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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 APPEAL**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

Plaintiff/respondent George Hemphill (Hemphill) is an electrical contractor. Hemphill commenced this action on January 9, 2007, alleging defendant/appellant Oscar Pagan (Pagan) owed Hemphill \$1,242.65 for electrical material, supplies, and labor performed in the spring of 2006. In his Answer, Pagan seemed to admit that Hemphill performed the electrical work but denied there was any agreement or authorization for Hemphill to perform any work. However, Pagan in his Answer acknowledged that the amount discussed between Pagan and Hemphill for the electrical work was \$940.00. At no time has Pagan paid Hemphill the \$940.00.

At all times Hemphill has been represented by an attorney, and Pagan has chosen to represent himself. Oscar Pagan can only represent himself, and it appears that his wife Basilisa Pagan has not appeared in this matter in any way. She did not appear at the trial, and she did not appear at oral argument on the appeal.

On October 31, 2007, a hearing was held on Hemphill's Motion for Summary Judgment. After the hearing, on November 6, 2007, Magistrate Judge Patrick R. McFadden granted partial summary judgment in the amount of \$940.00, the undisputed portion of the amounts claimed, along with \$175.00 attorney's fees.

Trial was held on May 12, 2008, on the remaining issues: the additional \$260.00 Hemphill claimed was due beyond the \$940.00 agreed to; interest; and attorney's fees. At the conclusion of the trial, Judge McFadden ruled for Hemphill in the amount of \$260.28. Judge McFadden found Hemphill the prevailing party on all claims, entitling him to fees, costs, and interest. Tr. pp. 44, L. 17 – p. 46, L. 23. Following the trial, on May 20, 2008, Hemphill's attorney filed an Affidavit RE: Attorney Fees, a Memorandum of Costs and a proposed Judgment. The amount of attorney's fees sought by Hemphill was \$3,545.00, and costs were sought in the amount of \$143.00. Eight days later, on May 28, 2008, Judge McFadden entered a judgment and awarded attorney's fees in the amount of \$3,200.00 and costs in the amount of \$143.00, in favor of Hemphill and against Pagan. Judge McFadden also awarded prejudgment interest in the amount of \$111.92. Judgment in the total amount of \$3,454.92 was entered on May 28, 2008. This judgment was then corrected and an Amended Judgment was entered *nunc pro tunc* on June 3, 2008, in the amount of \$3,717.20.

On June 16, 2008, Pagan filed his Notice of Appeal. In his Reply Brief, Hemphill seeks attorney's fees on appeal pursuant to Idaho Appellate Rule 41, Idaho Code §12-120(3), and §12-121. In his Notice of Appeal, Pagan lists his issues on appeal, which this Court has summarized as:

1. Hemphill failed to submit evidence, proof, or documentation to the Court proving or substantiating his claim
2. There exists no contract upon which this action for breach can rest

3. Hemphill did not submit a signed, written contract/document of agreement or authorization regarding the work performed
4. Hemphill did not meet with Pagan and receive instruction to perform additional work, despite having testified to the contrary
5. Hemphill did not submit evidence or documents of agreement proving that this meeting regarding additional work took place
6. Hemphill did not submit evidence or documents of agreement proving he advised Pagan of additional charges beyond the original agreement to \$940.00
7. The Magistrate erred in denying Pagan's Motion to Dismiss
8. The Magistrate erred in allowing Hemphill to testify to an alleged journal of daily activities which had not been provided in discovery or entered into evidence
9. The magistrate made no attempt to accommodate Pagan's hearing impairment, and as a result, Pagan was unable to hear or object to testimony regarding the journal.
10. Hemphill admitted and testified that he had no evidence of proof and submitted none.

Notice of Appeal, pp. 1-3. Both parties filed briefs, and the matter was heard before this Court on appeal on January 6, 2009. At the conclusion of oral argument on appeal, this Court took the matter under advisement.

At the beginning of oral argument this Court admonished Mr. Pagan that he was to be held to the same standards as a licensed attorney (*Golay v. Loomis*, 118 Idaho 387, 797 P.2d 95 (1990)), that this Court had to assume Pagan had a working knowledge of Idaho case law, Idaho statutes and the Idaho Rules of Civil Procedure and the Idaho Appellate Rules (even if that were not the case), and that this Court could not assist him in any way or give him any legal or other advice.

