

STATE OF IDAHO)
 County of KOOTENAI)
 FILED 11 | 13 | 2023)
 AT 1:40 O'clock P. 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**

JAY SHUITT and CLAUDIA FILEDS,)
 husband and wife,)
)
) *Plaintiffs,*)
 vs.)
GEORGE BALLING and MARY)
LANCASTER, husband and wife,)
)
) *Defendants.*)

Case No. **CV28-22-5357**

**MEMORANDUM DECISION ON
 DEFENDANT’S MEMORANDUM OF
 COSTS AND FEES**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On September 1, 2022, plaintiffs, through their attorneys Jonathon Hallin and Corey Metzner of Lukins & Annis, P.S. filed the Complaint in this action. On October 6, 2022, defendants, through their attorney, Mark Ellingsen of Witherspoon Kelley (now Witherspoon Brajchich McPhee, PLLC), filed an Answer to the Complaint.

On January 25, 2023, defendants filed a Motion for Summary Judgment. On February 22, 2023, this Court heard oral argument on Defendant’s Motion for Summary Judgment and on February 23, 2023, this Court entered its Memorandum Decision and Order Granting in Part and Denying in Part Plaintiffs’ Motion to Strike, Granting Defendants’ Motion to Strike, and Granting in Part and Denying In Part Defendants’ Motion for Summary Judgment.

On February 23, 2023, this Court scheduled this lawsuit for a three-day court trial to begin on November 6, 2023.

On July 13, 2023, counsel for plaintiffs filed a Motion for Leave to Withdraw as Counsel of Record, and a Declaration of Counsel in Support of Motion for Leave to

Withdraw as Counsel of Record. A hearing was held on August 1, 2023. At that hearing, counsel for plaintiff stated the reasons for withdrawal were lack of payment and correspondence from the plaintiffs. The Court granted the motion for withdrawal and indicated it would sign an order allowing withdrawal once presented. On August 8, 2023, this Court entered its Order Granting Leave to Withdraw as Counsel of Record, which showed a copy being sent by the Clerk of Court to plaintiffs at their listed email address of jayshuit52@gmail.com. The certificate of mailing supplied by plaintiffs' then attorney, and listed plaintiffs' address of 2600 E. Lookout Drive, Coeur d'Alene, ID 83815 (which is the property at the heart of this dispute, Complaint 2, ¶5), and also listed plaintiffs' email address of jayshit52@gmail.com. It was the email address which was used by the Clerk of Court in sending copies of the Order Granting Leave to Withdraw as Counsel of Record. That email address is consistent with the Confidential Case Information Sheet filed by the plaintiffs on September 1, 2022. This Court's Order Granting Leave to Withdraw as Counsel of Record ordered the plaintiffs to appoint another attorney within 21 days or to file notice with the court within 21 days that they will be self-represented in this action, consistent with Idaho Rule of Civil Procedure 11.3(b)(1)-(2) and (c)(1). Order Granting Mot. for Leave to Withdraw as Counsel of Record 2. Since the date of the entry of the Order Granting Motion for Leave to Withdraw as Counsel of Record on August 8, 2023, no attorney has appeared on behalf of plaintiffs and plaintiffs failed to file a notice with the court that they would be representing themselves in this action.

On September 6, 2023, defendants filed Defendants' Motion to Dismiss, which was based on plaintiffs' failure to secure an attorney or file notice of self-representation. On September 20, 2023, this Court heard oral argument on defendants' Motion to Dismiss, and at the conclusion of which, this Court granted Defendants' Motion to Dismiss. On September 27, 2023, this Court entered an Order Granting Defendants'

Motion to Dismiss, as well as a Judgment. The Court vacated the court trial scheduled for November 6, 2023.

On October 10, 2023, defendants filed a Declaration and Memorandum of Costs and Fees, and an Affidavit of Mark Ellingsen in Support of Memorandum of Costs and Fees. On October 30, 2023, counsel for defendants filed a Notice of Hearing, setting Defendants' Declaration and Memorandum of Costs for a hearing on November 27, 2023. The Court notes that at no time since the October 10, 2023, filing of the Declaration and Memorandum of Costs and Fees have either of the plaintiffs filed an objection to such. Thus, under Idaho Rule of Civil Procedure 54(e)(6), plaintiffs have waived any objection to contest defendants' request for attorney fees. *Conner v. Dake*, 103 Idaho 761, 761, 653 P.2d 1173, 1173 (1982); *Lowery v. Board of County Comm'rs*, 115 Idaho 64, 68, 764 P.2d 431, 435 (Ct. App. 1988), affirmed 117 Idaho 1079, 793 P.2d 1251 (1990).

II. STANDARD OF REVIEW.

The award of attorney fees rests in the sound discretion of the trial court and the burden is on the person disputing the award to show an abuse of discretion. *Anderson v. Ethington*, 103 Idaho 658, 660, 651 P. 2d 923, 925 (1982).

III. ANALYSIS

A. Prevailing Party Analysis; Defendants are Clearly the Prevailing Party.

This Court finds that defendants are entitled to an award of their attorney's fees and costs as a prevailing party in this lawsuit. Section 29 of the real estate purchase and sale agreement attached as Exhibit A to plaintiffs' Complaint states: "If either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal." Additionally, Idaho Rule of Civil Procedure 54(d)(1)(B) states that, "In

any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in 54(d)(1)(B), when provided for by any statute or contract.”

