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Department of Water Resources

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

BOB BLACKADAR
Plaintiff/Counterdefendant,

vs.

MYRTHUS AUSTIN
Defendant/Counterclaimant.

Case No.: 94-00004

MEMORANDUM DECISION AND
ORDER DENYING COSTS AND
ATTORNEY'S FEES

I.

PROCEDURAL & FACTUAL BACKGROUND

1. This case originated as a small claims action filed by Bob Blackadar ("Blackadar") against Myrthus Austin ("Austin") alleging causes of action of trespass and damages resulting when in 1989 Austin entered upon Blackadar's property to deepen and clean a previously unused irrigation ditch referred to as the "red ditch." The issue was whether Austin had a right to use and maintain the red ditch to deliver water to his property. Historically, Austin used a ditch referred to as the "green ditch", which also runs across Blackadar's property. The red ditch is a lateral ditch that branches off of the green ditch on Blackadar's property and runs across the property and onto Austin's property. Initially, Blackadar did not contest Austin's right to use and maintain the green ditch easement.

2. Blackadar prevailed in the small claims action and was awarded \$400.00 in damages and \$25.00 in attorney's fees. Judgment was entered on August 29, 1989.

3. On September 11, 1990, Austin appealed the decision to the magistrate division wherein a *de novo* court trial was held. On December 21, 1989, judgment was again entered in favor of

Blackadar in the amount of \$425.00. No memorandum of costs was filed for costs and fees incurred as a result of the proceedings before the magistrate.

4. On February 14, 1990, Austin appealed the magistrate's decision to the district court. On October 15, 1990, following a review of the record, the district court concluded the record was incomplete and remanded the case back to the magistrate division for a trial *de novo*. No memorandum of costs was filed for costs and fees incurred as a result of the proceedings before the district court.

5. On February 14, 1991, Austin appealed from district court's decision to remand the case to the Idaho Supreme Court. The Idaho Supreme Court affirmed the district court and remanded the case back to the magistrate for a trial *de novo*. Because no memorandum of costs was filed, the Supreme Court denied any claim for costs and fees on appeal to be waived. See *Remittitur* filed March 26, 1992.

6. On April 23, 1992, Blackadar, through counsel, filed an *Amended Complaint* alleging an additional cause of action for damages resulting from Austin's negligent maintenance of the green ditch by allowing a fire to burn out of control. Austin filed an *Answer and Counterclaim*. Apparently, through the course of discovery, the issues in the case expanded to include issues regarding the existence and ownership of Austin's water rights alleged to be delivered through the respective ditches. As a result of the additional issues, the Idaho Supreme Court issued an order transferring venue to the SRBA court prior to any trial on the merits taking place.

7. On February 22, 1995, Blackadar filed a *Motion for Summary Judgment* asserting in addition to other courses of action, that Austin had forfeited and/or abandoned his water and ditch rights on both the green and red ditches. Judge Hurlbutt, then Presiding Judge of the SRBA, in a July 7, 1995, *Memorandum Decision on Order Granting Partial Summary Judgment*, ruled that Austin did not forfeit and/or abandon his water right or his right to use of the green ditch by converting use to the red ditch. However, Judge Hurlbutt ruled that Austin did not have a right to the use of the red ditch and found Austin liable for damages for his negligent maintenance of the green ditch and for the trespass and deepening of the red ditch. The amount

of damages was to be determined in a subsequent proceeding. No attorney's fees or costs were awarded.

9. In 2002, this Court set the matter for status conference to resolve the damage issue. The parties were initially ordered to mediation. On March 25, 2003, the parties filed a stipulation indicating to the Court that a resolution had been reached with regard to damages but that the parties left the issue of attorney's fees for the Court to resolve. Pursuant to the stipulation, Austin gave up any and all right to use of the red ditch and Blackadar waived his right to any damages. The stipulation provided that the parties would "let the judge determine if any legal fees are appropriate." Following the filing of the stipulation this Court entered a final judgment in the case and set a deadline in accordance with I.R.C.P. 54(d)(5) for the filing of memoranda of costs.

10. On April 10, 2003, Blackadar timely filed a memorandum of costs seeking costs and attorney's pursuant to I.C. § 12-120(3) and under the Consumer Protection Act, I.C. § 48-608(3). Austin also timely filed a memorandum of costs and fees seeking costs and fees for proceeding *pro se*. Blackadar filed an objection to Austin's memorandum of costs. A hearing was held on the matter on May 20, 2003.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument occurred in this matter on May 20, 2003. The parties did not request additional briefing, and the Court does not require any additional filings on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or May 21, 2003.

III.

APPLICABLE LEGAL STANDARDS FOR THE AWARD OF COSTS AND FEES

In regards to costs, I.R.C.P. 54(d)(1)(A) provides that "[e]xcept when otherwise limited by these rules, costs shall be allowed as a matter of right to the **prevailing party** or parties, unless otherwise ordered by the court." (emphasis added). I.R.C.P. 54(d)(1)(C) lists those types of costs, discretionary and as a matter of right, that can be awarded pursuant to I.R.C.P. 54(d)(1)(A).

