

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 BONNER**

CITY OF SANDPOINT, a Municipal Corporation of the State of Idaho,)
)
) *Plaintiff,*)
)
vs.)
)
INDEPENDENT HIGHWAY DISTRICT, a political subdivision of the State of Idaho,)
)
) *Defendant.*)
)
_____)

Case No. **BON CV 2013 1342**

MEMORANDUM DECISION AND ORDER GRANTING IN PART (AS TO TIMING OF THIS COURT'S PRIOR DECISION) AND DENYING IN PART (AS TO AMOUNT OF ATTORNEY FEES PREVIOUSLY AWARDED) DEFENDANT IHD'S MOTION FOR RECONSIDERATION OF ATTORNEY FEES

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the defendant Independent Highway District's (IHD) Motion for Reconsideration filed on August 27, 2014. On July 31, 2014, this Court entered its Memorandum Decision and Order Granting Plaintiff City of Sandpoint's (City) Motion for Summary Judgment. In that decision, the Court found City to be the prevailing party against IHD. Memorandum Decision and Order Granting Plaintiff City of Sandpoint's Motion for Summary Judgment, pp. 16-18. On August 13, 2014, City filed, "City of Sandpoint's Motion for Award of Attorney's Fees and Costs", "City of Sandpoint's Memorandum in Support of Attorney's Fees and Costs", and "Memorandum of Costs and Affidavit of C. Matthew Andersen in Support of Attorney's Fees and Costs." On August 21, 2014, this Court entered and filed an "Order Granting Request for Attorney's Fees and Costs" and "Declaratory and Monetary Judgment", both of which ordered attorney fees as applied for by City, and denied all discretionary

costs. The Order Granting Request for Attorney's Fees and Costs errantly transposed the figures for attorney fees and costs. Order Granting Request for Attorney's Fees and Costs, p. 2. On August 21, 2014, this Court entered an "Amended Declaratory and Monetary Judgment" correcting that mistake.

On August 27, 2014, IHD filed a "Motion for Reconsideration", "Memorandum in Support of Objection to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs and Attorney Fees", "Objection to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs and Attorney Fees", "Affidavit of Brent Featherston", "Affidavit of Douglas S. Marfice" and "Affidavit of Susan P. Weeks in Support of Objection to Attorney Fee Request."

On October 6, 2014, City filed "City of Sandpoint's Response to Motion for Reconsideration and Reply to Opposition to Attorney Fees Award."

Oral argument on IHD's Motion for Reconsideration was held on October 23, 2014.

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 is matter of discretion. *Spidell v. Jenkins*, 111 Idaho 857, 727 P.2d 1285 (Ct.App. 1986).

IV. ANALYSIS.

IHD referenced the basis under which City seeks attorney fees, I.C. § 12-117 (Memorandum in Support of Objection to memorandum of Costs and Attorney Fees and Motion to Disallow Costs and Attorney Fees, pp. 3-4), but did not object in any way to that basis. No additional objection to the basis was made at oral argument.

Accordingly, the Court finds I.C. § 12-117 is the appropriate basis for awarding fees to City, the prevailing party, in this case.

A. The Court Erred in Determining the Time Period to Object had Passed.

City's first argument in its Motion for Reconsideration is that, "The Court entered its Order Granting Request for Attorney's Fees and Costs and Amended Order Granting Request for Attorney's Fees and Costs prior to the period for objection to such fees and costs." Motion for Reconsideration, p. 2; Memorandum in Support of Objection to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs and Attorney Fees, p. 1. City has not addressed the issue of the Court's timing, but does tacitly admit, "Defendant Independent Highway District (IHD) filed an objection to the award of fees, but not until August 27, 2014, the 14th day as permitted by I.R.C.P. 54(d)(b) [sic 54(d)(6)]." City of Sandpoint's Response to Motion for Reconsideration and Reply to Opposition to Attorney Fees Award, p. 2. Thus, City admits IHD's objection was timely.

