8-15-2013

Medical Recovery Services, LLC v. Strawn Appellant's Brief Dckt. 40827

IN THE SUPREME COURT OF THE STATE OF IDAHO

MEDICAL RECOVERY SERVICES, LLC an Idaho Limited Liability Company,

Appellant,

v.

STEPHANIE STRAWN and JASON STRAWN,
BRANDON LEWIS and RENEE LEWIS,
JOSEPH KNIGHT,

Respondents.

Supreme Court Docket No. 40827-2013

APPELLANT'S BRIEF ON APPEAL

Appeal from the District Court of the Seventh Judicial District for Bonneville County.
Honorable Dane H. Watkins, Jr., District Judge, presiding.

Bryan N. Zollinger, Esq., residing at Idaho Falls, Idaho, for Appellant,
Medical Recovery Services, LLC

Stephanie Strawn and Jason Strawn, residing at Idaho Falls, Idaho, Respondents
Brandon Lewis and Renee Lewis, residing at Idaho Falls, Idaho, Respondents
Joseph Knight, residing at Idaho Falls, Idaho, Respondents

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STATEMENT OF THE CASE

Plaintiff/appellant, Medical Recovery Services, LLC., ("MRS") appeals from the District Court's Memorandum Decision and Order RE: Motion for Reconsideration and Memorandum Decision and Order RE: Appeal both affirming the default judgments entered by the magistrate court on April 13, 2012, May 29, 2012 and June 18, 2012. This appeal addresses the Magistrate Court's refusal to award the amount of $350.00 in attorney's fees which the appellees agreed to pay by contract with Community Care, who was the original service provider. The magistrate court refused to award the contractually agreed upon attorney's fees under an improper and unconstitutional interpretation of I.C. § 26-2229A(4).

COURSE OF PROCEEDINGS

As each of the three cases appealed from have the same exact course of proceedings and same exact documents filed, MRS has included only those documents pertaining to defendants Stephanie and Jason Strawn in the record. On February 27, 2012, April 16, 2012 and May 2, 2012, MRS filed complaints in each of the matters appealed from seeking to recover amounts due on open accounts and for services provided.[1] On April 10, 2012, May 23, 2012 and June 12, 2012, MRS filed for entry of default judgment seeking $350 as attorney's fees based on contractual provisions with the original service provider in which the defendants agreed to pay $350 as attorney's fees.[2] On April 13, 2012, May 29, 2012 and June 18, 2012 the

[1] R Vol. I, p. 04.
[2] R Vol. I, p. 10.

magistrate court struck the $350 attorney's fee amount contained in the proposed default judgment and awarded an amount of attorney's fees equal to the principal.[3] On April 17, 2012, Plaintiff filed a Motion for Reconsideration specifically identifying the express language of the contract in which the defendants agreed to pay $350 as attorney's fees.[4] On April 20, 2012, the Magistrate Court denied the Motion for Reconsideration. On May 30, 2012 and July 6, 2012, Plaintiff filed Notices of Appeal.[5] Plaintiff also filed a Motion to Consolidate on July 6, 2012 based on the facts that each case followed the same legal and procedural posture and dealt with the identical legal analysis. On August 14, 2012 the District Court entered an Order Consolidating Cases.[6] Plaintiff filed its Amended Notice of Appeal on August 28, 2012.[7] On September 12, 2012, MRS filed its Brief on Appeal arguing that the Magistrate Court had committed reversible error by failing to award contractual attorney's fees and had improperly and unconstitutionally misinterpreted I.C. § 26-2229A(4).[8] On November 8, 2012, the District Court entered the Memorandum Decision and Order Re: Appeal[9] wherein that Court correctly reasoned that MRS was entitled to collect the contractual attorney's fees "[b]arring any other kind of specific statutory preclusion."[10] The District Court further correctly held that I.C. § 26-2229A(4) prohibits collection agencies from collecting any charges or expenses incidental to the

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[3] R Vol. I, p. 14-15.
[4] R Vol. I, p. 01.
[5] R Vol. I, p. 19.
[6] R Vol. I, p. 26.
[7] R Vol. I, p. 29.
[8] R Vol. I, p. 33.
[9] R Vol. I, p. 45.
[10] R Vol. I, p. 49.

