

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 SHOSHONE**

**GEORGE HEMPHILL, d/b/a NORTHSIDE )  
ELECTRIC AND SUPPLY, )**

*Plaintiffs/Respondents, )*

vs. )

**OSCAR W. PAGAN, Sr. and BASILISA )  
PAGAN, husband and wife, )**

*Defendants/Appellants. )*

Case No. **(W) CV 2007 11**

**MEMORANDUM DECISION AND  
ORDER ON  
PLAINTIFF'S/RESPONDENT'S  
MEMORANDUM OF COSTS AND  
AFFIDAVIT OF ATTORNEY'S FEES  
ON APPEAL**

**I. PROCEDURAL BACKGROUND.**

This is a commercial dispute. Specifically, this decision concerns attorney's fees pursuant to I.C. § 12-120(3) regarding that commercial dispute.

On January 8, 2009, this Court affirmed the decision of Magistrate Judge McFadden in all aspects *except* as to the issue of the *amount* of attorney fees; and ordered that this Court on appeal will conduct *de novo* review *only* on the issue of the *amount* of attorney's fees that are sought while this case was in the Magistrate Division (i.e., before Pagan filed his Notice of Appeal). I.R.C.P. 83(u). This Court noted that procedurally such will occur as follows:

The Pagans will have fourteen days from their receipt of this Memorandum Decision and Order on Appeal, within which to file an objection via I.R.C.P. 54(e)(6) (known as a Motion to Disallow Costs pursuant to I.R.C.P. 54(d)(6)), to the amount of attorney fees requested in Hemphill's Memorandum of Costs and Affidavit RE: Attorney Fees, both filed May 20, 2008. The fourteen days is pursuant to I.R.C.P. 54(d)(6). If

no Motion to Disallow or objection is timely filed, Judge McFadden's determination will stand. If an objection is timely filed, this Court (not the Magistrate) will conduct an evidentiary hearing pursuant to I.R.C.P. 56(e)(6) [54(e)(6)], only as to the *amount* of those fees. This Court is free to determine the amount of those fees up to the amount sought in Hemphill's Memorandum of Costs and Affidavit RE: Attorney Fees.

Memorandum Decision and Order on Appeal, p. 19. This Court also ordered that Hemphill is the prevailing party on appeal; Hemphill is entitled to attorney fees on appeal pursuant to I.C. §12-120(3) and § 12-121; and the issue of the amount of attorney fees and costs *on appeal* will occur pursuant to the Idaho Rules of Civil Procedure and Idaho Appellate Rules. *Id.*

On January 14, 2009, Hemphill filed: a "Memorandum of Costs"; an "Affidavit Re: Attorney Fees"; and a "Supplemental Affidavit Re: Attorney Fees." Those costs and fees pertain, appropriately, to those costs and fees incurred in Pagan's appeal. Hemphill is timely, pursuant to this Court's January 8, 2009, Memorandum Decision and Order on Appeal. Pagan thus had fourteen days pursuant to I.R.C.P. 54(d)(6), to file his objection to Hemphill's requested costs and fees on appeal. Pagan has not filed any separate objection to Hemphill's requested costs and fees on appeal, but in his "Notice of Objection" and a "Memorandum in Support of Objection", filed January 20, 2009, Pagan discussed costs and fees on appeal.

On January 20, 2009, Pagan filed a "Notice of Objection" and a "Memorandum in Support of Objection." Pagan's Notice of Objection and Memorandum pertain to the "May 12, 2008 (filed May 28, 2008) Summery [sic] Ruling of Award of Attorney fees and Cost". Notice of Objection, p. 1; Memorandum in Support of Objection, p. 2. Pagan objects to the imposition of any attorney fees and costs above the November 6, 2007. award of \$1,115.00, plus \$175.00 in attorney fees, entered by Judge McFadden. Memorandum in Support of Objection, p. 2. Pagan takes issue with any award of fees

incurred before October 31, 2007 (*Id.*, p. 3), the \$3,200.00 fees and \$143.00 costs awarded by Judge McFadden in his order filed May 28, 2008 (*Id.*, p. 4), and any award of costs and fees arising out of the instant appeal. *Id.* Pagan makes a broad, fundamental fairness argument, but does not set forth any specific grounds or basis for his objection. Pagan is timely, pursuant to this Court's January 8, 2009, Memorandum Decision and Order on Appeal.

