8-26-2011

Kinghorn v. Clay Respondent's Brief Dckt. 38109

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 38109-2010

KRYSTAL M. KINGHORN, f/k/a KRYSTAL M. BARRETT,

Plaintiff-Respondent,

v.

KELLY N. CLAY, an individual,

Defendant-Crossdefendant-Appellant,

and

BRP INCORPORATED,

Defendant-Crossclaimant-Respondent,

and

BANK OF COMMERCE,

Defendant-Respondent.

BRIEF OF RESPONDENT BRP INCORPORATED

Appeal from the District Court of the Seventh Judicial District for Fremont County
Case No. 2007-306
Honorable Jon J. Shindurling

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Respondent BRP, Inc. ("BRP") submits this brief in response to the opening brief of Appellant Attorney Brian Smith ("Attorney Smith").

I. STATEMENT OF THE CASE

A. Nature Of The Case

This appeal questions whether Attorney Smith can assert an attorney's charging lien under Idaho's attorney's fee lien statute, Idaho Code § 3-205. If so, it also questions the priority of such a lien when BRP has a right of setoff that is related to the same judgment on which the attorney's lien purports to attach. Those issues arise from the following circumstances.

Attorney Smith defended his client (Kelly Clay) against an action commenced by Krystal Kinghorn that sought the return of a parcel of real property. Clay had obtained the property from Kinghorn, which he then sold to BRP. BRP was also a defendant to Kinghorn's action and commenced a cross claim against Clay for breach of a warranty deed. To resolve the actions, the district court unwound the transfers. The district ordered BRP to reconvey the property to Clay. The district court also ordered Clay to return the property to Kinghorn, so long as she repaid Clay $22,235.33 to redeem the property. Kinghorn ultimately tendered the $22,235.33 payment. Finally, the district court awarded BRP damages on its cross-claim and ordered Clay to reimburse BRP the price it paid for the property plus its costs, a total of $64,099.96.

Against that backdrop, Attorney Smith seeks to assert and enforce an attorney's lien on Kinghorn's payment of $22,235.33 to redeem the property from Clay. He does so despite the fact that Clay commenced no cause of action, filed no counterclaim, recovered no affirmative relief, and is liable for a judgment that far exceeds the monies repaid by Kinghorn. As explained

below, Attorney Smith cannot assert an attorney's lien under Idaho Code § 3-205 in such circumstances and even if he could, the judgment obtained by BRP against Clay is superior to an attorney's lien. In the proceedings below, the district court agreed and correctly held that Kinghorn's payment should be directed to BRP. This Court should affirm.

B. Course Of Proceedings

To secure the judgment on its cross-claim against Clay, not knowing whether Clay would retain the property or Kinghorn would pay to redeem it, BRP filed a petition for writ of attachment, seeking to attach either (i) the property (in the event Clay retained it) or (ii) the $22,235.33 Kinghorn repaid to redeem the property (in the event she chose to do so). R. Vol. II at 234-36. Attorney Smith filed an opposition to BRP's petition for a writ of attachment and a motion for an order to perfect an attorney's fees lien. *Id.* at 245-48, 250-51. At the hearing on BRP's petition and Attorney Smith's motion, Kinghorn's counsel tendered the payment of $22,235.33 to redeem the property. *Id.* at 285-86. The district court accepted the tender, pending a decision on who – either Attorney Smith or BRP – was entitled to those monies. *Id.*

The district court entered a decision on September 1, 2010. *Id.* at 287. In that order, the district court found that, based on Kinghorn's tender of the redemption payment, BRP's petition for a writ of attachment was no longer necessary and that the only remaining issue was whether Attorney Smith's lien was valid and took priority over BRP's judgment. *Id.* at 288. Addressing that issue, the district court found Attorney Smith was not entitled to an attorney's lien and ordered Kinghorn's payment "be delivered directly to BRP to cover, in part, its judgment against

Clay." *Id.* at 291. On Attorney Smith's motion, the district court entered a Rule 54(b) Certificate deeming its order a final judgment. *Id.* at 298-99. This appeal followed. *Id.* at 300.

C. Statement Of Facts

The facts material to this appeal arise from the proceedings below and the many decisions entered by the district court to unwind the transfers of the property. The facts, as found by the district court, are undisputed and unchallenged. They begin with Kinghorn filing a complaint against Clay, BRP, and The Bank of Commerce on May 29, 2007, seeking the return of real property Clay sold to BRP a month earlier. R. Vol. I at 13-22. Years before, Kinghorn applied for a $20,000 loan from The Bank of Commerce and pledged the property, which she owned at the time, as collateral. R. Vol. II at 206. Kinghorn asked Clay to co-sign the loan, and Clay agreed but required Kinghorn to sign a quitclaim deed, to be recorded in the event she failed to make timely payments on the loan. *Id.*; R. Vol. I at 138. Kinghorn granted Clay a quitclaim deed and also signed a loan guarantee agreement. R. Vol. I at 27-29.