The only thing plaintiffs have prevailed upon in this litigation is they prevailed in part on their motion to strike. There were three objections made by plaintiffs to George Balling’s Affidavit in Support of Motion for Summary Judgment. Plaintiffs prevailed on one of those three objections. Mem. Decision and Order Granting in Part and Den. in Part Pls.’ Mot. to Strike, Granting Defs.’ Mot. to Strike, and Granting in Part and Denying in Part Defs.’ Mot. for Summ. J. 11-13. Viewing solely this motion, plaintiffs did not prevail, as they only won one of three arguments, losing two of those arguments. However, prevailing party is determined in the context of the entire litigation. *Summerfield v. St. Luke’s McCall, Ltd.*, 169 Idaho 221, 235, 494 P.3d 769, 783 (2021). Plaintiffs also survived summary judgment on four of the five grounds sought by defendants, but all that means is plaintiffs convinced this Court there was an issue of fact on four of their causes of action (or, stated differently, the defendants failed to convince this Court there was not an issue of fact on each of those causes of action). Defendants did convince this Court there was no dispute of fact and that plaintiffs’ cause of action for Violation of the Idaho Consumer Protection Act had to be dismissed as it was barred by the statute of limitations. Mem. Decision and Order Granting in Part and Den. in Part Pls.’ Mot. to Strike, Granting Defs.’ Mot. to Strike, and Granting in Part and Denying in Part Defs.’ Mot. for Summ. J. 24-28.

This Court finds that the combination of succeeding on one of their three motions to strike and successfully defending the motion for summary judgment on four of five grounds, does not make plaintiffs the prevailing party, it does not cause defendants to not be the prevailing party, and it does not result in defendants prevailing in part and not

prevailing in part. This is because successfully defense of a summary judgment motion simply allows that party to “live to see another day”; that party will get their day in trial. Here, plaintiffs were scheduled to have their day in court; they were set to have their three-day court trial. However, they gave up on this litigation in its entirety by a) not hiring a different attorney or b) even filing with the Court a statement that they would proceed on their own without an attorney. Giving up on litigation plaintiffs initiated is not “prevailing” by the plaintiffs. However, the act of giving up by the plaintiffs does result in this Court finding defendants are the prevailing party. The filing of a lawsuit is a serious matter. The party being sued must undergo the stress of litigation. The party being sued must choose to find and hire an attorney if they wish to be represented, or choose the fool’s errand of representing themselves in a commercial contract litigation where they will have to pay the prevailing party’s litigation costs and fees if they are not successful in their defense. All of this was set in motion by the choices of the plaintiffs. All of this ended by the choices of the plaintiffs in not continuing this litigation. There can be no other interpretation by this Court other than that the defendants are the prevailing party as compared to the plaintiffs.

B. Costs and Fees Sought.

1. Costs.

The only costs sought by defendants are the \$140.76 filing fee. This is a cost as a matter of right and is awarded to the defendants against the plaintiffs.

2. Fees.

Defendants request a total of \$16,751.76 attorney fees against the plaintiffs. Three different attorneys spent a total of 62.8 hours defending this case. This Court specifically finds the amount of hours spent on this successful defense is reasonable, if not unexpectedly low, given the fact that this case went to summary judgment and

ended on defendants' successful motion to dismiss. The Court finds the hourly rate of \$400.00 for Mr. Ellingsen to be on the high side in this community given his experience. However, it is not significantly high to warrant a downward departure by this Court from the amount sought by defendants. The hourly rates of the other attorney and the paralegal are reasonable. As to all the other factors enumerated under Idaho Rule of Civil Procedure 54(e)(3)(A)-(L), the Court has considered all of those factors and finds that none of them would result in either an upward departure or a downward departure of the amount sought by defendants.

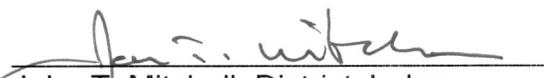
IV. CONCLUSION AND ORDER.

For the reasons stated above, defendants are the prevailing party in this litigation and as such, defendants are awarded costs as a matter of right in the amount of \$140.76, and are awarded attorney fees in the amount of \$16,751.76.

IT IS HEREBY ORDERED defendant are the prevailing party in this litigation.

IT IS FURTHER ORDERED defendants are awarded costs as a matter of right in the amount of \$140.76, and are awarded attorney fees in the amount of \$16,751.76.

Entered this 12th day of November, 2023.

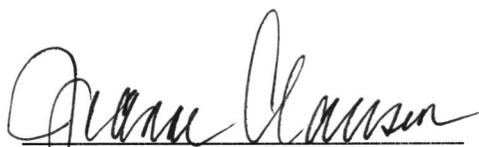


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 13th day of November, 2023, a true copy of the foregoing was mailed postage prepaid and by email to defendants, and by email or plaintiffs' counsel as follows:

Mark Ellingsen, Witherspoon Brajchich McPhee,
PLLC mellingsen@workwith.com
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Jeanne Clausen, Deputy Clerk