STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

GEORGE COMACK, *Plaintiff*, vs. **KIMBALL CARPETS, LLC, d/b/a PANHANDLE CARPET ONE FLOOR & HOME,** *Defendant*.	Case No. **CV 2010 461** **MEMORANDUM DECISION AND ORDER DENYING "DEFENDANT'S [KIMBALL] MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT; and MEMORANDUM DECISION AND ORDER ON PLAINTIFF COMACK'S MEMORANDUM OF COSTS AND ATTORNEY FEES**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion for a Judgment Nothwithstanding [sic] the Verdict (JNOV) filed by defendant Kimball Carpets, LLC d/b/a Panhandle Carpet One Floor & Home (Kimball) on November 9, 2011. Jury trial was held beginning October 24, 2011, which resulted in a verdict on October 26, 2011, in favor of George Comack (Comack), in the amount of $43,152.62. The following history is from this Court's October 19, 2011, Memorandum Decision and Order Denying Defendant Kimball's Motion in Limine:

> On January 20, 2010, plaintiff George Comack (Comack) filed his Complaint against his former employer, Kimball, alleging he had not been paid for various commissions earned prior to his resignation. Kimball filed its Answer, Counterclaim and Demand for Jury Trial on April 5, 2010. On August 12, 2010, this Court scheduled the matter for a three-day jury trial beginning April 18, 2011. No motion to dismiss nor a motion for summary judgment was filed by Kimball on this issue. Very little was filed in this

action until March 4, 2011, when both parties stipulated to continue the trial, because "the parties wish to pursue meaningful mediation prior to incurring additional costs with pre-trial preparation." This Court ordered mediation occur no later than April 20, 2011, the week the matter was originally to be tried. The parties in this case have failed to comply with this Court's March 4, 2011, Scheduling Order, by not reporting "…jointly to the Court in writing at least sixty (60) days prior to trial, setting forth when mediation occurred and the results of mediation." Scheduling Order, p. 7, ¶ 15.

On October 4, 2011, Kimball filed its motion in limine, seeking an Order of the Court determining that Comack's claims to commissions, after his signing of the most recent employment agreement between the parties, violates the parol evidence rule in light of the agreement's language that, "You will no longer be paid commissions…" Defendant's Motion in Limine, p. 2; Exhibit A to the Affidavit of Lisa Kimball. On October 6, 2011, Comack filed his Memorandum in Opposition to Defendant's Motion in Limine, arguing the parol evidence rule does not apply to the facts before the Court because the agreement contained no merger clause and:

> Because the August 1, 2009, agreement is incomplete and ambiguous on its face, and because this case involves multiple contracts, not merely negotiations leading up to a single contract, the parol evidence rule does not apply. Extrinsic evidence can be introduced to explain the agreements and the employment relationship between the parties from June 2007 through the end of his employment with the Defendant.

Memorandum in Opposition to Defendant's Motion in Limine, pp. 3-4. On October 17, 2011, Kimball filed its Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion in Limine, contending the mere lack of a merger clause does not render the agreement at issue ambiguous or incomplete; "[t]he Plaintiff wishes to add a term which sets forth that he is entitled to be paid commissions which is inconsistent with the written agreement." Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion in Limine, p. 3.

Memorandum Decision and Order Denying Defendant Kimball's Motion in Limine, pp. 1-3. The Court heard oral argument on the motions in limine on October 18, 2011, and denied Kimball's motion, finding the contract language to be both patently and latently ambiguous. Memorandum Decision and Order Denying Defendant Kimball's Motion in Limine, pp. 7-8. A three-day jury trial commenced on October 24, 2011, and ended with the jury returning its verdict in favor of Comack in the amount of $43,152.62, on

October 26, 2011. Judgment was entered in that amount by this Court on October 26, 2011.

On November 9, 2011, Kimball filed its Motion for a Judgment Notwithstanding the Verdict, asking that the Court direct a verdict for Comack in the amount of $1,721.06. Kimball's memorandum in support of the verdict was filed on November 15, 2011. Comack filed his Memorandum in Opposition to Defendant's Motion for Judgment Notwithstanding the Verdict on November 21, 2011.