In March 2007, Kinghorn defaulted on the loan. R. Vol. II at 207. Clay paid The Bank of Commerce $19,820.75 – the balance of the loan – and recorded the quitclaim deed. *Id.*; R. Vol. I at 175. A month later, Clay sold the property to BRP for $30,000, delivered title and a warranty deed to BRP, and pursuant to the warranty deed, pledged to warrant and defend "the quiet and peaceable possession of said premises ... against the claims of all persons." R. Vol. I at 139, 184-86. Kinghorn's complaint followed, seeking the return of the property. Clay served his answer to the complaint on June 22, 2007 and asserted no counterclaim against Kinghorn or cross-claim against BRP or The Bank of Commerce. *Id.* at 99. BRP also answered. *Id.* at 109.

In a series of orders that followed, the district court dismissed The Bank of Commerce, *id.* at 127-31, and found that (i) the quitclaim deed Kinghorn granted Clay was a mortgage, *id.* at 141-43; (ii) Kinghorn had a right to redeem the property, *id.* at 143; (iii) Kinghorn had a right of redemption that was denied to her, *id.* at 143, R. Vol. II at 215; (iv) BRP was not a bona fide purchaser, R. Vol. I at 167; (v) Clay must hold a foreclosure sale of the property, *id.* at 170; and (vi) BRP must convey the property to Clay, *id.* at 180-81.

Following the latter order – that BRP must return the property – BRP filed a cross-claim against Clay on September 22, 2009 for breach of the warranty deed, seeking reimbursement of the $30,000 BRP paid for the property, plus interest and $1,408.96 in property taxes and insurance expenses. *See id.* at 187-89. Clay answered the cross-claim but did not contest it. *See id.* at 191-93. In the meantime, rather than hold a foreclosure sale, Kinghorn and Clay entered into a stipulation to perform an accounting and allow the district court to determine the items charged to each. *Id.* at 173-78. The stipulation also provided that Clay would convey title to the property to Kinghorn, but Clay would have no obligation to do so if Kinghorn failed to pay Clay with six months of a determination of the amounts owed. *Id.* at 174.

To fully unwind the transactions, the district court entered another series of orders. In one, the district court entered summary judgment in favor of BRP on its cross-claim against Clay, finding Clay breached the warranty deed. R. Vol. II at 215. Another order addressed BRP's attorney fees for Clay's failure to defend BRP under the warranty deed and as the prevailing party on the cross-claim. *Id.* at 219-26. The district court awarded BRP $32,691 in attorney fees. *Id.* The district court later entered a "final judgment" on BRP's cross-claim

against Clay, awarding BRP $31,408.96 in damages (plus statutory interest) and the attorney fee award – for a total award of $64,099.96. *Id.* at 231-32.

The district court also addressed the accounting between Kinghorn and Clay and found Clay was entitled to $19,820.75 (the amount he paid The Bank of Commerce) plus $2,414.58 (his expenses to maintain the property) – for a total of $22,235.33. *Id.* at 206-15. In that same order, the district court found Clay was not entitled to his attorney fees incurred in defending Kinghorn's claims under their loan guarantee agreement because "Defendant Clay's attorney's fees were not incurred 'to enforce (the) Agreement' but, rather, were incurred to defend against Plaintiff's action to enforce her right of redemption." *Id.* at 212.

Once the accounting was complete, the district court entered an order on Kinghorn and Clay's stipulation and ordered Kinghorn to pay Clay $22,235.33 on or before July 26, 2010 or Clay would have no obligation to return the property to Kinghorn. *Id.* at 242-43. As noted above, what followed were the proceedings leading to this appeal: BRP's petition for a writ of attachment, Attorney Smith's motion for an order to perfect an attorney's fees lien, Kinghorn's payment of $22,235.33 to redeem the property, and the district court's order denying Attorney Smith an attorney's lien and directing Kinghorn's payment to BRP.

II. ISSUES PRESENTED ON APPEAL

The only issues presented on appeal stem from the district court's order denying Attorney Smith an attorney's lien and distributing Kinghorn's payment to BRP. Neither Attorney Smith nor Clay has appealed any of the district court's other orders or findings. BRP restates the issues presented on appeal, as follows:

1. Whether the district court correctly denied Attorney Smith's attempt to assert an attorney's lien under Idaho Code § 3-205 on the basis that Clay had not commenced a cause of action or filed a counterclaim.