On February 2, 2009, Hemphill filed a "Motion for Settlement of Attorney Fees." In that motion, Hemphill requests this court schedule an evidentiary hearing regarding the amount of attorney fees to be awarded to Hemphill on appeal and before the Magistrate Division. Motion for Settlement of Attorney Fees, p. 2. Alternatively, Hemphill asks the Court to settle the amount of attorney fees to be awarded to Hemphill on appeal and before the Magistrate Division, "since PAGANS have served notice upon the Court to rule in his absence regarding his Objection to Attorney fees. See page 5 of PAGAN's Memorandum in Support of Objection." Motion for Settlement of Attorney Fees, p. 2. As set forth below, this Court finds no hearing is necessary, and the issue of fees before the magistrate and fees and costs on appeal are at issue.

## **II. ANALYSIS.**

### **A. Introduction.**

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). This Court appreciates that, and operates within the bounds of that discretion.

In *Nanney v. Linella*, 130 Idaho 477, 943 P.2d 67 (Ct.App. 1997), the Court of Appeals analyzed the significance of I.R.C.P. 7(b)(1) in an objection to attorney fees

under I.R.C.P. 54(d) and (e). 130 Idaho 477, 481-482, 943 P.2d 67, 71-72. The Court stated:

...I.R.C.P. 7(b)(1), which requires that motions “state with particularity the grounds therefore” and that they “set forth the relief or order sought.” This requirement of particularity is “real and substantial,” and good practice “demands that the basis of a motion and the relief sought shall be clearly stated” so that the other party will not suffer surprise or prejudice. *Patton v. Patton*, 88 Idaho 288, 292, 399 P.2d 262, 264 (1965). See also *Mason v. Tucker and Assocs.*, 125 Idaho 429, 432, 871 P.2d 846, 849 (Ct.App. 1994). Petersen’s motion satisfies neither the “particularity” nor the “relief or order sought” criteria of Rule 7(b), for it neither tells the claimant what grounds for objection he must be prepared to meet at the hearing nor discloses whether the relief sought is complete disallowance of all requested fees and costs or only a portion thereof.

*Nanney*, 130 Idaho 477, 482, 943 P.2d 67, 72. Without stating his objection with particularity, Pagan has waived his objection to any particular amount. *Wefco Inc., v. Monsanto Co.*, 111 Idaho 55, 720 P.2d 643 (Ct.App. 1986). An evidentiary hearing is discretionary, “The court may conduct an evidentiary hearing, if it deems it necessary, regarding the award of attorney fees.” This Court exercises its discretion and finds an evidentiary hearing is unnecessary because: 1) Pagan has failed to specify with “particularity” his objections as to the amount of attorney fees; 2) Pagan has failed to notice a hearing himself; 3) Pagan has told this Court he won’t attend any further hearing; and 4) a hearing would only add to the attorney fees awarded against Pagan.

Here, Pagan does not provide Hemphill or this Court with specific grounds for the objection beyond his argument that fees and costs totaling \$7,619.72 on an amount in controversy of \$260.28 is not fair and just. Memorandum in Support of Objection, p. 5. Additionally, Pagan has not properly noticed up his objection for hearing by the Court, but rather asks the Court to “rule in the best interest of fairness and justice” in his absence as he is moving to the Philippines and “will be unable to attend any further

Court proceedings in the USA.” *Id.*

Because Pagan has not provided Hemphill or the Court with the grounds for objection that Hemphill must be prepared to meet, nor a hearing date at which to do so, this Court must exercise its discretion and determine Hemphill’s costs and fees.

**B. Prior Awards of Attorney Fees.**

First of all, regarding the award of attorney fees by Judge McFadden in his order filed May 28, 2008, this Court stated: “This Court is free to determine the amount of those fees up to the amount sought in Hemphill’s Memorandum of Costs and Affidavit RE: Attorney Fees.” Memorandum Decision and Order on Appeal, p. 19. Hemphill sought \$3,545.00 in attorney fees and \$138.47 in expenses and \$143.00 in costs. Affidavit RE: Attorney Fees, filed May 20,2008. Judge McFadden exercised his discretion and awarded \$3,200.00 in attorney fees (a reduction in the amount of \$345.00 compared to what Hemphill sought), \$143.00 in costs (the amount sought), and nothing for expenses. While this Court may award more than what Judge McFadden awarded, up to the amounts Hemphill sought, this Court declines to do so. Judge McFadden obviously gave this issue thought and made a reduction in the amounts sought by Hemphill. While Pagan has now objected, Pagan has not provided any “particularity” to his objection. He has not objected to the hourly amount charged by Hemphill’s attorney, nor to the number of hours spent up until the time of Judge McFadden’s May 28, 2008, Judgment. Nor has Pagan made any other objection as to any of the I.R.C.P. 54(e)(3)(A)-(K) criteria, or any other objection of any kind, other than to state the amounts sought are not fair and just “due to the low dollar amount of the judgment.” Memorandum in Support of Objection, p. 4. That is an objection to criteria (G) in I.R.C.P. 54(e)(3), “the amount involved and the results obtained.” As noted by

