

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

SKY CANYON PROPERTIES, LLC, ET AL,)
)
 Plaintiffs,)
 vs.)
)
 THE GOLF CLUB AT BLACK ROCK, LLC,)
)
 Defendant.)
 _____)

Case No. **CV 2011 2786**

**MEMORANDUM DECISION AND
ORDER DENYING PLAINTIFFS'
MEMORANDUM OF ATTORNEY
FEES AND COSTS ON REMAND**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on Plaintiffs' (Sky Canyon) Memorandum of Attorney Fees and Costs filed January 21, 2014, along with an affidavit of counsel in support, following the January 7, 2014, filing of the Remittitur by the Idaho Supreme Court. On February 4, 2014, defendant The Golf Club at Black Rock, LLC (Golf Club) filed Defendant's Objection to Plaintiffs' "Memorandum of Attorney's Fees and Costs, along with an affidavit of counsel. A Plaintiffs' Reply Memorandum in Support of Request for Attorney's Fees and Costs was filed on April 1, 2014. Oral argument was held April 15, 2014.

In 2011, this Court was presented with cross-motions for summary judgment. On December 13, 2011, this Court entered its Memorandum Decision and Order on Sky Canyon's Motion to Strike, and on Cross-Motions for Summary Judgment, which granted summary judgment in favor of Golf Club and denied summary judgment for Sky Canyon. This Court found Golf Club was qualified to be a Successor Declarant and

could exercise the declarant rights under the “Assignment of Declarant Rights clause of the July 31, 2001 “Black Rock Covenants, Conditions and Restrictions” (CCRs). On January 10, 2012, the parties stipulated that Golf Club was the prevailing party based upon this Court’s December 13, 2011, decision, and stipulated that Golf Club was entitled to an award of attorney fees up to that time in the amount of \$17,000.00 and costs of \$217.85. On March 16, 2012, Sky Canyon appealed the Judgment entered on February 8, 2012, based on that decision. As that appeal progressed, Sky Canyon also moved for reconsideration. On July 16, 2012, this Court issued its Memorandum Decision and Order on Sky Canyon’s Motion to Reconsider this Court’s February 8, 2012, Judgment, denying such motion. On July 23, 2012, counsel for Golf Club filed a Supplemental Affidavit of John F. Magnuson in Support of Defendant’s Supplemental Memorandum of Costs and Attorney Fees, seeking an additional \$10,075.00 in attorney fees while Sky Canyon’s motion for reconsideration was litigated. On August 7, 2012, the parties again stipulated as to the amount of additional attorney fees.

On November 26, 2013, the Idaho Supreme Court issued its decision reversing this Court’s decision. 2013 Opinion No. 114, p. 10, *Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 315 P.3d 792 (2013). In that decision the Idaho Supreme Court awarded Sky Canyon costs and fees on appeal, but was silent on whether Sky Canyon was entitled to attorney fees for all times prior to the appeal. Because this Court earlier found in favor of Golf Club, at no time did this Court address attorney fees on behalf of Sky Canyon.

On January 10, 2014, this Court filed a Judgment on Remand presented by counsel for Sky Canyon, consistent with the January 7, 2014, Remittitur. On March 4, 2014, this Court entered a Revised Final Judgment, as presented by counsel for Sky Canyon.

II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 54(d) states that costs *shall* be allowed as a matter of right to the prevailing party or parties unless otherwise ordered by the court. I.R.C.P. 54(d)(1)(A) (emphasis added). Costs include costs actually paid, which are awarded as a matter of right, and discretionary costs, which may be allowed upon a showing that the costs were necessary and reasonably incurred and should be assessed against the adverse party in the interest of justice. I.R.C.P. 54(d)(1)(C), (D). In ruling upon objections to discretionary costs, the trial court shall make express findings as to why each specific item of discretionary cost should or should not be allowed. I.R.C.P. 54(d)(1)(D). A court may upon its own motion disallow any items of discretionary costs and *shall* make express findings supporting such disallowance. *Id.* (emphasis added). In determining who is the prevailing party, the trial court shall in its discretion consider the final judgment or result in an action in relation to the relief sought by the parties. I.R.C.P. 54(d)(1)(B).