2. If the district court erred in that ruling, whether Attorney Smith can assert an attorney's lien under Idaho Code § 3-205 when Clay recovered no affirmative relief from a judgment in his favor and no proceeds on which a lien could attach.

3. If Attorney Smith can assert a valid attorney's lien, whether BRP's right to a setoff of the damages it was awarded on its cross-claim against Clay is superior to Attorney Smith's attorney's lien.

4. Whether BRP is entitled to its costs and attorney fees on appeal pursuant to I.A.R. 40 and Idaho Code § 12-121.

III. ATTORNEY FEES ON APPEAL

BRP seeks costs and attorney fees on appeal pursuant to I.A.R. 40 and Idaho Code § 12-121, respectively, for the reasons stated below in Section V.D of this brief.

IV. STANDARD OF REVIEW ON APPEAL

The interpretation and application of a statute are questions of law that are subject to free review by the Court. *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009). The standards governing statutory interpretation are well-founded. In *Farber*, the Court explained that the objective of statutory interpretation is to derive the intent of the legislature. *Id.* To determine legislative intent,

> [s]tatutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction. Therefore, the plain meaning of a statute will prevail unless it leads to absurd results.

Id. at 310-11, 208 P.3d at 292-93 (citations omitted). Thus, only where a statute is ambiguous must the Court engage in statutory construction. *Id.* at 310, 208 P.3d at 292. A statute is ambiguous if its language is capable of more than one reasonable interpretation, but ambiguity does not occur "merely because parties present differing interpretations to the court." *Id.* at 311, 208 P.2d at 293.

V. ARGUMENT

A. The District Court Correctly Denied Attorney Smith's Attempt To Assert And Enforce An Attorney's Lien Under Idaho Code § 3-205.

The principal flaw in Attorney Smith's brief is that he ignores the plain and unambiguous language of Idaho Code § 3-205. That statute provides:

> The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment.

Idaho Code § 3-205. The critical language is the statute's second sentence, which makes clear that an attorney possesses a charging lien when (1) the attorney's client commences a cause of

action or files a counterclaim and (2) there is a judgment in the client's favor and proceeds thereof. *Id.* As explained below, neither of those requirements is satisfied here.

1. Attorney Smith Cannot Assert An Attorney's Lien Under Idaho Code § 3-205 Because Clay Did Not Commence A Cause of Action Or Serve An Answer Containing A Counterclaim.

The district court denied Attorney Smith's motion for an order to perfect an attorney's lien on the basis that

> Smith never commenced an action or filed a counterclaim on behalf of Clay against Kinghorn. Under *White* [*v. St. Alphonsus Regional Medical Center*, 136 Idaho 238, 31 P.3d 926 (Ct. App. 2001),] and the plain language of I.C. § 3-205, Smith does not have an attorney's lien on Clay's proceeds from Kinghorn's redemption check.

R. Vol. II at 291. The district court was correct in its ruling. Indeed, it is undisputed that Clay never commenced an action or filed a counterclaim and that Attorney Smith merely defended Clay against the action commenced by Kinghorn. That Attorney Smith does not have a charging lien in such circumstances is clear from both the statute and Idaho jurisprudence.

Beginning with Idaho Code § 3-205, it very clearly reads that "[f]rom the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim." (Emphases added.) Under the plain meaning of that language, an attorney's lien attaches to "his client's cause of action or counterclaim" and it does so from the commencement of the action or the filing of the counterclaim. Thus, an attorney's lien does not attach to another party's cause of action or counterclaim. Nor does an attorney's lien attach to a claim or action his client may have had but does not affirmatively pursue; the client must commence or file an action. Contrary to the

arguments made by Attorney Smith, he cannot assert a charging lien on Kinghorn's action against Clay or on a claim Clay may have had against Kinghorn. *See* Appellant's Brief at 13-18.

The Idaho Court of Appeals endorsed that reading of Idaho Code § 3-205 in *White* when it observed the commencement of an action or filing of a counterclaim is "a prerequisite for the creation of an attorney's charging lien."[1] 136 Idaho at 241, 31 P.2d at 929. In *White*, an attorney (White) represented a client (Krivanec) injured in a car accident and negotiated a settlement with the other driver's insurer. *Id.* at 239, 31 P.2d at 927. The settlement was reached before Krivanec commenced a cause of action against the other driver. *Id.* A hospital, which provided medical services to Krivanec after the accident, asserted a hospital lien on the settlement proceeds. *Id.* White contested the hospital's lien contending his attorney's lien was superior. *Id.* The Court of Appeals disagreed: "In the present case, because no action was filed on behalf of Ms. Krivanec before payment of the settlement, White did not acquire a lien under I.C. § 3-205." *Id.* at 241-42, 31 P.3d at 929-30 (emphasis added).