principal amount but that "[c]reditors who are not licensed collection agencies are not subject to the same provision."[11] However, the District Court then improperly concluded that because "MRS has failed to overcome the presumption that I.C. § 26-2229A(4) is constitutional," the magistrate court's default judgment is affirmed.[12] MRS filed a Motion for Reconsideration on November 21, 2012 arguing that the District Court has unconstitutionally misapplied I.C. § 26-2229A(4) because the contractual fee for attorney's fees in this case is not a fee incidental to the principal but is part of the principal obligation.[13] MRS argued that because the fee provision it is seeking to enforce is contained in the original contract between the original service provider and debtors, that contract is not subject to I.C. § 26-2229A(4). On January 17, 2013, the District Court denied MRS' Motion for Reconsideration holding that the attorney's fees MRS is seeking to collect are incidental to the principal obligations owed by the defendants.[14] In so holding, the District Court agreed with MRS "that contractual attorney's fees are an integral part of an underlying contract" but "disagrees with the argument made by MRS that being integral to the underlying contract is synonymous with being integral to the underlying obligation."[15] MRS filed the Notice of Appeal on March 4, 2013.[16]

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[11] R Vol. I, p. 55.
[12] R Vol. I, p. 55.
[13] R Vol. I, pg. 59 (The Motion for Reconsideration is not part of the record but the District Court's Memorandum Decision references the Motion for Reconsideration).
[14] R Vol. I, p. 57.
[15] R Vol. I, p. 62.
[16] R Vol. I, p. 65.

STATEMENT OF FACTS

Because there were no answers filed in any of the cases appealed from and the Magistrate Court acted sua sponte in cutting the contractual attorney's fees sought on default judgment, the facts of this case contained in the record are limited. Each of the defendants signed a Patient Sign-In Form with Community Care which included a Promise to Pay section stating in relevant part that "I agree to pay as a reasonable attorney's fee $350 or 35% of the principal balance, whichever is greater, if my account is assigned to a collection agency and suit is filed to recover payment on my account."[17] Each of the defendants' accounts were then assigned to MRS who eventually filed suit to recover payment for the services the defendants had contracted to pay for but had not paid. MRS served each of the defendants with a Complaint and Summons and after the appropriate time had lapsed, MRS filed for entry of default judgment. MRS included as an exhibit to its Affidavit in Support of Application for Default Judgment, a copy of the contract each defendant had signed entitling Community Care, and in turn MRS as assignee, to collect attorney's fees of $350.[18] Ultimately, the magistrate and district courts held that I.C. § 26-2229A(4) prevented MRS from collecting the contractually agreed upon amount of attorney's fees.

ISSUES PRESENTED ON APPEAL

1. Did the Magistrate court commit reversible error when it did not award

[17] R Vol. I, p. 13.
[18] R Vol. I, p. 13.

attorney's fees on default in an amount agreed to by the parties pursuant to a written contract?

2. Is Medical Recovery Services, LLC entitled to an award of attorney's fees on appeal under I.C. 12-120(1), (3) and (5) and I.A.R. 41?

ARGUMENT

I.

THE LOWER COURTS COMMITTED REVERSIBLE ERROR BY FAILING TO AWARD THE AMOUNT OF ATTORNEY'S FEES THE PARTIES HAD CONTRACTUALLY AGREED UPON.

A. Standard of Review.

Whether MRS should be awarded the agreed upon amount of contractual attorney's fees depends on the interpretation of I.C. § 26-2229A(4). The Idaho Appellate Court has summarized the standard of review to be applied when deciding an award of attorney's fees based on the interpretation of statute as follows:

> When an award of attorney fees depends on the interpretation of a statute, the standard of review for statutory interpretation applies. *Stout v. Key Training Corp.*, 144 Idaho 195, 196, 158 P.3d 971, 972 (2007). The interpretation of a statute is an issue of law over which we exercise free review. *Zener v. Velde*, 135 Idaho 352, 355, 17 P.3d 296, 299 (Ct.App.2000). When interpreting a statute, we will construe the statute as a whole to give effect to the legislative intent. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990); *Zener*, 135 Idaho at 355, 17 P.3d at 299. The plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. *Watkins Family*, 118 Idaho at 540, 797 P.2d at 1388; *Zener*, 135 Idaho at 355, 17 P.3d at 299.

Action Collection Services, Inc., v. Bigham, 146 Idaho 286 (Idaho App., 2008).