II. ANALYSIS.

A. STANDARD OF REVIEW.

The Idaho Rules of Civil Procedure state appeals from the magistrate's division shall be heard by the district court as an appellate proceeding. If the record on appeal is not adequate, the district court may order a trial *de novo* or remand the matter to the magistrate's division. I.R.C.P. 83(b). Thus, as the Idaho Supreme Court has stated, in

an appeal from a magistrate court's decision, the district court should proceed in one of two ways: "(1) the district court could act as an appellate court and consider the record from the magistrate court, yet hear new evidence on matters not addressed below because they occurred after the appeal was filed; or (2) the district court could choose to wipe the slate clean and conduct a 'full' trial de novo." *Leavitt v. Leavitt*, 142 Idaho 664, 669, 132 P.3d 421, 426 (2006). I.R.C.P. 83(u) sets forth the scope of appellate review on appeal to the District Court from the magistrate division.

- (1) Upon an appeal from the magistrate's division of the district court, not involving a trial de novo, the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court under the statutes and law of this state, and the appellate rules of the Supreme Court.
- (2) Upon appeal from the magistrate's division of the district court involving a trial de novo, the district court shall render a decision in the action as a trial court as though the matter were initially brought before the district court.

I.R.C.P. 83(u). When the Idaho Supreme Court reviews the decision of a district court acting in its appellate capacity over the magistrate division, the Court reviews the magistrate court's decision independently of, but with due regard for, the district court's intermediate appellate decision. *State v. Doe*, 140 Idaho 271, 273, 92 P.3d 521, 523 (2004); *Marchbanks v. Roll*, 142 Idaho 117, 119, 124 P.3d 993, 995 (2005). The Supreme Court will uphold the magistrate court's findings of fact supported by substantial and competent evidence and exercises free review with regard to conclusions of law. *Doe*, 140 Idaho 271, 273, 92 P.3d 521, 523.

This Court on appeal finds no reason to conduct a trial *de novo*, except as to the *amount* of attorney fees as explained below. While appellant Pagan has strayed from the record in his briefs on appeal, and especially at oral argument on appeal, Pagan has

not brought forth any admissible “new evidence on matters not addressed below because they occurred after the appeal was filed,” as mentioned above in *Leavitt v. Leavitt*, 142 Idaho 664, 669, 132 P.3d 421, 426 (2006).

B. ISSUES ON APPEAL (OTHER THAN ATTORNEY FEES).

In his Memorandum in Support of Defendant’s Appeal and in his Appellant Supplemental [sic] Brief, Pagan adds additional issues other than those set forth in his Notice of Appeal. Pagan argues: the Judgment was “unjustified” because Hemphill had no evidence to substantiate Hemphill’s claim (this is the overarching complaint at trial and on appeal); the Magistrate erred in denying dismissal under I.R.C.P. 12 (Memorandum in Support of Defendant’s Appeal, pp. 2, 7); the Magistrate erred in refusing to admit the affidavit of Connie Amstutz who allegedly witnessed the \$940.00 agreement (*Id.* at pp. 2, 6); Hemphill was improperly permitted to testify regarding a journal allegedly documenting authorization for the additional \$260.00 (*Id.* at p. 4, Appellant’s Supplemental Brief, p. 4); the reason Pagan didn’t object was he is hearing impaired and unable to hear the evidence that Pagan later claims was inadmissible (Memorandum in Support of Defendant’s Appeal, p. 3); and the judgment was unfair, unreasonable and excessive (Appellant’s Supplemental Brief, p. 2).

The issue of dismissal of Hemphill’s claim was addressed by Judge McFadden on March 5, 2008, when he stated on the record that the issues raised are issues for trial and denied Pagan’s Motion to Dismiss. Ultimately, Pagan has admitted that the \$940.00 award and \$175.00 in attorney’s fees originally granted were proper, but argues no evidence was provided to support the existence of any:

[P]roof, written or otherwise, that would prove or substantiate that Appellant personally met with respondent at Appellant’s property located at 918 Maple St., Wallace Idaho on March 6, 2006 and requested Respondent to perform additional work.

And/or any sort of proof, written or otherwise, that would prove or substantiate that Respondent did on March 6, 2006, advise Appellant of any additional charges for any alleged additional work on Appellant's properly beyond his original agreement of \$940.00

Appellant's Supplemental Brief, pp. 7-8.