Also before the Court is Comack's "Memorandum of Costs and Attorney Fees", filed October 28, 2011, to which Kimball has not responded.

Oral argument on Kimball's motion for JNOV and Comack's Memorandum of Costs and Attorney Fees was held on November 29, 2011.

II. STANDARD OF REVIEW.

A motion for judgment notwithstanding the verdict is governed by Idaho Rule of Civil Procedure 50(b).

> The moving party admits the truth of the adversary's evidence and every inference that may be drawn therefrom; the motion should only be granted in the absence of evidence to support a verdict. The question on appeal, therefore, is whether as a matter of law the record contains sufficient evidence to support a jury verdict in favor of the plaintiffs on their complaint and against the defendants on their counterclaim.

Chisholm v. Simplot Company, 94 Idaho 628, 630 495 P.2d 1113, 1115 (1972). The question for the Court is whether substantial evidence existed upon which the jury could properly find a verdict; "[a]ll that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds could conclude the verdict of the jury was proper." *Mann v. Safeway Stores, Inc.,* 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974). Therefore, unlike with a motion for a new trial, the Court cannot make its own independent findings, by weighing the evidence or evaluating the credibility of

witnesses, and compare those to the jury's. *Quick v. Crane,* 111 Idaho 759, 727 P.2d 1187 (1986). The question is decided by the Court as a matter of law and on appeal, appellate courts exercise free review of the record in determining whether the verdict can be supported under any reasonable view of the evidence. *Litchfield v. Nelson,* 122 Idaho 416, 420, 835 P.2d 651, 655 (Ct.App. 1992).

The district court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford,* 139 Idaho 744, 753, 86 P.3d 458, 467 (2004). An award of costs, both costs as a matter of right and discretionary costs, 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); *Fish v. Smith,* 131 Idaho 492, 493, 960 P.2d 175, 176 (1998).

III. ANALYSIS OF KIMBALL'S MOTION FOR JNOV.

Kimball argues the Court improperly found a patent ambiguity in the "You will no longer be paid commissions" language of the contract. Defendant's Memorandum in Support of Motion for Directed Verdict, p. 1. Kimball claims because the term "paid" has a "very clear meaning" (according to Kimball), the contract is neither patently nor latently ambiguous. *Id,* p. 2. Kimball argues:

> If "paid" is given its common meaning, the act of making a payment, no absurdity results from the terms of the contract . Kimball no longer had to pay any commissions and that does not contradict any other part of the document. It further makes sense in light of the increase in base pay, and is not an absurdity.

Id. Despite arguing no latent ambiguity exists, Kimball cites to extrinsic evidence (i.e. the parties' previous understanding of the term "paid") to demonstrate the term "paid" is "only rendered ambiguous by Comack's subjective understanding…, which subjective understanding is inconsistent to all prior usage of the word 'paid' by the parties." *Id.,* p.

3. It is Kimball's contention that Comack should not have been permitted to introduce parol evidence as to further commissions to which he alleged to he was entitled. *Id.,* p. 4. Kimball requests the Court issue a directed verdict in favor of Comack in the amount of $1,721.06 "which represents the difference between the total commissions claimed by Comack and the verdict amount." *Id.*

In response, Comack argues Kimball misunderstands what is meant by the term "ambiguous" as made obvious by Kimball's statement "that the other possible interpretations are not relevant to the question of whether a patent ambiguity exists." Memorandum in Opposition to Defendant's Motion for Judgment Notwithstanding the Verdict, p. 2. Comack states the phrase "You will no longer be paid commissions" is both patently and latently ambiguous; that it can be reasonably interpreted to mean Comack would no longer receive commissions on projects bid from the date of the contract on, or, it could mean Comack waives all commissions not paid by the date of the contract. *Id.,* pp. 2-3. Comack then notes the Court is to consider the whole contract, not merely the term "paid", and the Court, having found the contract ambiguous as a matter of law, properly permitted the parties to present evidence to the jury as to the meaning of the contract. *Id.,* pp. 3-4.