B. Plaintiff Had A Legal Entitlement To Attorney Fees For The Amount The Parties Agreed To In A Written Contract.

It is generally accepted that a court will not permit a party to avoid its contractual obligations. *Smith v. Idaho State Federal Credit Union,* 114 Idaho 680 (1988). When a contract is clear and unambiguous, courts are required to enforce the terms as written and cannot revise them in order to make it better for the parties. *McKay v. Boise Project Bd. of Control,* 141 Idaho 463 (2005). In Idaho, an attorney's fee agreement constitutes a valid contract. *Curr v. Curr,* 124 Idaho 686 (1993). Additionally, Idaho courts have held that when there is a valid contract between the parties which contains a provision for attorney's fees and costs, the terms of that provision establish a right to attorney's fees and costs. *LeaseFirst v. Burns,* 131 Idaho 158 (1998).

Further, at least one Idaho court, as well as courts of other jurisdictions, have held that where parties to a contract fix the amount of the attorney fees to be paid, it is presumed that the agreed amount is reasonable. *See Wooten v. Dahlquist*, 42 Idaho 121 (1926) (holding that trial court did not err in presuming that the $200 fixed amount of contractual attorney's fees was reasonable in the absence of evidence to the contrary); *Government Street Lumber Company, Inc. v. AmSouth Bank, N.A.*, 553 So.2d 68 (Ala. 1989) (holding that trial court did not err in awarding amount of attorney's fees the parties expressly agreed to in a written

agreement); and *McDowell Mountain Ranch Community Ass'n, Inc. v. Simmons*, 165 P3d 667 (Ariz. App. 2007) (holding that an agreement to pay a specified amount in attorney's fees establishes a prima facie entitlement to fees in the amount requested.)

Here, the attorney's fee provisions are found in written contracts and provide that the defendants agreed "to pay as a reasonable attorney's fee $350 or 35% of the principal and interest on my account balance, whichever is greater, if my account is assigned to a collection agency and suit is filed to recover payment on my account."[19] The language of the attorney's fee provisions are clear and unambiguous. The parties entered into agreements in which they formed valid contracts for attorney's fees. These contracts created a right to the amount of attorney's fees agreed upon in the contracts when the accounts were assigned for collections and suits were filed to recover payment, and the amount is presumed by law to be reasonable.

C. Idaho Code Section 26-2229(A)(4) Does Not Apply To The Facts Of This Case.

Although MRS is subject to the Idaho Collection Agency Act ("ICAA"), Idaho Code §§ 26-2201 et. al., I.C. § 26-2229A(4) is not applicable in this case because MRS, as assignee, is trying to enforce contracts between the debtors and medical service providers and not a contract between MRS and the debtors. I.C. § 26-2222 defines a licensee as "a person who has obtained a license under this act." MRS is a licensee under the act, but the underlying medical provider and party to the contracts, Community Care, is clearly not a licensee or person required to be

[19] R Vol. I, p. 13.

licensed under this act. I.C. § 26-2229A states in relevant part that:

> (1) Every ***licensee or person required to be licensed under this act*** and its agents shall deal openly, fairly, and honestly without deception in the conduct of its business activities in this state under this act.
> (2) When not inconsistent with the statutes of this state, the provisions of the federal fair debt collection practices act, 15 U.S.C. section 1692, et seq., as amended, may be enforced by the director against collection agencies licensed or required to be licensed under the provisions of this act.
> (4) ***No collection agency licensee, or collection agency required to be licensed under this act***, or agent of such collection agency shall collect or attempt to collect any interest or other charges, fees, or expenses incidental to the principal obligation unless such interest or incidental fees, charges, or expenses:
> (a) Are expressly authorized by statute;
> (b) Are allowed by court ruling against the debtor;
> (c) Have been judicially determined;
> (d) Are provided for in a written form agreement, signed by both the debtor and the licensee, and which has the prior approval of the director with respect to the terms of the agreement and amounts of the fees, interest, charges and expenses; or

I.C. § 26-2229A (Emphasis Added).

