

<p>FIRST JUDICIAL DISTRICT, STATE OF COLORADO Gilpin County District Court</p> <p>2960 Dory Hill Road, Black Hawk, Colorado 80422, 303-582-5323</p> <p>Honorable Frederic Rodgers, Judge</p>	<p>Case No. 08 CV 56</p>
<p>Dory Lakes Property Owners Association, Plaintiff</p> <p>v.</p> <p>Board of County Commissioners of Gilpin County, Defendant</p>	
<p style="text-align: center;">ORDER ON BILL OF COSTS UNDER RULE 54(d) November 16, 2009</p>	

This matter is before the Court for decision on cross motions for awards of costs. After trial, each side contended that it was the prevailing party, and has filed verified bills of costs and requested an Award of Costs under Colorado Rules of Civil Procedure (CRCP) Rules 54(d) and 121, Section 1-22, and C.R.S. §§ 13-16-104, 105 and 13-16-109 as respectively applicable. In addition there are post-trial motions pending for amendment of judgment under Rule 59 (filed by Plaintiff) and for reconsideration (filed by Defendant). Having received and considered the documentation and arguments presented by the parties, and having reviewed the statements of counsel, the parties’ briefs and the applicable law, the Court enters the following findings, conclusions and ORDER.

Background

Plaintiff Dory Lakes Property Owners Association (“POA”) filed this action against the Board of County Commissioners of Gilpin County for a declaratory judgment to determine rights under a November 2, 1996 water storage lease (the lease) between the parties.¹ One part of the complaint disputed Defendant’s (“County”) right to make releases of its water from storage for certain uses, and another part complained of Defendant’s installation of outlet works on Plaintiff’s property adjacent to its lake without a corresponding easement from the POA. A preponderance of the evidence established that the POA acquired knowledge of the claim and controversy regarding the water storage and extent of permitted water releases under the lease issue as early as 1998

¹ The lease provides that the County’s stored water in POA’s Dory Lake be available to replace out-of-priority water used from its wells at the Gilpin County Justice Center. The Complaint seeks a declaratory judgment about whether such augmentation water might eventually serve other public purposes such as road and bridge, recreation center and baseball fields irrigation, purposes that are beyond what the POA contends are the lease’s expressly stated uses exclusively for the Justice Center building.

in correspondence from the county attorney, and from a report dated October 2000 that POA commissioned from its water consultant. A cause of action accrues when the potential for future harm is certain. *Magna Assoc. v. Torgrove*, 585 F.Supp. 585, 589 (D.Colo.1984). See Note, *Developments in the Law: Statutes of Limitations*, 63 Harv.L.Rev. 1177, 1205 (1950). The relevant statute of limitations for a declaratory judgment action based on rights deriving from a lease of property rights is three years. C.R.S. §13-80-101(1)(a). At the conclusion of Plaintiff's case the Court granted Defendant's motion for dismissal under Colo.R.Civ.P. Rule 41(b)(1), on the grounds that the claim related to disputed releases of water was barred by the statute of limitations, C.R.S. §13-80-101(1)(a). The Court also determined, contrary to the County's assertions, that the lease terms did not encompass the County's construction and maintenance of the outlet works, pump and pipes carrying water from the lake to Ralston Creek over POA's property.

STANDARD OF REVIEW

Section 13-16-104, C.R.S. provides that a plaintiff recovering damages shall be entitled to have judgment against defendant for its costs. Section 13-16-105 provides reciprocally that if defendant prevails it shall have its costs against the plaintiff or cross claim defendant. However, where each party prevails in part, the court must exercise its discretion in determining which party if any is the prevailing party and whether costs should be awarded. C.R.S. §13-16-109. *Archer v. Farmer Bros. Co.*, 90 P.3d 228 (Colo.2004); *Husband v. Colo. Mtn. Coll.*, 867, P.2d 57 (Colo.App.1993). In such cases, the trial court is in the best position to determine which party is the prevailing party by evaluating the relative strengths and weaknesses of each party's claims, the significance of each party's successes in the context of the overall litigation, the time devoted to each claim, and observe the overall course of the litigation. *Archer, id.* at 231.

A party seeking costs must provide the court with sufficient information and supporting documentation to allow a judge to make a reasoned decision for each cost item presented. *Brody v. Hellman*, 167 P.3d 192 (Colo.App.2007); *Aurora v. State of Colo. State Eng'r*, 105 P.3d 595 (Colo.App.2005). *Bennett v. Hickman*, 992 P.2d 670, 673-4 (Colo.App.1999) (Costs may be awarded for an expert witness whose credibility was determined adversely by the jury.) As to expert witness fees, generally, the statute allows the court to award the costs of expert witnesses in amounts which are commensurate with their expertise. It does not require that the amounts actually paid to the expert be assessed as costs. *Lamont v. Riverside Irr. Dist.*, 498 P.2d 1150, 1154 (Colo.1972). See C.R.S. § 13-16-122(1)(e) and 13-33-102(4); *Great Western Sugar Co. v. Northern Natural Gas Co.*, 661 P.2d 684, 695 (Colo.App.1982) (allowing expert witness fees as costs even though expert did not eventually testify at trial; only question was whether the amount of the fee was reasonable); *Audio-Visual Systems, Inc. v. Hopper*, 762 P.2d 696 (Colo.App.1988); *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352, 388-390 (Colo.1994); *Ballow v. PHICO Insurance Co.*, 878 P.2d 672, 684 (Colo.1994); *GF Gaming Corp. v. Taylor*, 205 P.3d 523, 526 (Colo.App.2009).