Attorney Smith seeks to distinguish *White* on the basis that "[t]here was no action commenced in which attorney White appeared at the time he recovered the proceeds for his client," while in the proceedings underlying this appeal a cause of action was commenced, albeit by Kinghorn. Appellant's Brief at 15. Attorney Smith misreads *White*. The question there was whether an attorney's lien can arise when no "lawsuit has been initiated by the attorney against

[1] That statement in *White* actually begins by referring to the "plain language of I.C. § 45-701." As the district court recognized, the citation to Idaho Code § 45-701 is most certainly a clerical error given the context of the passage. R. Vol. II at 290 n.1.

the wrongdoer on behalf of the injured person." 136 Idaho at 241, 31 P.2d at 929 (emphasis added). White did not acquire an attorney's lien because his client did not commence an action, not because there was no action commenced at all. *Id.* at 241-42, 31 P.2d at 929-30. Further, the fact that White's client could have filed an action was not enough to create an attorney's lien. Thus *White* confirms what Attorney Smith ignores: under the clear language of Idaho Code § 3-205 he can only assert an attorney's lien on an action commenced or filed by Clay.

In an attempt to side-step the statute and *White*, Attorney Smith relies nearly exclusively on *Skelton v. Spencer*, 102 Idaho 69, 625 P.2d 1072, *cert. denied*, 454 U.S. 894 (1981). *See* Appellant's Brief at 15-17. According to Attorney Smith, the statute can be read "broadly" because, under *Skelton*, "[a]ttorney's liens exist for 'services rendered in matters growing out of or in connection with the case in which judgment is rendered.'" *Id.* at 16, 17 (emphasis omitted) (*quoting Skelton*, 102 Idaho at 74, 625 P.2d at 1077). In truth, *Skelton* announces no such rule.[2] Moreover, the facts and holding of the decision set it apart from the instant circumstances. While *Skelton* has relevance here (as explained below), it does not stand for the proposition that

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[2] Attorney Smith quotes directly from *Skelton* for the proposition that "[a]ttorney's liens exist for 'services rendered in matters growing out of or in connection with the case in which judgment is rendered.'" Appellant's Brief at 16, 17 (quoting *Skelton,* 102 Idaho at 74, 625 P.2d at 1077). That quotation is not a holding of *Skelton* but describes the subject matter of a legal annotation. *See Skelton*, 102 Idaho at 74, 625 P.2d at 1077. The passage in question reads:

> Case law supports the recognition of the nature of such interdependent actions and the single assertion of a lien to secure compensation for the services provided therein. A number of older cases directly addressing this point are annotated at 97 A.L.R. 1133, "Attorney's charging lien as including services rendered or

(continued . . .)

an attorney's lien can be enforced when the attorney's client fails to commence or file an action and the attorney merely defends his client against an action.

In *Skelton*, a law firm (Rigby & Thatcher) represented a client (Spencer) in two causes of action commenced by Spencer and eventually settled both actions in Spencer's favor. 102 Idaho at 70-72, 625 P.2d at 1073-75. When Spencer later fired Rigby & Thatcher and refused to perform the settlement agreements, the other parties commenced a third action to enforce those agreements. *Id.* at 71, 625 P.2d at 1074. Rigby & Thatcher filed a petition in that action to enforce an attorney's lien against the settlement proceeds. *Id.* at 72, 625 P.2d at 1075. The question raised in *Skelton* was not whether an attorney's lien could attach to the settlement proceeds – clearly it could under those facts – but for which actions and in which actions the enforcement of the lien was proper. *See id.* at 74, 625 P.2d at 1077. The Court held that Rigby & Thatcher could enforce its lien in any of the three causes of action – either the two actions commenced by Spencer or the action commenced to enforce the settlement agreements – but that the latter action was the most reasonable. *Id.* at 75, 625 P.2d at 1078.

(. . . continued)

> disbursements made in other than the instant action or proceeding." (Subsection "b" of that annotation concerns liens for services rendered in matters growing out of or in connection with the case in which judgment is rendered.) The lapse of time has not impaired the logic of these cases.

Id. (emphasis added). Thus Attorney Smith's reliance on *Skelton* for his argument that he is entitled to an attorney's lien under Idaho Code § 3-205 simply because his services grew out of or were in connection with Kinghorn's action is unsupported and entirely misplaced.