The question for the Court on Kimball's motion for JNOV is a question of law. The Court cannot "trespass upon the province of the jury and be the judge of all questions of fact in the case, or make his or her own separate findings of fact and compare them to the jury findings." 46 AMJUR 2D *Judgments* § 313 (2011). As discussed by the Court in its Memorandum Decision and Order Denying Defendant Kimball's Motion in Limine, filed October 19, 2011, the question of whether an instrument is ambiguous is a question of law. Memorandum Decision and Order

Denying Defendant Kimball's Motion in Limine, p. 7. "…[I]t is only when that instrument is found to be ambiguous that evidence as to the meaning of that instrument may be submitted to the finder of fact." *Knipe Land Co. v. Robertson,* 151 Idaho 449, ___, 259 P.3d 595, 601 (2011) citing *Cool v. Mountainview Landowners Coop. Ass'n,* 139 Idaho 770, 772, 86 P.3d 484, 486 (2004).

Kimball's circular argument is entirely without merit. While arguing that no ambiguity exists, Kimball states extrinsic evidence, which can only be admitted if an ambiguity is found to exist, "establishes that no latent ambiguity exists." Defendant's Memorandum in Support of Motion for Directed Verdict, p. 3. Kimball argues the term "paid" in the phrase "You will no longer be paid commissions", means "money is received or paid." *Id.* Not only is this statement nonsensical, but it fails to take into account the *prospective* "will no longer" language in the contract term at issue. Kimball provides the Court with no support that the jury's verdict in this matter was not properly supported by substantial evidence.

The following is from this Court's October 19, 2011, Memorandum Decision and Order Denying Defendant Kimball's Motion in Limine where this Court already decided as a matter of law, the issue now raised by Kimball in his motion for JNOV:

> The contract at issue is attached to the Affidavit of Lisa Kimball, pp. 1-2, ¶ 3, Exhibit A. That contract is captioned: "Commission Contract for George Comack Revised for 8-01-09." The first paragraph reads:
>
> > You will no longer be paid commissions; your new agreement is as follows:
> > Yearly salary will be $45,000, which requires a minimum sales total of $750,000 per year. This salary will be divided into 12 months, equaling a monthly salary off $3,750. $2,500 of this salary will be paid at the first pay period of each month and the remaining $1,250 will be paid on the last pay period of each month.
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> Affidavit of Lisa Kimball, pp. 1-2, ¶ 3, Exhibit A. Comack began working at Kimball in July 2007. Complaint, p. 2, ¶ III. Comack claims he was owed commissions on various projects of Kimball's which had gone to contract

with the customer, and some of those contracts had been paid in full by the customer and some in part. Complaint, p. 3, ¶ VII. Comack was not paid his commission for those older contracts, and is suing for those commissions. *Id.* ¶ VIII.

Kimball moves this Court for an Order in Limine determining Comack's claim for commissions earned prior to the August 1, 2009, date at which the parties entered into their final employment agreement would violate the parol evidence rule as "Comack cannot be allowed to testify to a term contrary to the unambiguous language of the contract." Defendant's Motion in Limine, p. 2. Kimball concedes that the parties operated under several different compensation packages, some of which were not in writing, but that the most recent, entered into on August 1, 2009, stated, "You will no longer be paid commissions." *Id.,* p. 1, citing Exhibit A to the Affidavit of Lisa Kimball. Kimball cites to Washington case law discussing the "partial integration" exception to the parol evidence rule, arguing that partial integration may only be proved by extrinsic evidence so long as any collateral agreement is not inconsistent with the written agreement. *Id.,* p. 3. Here, Kimball argues, the August 1, 2009, agreement "speaks directly to the issue of the payment of further commissions and clearly and unambiguously sets forth that Comack will no longer be paid commissions." *Id.* At oral argument, Kimball's counsel argued simply that "more commissions" (which Kimball claims Comack is arguing) is contrary to the "no more commissions" language of the August 1, 2009, agreement.