Pagan appears to make a due process argument regarding his hearing impairment being the reason why he did not object to Judge McFadden's allowing Hemphill to testify as to his journal/activity log, and the reason Pagan claims the journal/activity log was inadmissible was it was never provided to him. *Id.* at 10. Both claims are without basis.

The first claim that Pagan was unable to make the objection because of his hearing impairment was not preserved for appeal and it is not supported by the record. Pagan states: "Respondent and his Attorney clearly took advantage of Appellant's hearing impairment and gave false testimony as they were aware of Appellant's inability to hear the testimony." Appellant's Supplemental Brief, p. 10. Pagan states that he failed to object to the testimony regarding the journal as he was unable to hear it. *Id.* This Court has reviewed the entire transcript of the May 12, 2008, oral argument. At no time during the May 12, 2008, trial did Pagan tell Judge McFadden that he had difficulty hearing. In response to that deficiency, at the January 6, 2008, oral argument on appeal, Pagan argued that he had told Judge McFadden at the March 5, 2008, hearing that he had difficulty hearing. That claim by Pagan is not borne out by the Court Clerk's minutes at that hearing. It is Pagan's burden as the appellant to provide a transcript that would support his claim. But even if Pagan had informed Judge McFadden on March 5, 2008, as to his difficulty hearing, Pagan made absolutely no mention on the day of trial, May 12, 2008. A review of the transcript shows Pagan had no difficulty

hearing the judge or witnesses, as he appropriately responded to questioning by Judge McFadden. Tr. p. 2, Ll. 20-23. Pagan has wholly failed to preserve this issue for appeal.

The second claim is equally baseless. Pagan states that he has never received a copy of the log, despite Hemphill having testified to the contrary. Appellant's Supplemental Brief, p. 10. This journal/activity log was submitted as Exhibit D to Pagan's Memorandum in Support of Appeal, and was clearly provided in Plaintiff's Response to Defendants' Second Request for Discovery.

In any event, the journal was not admitted in evidence, but appears to have been used pursuant to Idaho Rule of Evidence 612, a Writing or Object Used to Refresh Memory. Rule 612 states:

If while testifying, a witness uses a writing or object to refresh the memory of the witness, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

I.R.E. 612(a).

A witness may use virtually anything to refresh his or her memory; the material used need not be admissible themselves. *Baker v. Boren*, 129 Idaho 885, 893, 934 P.2d 951 (Ct.App. 1997). *Baker* involved a contract dispute over remodeling of a residence and the plaintiff's witness relying on notes when the record showed that plaintiffs did not keep time cards, daily diaries, or make entries into ledgers regarding information at the time the work was allegedly completed; the Court held that it was error to allow a witness to testify from notes under the guise of refreshing recollection. *Id.* at 892. In *Baker*, the Court of Appeals noted that two items of foundation must be laid before a witness may refer to notes to refresh his memory: (1) the need to refresh his or her memory and (2) that the notes will assist in refreshing his memory. *Id.* at 892.

“The witness may not testify directly from the notes, but can use them to assist in recollection.” *Id.*, citing *Hall v. American Bakeries Co.* 873 F.2d 1133, 1136 (8th Cir. 1989). The Court held that the district court’s allowing the use of notes to be error, but held that the error was not so prejudicial to the Borens as to warrant reversal. *Id.* at 893.

Here, Hemphill testified that he did keep such records regularly and that the journal had been provided to Pagan in discovery. It does not appear from the transcript that Hemphill was improperly testifying directly from his notes, but rather the notes refreshed his recollection of the disputed meeting on March 6, 2006. Alternatively, the hearsay exception at I.R.E. 803(5) would have permitted a witness to testify as to a recorded recollection where a writing is being offered for its truth and the writing was made at a time when the matter was fresh in the memory of a witness, correctly reflecting his or her knowledge.