Pagan, Judge McFadden had those same concerns. *Id.* The “amount involved” is \$260.28, the amount Judge McFadden found to be the “extras” in Hemphill’s contract to do electrical work for Pagan. What Pagan fails to realize is that Judge McFadden addressed those concerns in his reduction of the amount sought. What Pagan also fails to realize is that while he states that he “has never disputed that [Hemphill] did the job and [Pagan] has always agreed that [Hemphill] should be paid the agreed upon price of \$940.00” (Memorandum in Support of Objection, p. 2), **at all times Pagan has failed to pay Hemphill ANYTHING!** This is a commercial transaction, and Pagan has to comply with the attorney’s fees provision regarding commercial transactions. In light of Idaho Code § 12-120(3), in a legal dispute over a commercial transaction, one really needs to evaluate prior to litigation, or at least early on in litigation, *who is likely to prevail*, as it truly is winner take all. With Pagan *at all times* refusing to pay *even what Pagan admitted was due*, (\$1,115.00 pursuant to the Order Re: Partial Summary Judgment entered November 6, 2007), Pagan set himself up for all these attorney fees.

Judge McFadden took into account “the amount involved and the results obtained” in deciding attorney fees. Judge McFadden did not abuse his discretion. Pagan has offered no other salient objection to the attorney fees awarded by Judge McFadden in the Judgment filed May 28, 2008.

### **C. Attorney Fees on Appeal.**

Hemphill is the prevailing party on appeal. Thus, this being an appeal from a commercial transaction, Hemphill is entitled to attorney fees on appeal. Pagan has objected to those attorney’s fees sought on appeal by Hemphill, in the same fashion noted above...only an objection as to fairness, and the original amount involved, \$260.28, as found by Judge McFadden. Memorandum in Support of Objection, p. 4.

Again, Pagan ignores that *at all times* he has refused to pay Hemphill one cent, refused to pay *even what Pagan admitted was due*, (\$1,115.00 pursuant to the Order Re: Partial Summary Judgment entered November 6, 2007), and by so doing, Pagan set himself up for all these attorney fees.

This Court must still determine the reasonableness of those fees. This Court finds the time and labor required (I.R.C.P. 54(e)(3)(A)) as set forth in the Supplemental Affidavit Re: Attorney Fees; Memorandum of Costs, Exhibit "A", (15.3 hours), to be *very* conservative, given the briefing involved on appeal and oral argument. This Court finds Mr. Branstetter's (Hemphill's attorney) hourly rate (\$175.00/hour) very reasonable, and likely low, given "the prevailing charges for like work" (I.R.C.P. 54(e)(3)(D)). This Court is familiar with Mr. Branstetter's experience, skill and his abilities in contractual disputes (I.R.C.P. 54(e)(3)(C) and (D)), and finds his experience, skills and abilities to be above average or superior to the average attorney in the area. This Court agrees with Hemphill's attorney's claim that this appeal was pursued by Pagan frivolously and without foundation in law or fact. Supplemental Affidavit Re: Attorney Fees, p. 3; I.R.C.P. 54(e)(3)(H). Hemphill's attorney has represented Hemphill since 1980 and is the exclusive attorney Hemphill uses. Supplemental Affidavit Re: Attorney Fees, p. 3; I.R.C.P. 54(e)(3)(I). Hemphill's attorney claims the "other factors" this Court should consider are:

All attorney fees and expenses that were incurred are a direct result of unreasonable positions taken by the Appellant. The Appellant has acknowledged on multiple occasions at least \$940.00 is due the Respondent and a separate Judgment was entered in November 6, 2007 for that amount plus a small award of attorney fees. Despite having acknowledge amounts are due and owing and a Judgment entered for the initial amount, Appellant has not satisfied the Judgment. This is indicative of the unwillingness of Appellant to satisfy his obligations owing to the Respondent and the reason that that Respondent continues to incur attorney fees and expenses in obtaining payment for the services provided

to Appellant. Appellant has maintained an unreasonable meritless position throughout the proceedings.