An award of costs, as stated in the rule itself, is committed to the sound discretion of the court. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 857, 920 P.2d 67, 73 (1996). The grant or denial of discretionary costs is also committed to the discretion of the court, such an award or denial will only be set aside for an abuse of that discretion. *Fish v. Smith*, 131 Idaho 492, 493, 960 P.2d 175, 176 (1998). Whether costs are exceptional is evaluated in the context of the nature of the case. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005) (holding that the trial court's denial of expert fees was not an abuse of discretion where the court considered the nature of the class action and determined that although expert witnesses were necessary and their fees were reasonable, the costs were not

exceptional for a class action suit.); *Fish*, 131 Idaho at 493-4 (holding that trial court's denial of expert witness fees was not an abuse of discretion where it found the costs necessary and reasonable, but not exceptional because personal injury cases routinely require assessment of the accident and injuries by various doctors, accident reconstructionists, vocational experts, etc.).

Attorney's fees cannot be recovered unless they are authorized by statute or by express agreement of the parties. *Kidwell and Heiser v. Fenley*, 96 Idaho 534, 534, 531 P.2d 1179, 1179 (1975). Where there is a valid contract between the parties which contains a provision for an award of attorney's fees and costs, the terms of that contractual provision establish a right to fees and costs. *Farm Credit Bank of Spokane v. Wissel*, 122 Idaho 565, 568-69, 836 P.2d 511, 514-515 (1992). In *Leasfirst v. Burns, et al.*, 131 Idaho 158, 953 P.2d 598 (1998), the Idaho Supreme Court reasoned that the lessor plaintiff was entitled to an award of attorney fees under an equipment lease provision as against the guarantors because the guarantors had not challenged the validity of the lease contract. 131 Idaho 158, 163, 953 P.2d 598, 603.

Determination of the amount of fees to award under I.C. § 12-120(3) is matter of discretion. *Spidell v. Jenkins*, 111 Idaho 857, 727 P.2d 1285 (Ct.App. 1986). Idaho Code § 12-120(3) grants the prevailing party an award of reasonable attorney's fees in "any civil action to recover... in any commercial transaction." "The term 'commercial transaction' is defined to mean all transactions except transactions for personal and household purposes." I.C. § 12-120(3). And, I.C. § 12-120(3) does not require that there be a contract between the parties before that statute is applied; "the statute requires only that there be a commercial transaction." *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 472, 36 P.3d 218, 224 (2001). A broad

meaning has been given to the word “transaction” by the Idaho Supreme Court. See e.g., *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997).

III. ANALYSIS.

The Idaho Supreme Court held “Because the appellants (Sky Canyon) are the prevailing party on appeal, they are entitled to an award of costs incurred, reasonable attorney fees, and legal assistant fees pursuant to section 24.8 of the CC&R’s.” 2013 Opinion No. 114, p. 10, *Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 610, 315 P.3d 792, 798 (2013). The Idaho Supreme Court concluded “We award costs and attorney fees on appeal to the appellants.” *Id.* The Idaho Supreme Court reversed this Court’s award of attorney fees and costs to Golf Club prior to the appeal (*Id.*), but the Idaho Supreme Court did not discuss whether Sky Canyon was entitled to attorney fees and costs incurred prior to the appeal. *Id.* Sky Canyon seeks costs of \$802.15, and attorney fees in the amount of \$40,546.50. Plaintiffs’ Memorandum of Attorney Fees and Costs, p. 3.

Golf Club argues that when Sky Canyon filed its Complaint on April 1, 2011, Sky Canyon sought an award of fees under I.C. § 12-121, and did not seek an award of attorney fees under Section 24.8 of the Declaration. Defendant’s Objection to Plaintiffs’ “Memorandum of Attorney’s Fees and Costs, pp. 2, 5-6. Golf Club notes that “Since the [Idaho Supreme] Court had not been asked to award the Plaintiffs attorney fees incurred in proceedings before the trial Court, no such award was made.” *Id.*, p. 5. Golf Club argues the Idaho Supreme Court did not remand this case to this Court for purposes of awarding pre-appeal fees to plaintiffs. *Id.*, p. 7. In making that argument, Golf Club compares the present case (where the Idaho Supreme Court was silent as to attorney fees before the trial court), to *Star Phoenix v. Hecla*, 130 Idaho 223, 939 P.2d