Pagan’s argument regarding the Court’s improperly denying admission of the testimony of Ms. Amstutz is also without merit. Judge McFadden stated that he would sustain any objections regarding testimony of what another witness had to say. Tr. p. 35, Ll. 20-22. Pagan attempted to read from Amstutz’ affidavit regarding the meeting Pagan and Hemphill had on February 20, 2006. It was during this meeting that Hemphill allegedly agreed to perform all work for \$940, and purportedly there was no mention of any additional charges for additional electrical lines. Exhibit B to Appellant’s Brief, p. 2, ¶ 4. This “Affidavit”, filed on January 23, 2008, along with Pagan’s Memorandum in Support of Defendants’ Motion to Dismiss Further Summary Judgment, is not dated or notarized. The Idaho Rules of Evidence are directly on point, and no hearsay exception exists which would permit Pagan to proffer a statement by an out-of-court declarant into evidence to prove the truth of the matter asserted. I.R.E. 801, 802.

Thus, Judge McFadden's prohibiting Pagan from testifying as to Amstutz' affidavit was entirely proper. Even if the "affidavit" were allowed, it does not address directly the existence of any agreement on March 6, 2006, regarding the additional work to be done, which was the issue at trial (the "affidavit" simply stated that at a meeting on February 20, 2006, Hemphill had not mentioned any charges above and beyond the \$940.00 agreed to by Pagan).

All of Pagan's objections to evidentiary rulings made by Judge McFadden are without merit. When reviewing the trial court's evidentiary rulings, the appellate court applies an abuse of discretion standard. *Edmunds v. Craner*, 142 Idaho 867, 136 P.3d 338 (2006). Pagan has failed to demonstrate an abuse of discretion as to any evidentiary ruling made by Judge McFadden.

Based on the evidence presented by Hemphill at the court trial before him, Judge McFadden found that Hemphill established entitlement to recovery, and that a meeting did take place during which extra work was authorized by Pagan. Tr. p. 44, Ll. 3-10. Pagan's focus on the lack of a writing was misplaced as Idaho law does not require a writing. Idaho Code §§ 29-105, 9-505. Oral contracts are allowed. As shown immediately below, Judge McFadden recognized that and informed Pagan of that in court. Tr. p. 43, Ll. 11-14.

Hemphill claimed there was an oral contract; Pagan denied there was an oral contract. Judge McFadden made credibility determinations, and found Hemphill to be more credible than Pagan. Judge McFadden stated:

But, in any event, I believe that Mr. Hemphill has in fact established his entitlement to recovery today. I believe that a meeting did in fact take place between Mr. Hemphill and Mr. Pagan. I believe that the extra work was authorized. I understand that it was kind of on a time and materials type basis. I find that the extra work, the \$260.08, was in fact reasonably incurred. I don't think that the prices are out of line for the work that was

done.

For that reason, the other thing that I am going to state, is a matter of law, it is not a legal requirement that there be a written contract. A verbal contract, a verbal agreement was reasonable. I also find that Mr. Pagan's property benefitted from the use and services of Mr. Hemphill's work.

Tr. p. 44, Ll. 3-16. That factual finding of Judge McFadden is more than supported by substantial competent evidence.

In Pagan's Appellant Supplemental Brief, Pagan raises an issue for the first time on appeal. Pagan claims he was gone from this area on a trip to the Philippines from March 3, 2006, and returned April 4, 2006. Appellant Supplemental Brief, p. 5. Pagan's argument is that he couldn't have consented to any additional electrical work by Hemphill if Pagan was gone during that time. Not only did Pagan violate Idaho Appellate Rule 35(a)(4) by not briefing this issue as an issue in his initial brief, but Pagan specifically *withdrew* this issue from Judge McFadden's consideration. Tr. p. 2, Ll. 11-18.

The decision of Judge McFadden is affirmed in all aspects except as to the issue of the *amount* of attorney fees.

C. THE *AMOUNT* OF ATTORNEY'S FEES PRIOR TO THIS APPEAL.

Pagan argues that the amount of attorney's fees in this case are unreasonable and excessive. Appellant's Supplemental Brief, p. 20. He provides no support for this argument, in light of the Affidavit of fees and costs submitted, but argues only that the lawsuit is:

[R]eally about deceit and dishonesty. Respondent and his attorney are two dishonest individuals attempting to use the Court in order to extort \$3,715.20 from an elderly, disabled, honest man with very limited financial resources and no ability to pay these outrageous Attorney fees.

Id. at p. 20.

Pagan has presented no legitimate argument as to why attorney's fees should not have been awarded by Judge McFadden. Pagan has presented no legitimate argument as to why the *amount* of attorney fees awarded by Judge McFadden to Hemphill and against Pagan is unreasonable.

