterclaim asserting that it had paid more than its share of the arbitration cost, or that the contract was in any way breached. However, the absence of such a counterclaim would also be fatal to any claim for an award of arbitration costs even if the District had paid all of those costs, rather than the one-half it was contractually obligated to pay.

District Court erred when it concluded that it had discretion to refund the District the cost of its contract.

Furthermore, an award of discretionary costs is permissible solely upon a finding that such costs were "exceptional." *Hayden Lake Fire Prot. Dist. v. Alcorn,* 141 Idaho 307, 314, 109 P.3d 161 (2005), *overruled in part on other grounds by Farber v. State Ins. Fund,* 147 Idaho 307, 208 P.3d 289 (2012); *Fuller v. Wolters,* 119 Idaho 415, 807 P.2d 633 (1991). The District Court found only that there was a contract requiring payment by each party of one-half of the arbitrator's fees. R. Vol. 1, p. 139. That does not amount to a finding that the costs were both necessary and exceptional, or that they were incurred in the course of a civil action. In the absence of such express findings, the District Court abused its discretion in awarding discretionary costs, and should be reversed.

II. Principles of Judicial Deference to the Arbitration Process Compel Reversal of the District Court's Award of Arbitration Fees as Discretionary Costs of Action.

This Court has repeatedly deferred to the expertise of arbitrators in deciding cases properly presented to them. In doing so, the Court has followed the lead provided by the U.S. Supreme Court. While the School District may be correct that, by its terms, the Uniform Arbitration Act does not apply to an employment-based dispute, the principles of deference applied to such arbitration agreements are similar if not even more deferential than those applied under the arbitration act.

While the Uniform Arbitration Act itself has limited applicability, and arguably excludes labor agreements from its scope, this Court has previously discussed that standards of review and the deference owed to arbitrators are matters of judicial policy that hold true whether a particular

dispute is a commercial one under the Uniform Arbitration Act or a labor dispute governed by common law principles:

> We recognize that *Western Construction* is concerned with *labor* arbitration and as appellant points out and as is manifest in that decision, the scope of judicial review varies from that for *commercial* awards. We need merely add here that review in both areas is grounded upon similar considerations of judicial policy, and therefore *Western Construction* and other "labor" cases are persuasive though not exactly identical. See, e. g., *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125, 1129-31 (3d Cir. 1972); *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969). The "persuasiveness" is evidenced by the authority cited in both case law and in the parties' briefs herein.

Hecla Mining Co. v. Bunker Hill Co., 101 Idaho 557, 562, n. 4, 617 P.2d 861 (1980). Because of these similarities, whether the dispute was a commercial one subject to the state Uniform Arbitration Act, a dispute of interstate commerce subject to the Federal Arbitration Act, or a labor dispute subject to either federal or state common law, this Court has cited to and relied upon the same federal authority favoring arbitration of disputes and a highly deferential standard of review that encourages finality. *Hecla Min. Co. v. Bunker Hill Co.*, 101 Idaho 557, 617 P.2d 861 (1980); *Loomis, Inc. v. Cudahy*, 104 Idaho 106, 656 P.2d 1359 (1982). Each of these cases cited the standards first enunciated in the U.S. Supreme Court's "Steelworker Trilogy" of cases. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The Steelworkers Trilogy stand generally for the proposition that an arbitrator's decision will not be disturbed by the courts so long as it "draws its essence from" the contract. *Enterprise Wheel,* 363 U.S. at 597. This standard is just as, if not more deferential to the arbitrator's decision than the standards set out in the Uniform Arbitration Act. Thus, while the coverage of that Act may be in question the underlying standard, that the Court should defer to the

arbitrator's division of costs, particularly where it complies with the terms of the agreement to arbitrate, is beyond question.

Allowing the School District to recover the one-half of the arbitrator's fees that it agreed to pay pursuant to contract, and that the arbitrator ordered it to pay, would allow a "back door" method of challenging an arbitrator's award that is not sanctioned by existing law. Such a challenge would open every arbitration decision to potential challenge via obscure procedural devices, and limit the positive effects of finality of arbitral awards.

III. Plaintiff Terri Sanders Should Be Awarded Fees on Appeal Because Defendant School District's Position Was Without A Reasonable Basis in Law.

The Defendant School District has ignored the clear authority provided by this Court in pursuing this appeal. Its arguments on appeal are only possible by ignoring numerous decisions of this Court. Where a legal position is directly contrary to the prior decisions of this Court it should be found to lack a reasonable basis, thus justifying an award of fees pursuant to I.C. §12-117.