Thus, the issue addressed in *Skelton* is not an issue raised in this appeal. BRP does not challenge the proceeding in which Attorney Smith seeks to assert an attorney's lien but his right to such a lien. More importantly, unlike here, the attorneys in *Skelton* enforced an attorney's lien attached to settlement proceeds recovered in actions commenced by their client. For that very reason, the proposition that *Skelton* supports a charging lien asserted by Attorney Smith because it "arises out of 'services rendered in matters growing out of or in connection with the case in which judgment is rendered,'" Appellant's Brief at 16, 17, cannot be sustained. But even if that proposition were true,[3] *Skelton* cannot be extended to the instant circumstances where no action was commenced or filed by Clay and Attorney Smith simply defended Clay's interests.

Attorney Smith also ignores that *Skelton* is representative of how Idaho courts have consistently applied Idaho Code § 3-205: finding attorney's liens attach to the "client's cause of action or counterclaim." *See, e.g., Jarman v. Hale*, 112 Idaho 270, 731 P.2d 813 (Ct. App. 1986) (finding attorney who represented client in successful 42 U.S.C. § 1983 action had valid claim of lien); *Hansbrough v. D. W. Standrod & Co.*, 43 Idaho 119, 249 P. 897 (1926) (finding attorney's lien attached to client's proceeds from foreclosure actions commenced by client). Attorney Smith has pointed to no Idaho jurisprudence – and indeed BRP has found none – that dispenses with that requirement and holds an attorney's lien exists in the absence of a client's action and solely for services rendered in defending the client.

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[3] *See supra* n. 2.

Idaho is not alone in that application of Idaho Code § 3-205. States such as Missouri, Montana, New Jersey, New York, and Oklahoma share an attorney's lien statute virtually identical to Idaho's. *See, e.g.*, Mo. Rev. Stat. § 484.130; Mont. Code Anno. § 37-61-420; N.J. Stat. Ann. § 2A:13-5; N.Y. Jud. Law § 475; Okla. Stat. tit. 5, § 6. Interpreting the same statutory language at issue here, courts in those states hold that a client asserts no cause of action, and thus no attorney's lien attaches, when the client retains an attorney solely to defend him. *See, e.g., Reid v. Reid*, 906 S.W.2d 740, 742-43 (Mo. Ct. App. 1995) (finding attorneys do not have statutory attorney's lien under Mo. Rev. Stat. § 484.130 when solely defending client because client had no cause of action upon which lien could attach); *United States v J.H.W. & Gitlitz Deli & Bar, Inc.*, 499 F. Supp. 1010, 1014 (S.D.N.Y. 1980) (finding attorney's representation of defendant in resisting claim against him does not invoke protection of attorney's lien under N.Y. Jud. Law § 475 unless counterclaim is asserted).[4]

[4] There are many other examples of such decisions. *See, e.g., United States v. Clinton*, 260 F. Supp. 84, 90 (S.D.N.Y. 1966) (finding attorney who represents defendant cannot have charging lien in absence of a counterclaim); *Wilde v. Wilde*, 184 A.2d 758, 759 (N.J. Ch. 1962) (finding that N.J. Stat. Ann. § 2A:13-5 provides lien for attorney who has filed complaint, a counterclaim or a cross-claim and successful defense of client's title to realty or personalty will not, apart from statute or agreement, give attorney basis for claiming lien); *In re Lambert*, 109 A.2d 423, 424 (N.J. Ch. 1954) (finding lien for attorney's services in action in which client was adjudicated mentally competent to manage her own affairs did not apply because representation of client was purely defensive in nature); *Holloway v. Wright*, 215 P. 937, 938 (Okl. 1923) (finding attorney has statutory lien upon his client's affirmative cause of action only, and thus "lien cannot be extended to services which merely protect an existing right or title of his client's property.").

In *Reid*, for example, the Missouri Court of Appeals found a law firm did not have a valid attorney's lien because the law firm's client did not file an action or counterclaim and thus a lien had nothing to which to attach. 906 S.W.2d at 742-43. The court explained that:

> When a client is sued, and retains counsel solely to defend, the client is asserting no cause of action. It is only if a counterclaim is filed on behalf of the client that he is claiming to have a cause of action against the plaintiff. Thus, if there is no counterclaim, and the lawyer merely defends against the plaintiff's claim, the client has no cause of action upon which an attorneys' lien can attach.

Id. at 742-43 (citing *Kansas City Area Transp. Auth. v. 4550 Main Assocs.*, 893 S.W.2d 861, 869 (Mo. Ct. App. 1995). The same reasoning applies here. Attorney Smith merely defended Clay against Kinghorn's suit and thus there is no cause of action to which his lien can attach.