In the cases now on appeal, Community Care, the medical service provider who contracted with the debtors is not a licensee as defined by the ICAA and the ICAA does not apply to the contract between Community Care and its patients. The ICAA does not apply to anyone but "licensees" under the act and does not create any legal requirements as to the content of contracts between medical providers and their patients. The attorney's fee provisions are found in the contracts between Community Care and the appellees and are part of the principal debt assigned to MRS. The District Court in its Memorandum Decision and Order Re: Motion for Reconsideration stated:

> The attorney fees, while an integral part of the contract, are subordinate to the

> debt owing from the services provided by Community Care. In other words, the attorney fees are incidental to the principal obligation for purposes of Idaho Code § 26-2229A(4). This Court agrees with MRS that contractual attorney fees are an integral part of the underlying contract. *See Bank of Idaho v. Colley,* 103 Idaho 320, 326, 647 P2d. 7, 782 (Ct. App. 1982) ("The right to recover attorney fees is an integral part of the bank's entitlement under the guarant agreement."). However, this Court disagrees with the argument made by MRS that being integral to the underlying contract is synonymous with being integral to the underlying obligation.[20]

The District Court does not explain how I.C. § 26-2229A(4) applies to Community Care who is not a licensee but instead apparently interprets that statute to mean that a collection agency cannot "collect" these fees for its client. However, other Idaho statutes and rules of procedure clearly conflict with this interpretation and allow collection agencies to collect attorney's fees. It is generally accepted in the state of Idaho and the practice of all magistrate courts, district courts, and the Supreme Court in the state of Idaho to award attorney's fees to collection agencies under I.C. §§ 12-120(1) & (3). Thus according to the reasoning of the lower courts in this case, all of these other courts, including this magistrate court who did award some attorney's fees, are improperly awarding attorney's fees in violation of I.C. § 26-2229A(4). Clearly, the intention and plain language of I.C. § 26-2229A(4) is to allow collection agencies and other licensees under the act to collect attorney's fees that are "expressly authorized by statute." Attorney's fees in the cases on appeal are awardable under I.C. §§ 12-120(1) and (3) and the amount is set pursuant to valid contracts between the Community Care and the debtors. Therefore, all the lower courts are really doing is holding that the parties to a contract

[20] R Vol. I, p. 62.

cannot set the amount of attorney's fees and improperly citing I.C. § 26-2229A(4) in support of this outcome.

The lower courts fail to cite to or otherwise explain any authority under which they completely invalidate and rewrite Community Care's contract and seems to override the legal presumption that the contractual amount is reasonable. Because MRS, who is the licensee in this case, is not seeking any charges incidental to the principal but is only seeking to enforce the amount of the contractual debt, this court should enforce Community Care's contract which it assigned to MRS and award MRS the contractual fees sought.

D. Court's Have Consistently Upheld And Enforced Similar Contractual Attorney's Fee Provisions Under the Fair Debt Collection Practices Act.

MRS has been unable to locate even a single Idaho case which applies I.C. § 26-2229A(4) and will therefore rely on case law interpreting the Fair Debt Collection Practices Act ("FDCPA") which is expressly adopted and incorporated as part of the Idaho Collection Agency Act ("ICAA")[21] to show that similar contracts for attorney's fees are routinely upheld. In this regard, courts have held that contracts between the underlying creditor and debtor are enforceable by the collection agency to which the debt is assigned. *See Shapiro v. Riddle & Associates, P.C.*, 351 F.3d 63, 64 (2d Cir. 2003)(Affirming district court's decision that it was not a violation of FDCPA to collect a contractual attorney fee on a contract between the underlying debtor and

[21] See I.C. § 26-2229A(2).

creditor.). One court explained that "once a debtor such as Bull agrees to pay attorneys' fees in the event of default, he cannot use the FDCPA to contest the reasonableness of those fees, which is precisely what Plaintiff seeks to do in this case. Stated differently, even if a court were to agree with Plaintiff that $3,900 is an unreasonable amount of attorneys' fees, Defendants demanding that amount in their collection complaint does not give rise to a claim under the FDCPA." *Bull v. Asset Acceptance, LLC*, 444 F. Supp. 2d 946, 951 (N.D. Ind. 2006).

In these cases, the defendants have not even objected to the contractual amount of fees but instead the court has on its own initiative raised the objection for the debtor. The court distinguishes these federal cases stating that "the federal fair debt collection statute is inconsistent with the Idaho statute on this particular issue and thus any cases cited would be inapposite." The relevant language contained in the FDCPA states that "the following conduct is a violation of this section: (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) ***unless such amount is expressly authorized by the agreement creating the debt or permitted by law***. 15 U.S.C.A. § 1692f (West)(Emphasis added). Clearly the contractual language at issue in these cases complies with 15 U.S.CA. § 1692f as the contracts between Community Care and the debtors expressly authorize the fees.