542 (1997) (where the Idaho Supreme Court reversed the trial court and held “On remand, we direct the trial court to award attorney fees, including those on appeal, to Hecla pursuant to I.C. §12-120(3)” 130 Idaho 223, 232, 939 P.2d 542, 551). *Id.* Golf Club notes “While the Supreme Court determined that The Golf Club at Black Rock, LLC did not qualify as ‘Successor Declarant’ under the Declaration, it did not disturb this Court’s ruling (based upon Plaintiffs’ concession) that the ‘Period of Declarant Control’ remained in effect.” *Id.*, p. 5. Golf Club notes that “On January 21, 2014, the Supreme Court awarded Plaintiffs/Appellants \$31,615 in attorney fees incurred on appeal (together with an additional award of \$2,040.32 in additional costs).” *Id.* Golf Club argues that the concept of an overall prevailing party in proceedings before the trial court was “mixed.” *Id.*, p. 8. Golf Club notes Sky Canyon sought two forms of declaratory relief: first, a declaration that the “Period of Declarant Control” had expired, and second, a declaration that Golf Club did not qualify as a “Successor Declarant”. Golf Club claims that following discovery and briefing, Sky Canyon conceded that the “Period of Declarant Control” remained in effect and was withdrawn from consideration, as reflected in this Court’s December 13, 2011, decision. *Id.* Finally, Golf Club argues the attorney fees sought by Sky Canyon are not in a “reasonable” amount, pointing out 1) the fees sought by Sky Canyon include fees for unsuccessfully litigating the “Period of Declarant Control” issue, 2) the fees sought by Sky Canyon for attorney time prior to appeal exceed by \$13,181.00 that amount requested by Golf Club for that same time period, and 3) there has been no showing that it was necessary to engage three attorneys and legal assistants for purposes of briefing a routine case of contract interpretation. *Id.*, pp. 8-9.

Sky Canyon argues they have not lost their claim to district court attorneys’ fees

by not requesting said fees before the Idaho Supreme Court because the issue of district court attorneys' fees was not ripe at the time the appeal was filed. Plaintiffs' Reply Memorandum in Support of Request for Attorney's Fees and Costs, p. 3. Sky Canyon did not discuss *Star Phoenix v. Hecla*, 130 Idaho 223, 939 P.2d 542 (1997). Without admitting such, Sky Canyon concedes it requested attorney fees in its Complaint only under I.C. § 12-121, but argues that it requested attorney fees under Section 24.8 of the CC&R's in the Memorandum of Fees and Costs. *Id.*, p. 4. Sky Canyon argues they are now the prevailing party, claiming the "Period of Declarant Control" was only tangentially relevant to the issue of who the qualifying party was for exercising Declarant status over the Black Rock Development project. *Id.*, pp. 4-5. Finally, Sky Canyon argues the amount of attorneys' fees requested are reasonable. *Id.*, pp. 5-6.

This Court is not persuaded by Golf Club's argument that Sky Canyon originally sought attorney fees pursuant to I.C. § 12-121 (with the difficult to prove standard of claims being unreasonable and without foundation), and now seeks attorney fees under Section 24.8 of the CC&R's (with the relatively simple prevailing party standard). There is no concept that a party is stuck with the method of attorney fees alleged in their initial pleading. The party asserting the claim has the burden of directing the court's attention to either a statute or a contract between the parties authorizing the award of attorney fees, and failing to do so, attorney fees may be denied. *Fournier v. Fournier*, 125 Idaho 789-791, 874 P.2d 600, 602 (Ct.App. 1994). The need to state a basis is to allow the responding party a due process opportunity to challenge such claims. *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 447, 235 P.3d 387, 397 (2010). A request for attorney fees should alert the other party to the basis upon which attorney fees are

requested in order that the other party may have a sufficient opportunity to object. *Id.*

In Idaho, attorney fees can be awarded by the trial court when provided for by contract. *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 361, 48 P.3d 1241, 1250 (2002). The Court finds this requirement has been met in Section 24.8 of the Declarations in the Black Rock Covenants, Conditions and Restrictions (CCR's). The underlying action must be brought under the contract or to enforce terms of the contract for attorney fees to be awarded. *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 591-92, 166 P.3d 374, 381-82 (2007). The Court finds the purpose of this lawsuit was to interpret and enforce the CCR's. In claims for attorney fees under a contract, the trial court must first interpret the contract to determine if attorney fees are appropriate before making the discretionary determination as to who is the prevailing party. *Thieme v. Worst*, 113 Idaho 455, 461, 745 P.2d 1076, 1082 (Ct.App. 1987). The Court finds attorneys fees are appropriate under Section 24.8.