A party has fourteen days to object to attorney fees. I.R.C.P. 54(d)(6). Thus,

this Court was mistaken when it approved City's attorney fees and denied discretionary costs only seven days after City had made application for fees and costs. Thus, the Court deprived IHD of its chance to respond to those fees and costs sought by City. IHD's Motion to Reconsider is an appropriate method to correct that error by the Court. IHD's Motion to Reconsider and Objection to Memorandum of Costs and Attorney's Fees were timely filed under I.R.C.P. 54(d)(6).

B. The Court's Determination of Discretionary Costs Remains Unchanged.

IHD objects to the discretionary costs sought by City. Memorandum in Support of Objection to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs and Attorney Fees, p. 8. However, the Court did not grant City those discretionary costs in the first place. The Court has been presented with no argument as to why that decision should change. Thus, the Court's denial of City's discretionary costs remains that all such costs are denied.

C. Determination of the Amount of Attorney Fees Remains Unchanged.

IHD objects to the hourly rate of Attorney Beverly Anderson, who was billed at \$225.00 per hour. Memorandum of Costs and Affidavit of C. Matthew Andersen in Support of Attorney's Fees and Costs, p. 6. Yet, IHD's own attorney witnesses, Douglas S. Marfice, Brent Featherston and Susan Weeks (also counsel for IHD), all have hourly rates of \$250.00 per hour, or \$25.00 more per hour than Beverly Anderson, who has five years more experience than Marfice and eight years more experience than Featherston. This justifies an upward departure from what City initially requested.

IHD objects to C. Matthew Andersen's hourly rate of \$325.00 per hour. Andersen has been a member of the Washington State Bar since 1976, or thirty-eight years. None of IHD's attorney witnesses have that length of experience. Memorandum of Costs and Affidavit of C. Matthew Andersen in Support of Attorney's Fees and Costs,

pp. 3, 6. For the reasons stated below, the Court finds IHD's objections to C. Matthew Andersen's hourly rate to be unavailing.

IHD points the Court to its March 12, 2013, decision in *Samuel v. Black Rock Development, Inc., et al.*, Kootenai County Case No. CV 2012 4492, pointing out that this court adjusted attorney fees downward finding rates of \$400.00 per hour for one attorney, \$275.00, \$225.00 and \$220.00 per hour for other attorneys unreasonable, where this court reduced the attorney fees requested downward by 33%. Memorandum in Support of Objection to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs and Attorney Fees, p. 6. Counsel for IHD is correct that this Court reduced attorney fees downward by 33%. Kootenai County Case No. CV 2012 4492, Memorandum Decision and Order Granting in Part and Denying in Part Plaintiff Samuel's Motion for Award of Attorney Fees and Costs and Granting Plaintiff's Motion to Certify Judgment, p. 19. But counsel for IHD also knows this argument is incomplete, as IHD's argument overlooks two clearly made points in that decision. First, is the fact that the one-third reduction in the amount of attorney's fees sought in *Samuel* was based on *all twelve* of the I.R.C.P. 54(e)(3)(A-L) factors, of which, hourly rate is but one factor. Second, when the Court analyzed the hourly rate of the applicant attorneys in *Samuel*, the Court found such rates were unreasonable, but in doing so specifically held:

This Court specifically finds the \$400.00 per hour rate by attorney Robert A. Dunn to be unreasonable. The Court finds the \$275.00 per hour rate by Kevin W. Roberts, \$225.00 per hour rate by Jason T. Piskel and \$220 per hour rate by Michael R. Tucker, attorneys licensed in Idaho for five years, seven years and six years, respectively, to be unreasonable.