As the above discussion shows, Attorney Smith cannot assert an attorney's lien on another party's cause of action or on a claim his client may have had but did not affirmatively pursue by filing an action. To the contrary, courts considering the language used in Idaho Code § 3-205 – whether in Idaho or elsewhere – apply its plain meaning to hold that an attorney's lien attaches to "his client's cause of action or counterclaim." When the client does not commence an action or file a counterclaim, as in *White*, or merely defends against an action, as in *Reid*, the attorney's lien has nothing to which to attach. Here the district court correctly concluded that Attorney Smith cannot assert an attorney's lien because Clay never filed a cause of action or counterclaim. *See* R. Vol. II at 291. This Court should affirm on that basis alone.

2. Attorney Smith Cannot Assert An Attorney's Lien Under Idaho Code § 3-205 Because Clay Recovered No Affirmative Relief From A Judgment In His Favor And No Proceeds On Which A Lien Could Attach.

But even if the Court finds that Attorney Smith's charging lien can attach to Kinghorn's cause of action or a claim Clay might have had, Attorney Smith still cannot satisfy the requirements of Idaho Code § 3-205. As noted, the statute clearly states that an attorney's lien "attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof." Idaho Code § 3-205. In other words, the statute limits an attorney's lien to outcomes where "proceeds" or a "fund" from a decision or judgment have been obtained "in his client's favor." *See Skelton,* 102 Idaho at 75, 625 P.2d at 1078. In *Skelton*, the Court explained that:

> the intent of the law on this point is to allow the attorney an interest in the fruits of his skill and labors. The lien secures his right to compensation for obtaining the recovery of "fund" for his client. Of course, where the attorney's efforts are sterile, there would be nothing against which the lien right could be asserted, but where he has produced a fund, he has an equitable interest therein recognized by the lien statute and relevant case law.

Id. (emphasis added); *see also Banque Indosuez v. Sopwith Holdings Corp.*, 772 N.E.2d 1112, 1117 (N.Y. 2002) ("the litigation or settlement must result in more than the mere entry of a judgment on behalf of a client: there must be proceeds from the litigation upon which the lien can affix.") Here Attorney Smith cannot take advantage of the statute because Clay obtained no

affirmative recovery from a judgment in his favor and no proceeds thereof.[5] That is true for two reasons.

First, Attorney Smith did not recover a fund on behalf of Clay because he merely defended and protected Clay's interest in the property. As noted by the district court, "Defendant Clay's attorney's fees were not incurred 'to enforce (the) Agreement' but, rather, were incurred to defend against Plaintiff's action to enforce her right of redemption." *See* R. Vol. II at 212 (*quoting* Clay's argument). "An attorney who merely defends or protects his client's interests in property without obtaining an affirmative recovery is not entitled to a lien on the property that his client retains." *See Rosenman & Colin v. Richard*, 850 F.2d 57, 61 (2nd Cir. 1988) (applying N.Y. Jud. Law § 475).

That Attorney Smith merely defended Clay and recovered no fund on his behalf is also evident by the district court's orders to unwind the transfers of the property and restore the parties to their original positions before the transactions occurred. The district court explained its resolution as follows:

> The end result of Kinghorn's suit was for this court to unwind the transaction. Kinghorn and Clay stipulated to Kinghorn repaying Clay the balance on the loan in return for Clay delivering title on the property. As a result of BRP's claims against Clay, this court has ordered Clay to pay BRP $31,408.96 for the unwound transaction and $32,691.00 in fees and costs related to defending the lawsuit.

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[5] Even though the district court did not directly address this issue, the Court can affirm the district court on alternative grounds. *See Martel v. Bulotti*, 138 Idaho 451, 455, 65 P.3d 192, 196 (2003) (finding that where relevant facts are undisputed, reviewing court may apply law to undisputed facts de novo).

R. Vol. II at 288. Ultimately, Kinghorn redeemed the property for $22,235.33, the amounts Clay expended to pay off Kinghorn's loan and to maintain the property for a brief time. *Id.* In effect, the district court simply preserved Clay's interest in the property – whether that be the property itself or the repayment of monies to redeem the property.