Golf Club argues in the present case the Idaho Supreme Court did not remand the case for purposes of awarding pre-appeal fees (attorney fees before the district court) to Sky Canyon. Defendant's Objection to Plaintiffs' "Memorandum of Attorney's Fees and Costs", p. 7. Instead, the Idaho Supreme Court "...awarded attorney fees on appeal to the Appellants (Sky Canyon)." *Id.* (underlining in original). Golf Club cites *Star Phoenix v. Hecla*, 130 Idaho 223, 939 P.2d 542, as a case where on remand, the Idaho Supreme Court ordered the district court to award attorney fees, including those on appeal. *Id.* Golf Club argues that in *Star Phoenix* the appellant/defendant Hecla requested the Idaho Supreme Court award attorney fees incurred both on appeal and before the trial court. *Id.* That fact (that Hecla requested attorney fees both for work before the Idaho Supreme Court and before the trial court) is not apparent from the *Star*

Phoenix decision by the Idaho Supreme Court, but such fact is certainly consistent with such decision. Counsel for Golf Club in the instant case should be the one to know such fact, as he represented Star Phoenix and argued on appeal. The firm which represents Sky Canyon also represented Hecla in the *Star Phoenix* appeal, and thus, is in a position to know whether attorney fees before the district court were requested of the Idaho Supreme Court. At least in briefing, counsel for Sky Canyon did not address this argument raised by Golf Club relative to *Star Phoenix*.

This Court finds the Idaho Supreme Court in the instant case was silent as to the issue of Sky Canyon's attorney fees before the district court incurred prior to Sky Canyon's appeal. The Idaho Supreme Court specifically reversed this Court's award of costs and attorney fees to Golf Club: "Therefore, we reverse the judgment of the district court, including its award of costs and attorney fees to The Golf Club." 2013 Opinion No. 114, p. 9, *Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 610, 315 P.3d 792, 798. Yet, in doing so, the Idaho Supreme Court was silent on the issue of whether Sky Canyon is now entitled to its fees at the district court level. The Court also finds the Idaho Supreme Court in *Star Phoenix* was not silent as to that issue. In the present case, the Idaho Supreme Court specifically found that Sky Canyon was entitled to attorney fees and costs on appeal, and apparently has in fact awarded those fees and costs in favor of Sky Canyon and against Golf Club. Yet, in doing so, the Idaho Supreme Court was silent on the issue of whether Sky Canyon is now entitled to its fees at the district court level.

The Court finds this silence by the Idaho Supreme Court was intentional and has significance when compared with the specific directive by the Idaho Supreme Court in *Star Phoenix*. In light of that silence and in light of the Idaho Supreme Court's decision

in *Star Phoenix*, this Court finds it would be error to award costs and attorney fees to Sky Canyon for work before the district court.

It has not been explained to this Court why counsel for Hecla made such a comprehensive request for attorney fees before the Idaho Supreme Court in *Star Phoenix*, but that same law firm did not make such a request in the present case. As mentioned above, at least in briefing, counsel for Sky Canyon did not address this argument raised by Golf Club relative to *Star Phoenix*. At oral argument, counsel for Sky Canyon did not discuss the arguments raised by Golf Club relative to *Star Phoenix*. It was only in rebuttal that counsel for Sky Canyon stated Sky Canyon had no basis on appeal to set forth attorney fees and costs before the district court as an issue because "...we were not the prevailing party." While that is true in the present case, Hecla was not the prevailing party before the district court in *Star Phoenix*, to the tune of twenty million dollars. On appeal, Hecla apparently asked the Idaho Supreme Court for, and obviously received from the Idaho Supreme Court in its decision, attorney fees on appeal *and* attorneys fees and costs before the district court. In the present case, it is only the right to attorney fees on appeal that were awarded to Sky Canyon in the Idaho Supreme Court's decision, and later, the amount of that award was determined by the Idaho Supreme Court.