In response, Comack argues each of the employment agreements entered into by the parties were separate and that the August 1, 2009, agreement "was not an integration or merger of all previous agreements, it was a completely new agreement which commenced on August 1, 2009." Memorandum in Opposition to Defendant's Motion in Limine, p. 2. Comack contends the parol evidence rule is inapplicable here in part because the agreement contains no merger clause; thus, Comack argues, the Court would need to find the August 1, 2009, agreement unambiguous and complete on its face in order to find it merged or integrated all prior contracts, which did each contemplate that Comack would be paid commissions. *Id.,* p. 3. Additionally, Comack alleges the agreement is ambiguous and incomplete on its face because: a) it makes no reference to commissions earned, but not paid, up to the August 1, 2009, date; b) the term "yearly salary" is not used in reference to the beginning of the parties' employment relationship and is not backdated to the beginning of 2009, therefore, the agreement can be construed as only applying form August 1, 2009, onward; and c) the agreement is referred to as "revised" and "new", "which by itself creates an ambiguity in terms of its relationship to prior agreements" [which did contemplate Comack being compensated for commissions earned]. *Id.,* pp. 3-4. Comack seeks to present extrinsic evidence on the prior agreements which governed the parties' relationship to show the meaning of the prior agreements, the substance of the agreements themselves, and the parties' practices under those agreements. *Id.,* p. 4.

In *Gray v. Tri-Way Const. Services, Inc.,* 147 Idaho 378, 210 P.3d 63 (2009), the Idaho Supreme Court affirmed the District Court's grant of summary judgment dismissing Gray's breach of contract claim because the parties never reduced their employment agreement into writing, in violation of the statute of frauds. 147 Idaho 378, 384, 210 P.3d 63, 69. The Court wrote:

> …[T]he agreement contained an integration clause, demonstrating that the contract requires a writing for a full expression of the covenants and promises, as "[t]he salutary purpose of (an integration clause) is to preclude consideration of matters extrinsic to the agreement."

Id., citing *Star Phoenix Min. Co. v. Hecla Min. Co.,* 130 Idaho 223, 233, 939 P.2d 542, 552 (1997) (quoting *Havel v,. Kelsey-Hayes Co.,* 83 A.D.2d 380, 384, 445 N.Y.S.2d 333 (N.Y.A.D. 1981)). The August 1, 2009, agreement between the instant parties contained no such integration or merger clause. However, the Court's inquiry does not end due to this absence. Kimball is correct in positing that the mere lack of a merger clause does not render an agreement ambiguous or incomplete. *See* Defendant's Reply to Plaintiff's Memorandum In Opposition to Defendant's Motion in Limine, pp. 1 *et seq.* The question of whether a contract contains ambiguity is a question of law over which reviewing courts exercise free review. *Cool v. Mountainview Landowners Coop. Assn.,* 139 Idaho 770, 772, 86 P.3d 484, 486 92004). "Although parol evidence generally cannot be submitted to contradict, vary, add or subtract from the terms of a written agreement that is deemed unambiguous on its face, there is an exception to this general rule where a latent ambiguity appears." *Knipe Land Co. v. Robertson,* 151 Idaho 449, ___, 259 P.3d 595, 601 (2011). "A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist." *Id.,* citing *Cool,* 139 Idaho 770, 773, 86 P.3d 484, 487. Where a latent ambiguity exists, the Court is to determine the intent of the parties at the time they entered into the contract. *Id.,* citing *Snoderly v. Bower,* 30 Idaho 484, 488, 166 P.265, 266 (1917) ("It is not for the court or jury to make a contract for the parties, but only to determine what the parties intended the ambiguous terms to mean at the time they entered into the agreement.").

Here, the Court finds a patent ambiguity exists. The agreement says "You will no longer be paid commissions". That language could mean "You will no longer be paid past commissions now due and owing to you", or, it could mean "From August 1, 2009, you will no longer be paid commissions on future work you do." If anything, the language is more clear toward Comack's interpretation, because the language looks toward the future…"You will no longer be paid commissions". Kimball's argument that the contract language includes past commissions is not supported by the contract language…there is nothing that mentions past commissions. That, at best, from Kimball's standpoint, is a vague contract, and the contract will be construed against the drafter, which in this case, appears to be Kimball given the letterhead on the contract.

