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AT \_\_\_\_\_ O'Clock \_\_\_\_\_ M  
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**

**ANDY HARTIN and CHRISTIE HARTIN,** )  
**husband and wife,** )  
 )  
*Plaintiffs,* )  
vs. )  
 )  
**KIP SCHLINKER,** )  
 )  
*Defendant.* )  
 )  
 )  
 )  
 )

Case No. **CV 2010 10330**

**MEMORANDUM DECISION AND  
ORDER GRANTING PLAINTIFFS'  
MOTION TO DETERMINE  
ATTORNEY'S FEES AND COSTS,  
AND ORDER DENYING  
DEFENDANT'S MOTION TO  
DISALLOW ATTORNEY FEES AND  
COSTS**

**I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.**

This matter is before the Court on Plaintiffs' Motion to Determine Attorney's Fees and Costs and defendant's Motion to Disallow Attorney Fees and Costs.

Plaintiffs Andy Hartin and Christie Hartin (Hartins) filed their Complaint on December 1, 2010, alleging defendant Kip Schlinker (Schlinker) defaulted on his \$45,000.00 promissory note to Hartins. On December 10, 2010, Schlinker filed his *pro se* Answer, denying he received all he was supposed to from the Hartins. On April 11, 2011, Ruth Fullwiler, counsel for Schlinker filed a Notice of Appearance.

On March 8, 2011, several weeks before the Notice of Appearance by Schlinker's attorney was filed, Hartins filed their motion for summary judgment and affidavit in support thereof, arguing Schlinker failed to respond to discovery requests and all unanswered requests for admission are now deemed admitted pursuant to

I.R.C.P. 36(a). Affidavit of Edward J. Anson, p. 2, ¶ 5. Schlinker replied to the motion for summary judgment on May 10, 2011. Schlinker also moved the Court for leave to amend his Answer and for an Order permitting him to enter denials to the Hartins' Requests for Admission. At the May 24, 2011, hearing on the motions, this Court granted Schlinker's motion to allow denials to Plaintiff's Requests for Admission; and, in turn, denied Hartins' motion for summary judgment. Order, p. 2. The Court also granted Schlinker's motion for leave to amend his Answer. *Id.* Because the Court determined Schlinker improperly failed to answer the discovery requests proffered, the Court imposed costs and ordered Schlinker to pay Hartins' attorney's costs for all efforts expended after the preparation of discovery requests. Although Schlinker was before the Court *pro se* at the time the discovery responses were due, the Court noted on the record that *pro se* litigants are held to the same standards as those represented by counsel. The June 1, 2011, Order states, "Defendant shall pay the amount of court-ordered attorney's fees and costs before this case can move forward." Order, p. 2.

On May 31, 2011, counsel for Hartins filed his Affidavit of Memorandum of Costs and Attorney fees. On June 13, 2011, Schlinker objected to the memorandum of costs and fees by filing his Motion to Disallow Award for Attorney's Fees and Costs and Objection to Memorandum of Attorney's Fees. Oral argument on these motions was held on September 27, 2011.

This matter is presently set for a one-day court trial commencing on October 24, 2011.

## **II. STANDARD OF REVIEW.**

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).

### III. ANALYSIS.

During the May 24, 2011, hearing on Hartins' motion for summary judgment, and Schlinker's motions for leave to amend his answer and for permission to enter denials to Hartins' Requests for Admission, the Court awarded Hartins attorney's fees and costs for all actions taken after the preparation of discovery. The Court's Order read:

...Defendant shall pay Plaintiffs' reasonable attorney's fees and costs incurred for his inaction in responding to Plaintiff's First Set of Requests for Admissions pursuant to I.R.C.P. 36(a) and shall only include reasonable attorney's fees and costs incurred after preparation of Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions to the hearing on Plaintiff's Motion for Summary Judgment held on May 24, 2011. The amount of fees and costs shall be determined after a motion and hearing set at a later date. Defendant shall pay the amount of court-ordered attorney's fees and costs before this case can move forward.

Order, p. 2. Hartins' counsel's Affidavit and Memorandum of Costs and Attorney Fees, filed May 31, 2011, addresses the factors set forth in I.R.C.P. 54(e)(3) and itemizes the time spent by counsel between March 7, 2011, and May 24, 2011. Affidavit of Memorandum of Costs and Attorney fees, pp. 2-3. On June 13, 2011, Schlinker filed his Motion to Disallow Award for Attorney's Fees and Costs and Objection to Memorandum of Attorney's Fees. Schlinker objects and moves to disallow fees and costs on the grounds that: (1) Idaho Rule of Civil Procedure 37(c) permits a Court to grant fees against a party who fails to admit a request for admission pursuant to I.R.C.P. 36 *if* the party requesting the admission thereafter proves the genuineness of the document or the truth of the matter, which Schlinker posits Hartins have not done; and (2) the amount of fees and costs requested is unreasonable because the instant matter does not involve novel or difficult issues, Plaintiffs' counsel is experienced, summary judgment was based solely on Schlinker's failure to respond to the Requests for Admission, and, therefore, any "time spent to prepare such documents would be