The award of reasonable costs to the prevailing party is mandatory. *Hall v.*

Frankel, 190 P.3d 852, 866 (Colo.App.2008). The prevailing party is the party that prevailed on a significant issue in the case and derives some of the benefits sought by the litigation. *Farmers Res. and Irr. Co., v. City of Golden*, 113 P.3d 119, 127-129 (Colo. 2005) (City of Golden was prevailing party after successful defense of plaintiffs' declaratory and injunctive relief action, despite losing on other issues, because Golden prevailed against principal declaratory and injunctive relief sought); *Archer v. Farmer Bros. Co.*, *id.* at 230-31. In determining who is the prevailing party, the trial court is required to evaluate the relative strengths and weaknesses of the claims, the significance of each party's successes in the overall context of the litigation, and the time devoted to each claim. *Id.*; *Hall*, 190 P.3d at 867. Costs are not limited to the specific claims on which a party prevailed at trial. See *Mackall v. Jalisco Int'l, Inc.*, 28 P.3d 975 (Colo.App.2001) (the court rejected defendant's argument that expert witness fees were not recoverable because the underlying claim was dismissed by a directed verdict). Also, the costs of discovery depositions and necessary preparation are recoverable when reasonably necessary for the development of the case. See *Cherry Creek Sch. Dist. No. 5 v. Voelker*, 859 P.2d 805 (Colo.1993).

FINDINGS, CONCLUSIONS AND ORDER

Prevailing Party

Each side contends it is the prevailing party: the County because it prevailed on the Court's dismissal of the POA's complaint challenging its right to make releases of its water from storage for certain uses; and the POA because it prevailed in the Court's determination that the lease did not authorize the County to install the pump, pipe and outlet works on Plaintiff's property adjacent to its lake without a corresponding easement from the POA. Under C.R.C.P. 54(d), "costs shall be allowed as of course to the *prevailing party* unless the court otherwise directs" (Emphasis added). "To prevail for purposes of C.R.C.P. 54(d), the party must prevail on a significant issue in the litigation and achieve some of the benefits sought therein." *Parsons v. Allstate Ins. Co.*, 165 P.3d 809 (Colo.App.2006). Colorado courts have explained that "[t]he number of claims upon which a party prevails and the amount awarded for such claims are not determinative of who is the prevailing party for purposes of awarding costs." *Parsons, id.* at 820; see also *Farmers Reservoir and Irr. Co. id.* at 128. Colorado courts have specifically found that a defendant in a contract dispute who prevails on its statute of limitations defense can be the prevailing party entitled to its costs. *Pat's Construction Service, Inc. v. Ins. Co. of the West*, 141 P.3d 885, 890-91 (Colo.App.2005), (*cert. den.*, 2006) (dismissal on directed verdict granted based on statute of limitations defense entitling defendant to its costs); See generally *Archer*, 90 P.3d at 231 (whether couched as claim, counterclaim, or defense is of no consequence as all that is necessary is that party prevail on "some aspect" of issues in dispute). *Great Western Sugar Co. v. Northern Natural Gas Co*, 661 P.2d 684, 695 (Colo. App. 1982).

The central claim in this case was whether the Lease prohibited the County from releasing its water from Dory Lake for uses other than augmentation of water use in the Justice Center. This claim was the subject of three motions for summary judgment and

several other motions filed with the Court, and it was the focus of the parties in the pre-trial disputes litigated by the Court. This claim was the chief focus of all evidence, witnesses, and argument presented at trial and was the only claim on which the Plaintiff, Dory Lakes Subdivision Property Owners Association presented evidence. The County prevailed at trial against the POA on this central claim. The Court ruled that the POA's claim was barred by the statute of limitations, C.R.S. §13-80-101(1)(a), affirming this in its September 10, 2009 Trial Decision and Declaratory Judgment Order.² As a consequence, County may now use and release its water from Dory Lake for any use without limit under the Lease. Statutes of limitations serve to promote justice, discourage unnecessary delay, and forestall the pursuit of stale claims. *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094 (Colo.1996).

The claim upon which the POA prevailed involved deciding whether the County's construction and installation of a new pump, pipe and outlet works in Dory Lake, on and under the Lake bottom, and on Plaintiff's property is allowed under the Lease, or instead constitutes a taking for which the Association is entitled to just compensation. At trial POA presented little evidence on this claim, relying mainly on legal arguments that the County could not take Association property without paying it additional compensation under the Lease. The Court found in favor of the POA on this claim. The Court held that the Lease did not contemplate the outlet works, new pump and pipeline and that compensation to Plaintiff for those structures was not included in the annual lease payments. None of the many disputed pre-trial issues were concerned with this claim.