However, this Court has found a procedural defect regarding the *amount* of attorney's fees. This Court is convinced this defect must be corrected. The following sequence of events must be reiterated.

Following the trial on May 12, 2008, on May 20, 2008, Hemphill's attorney filed an Affidavit RE: Attorney Fees, a Memorandum of Costs and a proposed Judgment. The amount of attorney's fees sought by Hemphill was \$3,545.00, and costs were sought in the amount of \$143.00. Eight days later, on May 28, 2008, Judge McFadden entered a judgment and awarded attorney's fees in the amount of \$3,200.00 and costs in the amount of \$143.00, in favor of Hemphill and against Pagan. At no time has Pagan ever filed an objection to the amount of attorney's fees sought.

The procedural problem is due to the fact that the entry of the Judgment, which included the award of attorney's fees in the amount of \$3,200.00, came only eight days after the Affidavit RE: Attorney Fees and Memorandum of Costs was filed. Idaho Rule of Civil Procedure 54(d)(5) requires a memorandum of costs be filed within fourteen days after the entry of judgment, and premature filing is acceptable. *Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818, 683 P.2d 854 (1984). Hemphill was timely in his filing of his Affidavit RE: Attorney Fees and Memorandum of Costs. Pagan then had fourteen days after the Affidavit RE: Attorney Fees and Memorandum of Costs was served upon him to object. The certificate of mailing on those documents shows they were mailed to Pagans on May 19, 2008. Thus, Pagans had until at least June 2, 2008,

to object to those requested costs and attorney fees. The procedural problem is that Judge McFadden did not wait until June 2, 2008, to see if there would be an objection.

In fact Pagan has never objected. Idaho Rule of Civil Procedure 54(d)(6) requires that “Failure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed.” Viewed in the light of I.R.C.P. 54(d)(6) in isolation, Pagan has waived his objections to the amounts claimed by Hemphill. However, that rule must be viewed in the context of the next rule. Idaho Rule of Civil Procedure 54(d)(7) states that “...*after* the time for filing an objection has past [passed], the court *shall*, upon motion of any party or upon the court’s own initiative, enter an order settling the dollar amount of costs, if any, awarded to any party to the action.” (emphasis added). The italicized portions show that the trial court *must* set the amount of costs (ie., it is not discretionary, the trial court must do this), but can only do so *after* the time for filing an objection has passed (ie., after fourteen days have passed from the time of service of the memorandum of costs). Judge McFadden signed and filed the Judgment too soon. Thirteen days too soon. While it is unlikely, the fact that the Judgment was filed before the fourteen days had expired may have kept Pagans from objecting at *any* time after the Judgment was filed.

An issue arises because Pagan has not raised this issue on appeal. Pagan has completely failed to comply with Idaho Appellate Rule 35(a)(4) by not listing attorney fees as an issue in his initial brief. Pagan has not listed any issues period. The failure of the appellant to include an issue in the statement of issues required by subdivision (a)(4) of this rule will eliminate consideration of that issue on appeal. *Kugler v. Drown*, 119, Idaho 687, 809 P.2d 1166 (Ct.App. 1991). Pagan only cryptically complains that the award in the amount of “...3715.20 award on a final ruling of 260.28” is “clearly

unfair, unreasonable and excessive”. Appellant Brief, p. 2. The primary reason the award is in that amount is attorney fees, but Pagan never mentioned that issue at any place in his first brief. Thus, Pagan has arguably waived his ability to raise attorney’s fees as an issue on appeal. I.A.R. 41(a), I.A.R. 35. However, the rule that failure of an appellant to include an issue in the statement of issues as required by I.A.R. 35(a)(4) will eliminate the consideration of that issue in the appeal should be relaxed where the issue was addressed by authorities cited or arguments contained in the briefs. *State v. Prestwitch*, 116 Idaho 959, 783 P.2d 298 (1989); *Crown v. State, Department of Agriculture*, 127 Idaho 188, 898 P.2de 1099 (Ct.App. 1994). Arguably, that has occurred here.