The ICAA permits collection agencies to collect fees that are authorized by statute, allowed by court ruling, have been judicially determined or are provided by a written

agreement signed by the licensee and the debtor and approved by the director.[22] In this case, the attorney's fees sought are allowable per statute as explained above, by court ruling because the courts of Idaho routinely uphold contracts for attorney's fees, and because the contractual provision at issue is between the creditor and debtor and not between the collection agency and debtor. Because contractual attorney's fee provisions have routinely been upheld in FDCPA cases, this court should award MRS the contractual attorney's fees it seeks in this case as MRS is not in violation of the FDCPA or the ICAA.

II.

THE DISTRICT COURT IMPROPERLY INTERPRETS I.C. § 26-2229A(4) AND THIS IMPROPER INTERPRETATION AND APPLICATION RENDERS I.C. § 26-2229A(4) UNCONSTITUTIONAL.

A. Standard of Review.

This Court has explained the standard of review to apply when reviewing the constitutionality of a statute. This Court has stated that

> The constitutionality of a statute is a question of law over which this Court exercises free review. *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998); *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). The party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional and "must overcome a strong presumption of validity." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). Courts are obligated to seek an interpretation of a statute that upholds its constitutionality. *State v. Newman*, 108 Idaho 5, 13, 696 P.2d 856, 864 (1985). The judicial power to declare legislative

[22] See I.C. § 26-2229A(4).

action invalid upon constitutional grounds is to be exercised only in clear cases. *State ex rel. Brassey v. Hanson*, 81 Idaho 403, 406, 342 P.2d 706, 709 (1959).

Moon v. N. Idaho Farmers Ass'n, 140 Idaho 536, 540 (2004).

B. The Lower Courts' Interpretation of I.C. § 26-2229A(4) Would Render That Statute Unconstitutional As A Law Impairing The Obligation of Contracts.

The United States Constitution Article 1, § 10, cl. 1 states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, ***or Law impairing the Obligation of Contracts***, or grant any Title of Nobility

U.S. Const. art. I, § 10, cl. 1(Emphasis added). The Constitution of the State of Idaho at Article 1, § 16 states that "No bill of attainder, ex post facto law, ***or law impairing the obligation of contracts shall ever be passed***." Idaho Const. art. I, § 16 (Emphasis added). Idaho Courts have explained:

> An attorney fee agreement constitutes a valid contract under Idaho law, and appellants performed services for their clients in reliance on the terms of the fee agreements. It is clear that, in Idaho, parties to a contract have a property interest in the subject matter of the contract that is protectable both under the Contract Clause and the Due Process Clause of the United States Constitution.

Curr v. Curr, 124 Idaho 686, 691-92, 864 P.2d 132, 137-38 (1993). "Further, a law which in its operation denies or obstructs any rights accruing under a contract is a violation of Idaho's constitutional provision prohibiting any laws which impair the "obligation of contract." *Curtis v. Firth*, 123 Idaho 598, 610, 850 P.2d 749, 761 (1993).

Idaho courts have consistently held that "where there is a valid contract between the parties which contains a provision for an award of attorney fees and costs, the terms of that contractual provision establish a right to an award of attorney fees and costs." *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 187 (2003) (emphasis added); and *Farm Credit Bank of Spokane v. Wissel*, 122 Idaho 565, 569 (1992). See also *Lease First v. Burns*, 131 Idaho 158, 163 (1998) (holding that a party is entitled to an award of attorney's fees where "the terms of that contractual provision establish a right to an award of attorney fees and costs.") Attorney's fee provisions in contracts are "an integral part" of a party's entitlement under the provisions of an agreement. *Bank of Idaho v. Colley*, 103 Idaho 320, 326, (Ct. App. 1982). Court's cannot treat attorney's fees provisions differently than the obligation to pay the contractual debt. *Id.* The right to attorney's fees based on a contract is so well defined that a trial court cannot even award attorney's fees based on a statute when "a valid agreement between the parties specifically limits the dollar amount that may be claimed and awarded." *Chittenden & Eastman Co. v. Leasure*, 116 Idaho 981, 982 (Ct. App. 1989). The rationale for this rule is that "the freedom of contract . . . is 'a fundamental concept underlying the law of contracts and is an essential element of the free enterprise system." *Zenner v. Holcomb*, 147 Idaho 444, 452 (2009).