> Even if there is no patent ambiguity, the August 1, 2009, agreement loses any certainty it has when applied to facts. This is latent ambiguity. No term of employment is listed in the agreement; that is, the August 1, 2009, agreement states no explicit beginning or end date. The agreement states it is "Revised for 8-01-09", indicating it went into effect beginning on that date. That also infers another contract was in effect up until that time. And the agreement states, "You will no longer be paid commissions", which certainly acknowledges commissions were previously paid, and also certainly indicates that they will not be paid in the future. But does "You will no longer be paid commissions" mean commissions already earned in the past and earned in the future, or does it simply mean commissions earned on customer contracts that Comack obtains for Kimball after August 1, 2009. In the agreement there is no mention of past commissions earned, but not paid, by the effective date of August 1, 2009. At best (again looking at it from Kimball's standpoint), the Court finds the August 1, 2009, agreement is ambiguous and vague. As such, this Court must determine the intent of the parties at the time they entered into the August 1, 2009, agreement with regard to previously-earned commissions prior to submitting the ultimate questions of fact in this case to the jury. The Court will have to wait and hear all extrinsic evidence on that issue. Once the Court makes that decision, it remains to be seen what issues will be presented to the jury for its determination.
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> **IV. CONCLUSION AND ORDER.**
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> For the reasons stated above, this Court must deny Kimball's Motion in Limine and consider extrinsic evidence to reconcile the latent ambiguity regarding Comack's purported earned but unpaid commissions.
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> For the reasons stated above,
>
> IT IS HEREBY ORDERED Kimball's Motion in Limine is DENIED.

Memorandum Decision and Order Denying Defendant Kimball's Motion in Limine, pp. 4-8. Kimball has provided absolutely no additional reason as to why this jury's verdict is not supported by substantial competent evidence. *Mann v. Safeway Stores, Inc.,* 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974). The only way Kimball's argument that "paid" means: a) you will no longer be paid commissions earned in the future *and* b) you will no longer be paid commissions earned in the past makes any sense is if this were a contract which specifically waived Comack's ability to claim past commissions, and this contract does not do that. The contract does not mention a single word about the past, the contract is only focused on the future: "You will no longer be paid commissions; your new agreement is as follows:" Affidavit of Lisa Kimball, pp. 1-2, ¶ 3, Exhibit A.

At oral argument on November 19, 2011, counsel for Kimball argued *Kessler v. Tortoise Development, Inc.,* 134 Idaho 264, 1 P.3d 292 (2000), states that "a court can look to extrinsic evidence to determine if a term is ambiguous because it can be ambiguous to the world but not ambiguous between two parties." The Court has reread *Kessler,* and finds no such statement by the Idaho Supreme Court. The Idaho Supreme Court in *Kessler* found that while the language of the Title Insurance provision appeared unambiguous when viewed in isolation, the ambiguities became apparent only when the Title Insurance provision was viewed in the context of the whole agreement as amended, and noted that extrinsic evidence may be used to show a latent ambiguity. 134 Idaho 264, 270, n. 3, 1 P.3d 292, 297, n. 3. But counsel for Kimball in his briefing made it clear *there is no latent ambiguity*. *Id.,* p. 2. Counsel for Kimball wrote the word "paid" is not patently ambiguous, nor is it latently ambiguous because "paid", in light of the circumstances of this case, has a very clear meaning (a different meaning than the ordinary meaning). Defendant's Memorandum in Support of Judgment Notwithstanding the Verdict, pp. 2-3. While that is the very definition of a latent ambiguity, counsel for Kimball specifically writes there is no latent ambiguity.

What Kimball's counsel is really arguing is that "paid" is not patently ambiguous, and with the extrinsic evidence of the course of dealings between the parties, there also no latent ambiguity (*Id.*, pp. 2-3), but, Kimball's counsel continues: "The word 'paid' has a very specific meaning between Kimball and Comack." *Id.,* p. 3. As argued by counsel for Kimball, that specific meaning between Kimball and Comack, is that Comack got paid when Kimball got paid. *Id.* Kimball's counsel is asking this Court to find that with the extrinsic evidence (the course of dealings between the parties that Comack gets paid when Kimball gets paid), the ambiguous language ("You will no