In his dissent in *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981), Justice Bistline quoted the Idaho Supreme Court in *Stoner v. Turner*, 73 Idaho 117, 121, 247 P.2d 469, 471 (1952), and addressed the effect of noncompliance with procedural rules:

The object of statutes and rules regulating procedure in the courts is to promote the administration of justice. Those statutes and rules which fix the time within which procedural rights are to be asserted are intended to expedite the disposition of causes to the end that justice will not be denied by inexcusable and unnecessary delay. But, *except as to those which are mandatory or jurisdictional*, procedural regulations should not be so applied as to defeat their primary purpose, that is, the disposition of causes upon their substantial merits without delay or prejudice.

Reeves, 102 Idaho at 278, 629 P.2d at 674 (emphasis added). Rule 1(a), on the scope of the civil rules, states that the rules should be “liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding.” The term “determination”, has been analyzed by the Idaho Supreme Court in *Bunn v. Bunn*, 99 Idaho 710, 587 P.2d 1245 (1978).

This Court’s research has not found any case law that addresses the appropriate

remedy when a trial court acts prematurely on a memorandum of costs. Based upon this Court's reading of I.R.C.P. 54(d)(6) in light of I.R.C.P. 54(d)(7), this Court determines that the most appropriate course of action is that Pagan should be given an opportunity to object to the *amount* of fees requested before the magistrate.

One procedural method would be to remand this to the Magistrate Judge McFadden. However, that would mean Judge McFadden would have a hearing on the issue of the amount of the attorney fees below, while this Court determines the issue of the amount of the attorney's fees on appeal. Judge McFadden's ruling would then be subject to appeal. It would not be impossible, but it would be difficult to reach finality in this case, with that method. Undoubtedly, it would involve a good deal of time.

This Court determines that the best method is for *this Court* to 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 (ie., before Pagan filed his Notice of Appeal). I.R.C.P. 83(u). Procedurally, that 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), 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.

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.

D. APPELLANT IS THE PREVAILING PARTY ON APPEAL.

Hemphill has prevailed on all substantive issues on appeal. While this Court has found that the issue of attorney's fees needs to be revisited, the need for that has nothing to do with Pagan's appeal. Accordingly, Pagan has not prevailed even on the issue of attorney's fees on this appeal. Reply Brief, pp. 6, 10.

In his Notice of Appeal, Pagan does not even mention the issue of attorney's fees. In Pagan's first brief on appeal, he likewise fails to mention the issue of attorney's fees directly. Pagan only peripherally complains that the award in the amount of "...3715.20 award on a final ruling of 260.28" is "clearly unfair, unreasonable and excessive". Appellant Brief, p. 2. The primary reason the award is in that amount is attorney fees, but Pagan never mentioned that issue in his first brief. Thus, Pagan has arguably waived his ability to raise attorney's fees as an issue on appeal. I.A.R. 41(a).

The reason the *amount* of attorney's fees prior to the appeal must be revisited is due to a procedural defect spotted by this Court on appeal. Not having raised the specific issue himself, and having arguably waived the issue of attorney's fees generally (both before the magistrate pursuant to I.R.C.P. 54(d)(6), and before this Court on appeal pursuant to I.A.R. 41(a) and I.A.R. 35), Pagan cannot in any way be said to have prevailed on the issue of attorney fees in the underlying action.

Even if Pagan were to be given credit for prevailing on the issue of the *amount* of attorney fees, this Court's finding that Hemphill is the prevailing party on appeal would remain the same. Hemphill has prevailed on all substantive issues on appeal, and has prevailed on the issue that he is entitled to *an* award of attorney fees awarded by Judge

McFadden. It is only the *amount* of those fees that cannot be affirmed. A party need not prevail on *all* the issues in order to be found to be the prevailing party. *Smith v. USAA Property Cas. Ins.*, 132 Idaho 466, 974 P.2d 1095 (1999).

Accordingly, Hemphill is the prevailing party on appeal.

E. HEMPHILL IS ENTITLED TO ATTORNEY FEES ON APPEAL.

Hemphill argues he is entitled to attorney fees on appeal under Idaho Appellate Rule 41, in that: 1) Pagan's appeal is frivolous, entitling him to fees under Idaho Code §12-121, and 2) that Hemphill is the prevailing party on appeal and this dispute involves a commercial transaction under Idaho Code §12-120(3).