In these cases, Community Care had a valid contract which contained a provision for attorney's fees which established a right to an award of the contractually agreed upon attorney's fees. The District Court found that "I.C. § 26-2229A(4) plainly prohibits MRS from

collecting any fees, which are incidental to the principal obligation."[23] MRS agrees. However, the contracts between the debtors and the original service provider, Community Care, contain a provision in which the debtors agreed to "pay [Community Care] as a reasonable attorney's fee $350 or 35% of the principal and interest on my account balance, whichever is greater, if my account is assigned to a collection agency and suit is filed to recover payment on my account."[24] This contractual provision gives Community Care the contractual right to $350 or 35% of the principal and interest as a contractual attorney fee, which predates any assignment or interest MRS obtained in the accounts.

Because contractual provisions for attorney's fees are "integral clauses" in contracts and should not be treated any differently than any other obligations created by contract, the attorney's fees MRS seeks are part of the principal obligation owing to Community Care, not MRS. When Community Care assigned the contracts to MRS to file suit, Community Care conferred a complete and present right in the contracts to MRS, which included the debtor's obligation to pay Community Care contractual attorney's fees. Accordingly, MRS has not added any charges, fees, or expenses incidental to the principal obligation but seeks to collect the amount of contractual debt Community Care has assigned to it. Therefore, MRS is not collecting or attempting to collect any "fees incidental to the principal obligation," and I.C. § 26-

[23] R Vol. I, p. 51.
[24] R Vol. I, p. 13.

229A(4) does not apply to preclude MRS from recovering the contractually agreed upon amount as attorney's fees on the principal obligation.

The underlying rationale for the rule regarding contractual attorney's fees underscores the point in this case. As explained above, recovering attorney's fees as part of a contractual obligation is "within the freedom of contract" and "an essential element of the free enterprise system." Community Care extended credit to the debtors in exchange for which Community Care obtained a contractual term that the debtors agreed to pay a contractual amount to Community Care for attorney's fees if Community Care assigned an account to collections. No evidence exists that this transaction was anything other than an arm's length bargained for transaction between Community Care and the debtors. This important "free enterprise" exchange resulting in a contractual obligation for attorney's fees took place between Community Care and the debtors months before MRS ever even got involved. If this Court were to deny Community Care its contractual right to attorney's fees, this Court would deny Community Care good and valuable consideration it bargained for in extending credit to the debtors who, as it turns out, were not good credit risks, further underscoring the very reason Community Care bargained for and obtained an attorney's fees provision for accounts turned over for collections. Accordingly, MRS is not collecting any fees, which are incidental to the principal obligation, but collecting part of the principal obligation itself.

Finally, the purpose of I.C. § 26-2229A(4) does not apply here in this bargained for exchange between Community Care and the debtors. The purpose of the rule is to protect

debtors from collection agencies with whom the debtors have no ability to bargain at arm's length as part of a free enterprise system. For example, if a debtor owes an assigned debt of $500 to a collection agency, the debtor has no ability to walk away from the transaction. He owes the money and is presumably pinched to pay it without a garnishment. If the collection agency says it will take payments, but charges a $15 a month service fee, the debtor can do nothing about it. If the collection agency says it will take credit card payments, but charges a $10 fee per transaction, the debtor can do nothing about it. Or if the collection agency charges a monthly reminder fee, a statement fee, or any other incidental fee, the debtor can do nothing about it. Thus, the rule is aimed at protecting debtors from incurring collection agency fees which the debtor has no power to avoid. This picture contrasts sharply with the debtor who, as here, agrees to receive credit and medical services as part of an arm's length transaction. If the debtor did not want the medical services, he could have done something about it: gone elsewhere for treatment. This is especially true given that Community Care does not render "emergency room" services making the services simply primary care services.

The lower courts in these cases have completely disregarded Community Care's right to contract by not awarding MRS the contractually agreed upon attorney's fees. By misinterpreting I.C. § 26-2229A(4) the lower courts' decision would render I.C. § 26-2229A(4) unconstitutional as it would impair Community Care's freedom to contract.

C. <u>The Lower Courts' Interpretation of I.C. § 26-2229A(4) Would Render That Statute Unconstitutional As A Violation of Community Care's Equal Protection</u>.