longer be paid commissions") becomes non-ambiguous, capable of only one interpretation (by signing this contract you are now forfeiting all past commissions earned but not yet paid). *Kessler* does not say you can do that. *Kessler* says you can use extrinsic evidence to show a latent ambiguity exists. *Kessler* does not say you can use extrinsic evidence to show that the latent ambiguity is capable of only one interpretation…because to do so would be conceding the document was not ambiguous in the first place! This is the absurdity of Kimball's argument. Kimball is asking this Court to find the language "You will no longer be paid commissions", is not patently ambiguous, is not latently ambiguous, but with the admission of extrinsic evidence, that language is capable of only one interpretation, and that is Kimball's interpretation, that "You will no longer be paid commissions *in the future and for any past commissions earned and paid in the future*." That is adding language to the contract. That is calling the ambiguous, non-ambiguous, with the use of extrinsic evidence. No rule of contract construction allows this.

Also at oral argument on November 29, 2011, counsel for Kimball argued that Comack testified regarding his earlier contracts at Kimball, on sales that were made during an old contract but were paid by the customer after he signed a new contract, he was paid under the new contract. Comack did not testify to that effect. Comack testified, when being questioned about Exhibit 1, the first contract that he had with Kimball, that the commission is earned at the time of the sale, and that such arrangement is the standard in the industry, and that he was paid after the job was paid in full, unless there was progressive payments on the job. No one even has a record of the second contract. Comack quit shortly after the last contract (Exhibit D) was signed. This is the contract language which is in dispute. At trial, Comack testified on direct

examination that in all prior agreements he was not allowed to "up" his commission based on the new agreement, that his understanding was any job he had bid after the date of the new agreement, he would be paid under the new agreement, but that as to any jobs bid prior to and accepted by the customer prior to the date of the new agreement, he would be paid under the previous agreement. At the November 29, 2011, hearing, counsel for Kimball said that Comack testified that in "every single contract"

> I went through an extensive—I would hand him these packets of payments and commission structures and we went through that with him, and I would say "doesn't that appear that you apply the new commission structure" and he admitted "yes it did."

No citation was given to the record or to an exhibit. The Court reviewed its detailed notes of Comack's extensive examination. Those notes show that on cross-examination, Comack testified that he earned his commission at the time of the sale with the customer, that Comack testified he was owed that commission at that moment in time, but he was paid that commission when the store was paid by the customer. There was no effective cross-examination of Comack that impeached that testimony. There was no cross-examination of Comack that established that he was paid per the terms of any new agreement for work that he had done and commissions earned on the prior agreement. The accounting and recordkeeping of Kimball was so pathetically bad that any impeachment by documentation was impossible.

Absolutely nothing offered by Kimball in his motion for JNOV or at oral argument changes what was written by this Court just before trial began:

> Here, the Court finds a patent ambiguity exists. The agreement says "You will no longer be paid commissions". That language could mean "You will no longer be paid past commissions now due and owing to you", or, it could mean "From August 1, 2009, you will no longer be paid commissions on future work you do." If anything, the language is more

> clear toward Comack's interpretation, because the language looks toward the future…"You will no longer be paid commissions". Kimball's argument that the contract language includes past commissions is not supported by the contract language…there is nothing that mentions past commissions. That, at best, from Kimball's standpoint, is a vague contract, and the contract will be construed against the drafter, which in this case, appears to be Kimball given the letterhead on the contract.

Memorandum Decision and Order Denying Defendant Kimball's Motion in Limine, pp. 7-8. Again, Kimball has provided no cogent additional reason as to why this jury's verdict is not supported by substantial competent evidence. *Mann v. Safeway Stores, Inc.,* 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974). That is Kimball's burden. Kimball has failed to meet that burden. Kimball's Motion for a Judgment Nothwithstanding the Verdict must be denied.

IV. ANALYSIS OF COMACK'S MEMORANDUM OF COSTS AND ATTORNEY'S FEES.

A. Costs.

Comack timely filed his Memorandum of Costs and Attorney Fees on October 28, 2011, two days after the Judgment was filed. I.R.C.P. 54(d)(5). Kimball has not filed any response, objection, or motion to disallow any part of Comack's Memorandum of Costs and Attorney Fees. Under I.R.C.P. 54(d)(6) Kimball had fourteen days from October 28, 2011, to file such response, objection, or motion to disallow. Kimball has failed to failed to file any pleading in response. "Failure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed." I.R.C.P. 54(d)(6). At oral argument on November 29, 2011, counsel for Kimball conceded he had no basis from which to contest the amount of attorney fees and costs requested. However, failure to timely object does not mean the trial court must automatically award the full amount specified in the memorandum (*Fearless Ferris Wholesale, Inc. v Howell,* 105 Idaho 699, 672 P.2d 577 (Ct.App.