I.A.R. 41(d) permits a party to file claim for attorney fees, along with or as part of an affidavit of fees, where a Court has determined the party is entitled to fees on appeal. "The Court shall determine the amount of attorney fees or remand this question to the district court or agency to hear additional evidence and determine the amount of attorney fees to be allowed." I.A.R. 41(d). A party seeking fees on appeal must assert the claim in the first appellate brief filed by the party. I.A.R. 41(a). Here, Hemphill has complied with the rules, requesting fees in his reply brief. Pagan has failed to do so.

This matter is a dispute over a commercial transaction, subject to attorney fees being awarded to the prevailing party and assessed against the losing party. Idaho Code § 12-120(3). 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).

An award of attorney fees under I.C. § 12-121, however, may only be granted by the Court when it finds that the case was brought, pursued or defended frivolously, unreasonably, or without foundation. *Hossner v. Idaho Forest Indus., Inc.*, 122 Idaho 413, 835 P.2d 648 (1992). Although Pagan is appearing *pro se* in this matter, as argued by Hemphill, *pro se* litigants are “held to the same standards and rules as those represented by an attorney.” *Golay v. Loomis*, 118 Idaho 387, 392, 797 P.2d 95, 100 (1990); *Schneider v. Curry*, 106 Idaho 264, 678 P.2d 56 (Ct.App. 1984) (review denied). Unfortunately, Pagan brought this appeal frivolously, unreasonably and without foundation. The Court below aptly found Hemphill the prevailing party, entitling him to reasonable fees and costs. Under Idaho Code § 12-120, an action brought to recover a debt incurred on a contract relating to the purchase or sale of goods, wares, merchandise, or services, entitles the prevailing party to a *mandatory* award of attorney fees. See *Robertson Supply, Inc. v. Nicholls*, 131 Idaho 99, 952 P.2d 914 (Ct.App. 1998). And “[a]n award of attorney fees at trial under I.C. § 12-120(3) supports a similar award on appeal.” *Cheney v. Smith*, 108 Idaho 209, 697 P.2d 1223 (Ct.App. 1985). Thus, even if this Court were to find that Pagan did not pursue this appeal frivolously and without foundation, Hemphill would nevertheless be entitled to fees on appeal pursuant to the contract portion of I.C. § 12-120(3).

While such a finding under Idaho Code § 12-120(3) renders a finding of attorney fees under Idaho Code § 12-121 moot, this Court finds that Pagan’s appeal was brought without foundation. While the action before Judge McFadden may have been defended

by Pagan legitimately, due to a discrepancy over what happened (ie., a dispute of fact as to what was said between the parties...Pagan's version or Hemphill's version, and whether an oral contract was entered into based on which of the two versions was believed), this appeal is without foundation. Aside from all the peripheral issues raised by Pagan which have no merit (whether Pagan was in the Philippines, the inadmissibility of Amstutz' affidavit, allowing Hemphill to testify from his journal/activity log, etc.), the primary issue repeated by Pagan throughout this appeal was that Hemphill had no *written* evidence to back up this oral contract. That is an "issue" or an argument that has no support in the law, and Judge McFadden told Pagan that. Tr. p. 43, Ll. 11-14. Hemphill's version of the events in question are supported by substantial and competent evidence. It is Pagan's duty at this point to demonstrate that there was a lack of substantial and competent evidence supporting Judge McFadden's decision, and simply saying "no, it wasn't" is not good enough. Pagan is simply asking this Court to "second guess" the trial court on conflicting evidence, and, as such, attorney fees are allowed under Idaho Code § 12-121, on appeal. *DeChambeau v. Estate of Smith*, 132 Idaho 568, 976 P.2d 922 (1999). Where an appellant has failed to point to any findings of fact which were clearly, or even arguably, unsupported by substantial and competent evidence, and presented no significant issue on a question of law, and did not request that the court establish any new legal standards, and where there was no showing that the magistrate misapplied the law, the appeal is brought unreasonably and without foundation; hence, attorney fees on appeal were awarded. *Getchel v. Butler*, 104 Idaho 876, 664 P.2d 783 (Ct.App. 1983).

III. ORDER.

IT IS HEREBY ORDERED the decision of Judge McFadden is affirmed in all

aspects except as to the issue of the *amount* of attorney fees.

IT IS FURTHER ORDERED this Court 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 (ie., before Pagan filed his Notice of Appeal). I.R.C.P. 83(u). Procedurally, that 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), 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.

IT IS FURTHER ORDERED 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. 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.

Entered this 8th day of January, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2009, 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 #

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