Both article 1 § 2 of the Idaho Constitution and the Fourteenth Amendment to United States Constitution provide all people with equal protection and benefit of the law. Idaho courts have explained that "[t]he principle underlying the equal protection clauses of both the Idaho and United States Constitutions is that all persons in like circumstances should receive the same benefits and burdens of the law." *Bon Appetit Gourmet Foods, Inc. v. State, Dept. of Employment*, 117 Idaho 1002, 1003-04, (1989); *See also, Sterling H. Nelson & Sons, Inc. v. Bender,* 95 Idaho 813, 520 P.2d 860 (1974); and *State v. Breed,* 111 Idaho 497, 725 P.2d 202 (Ct.App.1986). In determining the standard of review to apply to equal protection analysis, the Idaho Court of Appeals has explained:

> "In any equal protection analysis, the Court must: (1) identify the classification at issue; (2) determine the standard of review to apply; and (3) apply the standard. Strict scrutiny applies where the classification is based upon a suspect class (such as race) or involves a fundamental right. Idaho Courts use the "means focus" test where the classification is discriminatory on its face and clearly bears no relationship to the statute's declared purpose. Finally, the rational basis test applies in all other situations. In order to survive rational basis review, the statutory classification must "bear a rational relationship to [a] legitimate government interest."

Aeschliman v. State, 132 Idaho 397, 401, 973 P.2d 749, 753 (Ct. App. 1999)(Internal citations omitted).

In this case, the lower courts' interpretation of I.C. § 26-2229A(4) does not involve a suspect class and this court should review the magistrate's decision using a rational basis review. MRS does not argue that this statute is unconstitutional on its face but only that the lower courts have applied the statute in violation of the equal protection clause. Essentially, if the lower courts' rulings are upheld, the outcome would be that the laws would apply

differently to "licensees" under the ICAA. For example, under the lower courts' analysis, Community Care would be able to directly hire a law firm to collect on its contractual debt and the law firm could collect the contractual attorney's fees. However, if Community Care decides to hire a collection agency to collect the debt and the agency finds it necessary to file suit, the collection agency could not collect the contractual attorney's fees. The effect of this unequal protection or burden of the law is that fewer creditors would use a collection agency to collect debts because in order to recover attorney's fees the creditors would have to hire an attorney and file law suits against their patients, customers or clients directly. This could not have been the intention of the legislature and is not what I.C. § 26-2229A(4) actually states on its face. Although the ICAA does not have a purpose section, the FDCPA states that "[i]t is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C.A. § 1692. The magistrate court's interpretation of I.C. § 26-2229A does not rationally relate to this stated purpose but would only create different burdens on collection agencies compared to attorney's or other similarly situated debt collectors. Therefore, because there is no rational basis reasonably related to a legitimate government objective, the magistrate court's interpretation of I.C. § 26-2229A would render it unconstitutional as applied.

III.

MRS IS ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL.

Idaho Appellate Rule 40 allows an award of costs "as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." I.A.R. 40(a). MRS is entitled to attorneys fees and costs pursuant I.C. 12-120(1), I.C. 12-120(3), I.A.R. 40 and I.A.R 41. Because the matter in dispute was less than $25,000, MRS demanded payment in writing from the defendants more than 10 days before filing suit and because MRS was attempting to collect on an open account, account stated, or contract relating to the purchase of services MRS was entitled to recover attorney's fees and costs. Accordingly, MRS should be entitled to an award of attorney's fees under Idaho Code Sections 12-120(1) and 12-120(3), Idaho Appellate Rule 41 and costs under Idaho Appellate Rule 40 if this Court finds MRS to be the prevailing party on this appeal.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's Memorandum Decision and Order Re: Appeal and the District Court's Memorandum and Order Re: Motion for Reconsideration affirming the decision of the magistrate court to reduce the contractually agreed upon attorney's fees with instructions for the magistrate court to award MRS the contractually agreed upon attorney's fees.

RESPECTIVELY SUBMITTED this 13th day of August, 2013.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By:_____
Bryan N. Zollinger
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2013, I caused a true and correct copy of the forgoing **APPELLANT'S BRIEF ON APPEAL** to be served, by placing the same in a sealed envelope and depositing it in the U.S. Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

PARTIES SERVED:

[✓] U.S. Mail
[ ] Facsimile
[ ] Hand Delivery
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