1983)); the lack of an objection does not preclude the trial court from exercising its discretion in deciding whether and how much to award as costs and attorney fees. *Long v. Hendricks,* 109 Idaho 73, 705 P.2d 78 (Ct.App. 1985).

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).

Here, although the Court has not up to this point made an explicit prevailing party finding, there can be no conclusion but that Comack prevailed. The Judgment, entered October 26, 2011, awards Comack $43,152.62, and the Judgment orders Comack be awarded costs to be determined pursuant to the Idaho Rules of Civil Procedure. Judgment, p. 1. Since costs can only be awarded to the prevailing party, implicit in the Judgment is this Court's finding that Comack prevailed. The Court now makes explicit the fact that Comack is the prevailing party.

Following entry of the Judgment, Comack timely filed his Memorandum of Costs and Attorney Fees on October 28, 2011, as contemplated by I.R.C.P. 54(d)(5). Thereafter, Kimball filed a Motion for Judgment Notwithstanding the Verdict on November 9, 2011, but did not file an Objection to Costs as contemplated by I.R.C.P. 54(d)(6). Such a failure to object constitutes a waiver of the right to contest fees and costs. *Conner v. Dake,* 103 Idaho 761, 653 P.2d 1173 (1982). Rule 56(d)(6), which also applies to attorney fees pursuant to I.R.C.P. 54(e)(6), requires a party to object to the claimed costs of another party by filing a motion to disallow part or all of such costs, and "[f]ailure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed." I.R.C.P. 54(d)(6). Here, no objection to the items in the memorandum of costs was made.

Comack requests costs as a matter of right in an amount of $948.15:

1. Filing Fee of $88.00.
2. Service of Process Fees of $58.00.
3. Preparation of exhibits admitted in evidence fee of $183.40.
4. Deposition transcription fee of $419.05.
5. Deposition copy fee of $199.70.

Memorandum of Costs and Attorney Fees, pp. 1-2. Comack also requests the following costs as a matter of discretion, for a total of $1,062.17:

1. Mediator Fee of $1,004.93.
2. Blow up of Exhibit 24, $57.24.

Id., p. 2. Discretionary costs may include "long distance phone calls, photocopying, faxes, travel expenses and postage." *Auto Club Ins. Co. v. Jackson,* 124 Idaho 874, 880, 865 P.2d 965, 971 (1993). In reviewing a grant or denial of discretionary costs, the key issue is "whether the record indicates express findings by the district court as to whether a cost was necessary, reasonable, exceptional, and should be awarded in the interests of justice." *Hayden Lake Fire Protection Dist.,* 141 Idaho at 314. In *City of*

McCall v. Seubert, 412 Idaho 580, 130 P.2d 1118 (2006), the Idaho Supreme Court upheld a denial of discretionary costs where the trial court found the Seubert's and Intervenors' costs were "routine costs associated with modern litigation overhead…" and therefore not exceptional, despite being reasonable and necessary in a complex condemnation action. 412 Idaho 580, 588-89, 130 P.2d 1118, 1126-27. While the discretionary costs claimed by Comack are certainly reasonable and necessary, there has been no showing that they are "exceptional" and should be "awarded in the interests of justice." Accordingly, Comack's costs as a matter of right are granted, but not the discretionary costs.

B. Attorney Fees.

Comack also seeks an award of attorney fees against Kimball in the amount of $39,120.00, reasonably incurred in this action, pursuant to I.C §12-120(3). Memorandum of Costs and Attorney Fees, pp. 2, 5, 6. Again, Kimball has not responded or objected to the memorandum. Idaho Code § 12-120(3) grants the prevailing party the right to 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). Idaho Code § 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 Idaho148, 937 P.2d 1222 (1997) (where attorneys sued in a malpractice action had represented parties in the prior medical malpractice case, the actions were held to be so "intimately

intertwined" that both could be considered as having arisen out of the same transaction); *Mittry v. Bonneville County,* 38 Idaho 306, 222 P. 292 (1923) (Court held that all contracts for construction of a county courthouse were, from the county's perspective, one transaction because they had "one common purpose," the erection and completion of a courthouse).