minimal.” Motion to Disallow Attorneys Fees and Costs and Objections to Memorandum of Fees and Costs, p. 3. “If the Court orders an award of attorneys [sic] fees and costs, Defendant requests that the order reduce Mr. Anson’s claim by one-half.” *Id.* Hartins have filed their Motion to Determine Attorney’s Fee and Costs and Notice of Hearing on August 23, 2011, but have not responded substantively to Schlinker’s Motion to Disallow Attorney’s Fees.

Several problems arise with regard to Schlinker’s Motion to Disallow Attorney’s Fees. First, Schlinker argues I.R.C.P. 37(c) grants the Court authority to award fees against a party who “fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36” ... “if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter.” I.R.C.P. 37(c). However, Schlinker asserts Hartins never sought attorney’s fees and costs pursuant to Rule 37(c). Motion to Disallow Attorneys Fees and Costs and Objections to Memorandum of Fees and Costs, p. 3. This Court’s Order makes it explicitly clear that basis for the attorney fee award was I.R.C.P. 36(a). Idaho Rule of Civil Procedure in turn refers to I.R.C.P. 37(a)(4), the rule governing award of expenses of discovery orders. Order, p. 2. This Court’s imposition of costs and fees against Schlinker was based on his inaction, that is, Schlinker’s *abject failure to respond* to Hartins’ Request for Admission. See Order, p. 2. While that abject failure of Schlinker to admit or deny the requests to admit is not a “violation of a discovery order”, it was a violation of the Idaho Rules of Civil Procedure, specifically, I.R.C.P. 36.

Both the decision to impose sanctions, and the determination of the appropriate sanction to be fashioned, lie within the sound discretion of the trial court. However, the discretion of the courts is not unlimited; the Due Process Clause of the Fifth Amendment of the United States Constitution limits the power of the courts to dismiss an action without affording a party the opportunity for a hearing on the merits of his or her cause.

In arriving at a sanction to be imposed, the court will consider not only the prejudice to the discovering party, but also the necessity to maintain the integrity of orders entered by the court. The court should take into account the deterrent effect of the sanction and the principle that a party should not benefit from its unwillingness to permit discovery.

23 AM.JUR.2d *Depositions and Discovery* § 211 (2011). This is precisely what we have here, Schlinker's complete "unwillingness to permit discovery." That failure by Schlinker resulted in Hartins, rightfully so, filing a motion for summary judgment, based on the deemed admissions resulting from Schlinker's failure to admit or deny the requests to admit. The Court could have acted within its discretion, enforced the rules of civil procedure, and granted Hartins' motion for summary judgment against Schlinker. To soften the harsh effect of Schlinker's failure to comply with discovery, the Court denied Hartins' motion for summary judgment, permitting the instant matter to proceed on the merits. Rather than paying the small price for his complete failure to comply with the Idaho Rules of Civil Procedure, Schlinker now objects because the order for attorney fees is not covered by I.R.C.P. 37(a) (in that Schlinker did not violate any prior order of this Court in failing to admit or deny the request to admit) or (c) (in that Hartins has not proved the denials to be false). However, Idaho Rules of Civil Procedure 16(i) and 37(b) provide the Court with broad discretion with regard to fashioning sanctions for discovery violations and/or violations of the Court's Pre-Trial Order. In this light, there is simply no requirement that Hartins prove the truth of the matters Schlinker failed to admit or deny pursuant to I.R.C.P. 37(c) in order for the Court to impose sanctions for discovery violations, and there is no requirement that Schlinker first have violated an existing order by this Court. Idaho Rule of Civil Procedure 16(i) makes it clear that "...if a party...fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C) (D)." Requiring the offending party to pay

reasonable expenses, including attorney's fees caused by the offending party's failure, is an alternative that the Court should (in fact, must) consider before imposing the sanctions in subsection (B) (an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence), (C) (an order striking out pleadings...staying proceedings...or rendering a judgment by default), or (D) an order of contempt.