As discussed in detail in the opening briefs, the Court has repeatedly held that "I.C. §12-117 is the exclusive means for awarding attorney fees for the entities to which it applies." *Potlatch Ed. Assn. v. Potlatch School District,* 148 Idaho 630, 635, 226 P.3d 1277, 1282 (2010); *Roe v. Harris,* 128 Idaho 569, 917 P.2d 403 (1996); *Sate v. Hagerman Water Right Owners, Inc. ("HWRO"),* 130 Idaho 718, 724,947 P.2d 391, 396 (1997)(I.C. 12-117 is exclusive basis of awarding fees against state agency); *Westway Cosntr., Inc. v. Idaho Transportation Dept.,* 139 Idaho 107, 73 P.3d 721 (2003); *Brown v. City of Pocatello,* 148 Idaho 802, 229 P.3d 21164 (2012); *Lake CDA Investments v. Idaho Dept. of Lands,* 149 Idaho 274, 233 P.3d 721 (2010); *Smith v. Washington County*, 150 Idaho 388, 247 P.3d 615 (2010); *Allied Bail Bonds, Inc. v.*

County of Kootenai, 151 Idaho 405, 258 P.3d 340 (2011); *Sopatyk v. Lemhi County,* 151 Idaho 809, 264 P.3d 916 (2011); *Henry v. Taylor,* ___ Idaho ___, 267 P.3d 1270 (January 5, 2012); *Keepler-Fleenor v. Fremont County,* ___ Idaho ___, 268 P.3d 1159 (January 24, 2012); *Arambarri v. Armstrong,* ___ Idaho ___, 274 P.3d 1249 (March 8, 2012); *City of Osburn v. Randel,* ___ Idaho ___, 277 P.3d 353 (April 26, 2012); *Idaho Transportation Dept. v. Grathol,* ___ Idaho ___, 278 P.3d 957 (June 1, 2012).

That Defendant's position is without basis is demonstrated by the incorrect statements it must make to try to justify that position. For instance, at page 6 of its brief in response, the School District admits that Plaintiff Sanders might have an issue on appeal "if there were a source of law stating that both I.C. §§12-120(3) and 12-117 could not both apply to a single case." Appellant's Reply and Response, p. 6. As noted above, this Court has repeatedly and for many years held that only one statute, I.C. §12-117 can apply in those cases to which it applies. This is the very meaning of the word "exclusive" in this setting.

Similarly, the District claims that "Sanders cannot point to a single case that specifically state that I.C. §12-117 is exclusive over I.C. §12-120(3) when a school district or board is a party in a contract lawsuit." Appellant's Reply and Response, p. 9. Even more outrageously, the District claims that "none of those cases [decided by this Court] specifically holds that I.C. §12-117 is exclusive over I.C. §12-120." Appellant's Reply and Response, p. 26. Yet, this is precisely the holding in *Potlatch Ed. Assn.,* 148 Idaho 630, which holding was reaffirmed in *Smith v. Washington County,* 150 Idaho 388, 392.

The School District's attempt to craft an argument that I.C. §12-117 is somehow not exclusive relies on simply pointing to cases where the issue of exclusivity was not raised by the parties. *E.g., Sadid v. Idaho State Univ.*, 151 Idaho 932, 265 P.3d 1144 (2011); *Noak v. Idaho*

Dept. Correction, 152 Idaho 305, 271 P.3d 703 (2012). In other words, the School District's argument relies solely and entirely upon the fact that in cases where the exclusivity of §12-117 was not raised by the parties, this Court did not find that §12-117 was exclusive. But this Court has always held that it will not decide issues not raised by the parties, or consider issues raised but not supported by argument and authority. *E.g., Idaho State Insurance Fund v. Van Tine,* 132 Idaho 902, 980 P.2d 566 (1999); *Idaho Watersheds Project v. Bd. Of Land Commissioners,* 128 Idaho 761, 918 P.2d 1206 (1996). The School District's attempt to build an argument on the basis of decisions that were not made on issues that were not presented to the Court does not present a reasonable basis for this appeal, and thus an award of Ms. Sanders' fees on appeal is appropriate pursuant to I.C. §12-117.

Respectfully submitted this 26th day of November, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of November, 2012, a true and correct copy of the above and foregoing RESPONDENT CROSS-APPELLANT'S REPLY BRIEF was forwarded addressed as follows in the manner stated below:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that on this 26th day November, 2012, the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that and electronic copy was served on each party at the following email addresses:

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