The County first raised the statute of limitations argument in its first and second Motions for Summary Judgment, and it was addressed by the Court *inter alia* in its pre-trial orders. *See* 2009 WL 2876670, (Trial Order) District Court of Colorado, First Judicial District. July 02, 2009. Although the Court did have the benefit of reading Robert Oatman's brief Affidavit in connection with determining the first Summary Judgment Motion, it was not until the Court heard Mr. Oatman's trial testimony, along with Del Johnson's testimony that the predicate elements of the statute of limitations determination came into focus.³

Reasonableness of Costs

Plaintiff contends that none of County's expert witnesses was necessary to the statute of limitations determination at trial. The Court disagrees. In the first place, the Plaintiff presented expert testimony from Bill Kirven and Patricia Flood as part of its case in chief. It is neither unexpected nor unreasonable for the County's lawyers to consult with and place reliance upon on its own expert witness resources in order to prepare for cross examination of the opposing experts. *See* the Court's Order addressing a variety of pre-trial motions to dismiss, to compel, *in limine* and County's third motion for summary

² *Dory Lakes Property Owners Ass'n v. Board of County Com's of Gilpin County*, reported at 2009 WL 2968430 (Trial Order), Colo.Dist.Ct., September 10, 2009, (No. 08 CV 56.)

³ The County argues that POA withheld evidence from its expert and water attorney that would have likely resulted in summary judgment in the County's favor based on the statute of limitations defense, most of its costs would not have been incurred by the County. An Order granting County's Motion to Compel disposed of this controversy over privilege and work product, before trial.

judgment, 2009 WL 2842172 (Trial Order), Colo.Dist.Ct., September 04, 2009, (No. 08 CV 56.). In the second place, in addressing POA's motion to exclude the testimony of Defendant's expert William A. Hillhouse, the Court noted that his experience-based expertise would be helpful to the trier of fact in understanding the many water law principles that both parties had raised in briefs during the numerous pre-trial disputes.

The County seeks its costs for four expert witnesses: William Saylor, PE (\$18,061.66), William A. Hillhouse, Esq., (\$25,388.78) Laurel Stadjuhar PE (\$8,855) and Jeffrey A. Clark (\$3,061.25).⁴ Given the fact that the County incurred costs in defending this lawsuit, as the prevailing party it is entitled to recover its costs as were reasonably necessary to adequately defend, develop, and litigate this case and were in direct response to and the result of the claims made by Plaintiff in this case. Three of the endorsed expert witnesses --Saylor, Stadjuhar and Clark-- are employees of Bishop-Brogden Assoc., long-time water engineers and consultants for the County.

The County has established the reasonableness of preparing each of these four expert witnesses for testimony at trial to meet the Plaintiff's evidence, to help prepare to depose Defendant's experts, and to establish affirmative defenses. *Cherry Creek School Dist. No. 5 v. Voelker by Voelker*, 859 P.2d 805 (Colo.1993). Although each of the water engineers' fees and costs are individually within the boundaries of reasonableness, the Court concludes that, for purposes of its award of costs, their fees are in part duplicative of one another, and hereby reduces each fee by one-third. Thus Mr. Saylor's cost recoverable fee is reduced to \$12,041.11, Ms. Stadjuhar's to \$5,903.34, and Mr. Clark's to 2,040.83, for a total cost of \$19,985.28, resulting in a net reduction in their combined costs of \$9,992.63. Mr. Hillhouse's expert qualifications reasonably support his time and fee rate, a rate comparable to that charged by many experts in water law and other areas of specialized practice. The amount of work required in this case was considerable, given the nature and long history of this case; and combined with complex issues of contract law and water law, the costs reasonably reflect his thorough review of these issues.

The Court further finds that Plaintiff's objections about the mediation costs are irrelevant under Colorado Rules of Evidence Rule 408, and that such costs are recoverable; and that despite POA's carefully detailed objections about copying costs, deposition costs and mileage expense, the County's Bill of Costs sufficiently supports their award to withstand the challenge.

Order

ACCORDINGLY, based on the foregoing findings of fact and conclusions of law, the Court hereby orders:

⁴ The County identifies the gist of Mr. Saylor's testimony to be preparation of the Lease and work on related Water Court Case No. 94 CW 277; the gist of Ms. Stadjuhar's testimony to be accounting for water removed from storage; and the gist of Mr. Clark's testimony to be working with the state engineer on the County's substitute water supply plan.

1. Defendant's motions for its actual costs as prevailing party CRCP 54(d) and CRS §§ 13-16-105 and 109 is granted in part in the amount of **\$58,853.59**.

2. Plaintiff's motion for costs as the prevailing party under CRCP 54(d) and CRS §§ 13-16-104 and 109 is denied.

IT IS SO ORDERED.

Done and signed in Black Hawk, Colorado this 20th day of November, 2009.

By the Court:

A handwritten signature in cursive script that reads "Frederic Rodgers".

Frederic Rodgers
JUDGE