Second, Schlinker takes issue with Hartins' failure to have filed a motion to compel in response to his violation of I.R.C.P. 36(a). Motion to Disallow Attorneys Fees and Costs and Objections to Memorandum of Fees and Costs, p. 3. There is no support cited for Schlinker's position in this regard. Hartins are under no obligation to file a motion to compel in advance of seeking summary judgment. In fact, the Idaho Rule of Civil Procedure permits either party to move for summary judgment on all or part of a claim, counterclaim, cross-claim or motion to obtain declaratory judgment after the expiration of twenty days from service of process or a party's appearance. I.R.C.P. 56(a). The motion must be filed at least sixty days before the trial date. *Id.* Hartins' motion for summary judgment was filed on March 8, 2011, more than six months before the October 24, 2011, trial date. And, Hartins' motion was filed well over twenty days after Schlinker appeared via his *pro se* Answer, filed December 20, 2011. Hartins acted reasonably in seeking summary judgment, as no disputed issues of fact existed prior to the Court's permitting Schlinker to deny his previously-deemed admissions and amend his Answer.

Third and finally, Schlinker appears to take issue with the amount of fees sought by Hartins' counsel, requesting that the court, should it order and award of fees and costs, "reduce Mr. Anson's claim by one-half." Motion to Disallow Attorneys Fees and Costs and Objections to Memorandum of Fees and Costs, p. 3. Hartins' counsel's

Affidavit of Costs and Fees sets forth the factors listed in I.R.C.P. 54(e)(3), admitting the matter did not involve novel or difficult questions of law, that the time and labor required were typical, and the time limitations were typical. There is nothing before the Court to indicate that either Mr. Anson's hourly rate, nor the four hours spent preparing drafting and preparing for the motion for summary judgment are unreasonable.

Mr. Anson's hourly rate is reasonable within the legal community, and Mr. Anson has proven that in his affidavit. The hours spent by Mr. Anson are, if anything, low given this Court's review of the pleadings that were involved in Hartins' summary judgment motion. As ordered by the Court, the fees sought relate only to the time spent on the case *after* preparation of discovery through hearing on the motion for summary judgment. Order, p. 2. At oral argument, counsel for Schlinker seemed to have abandoned the objection to the amount of attorney fees.

Fourth, at oral argument, counsel for Schlinker for the first time raised the additional argument that this Court should wait until resolution of the entire case to decide whether to impose the sanction of attorney fees against Schlinker. At oral argument, for the first time, counsel for Schlinker cited *Payne v. Wallace*, 136 Idaho 303, 32 P.3d 695 (Ct.App. 2001), and *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004) as authority for this proposition. (Schlinker cited *Payne* in his brief but for a different point, Motion to Disallow Attorneys Fees and Costs and Objections to Memorandum of Fees and Costs, p. 2). Following oral argument, the Court read both *Payne* and *Bailey*, and neither *Payne* nor *Bailey* support Schlinker's argument that the decision on attorney fees should wait until completion of the trial.

Finally, at oral argument, counsel for Hartins pointed out that this Court's June 1, 2011, Order, contains the language "Defendant shall pay the amount of court-ordered

attorneys fees and costs before this case can move forward”, which allows Schlinker to control by his own future inaction, the course of this lawsuit, a lawsuit which is rapidly approaching trial. Counsel for Schlinker prepared the Order and counsel for Hartins approved its form and this Court signed the Order. However, there is no reason to allow the unintended consequence of placing Schlinker in control of Hartins’ case solely by Schlinker’s possible future decision not to pay the attorney fees award, especially when it was Schlinker’s own failure to respond that caused the Order in the first place.

#### **IV. CONCLUSION AND ORDER.**

For the reasons stated above, this Court must grant Hartins’ Motion to Determine Attorney’s Fees and Costs, in the amount set forth in Mr. Anson’s Affidavit of Costs and Fees, and must deny Schlinker’s Motion to Disallow Attorney’s Fees and Costs and Objections to Memorandum of Fees and Costs.

IT IS HEREBY ORDERED Hartins’ Motion to Determine Attorney’s fees and Costs (\$1,020.00), in the amount set forth in Mr. Anson’s Affidavit of Costs and Fees, is GRANTED and Schlinker’s Motion to Disallow Attorney’s Fees and Costs and Objections to Memorandum of Fees and Costs is DENIED.

IT IS FURTHER ORDERED, pursuant to I.R.C.P. 16(i), Schlinker must pay to Hartins (through Hartins’ attorney Mr. Anson) the amount set forth in Mr. Anson’s Affidavit of Costs and Fees (\$1,020.00), within fourteen (14) days from the date of this Order Granting Plaintiffs’ Motion to Determine Attorney’s Fees and Costs, as a sanction, and failure to timely pay will result in default of Schlinker as to all defenses and claims he might have regarding this litigation.

Entered this 27<sup>TH</sup> day of September, 2011.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of September, 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  
Edward J. Anson

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| Lawyer  
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\_\_\_\_\_  
Jeanne Clausen, Deputy Clerk