Having obtained no affirmative relief through Attorney Smith's efforts, Clay recovered no fund for Attorney Smith's lien to attach to. In the words of *Skelton*, Attorney Smith's "efforts were sterile." 102 Idaho at 75, 625 P.2d at 1078; *see also Rosenman & Colin*, 850 F.2d at 62-63 (finding attorneys did not create proceeds to which charging lien could attach when client merely retained two sculptures and was repaid on loan for another sculpture); *Hill v. Turney*, 710 P.2d 50, 57-58 (Mont. 1985) (finding attorney had no basis for charging lien on cattle when jury found against client's claim for conversion of cattle and awarded damages to defendant on counterclaim but directed defendant to return cattle as condition of damages).

Second, the monies Kinghorn repaid to Clay do not create proceeds or a fund in favor of Clay because BRP is entitled to a setoff of the damages it was awarded on its cross-claim against Clay. "[T]he right of setoff exists in Idaho, except where denied or limited." *Brown v. Porter*, 42 Idaho 295, 298, 245 P. 398 (1926); *see also* Idaho R. Civ. P. 54(b) (allowing for offset and "a single judgment for the difference between the entitlements" when "any parties to an action are entitled to judgments against each other such as on a claim and counterclaim, or upon cross-claims"). There is no such limitation in Idaho Code § 3-205. Clay won no recovery because BRP's judgment of $64,099.96 exceeded the $22,235.33 Kinghorn tendered to repay Clay. There are no funds left for Attorney Smith to attach a charging lien to under the statute. *See*

Banque Indosuez, 772 N.E.2d at 1117-18 ("[W]here competing claims arise out of the same transaction or instrument, an attorney's charging lien under section 475 will be recoverable against the client's net recovery ....")

* * *

In sum, under the facts presented here, Idaho Code § 3-205 imposes two fundamental requirements that must be met before an attorney's lien can be asserted. First, a charging lien is only available to an attorney whose client commenced a cause of action or filed a counterclaim. Second, the attorney may only place a lien on funds that are a result of the successful prosecution of such actions. Attorney Smith can satisfy neither of those requirements. As such, the underlying basis for Attorney Smith's appeal fails, and the Court's review can end here.

B. Even If Attorney Smith Has A Valid Attorney's Lien Under Idaho Code § 3-205, BRP's Right To A Setoff Is Superior To His Lien.

Attorney Smith also argues that a "charging lien attached to the district court's decision awarding Clay $22,235.33" is superior to any interest BRP may have in those monies. Appellant's Brief at 18. But even if Attorney Smith can meet the requirements for an attorney's lien under Idaho Code § 3-205, BRP's right to a setoff is superior to his lien. *See Dawson v. Eldredge*, 89 Idaho 402, 408-09, 405 P.2d 754, 758 (1965). In *Dawson*, the Court denied a lien right when the debt owed was subject to a complete adjudicated offset. *Id.* at 409, 405 P.2d at 758 ("Because the counterclaim is a complete setoff, the lien is not applicable.").

A similar rule has also been expressed in other states with statutes using language identical to Idaho Code § 3-205. In *Banque Indosuez*, 772 N.E.2d at 1117, for instance, the New York Court of Appeals recognized that:

> [o]ur decisions ... indicate that an attorney's charging lien maintains superiority over a right of setoff where the setoff is unrelated to the judgment or settlement to which the attorney's lien attached. However, we conclude that a different rule should apply here, where the setoff is the result of judgments emanating from the same transaction or instrument.

772 N.E.2d at 1117 (internal citations omitted, emphasis added). Others states hold the same. *See, e.g.*, *Reed v. Reed*, 10 S.W.3d 173, 178 (Mo. Ct. App. 1999) ("The general rule in Missouri is that, if 'the cause and the setoff are related to the same matter, the lien attached only to the surplus that may be adjudged the plaintiff after a balance is struck.'" (quotation omitted)); *Hobson Construction Co. v. Max Drill, Inc.*, 385 A.2d 1256, 1258 (N.J. Super. Ct. App. Div. 1978) ("equitable principles require that the party holding the excess judgment should not be burdened by the fee of the attorney representing the losing litigant."); *Galbreath v. Armstrong*, 193 P.2d 630, 634 (Mont. 1948) ("The general rule is that while an attorney's lien is subordinate to the rights of the adverse party to offset judgments in the same actions or in actions based on the same actions or in actions based on the same transaction, it is nevertheless superior to any right to offset judgments obtained in wholly independent actions.")

The Missouri Court of Appeals in *Reed* explained the policy behind this rule: "Where different claims arise in the course of the same suit, or in relation to the same matter, it is undoubtedly equitable and just that these equities should be arranged between the parties without reference to the solicitor or attorney's lien." *Reed*, 10 S.W.3d at 179 (quotation omitted). Thus

"[h]is lien is only on the clear balance due to his client after all the equities are settled." *Id.* (quotation omitted). The same reasoning should apply here. Like Missouri and other states recognizing that rule, Idaho law also finds attorney's liens are equitable in nature. *See Frazee v. Frazee*, 104 Idaho 463, 466, 660 P.2d 928, 931 (1983). Further, there is no question that BRP's cross-claim against Clay arose in the course of Kinghorn's action against Clay. *See* Idaho R. Civ. P. 13(g) (allowing cross-claim arising out of transaction or occurrence that is subject matter of original action).