Supplemental Affidavit Re: Attorney Fees, p. 4; I.R.C.P. 54(e)(3)(L). This Court agrees with these “other factors”. Keep in mind NO APPEAL HAS BEEN TAKEN from the November 6, 2007, Judgment. Additionally, the Court finds that Pagan’s appeal and simultaneous refusal to pay a judgment from which Pagan did not appeal, combined with the fact that Pagan has now told Hemphill and the Court that he has left for the Philippines and is not coming back (Memorandum in Support of Objection, p. 5), smacks of an attempt to avoid responsibility for the judgment from which Pagan did not appeal, plus the delay and expense Pagan has caused Hemphill on Pagan’s appeal.

Based upon criteria in I.R.C.P. 54(e)(3)(A)-(D), (H), (I) and (K), an **upward** departure of the fees sought is warranted.

This was not a fixed or contingent fee case, but rather the hourly rate was fixed and fees were based upon hours worked. Supplemental Affidavit Re: Attorney Fees, p. 2; I.R.C.P. 54(e)(3)(E). There were no time limits imposed by the client. Supplemental Affidavit Re: Attorney Fees, p. 2; I.R.C.P. 54(e)(3)(F). There was no automated research. Supplemental Affidavit Re: Attorney Fees, p. 4; I.R.C.P. 54(e)(3)(K). These are **neutral** factors.

The only factors that *could* justify a **downward** departure of the fees sought, is I.R.C.P. 54(e)(3)(G) “The amount involved and the results obtained”, and I.R.C.P. 54(e)(3)(J), “awards in similar cases.” This was the factor used by Judge McFadden to award less than the amount sought almost a year ago. However, on appeal, the light for Pagan must at some point have gone on, that this *is* a commercial dispute, and that there is no legal or factual basis *brought by Pagan* to support the appeal from Judge McFadden’s decision. The *only* defect in Judge McFadden’s decision was the timing of

the Judgment on May 28, 2008, relative to Hemphill's Affidavit RE: Attorney Fees and Memorandum of Costs. Memorandum Decision and Order on Appeal, p. 11. That defect was discovered *by this Court*, not by Pagan on his appeal, and that defect has now been remedied due to the fact that Pagan was given the entire time due to object to the amount of attorney fees requested by Hemphill, and Pagan failed to object with specificity. While the amount of the award is a factor under I.R.C.P. 54(e)(3)(G) and (J), as noted by Hemphill, "The Rules of Civil Procedure and case law do not indicate that the amount of an attorney fees award must be proportionate to the size of the damage award. *Meldco, Inc., v. Hollytex Carpet Mills, Inc.*, 118 Idaho 265, 796 P.2d 142 (Ct.App. 1990). This Court finds no reason to make a downward adjustment of the attorney fees sought as a result of the factors in I.R.C.P. 54(e)(3)(G) and (J).

This Court finds that while attorneys fees are sought by Hemphill in the amount of \$2,677.50, given the lack of any reason for a downward departure, and the several reasons for an upward departure from the amounts claimed, an award of \$3,200.00 for attorney fees on appeal is justified. Expenses in the amount of \$92.22 are denied as a discretionary cost under I.R.C.P. 54(d)(1), and no showing has been made as to the exceptional nature of such expenses.

### **III. ORDER.**

**IT IS HEREBY ORDERED** that the Attorney's Fees determined by Magistrate Judge McFadden in the Judgment filed on May 28, 2008, is **AFFIRMED**.

**IT IS FURTHER ORDERED** that all other decisions of Magistrate Judge McFadden are affirmed.

**IT IS FURTHER ORDERED** that Hemphill's request for attorney fees on appeal is **GRANTED**, and Hemphill is entitled to attorney fees on appeal in the amount of

\$3,200.00.

**IT IS FURTHER ORDERED** that Hemphill's request for expenses on appeal is DENIED.

**IT IS FURTHER ORDERED** that Hemphill prepare a Judgment consistent with this order and in these amounts, making any necessary interest calculations. Following presentation of such Judgment, and any signing of such Judgment, this matter shall be remanded to Magistrate Division.

Entered this 3<sup>rd</sup> day of February, 2009.

\_\_\_\_\_  
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of February, 2009, 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>	
Michael Branstetter	208 752-0951	Honorable Patrick R. McFadden

**Oscar W. Pagan, Sr.**  
**Basilisa Pagan**  
**6317 Courcelles Parkway**  
**Coeur d'Alene, ID 83815**

\_\_\_\_\_  
Jeanne Clausen, Deputy Clerk