Kootenai County Case No. CV 2012 4492, Memorandum Decision and Order Granting in Part and Denying in Part Plaintiff Samuel's Motion for Award of Attorney Fees and

Costs and Granting Plaintiff's Motion to Certify Judgment, p. 18. There is a big difference between an attorney of seven years in the *Samuel* case requesting his hourly rate of \$400.00 per hour and an attorney of C. Matthew Andersen's thirty-eight years of experience requesting his hourly rate of \$325.00 in the present case. Experience is perhaps the largest factor in any attorney determining his hourly rate, a rate which the market will decide can be justified, and in any particular case, the client ratifies is justified. Experience is a factor for this Court to consider. I.R.C.P. 54(e)(3)(C). The Court specifically finds Andersen's hourly rate is reasonable, given his experience. The Court also finds that the affidavits submitted by IHD justify the exact hourly rate charged by City's other attorney, Beverly Anderson. The Court finds her hourly rate of \$225.00 (for most of her work) and \$250.00 (for one half hour), to be reasonable, given her experience.

IHD also objects to the amount of hours spent by counsel for City on this case. Memorandum in Support of Objection to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs and Attorney Fees, pp. 4-8. The Court has reviewed those arguments, and finds them to be without merit. IHD points out 118.9 hours spent for research, outlining and writing City's response brief, research and writing the reply brief, and preparing for and attending the hearing on IHD's motion to dismiss is excessive. Memorandum in Support of Objection to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs and Attorney Fees, pp. 6-7. The Court cannot make the finding IHD urges. The Court does not find such amount of time unreasonable. The proof is, as they say, in the pudding. The City spent enough time to put enough quality into a brief, which, as it turns out, won the day. IHD took a position that turned out to be a losing one. Having good facts helped, but quality legal work certainly helped the City prevail. IHD objects to 14.9 hours being spent by City's attorneys on a stipulated

preliminary injunction, 7.8 hours on Rule 54 certification, 14.7 hours on permissive appeal issues, 19.1 hours to prepare a brief to the Idaho Supreme Court, 33.8 hours spent opposing the permissive appeal, and 32.95 hours on summary judgment. *Id.*, p. 7. No specific argument is made by IHD, just general objection to the amount of hours. The Court cannot find these hours to be unreasonable. The City prevailed on these issues, thus, the above analysis that good legal work takes time applies here as well.

Considering the hourly rate charged and the amount of time billed (which are the two focal points of IHD's objection), as well as all the other I.R.C.P. 54(e)(3)(A-L) factors, which this Court has considered, the Court finds no good reason to depart downward from its earlier finding that the attorneys' fees requested by City were anything other than reasonable. In fact, one factor alone would justify an upward departure from the amount requested being low, and an increase warranted.

Idaho Rule of Civil Procedure 54(3)(3)(G) requires the Court to consider "the amount involved and the results obtained." This case involves multi-decade litigation between these two entities, in more current-time with this lawsuit involving IHD's blunt statement given with little notice it would not be paying the City the substantial contract price of about \$350,000.00 per year, on a contract that was reached to put prior decades of litigation to bed, or so everyone thought. And, as it turns out, the IHD's novel legal reason for refusing to pay City on that contract, turned out to be invalid. The Court will not award the City increased fees. Instead, the Court finds the factor contained in I.R.C.P. 54(3)(3)(G) is powerful reason why the amount already found by the Court, is reasonable.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED defendant IHD's Motion to Reconsider is GRANTED in

part, to the extent the Court's earlier determination was premature, but DENIED to the extent that its earlier findings were anything other than reasonable.

IT IS FURTHER ORDERED the City of Sandpoint's motion for attorney's fees is GRANTED in the amount requested and the City of Sandpoint is awarded attorney's fees in the amount of \$56,131.75.

IT IS FURTHER ORDERED the City of Sandpoint's requests for discretionary costs is DENIED.

IT IS FURTHER ORDERED counsel for City of Sandpoint shall prepare an appropriate Judgment.

Entered this 24th day of October, 2014.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 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>
Scot R. Campbell	208 255 1368	C. Matthew Andersen	208 765-2121
Susan Weeks	208 664-1684	David E. Wynkoop	208 887-4865

Linda Oppelt, Deputy Clerk