There are some similarities between *Star Phoenix* and the present case. *Star Phoenix* filed a declaratory judgment against Hecla on the issue of default on a lease. *Star Phoenix v. Hecla*, 130 Idaho 223, 228, 939 P.2d 542, 547. On summary judgment, the district court granted partial summary judgment for *Star Phoenix*, found the lease was unambiguous, and later instructed the jury that Hecla was in breach of the lease by giving the termination notice and by refusing to rescind the termination notice. 130

Idaho 223, 229-30, 939 P.2d 542, 548-49. The jury returned a twenty million dollar verdict in favor of Star Phoenix, and Hecla appealed. The Idaho Supreme Court reversed the district court's finding that Hecla breached the lease, specifically finding Hecla did not breach the lease. 130 Idaho 223, 230-32, 939 P.2d 542, 549-51. The Idaho Supreme Court reversed the judgment against Hecla and remanded the case to the trial court for entry of judgment in favor of Hecla, and concluded:

We award Hecla costs on appeal. On remand, we direct the trial court to award attorney fees, including those on appeal, to Hecla pursuant to I.C. § 12-120(3).

130 Idaho 223, 233, 939 P.2d 542, 552. In the present case, the Idaho Supreme Court was silent on the issue of attorney fees before the district court. The Idaho Supreme Court awarded costs and fees on appeal to Sky Canyon, but rather than having the district court decide the amount of costs and fees on appeal (as the Idaho Supreme Court has the power to do (I.A.R. 40(f)), and did do in *Star Phoenix*), the Idaho Supreme Court has already taken up that issue and awarded Sky Canyon its attorney fees of \$31,615.00 and costs of \$2,040.32 on appeal. Defendant's Objection to Plaintiffs' "Memorandum of Attorney's Fees and Costs, p. 5.

Counsel for Sky Canyon made the argument at the April 15, 2014, hearing and in briefing that Sky Canyon could not have made its request any earlier than it did, as it is only after a judgment is entered that a party makes its request for attorney fees. In briefing, Sky Canyon argues that "I.R.C.P. 54(d)(5) states that a request for fees in the district court is to be made after the entry of judgment." Plaintiffs' Reply Memorandum in Support of Request for Attorney's Fees and Costs, p. 3. (emphasis in original). This argument misses the point. First, it does not directly address *Star Phoenix*, but instead offers an excuse for why Sky Canyon did not bring the issue up on appeal before the

Idaho Supreme Court. Second, the argument does not provide such an excuse. Idaho Rule of Civil Procedure 54(d)(5) sets forth the “procedure” for claiming costs and attorney fees. That rule does not establish the “right” to attorney fees. Idaho Rule of Civil Procedure also sets a limitation period; it makes it clear that a “memorandum of costs [including fees] may not be filed later than fourteen (14) days after entry of judgment.” However, at no point does I.R.C.P. 54(d)(5) establish a party’s “right” to costs and attorney fees. It is Sky Canyon’s “right” to attorney fees before the district court that seems to be precluded by the differences between this case and *Star Phoenix*.

Because this Court finds Sky Canyon failed to preserve the issue of attorney fees before the district court in its appeal to the Idaho Supreme Court, and because attorney fees before the district court was not an issue directed by the Idaho Supreme Court to be reviewed by this Court on remand, this Court does not reach that issue, and, accordingly, will not address the arguments surrounding “prevailing party” or “reasonableness” of the attorney fees and costs presented.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the costs and fees requested in Plaintiffs’ (Sky Canyon) Memorandum of Attorney Fees and Costs filed January 21, 2014, must be denied.

IT IS HEREBY ORDERED all attorney fees and costs requested on behalf of Sky Canyon before the district court incurred prior to Sky Canyon’s appeal to the Idaho Supreme Court are DENIED.

Entered this 1st day of May, 2014.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>		<u>Lawyer</u>	<u>Fax #</u>
Peter J. Smith				
Mischelle Fulgham	664-4125		John F. Magnuson	667-0500

Jeanne Clausen, Deputy Clerk