In determining the amount of attorney fees, I.R.C.P 54(e)(3) states that the Court *shall* consider the following factors:

A) the time and labor required
B) The novelty and difficulty of the questions
C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law
D) The prevailing charges for like work
E) Whether the fee is fixed or contingent
F) The time limitation imposed by the client or circumstances of the case
G) The amount involved and the results obtained
H) The undesirability of the case
I) The nature and length of the professional relationship with the client
J) Awards in similar cases
K) The reasonable cost of automated legal research, if the court finds it reasonably necessary in preparing a party's case
L) Any other factor which the court deems appropriate in the particular case.

Each factor is amply addressed by counsel for Comack. Memorandum of Costs and Attorney Fees, pp. 4-7. Comack's attorney has kept track of his time on this case, which amounts to a minimum of 195.6 hours. *Id.,* p. 5. Comack's attorney claims an hourly rate of $200.00 the minimum which is reasonable for an attorney of his experience and skill. *Id.,* pp. 4-5. The Court finds that to be the case. Comack's attorney is extremely reasonable in requesting attorney's fees at an hourly rate of $200.00 per hour. Comack has thus set forth sufficient evidence for this Court to analyze the attorney fees under I.R.C.P. 54(e)(3)(A), (C) and (D). Comack's attorney

has a contingency fee agreement with Comack for 33% of the gross jury verdict if this matter were to go to trial. *Id.,* pp. 5-6. This addresses I.R.C.P. 54(e)(3)(E). As Comack's attorney correctly points out, the Court is not bound by that fee agreement in determining what is a "reasonable fee." *Nalen v. Jenkins,* 114 Idaho 973, 763 P.2d 1081 (Ct.App. 1988); *Decker v. Homeguard Sys.,* 105 Idaho 158, 666 P.2d 1169 (Ct.App. 1983). And, "while the results obtained" is a factor the Court must consider (I.R.C.P. 54(e)(3)(G)), there is no requirement under I.R.C.P. 54(e)(3) that the amount of the attorney fee award be proportionate to the size of the verdict. *Meldo, Inc. v. Hollytex Carpet Mills, Inc.,* 118 Idaho 265, 796 P.2d 142 (Ct.App. 1990). The Court finds no reason to limit the attorney fee award to the contingency fee contract. What is fair and reasonable in this case is the amount of time spent and a reasonable hourly rate. Strict adherence to the contingency agreement, in light of the amount of the verdict (which was all Comack sought), the amount of hours spent, and Comack's attorney's experience and skill, would only serve to penalize Comack's attorney. The Court finds that the remaining factors (I.R.C.P. 54(e)(3)(B), (F), (H), (I), (J), (K) and (L)), though addressed by Comack, are either not a factor in this case, or are neutral factors, factors which neither justify a departure upward or downward from the amount of attorney fees requested by Comack. The amount requested by Comack for attorney fees is entirely reasonable.

V. ORDER.

IT IS HEREBY ORDERED defendant Kimball Carpets, LLC's "Defendant's Motion for a Judgment Notwithstanding the Verdict" is DENIED.

IT IS FURTHER ORDERED the amounts requested in plaintiff Comack's Memorandum of Costs and Attorney Fees for Costs as a Matter of Right (in the amount of

$948.15) and for Attorney's Fees (in the amount of $39,120.00, reasonably incurred in this action, pursuant to I.C §12-120(3)) are awarded or GRANTED, and the amount requested as Discretionary Costs is DENIED.

IT IS FURTHER ORDERED counsel for Comack shall prepare a final Judgment consistent with this Memorandum Decision and Order.

Entered this 29th day of November, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Randall R. Adams	664-5380	Arthur M. Bistline	665-7290

_____
Jeanne Clausen, Deputy Clerk