Nor is there any question that BRP's judgment against Clay exceeded the payment by Kinghorn to redeem the property. As in *Reed* (and the other cases cited above), it would be unjust and unfair to allow Attorney Smith to obtain the benefit of the $22,235.33 repaid by Kinghorn when BRP is entitled to reimbursement from Clay on a judgment that arises from the same transaction and dispute. In short, BRP should not be burdened by the fees of Attorney Smith in representing Clay, the losing litigant, and Clay should be allowed to avoid a portion of the judgment owed to BRP. For this reason too, BRP is entitled to the $22,235.33 payment.

C. The District Court Correctly Found That BRP's Petition For A Writ Of Attachment Was Unnecessary Once Kinghorn Tendered Payment To Redeem The Property.

Attorney Smith also argues the district court erred when it failed to consider BRP's Petition for a Writ of Attachment under Idaho Code § 8-501. Appellant's Brief at 21. At the hearing, the district court recognized that once Kinghorn tendered her payment to redeem the property, "the only remaining issue to consider was whether Smith's lien took priority over BRP's judgment." R. Vol. II. at 288. The district court did not err. The district court had no

reason to address BRP's petition because Kinghorn's payment effectively mooted the issue: the payment was tendered to the district court and the district court had the authority to decide priority to those monies given BRP's judgment against Clay. Moreover, there can be no error because Attorney Smith did not have a valid attorney's lien and even if he did, BRP was still entitled to a setoff of its judgment against Clay. Attorney Smith's claim of error in this regard should also be denied.[6]

D. BRP Is Entitled To Costs And Attorney Fees On Appeal.

BRP seeks costs on appeal pursuant to I.A.R. 40. BRP also seeks its attorney fees on appeal pursuant to Idaho Code § 12-121, which permits the award of attorney fees to the prevailing party if the Court determines the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. *See Troche v. Gier*, 118 Idaho 740, 742, 800 P.2d 136, 138 (1990) (holding that attorney fees should be awarded when court believes that appeal has been brought or defended frivolously, unreasonably, or without foundation). As explained above, Attorney Smith failed to assert legitimate issues regarding the proper interpretation of Idaho

[6] Even though the district court did not reach the merits of BRP's petition for a writ of attachment, Attorney Smith contends BRP was not entitled to a writ. Appellant's Brief at 18-21. Although such an argument has no relevance to or bearing on the outcome of this appeal, taking each of the arguments in order, Attorney Smith is mistaken. First, by the plain language of Idaho Code § 8-501, BRP is entitled to seek a writ "at the time of issuing of summons, or at any time afterwards." There is no requirement that a writ be obtained before a judgment is issued. Second, BRP recovered a judgment on its cross claim against Clay based on a warranty deed. Thus BRP sued on a contract for the direct payment of money and received that relief through a judgment. *See Wallace v. Perry*, 74 Idaho 86, 91, 257 P.2d 231, 234 (1953). Third, the affidavit supporting BRP's petition attests that the indebtedness is upon the judgment BRP obtained against Clay in successfully prosecuting its cross-claim. R. Vol. II at 239-40. The affidavit therefore met the requirements of Idaho Code § 8-502(a) in that respect and in all others.

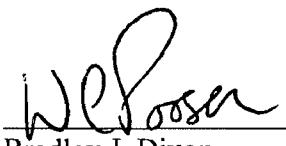
Code § 3-205, and therefore, pursued this appeal frivolously, unreasonably or without foundation.

VI. CONCLUSION

For the reasons set forth above, BRP respectfully requests the Court affirm the district court's order denying Attorney Smith's motion to perfect an attorney's fees lien on Kinghorn's redemption payment and instead, distributing the funds to BRP. BRP also requests that the Court find it the prevailing party on appeal and award it costs and attorney fees.

RESPECTFULLY SUBMITTED this 26th day of August, 2011.

STOEL RIVES LLP



Bradley J. Dixon
W. Christopher Pooser
Defendant-Crossclaimant-Respondent BRP Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of August 2011, I served a true and correct copy of the foregoing **BRIEF OF RESPONDENT BRP INCORPORATED** by the method indicated below, addressed to the following:

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By: W. Christopher Pooser