With respect to attorney's fees, I.R.C.P. 54(e)(1) provides for the award of reasonable attorney's fees in any civil action "to the **prevailing party** as defined in Rule 54(d)(1)(B) **when provided for by any statute or contract** (emphasis added). I.R.C.P. 54(e)(5) provides that when allowable by statute or contract attorneys fees shall be processed in the same manner as costs.

For purposes of determining the "prevailing party" in applying 54(d)(1)(A), for the award of costs, and I.R.C.P. 54(e)(1), for the award of attorney's fees, I.R.C.P. 54(d)(1)(B) provides:

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, whether there were multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issue or claims. The trial court in its sound discretion may determine that a party to an action prevailed in part or 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.

As a prerequisite to recovering costs and/or attorneys fees, I.R.C.P. 54(d)(5) requires that any party who claims costs must file and serve on adverse parties a memorandum itemizing the costs and fees being sought not later than 14 days after entry of judgment. This rule also provides that "failure to file such memorandum of costs within the period prescribed by the rule shall be a waiver of right to costs." For purposes of applying the rule the courts have defined "entry of judgment" as a decree or any order from which direct appeal lies. See *Harney v. Weatherby*, 116 Idaho 904, 907, 781 P.2d 241, 244 (Ct. App. 1989).

Furthermore, for purposes of recovering attorney's fees it is incumbent on the party claiming such fees to assert the grounds on which fees are being sought. The court is not empowered to award fees on a basis not asserted by the moving party. *Bingham v. Montana Resource Associates*, 133 Idaho 420, 987 P.2d 1035 (1999).

Lastly, *pro se* litigants are not entitled to recover attorneys fees for self representation. *O'Neil v. Schuckardt*, 112 Idaho 472, 733 P.2d 693 (1987).

IV.

FINDINGS, CONCLUSIONS AND RULING

The Court in this case declines to award costs or attorney's fees to either party for the following reasons.

1. Untimeliness of memoranda of costs for portions of the proceedings.

Because no memoranda of costs were filed until after the case was ultimately remanded by the Idaho Supreme Court, this Court finds that any claim for costs and/or attorney's fees for any portion of the proceedings occurring prior to the remand by the Idaho Supreme Court for a trial *de novo* is untimely and, therefore, waived pursuant to I.R.C.P. 54(d)(5). The 14-day time limit under I.R.C.P. 54(d)(5) runs from the entry of any order from which a direct appeal can be taken. In this case there were three direct appeals from orders prior to the matter being remanded by the Supreme Court and no memorandum of costs were filed within the required time period.

2. Neither party "prevailed" on all of the issues in the SRBA proceedings.

Because this case involved multiple issues and counterclaims, the determination of the extent to which a party prevailed on a particular issue is one of discretion. I.R.C.P. 54(d)(1)(B). The Court may apportion the costs and fees between and among the parties in a fair and equitable manner after considering all the issues and claims involved in the action. *Id.* In this regard, this Court finds that neither party prevailed on all of the issues raised in the proceedings following remand from the Idaho Supreme Court.

Following remand, Blackadar raised additional issues regarding abandonment and forfeiture of Austin's water right and related right to use the green ditch. The issues surrounding the existence of the water right were responsible for venue being transferred to the SRBA. Although Blackadar prevailed on the issues of trespass and damages, Austin prevailed on the issues of abandonment and forfeiture as concerns his water right and right to the use of the green ditch for delivery of the same.

Furthermore, because the parties ultimately settled the issue of damages and any remaining issues regarding the use of the red ditch pursuant to a stipulation, this Court cannot determine which party prevailed. Accordingly, in exercising its discretion, the Court finds that because neither party prevailed on all of the issues, a fair and equitable resolution is that each party bear their own costs and fees.

3. Austin may not recover attorney's fees.

In addition, because Austin proceeded *pro se* in the matter, as a matter of law he cannot recover attorney's fees.

4. Neither party states a cognizable basis for the award of attorney's fees.

Finally, neither party has stated a correct basis for the award of attorney's fees. Austin, in his memorandum of costs, fails to state any statutory basis for the award of attorney's fees. Blackadar relies on I.C. § 12-120(3) and the Consumer Protection Act as the basis for attorney's fees. I.C. § 12-120(3) applies to "commercial transactions." In order to recover under this provision, the gravamen of the claim must be grounded in a "commercial transaction." The gravamen of the issues in this case are grounded in tort, hence the Court finds that I.C. § 12-120(3) is inapplicable to the issues in this case. *See Erickson v. Flynn*, 138 Idaho 430, 435, 64 P.3d 959, 964 (Ct. App. 2003). The Court is not empowered to determine a statutory basis for attorney's fees.

**V.
ORDER**

For the above-stated reasons the award of costs and/or attorney's to either party is DENIED.

DATED: 6-20-03


ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication