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IN THE SUPREME COURT OF THE STATE OF IDAHO

ACTION COLLECTION SERVICE, INC.
an Idaho Corporation,

Plaintiff/ Respondent,

vs.

HARMONY L. BLACK fka
MCCULLOUGH,

Defendant/Appellant.

SUPREME COURT NO. 46116-2018
Canyon Co. Case No. CV 2012-3011

RESPONDENT'S BRIEF

Appeal from the District Court of the Third Judicial District
of the State of Idaho, In and For the County of Canyon

The Honorable George Carey, District Judge
The Honorable Jerold W. Lee, Magistrate Judge
Presiding

ATTORNEY FOR APPELLANT

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I.

STATEMENT OF THE CASE

Action Collection Service, Inc. (hereinafter “ACS”) commenced suit on March 29, 2012. In its complaint, ACS brought claim for payment of \$4,465.00 in principal charges alleged to be owed the Idaho Department of Juvenile Corrections for the care and treatment of Ms. Black’s minor daughter. Ms. Black appeared pro se and asserted a damage claim against ACS under the Fair Debt Collection Practices Act. ACS moved for summary judgment and the magistrate entered judgment against Ms. Black on all claims. Following a series of appeals, the case was remanded and resubmitted on cross motions for summary judgment.¹

On July 29, 2015, summary judgment was again entered against Ms. Black on her Fair Debt Collection Act claim. R. Supreme Court #44466-2016, p. 244. The remainder of the case was set for trial on February 19, 2016. Before trial, Ms. Black retained counsel, who filed a written notice of appearance on January 21, 2016. R. Supreme Court #44466-2016, p. 318. The parties then attempted settlement where it appeared that an agreement for a mutual dismissal of all claims was acceptable, but the settlement foundered when Ms. Black refused to sign a mutual settlement agreement. R. Supreme Court #46116-2018, pp. 221-230.

On the second day of trial, the magistrate recused himself and the case was re-assigned to the district court based on Ms. Black’s second counterclaim for damages which exceeded \$10,000.00. Trial resumed on July 7, 2016, with the district court entering judgment against Ms.

¹ Ms. Black’s first appeal was filed on September 11, 2012 with an order remanding the case issued on January 30, 2014. That decision was appealed to the Idaho Supreme Court on March 5, 2014 with the district court’s decision affirmed in part and remanded back to the magistrate on February 23, 2015.

Black on all claims on July 14, 2016.² R. Supreme Court #44466-2016, p. 508-509, 699. ACS sought an award of costs and attorney's fees. R. Supreme Court #44466-2016, p. 701-717. Ms. Black objected on the grounds that the costs and fees were unreasonable in amount compared to the amount awarded ACS, and that ACS had not complied with Idaho Code Section 12-120(1) or Idaho Code Section 12-120(3). R. Supreme Court #44466-2016, p. 730-734; R. 742-750. The district court awarded ACS costs as a matter of right and attorney's fees in the sum of \$3,500.00. R. Supreme Court #44466-2016, pp. 755-766, 800-801. Ms. Black appealed and the judgment on ACS's claim was vacated on the grounds that the assignment to ACS by the Idaho Department of Juvenile Corrections was premature. The judgments in favor of ACS on Ms. Black's counterclaims were not appeal and were not reversed.

On remand, Ms. Black moved for an award of costs and attorney fees. R. Supreme Court #46116-2018, pp. 90-123. Judgment was entered in favor of Ms. Black on ACS's claims and against Ms. Black on her counterclaims. R. Supreme Court #46116-2018, pp. 233-234. Both parties submitted extensive briefing and argument concerning the costs and attorney's fee request, with the district court awarding Ms. Black costs and attorney's fees in the sum of \$4,501.00. R. Supreme Court #46116-2018, pp. 233-246. Ms. Black sought reconsideration of that award, and additional briefing and oral argument followed.

On June 28, 2018, the district court issued its final written decision confirming the original award of \$4,501.00. R. Supreme Court #46116-2018, pp. 247-257; 319-330. Ms. Black

² During the trial, Ms. Black filed an interlocutory appeal without approval from the trial court, which was dismissed on March 28, 2016. R. Supreme Court #44466-2016, pp. 373, 389, 461-463.

now appeals the amount awarded in attorney's fees. She did not appeal the entry of judgment against her on her counterclaims.

II.

ATTORNEY'S FEES ON APPEAL

ACS requests attorney's fees on appeal. This request is based on Idaho Code Sections 12-120(1), 12-120(2), 12-120(3) and 12-121.

III.

ARGUMENT

A. The district court's determination that Ms. Black was the prevailing party did not obligate the district court to award the entire amount requested.

When the trial court evaluates an attorney fee request based on the application of a statute or rule that requires there be a "prevailing party," the trial court must determine whether the party did in fact prevail "in the action," and if so, only then may the trial court fix the amount of attorney's fees in light of the Idaho Rule of Civil Procedure 54(e)(3) factors. I.R.C.P. 54(d)(1)(B); I.R.C.P. 54(e)(1) and (3). Idaho Rule of Civil Procedure 54(d)(1)(B) provides:

In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

I.R.C.P. 54(d)(1)(B)(emphasis added).

In cases where both parties are successful, the court may sever the claims and analyze the requests separately for each, may simply deny costs and fees altogether on a finding that there was no overall prevailing party, or may apportion the costs and fees between and among the parties in a fair and equitable manner after considering all of the issues and claims involved and the resultant judgment or judgments obtained in light of the factors stated in Idaho Rule of Civil Procedure 54(e)(3). *Jorgensen v. Coppedge*, 148 Idaho 536, 539, 224 P.3d 1125, 1128 (2010); *Rockefeller v. Grabow*, 139 Idaho 538, 82 P.3d 450 (2003)(citing *Ramco v. H-K Contractors, Inc.*, 118 Idaho 108, 794 P.2d 1381 (1990)); *See also, Rockefeller v. Grabow*, 136 Idaho 637, 645, 39 P.3d 577, 585 (2001)(holding that a partially successful claimant must apportion the requested costs and fees between claims that qualify and ones that do not).

Ms. Black contends that as the prevailing party, the district court was bound to award her the entire amount of attorney's fees requested based on the application of the Lodestar Method. In support of her claim, Ms. Black asserts that this case was litigated for over five years, with the inference that her attorney was involved in the case for the entire five-year time period. [Appellant's Brief, p. 6].

While it is true that this matter was filed in March 2012, Mr. Katsilometes did not formally appear in the case until January 21, 2016, one month prior to the start of trial.³ R. Supreme Court #44466-2016, p. 318. Ms. Black's request for fees are not sums she is obligated to pay her attorney, but rather sums her lawyer believes should be awarded to him for Ms. Black's partial successes, despite having previously argued that ACS's attorney's fees, which

³ As part of Ms. Black's memorandum of costs and attorney's fees, Mr. Katsilometes claims \$12,270.00 for time he allegedly incurred prior to his appearance in this case.

were substantially less in hourly rate and total amount, were unreasonable and that the small size of this case dictates a reduced attorney's fee award.⁴ R. Supreme Court #46116-2018, p. 328(finding that the fee arrangement was contingent); R. Supreme Court #44466-2016, p. 730-734; R. 742-750.

Ms. Black further claims that her attorney's hourly rate and overall time spent were not challenged. ACS argued that the time spent in this case was excessive and that the hourly rate was inconsistent with like work in the Canyon County community. R. Supreme Court #46116-2018, pp. 124-136. The district court was aware of those arguments, had briefing and oral argument from both parties concerning these issues, and reached a decision that it has never had a claim for such a high hourly rate. R. Supreme Court #46116-2018, p. 327. The district court also took into consideration the other Rule 54(e)(3) factors. R. Supreme Court #46116-2018, pp. 236-246, 319-330. Namely, "[t]he amount involved was well under \$10,000.00. The result of the case was twofold: that Ms. Black did not have a monetary judgment entered against her and that her counterclaim was dismissed." R. Supreme Court #46116-2018, p. 327. As such, the district court was cognizant that ACS had brought suit against Mr. Black in the magistrate's division to recover a four-figure balance, and that Ms. Black's counterclaims were denied, leaving a mixed result in the overall outcome of the case. R. Supreme Court #44466-2016, p. 244; R. Supreme Court #46116-2018, pp. 233-235. Thus, the mere fact that the district court found Ms. Black to be a prevailing party did not restrict the award to the time and labor asserted by Ms. Black's attorney. Rather, the district court was required to evaluate the fee request

⁴ ACS's claim for attorney fees included time and labor expended from March 2012 to July 2016. As a result, ACS's claim for fees included approximately four more years of service than that of Ms. Black's claim for fees.

consistent with Rule 54, including the option to apportion the award between and among the parties in a fair and equitable manner after considering all of the issues and claims involved and the resultant judgment or judgments obtained. I.R.C.P. 54(d)(1)(B). As such, the district court was free to account for the successes of both parties, the resultant judgments obtained, and the other factors of Rule 54(e)(3). R. Supreme Court #46116-2018, pp. 233-234, 319-330. *Clear v. Marvin*, 86 Idaho 87, 383 P.2d 346 (1963)(holding that error is never presumed on appeal and the burden of showing it is on the party alleging error).

B. The district court’s decision to award Ms. Black, a partially successful defendant, attorney’s fees less than requested was not an abuse of discretion.

Rule 54(e)(8) requires that any claim for attorney fees be made pursuant to Rule 54(e) unless an applicable statute or contract provides otherwise. I.R.C.P. 54(e)(8). The Lodestar Method for evaluating the reasonableness of an attorney’s fees request is not the applicable standard when the request is based on a state statute. *Perkins v. U.S. Transformer West*, 132 Idaho 427, 974 P.2d 73 (1999)(rejecting the Lodestar Method and holding that the proper measure of attorney fees under a state statute is governed by Rule 54(e)(3)), *overruled on other grounds by Poole v. Davis*, 153 Idaho 604, 288 P.3d 821 (2012). As such, “[t]he time and labor actually required . . . is not the ‘be all, end all’ of the attorney fee question.” *Sun Valley Potato Growers, Inc.* 139 Idaho 761, 769, 86P.3d 475 (2004); *Medical Recovery Services, Inc. v. Jones*, 145 Idaho 106, 175 P.3d 796, (Ct. App. 2007). The trial court is permitted to examine the reasonableness of the claim in relation to the claims for which he or she is entitled, and the court need not accept the figures advanced by the requesting attorney, and may consider the case and result as a whole when making a fee determination. *Daisy MFG. Co., Inc. v. Paintball Sports,*

Inc., 134 Idaho 259, 263, 999 P.2d 914, 918 (Ct. App. 2000)(holding that an “attorney cannot spend his time extravagantly and expect to be compensated by the party who loses at trial”). Thus, the reasonableness of an attorney fee award is based on the trial court’s consideration of all the factors set forth in Rule 54(e)(3), without giving undue weight or emphasis to any single factor. *Medical Recovery Services, Inc.*, 145 Idaho at 109; *Nalen v. Jenkins*, 113 Idaho 79, 81, 741 P.2d 366 (Ct. App. 1987). Moreover, simply because the trial court determines that a claimant is a prevailing party and therefore entitled to some attorney’s fees, does not mean that the award must be in the full amount requested. The trial court is permitted to apportion the attorney’s fees between and among the parties in a fair and equitable manner after considering all of the issues and claims involved and the resultant judgment or judgments obtained. I.R.C.P. 54(d)(1)(B); I.R.C.P. 54(e)(1); *Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 121, 626 P.2d 767 (1980)(holding that the trial court does not have to grant a full reasonable attorney fee to a partially prevailing party); *see also, Credit Suisse AG v. Teufel Nursery, Inc.*, 156 Idaho 189, 203, 321 P.3d 739 (2014)(holding that the district court did not abuse its discretion in reducing the attorney fee request by 40%); *Medical Recovery Services, Inc.*, 145 Idaho at 111(affirming a 90% reduction in the amount requested); *Beco Constr. Co. v. Harper Contr., Inc.*, 130 Idaho 4, 10-11, 936 P.2d 202 (Ct. App. 1997)(denying Beco’s claim that the attorney fee award was unreasonably low because the reasonableness of the amount involves a discretionary determination by the trial court after considering all the factors in Rule 54(e)(3)). Thus, the amount to be awarded is within the trial court’s discretion and will not be overturned unless the party appealing the decision shows an abuse of discretion. *Id.* In assessing whether an

award of attorney fees was an abuse of discretion, this Court conducts a four-part inquiry: Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *Id.*

Ms. Black contends that the district court abused its discretion in reducing the requested attorney's fees because it did not calculate the award based on the actual time and labor asserted by counsel using the Lodestar Method adjusted upward or downward based on the other Rule 54(e)(3) factors.

Here, the trial court issued a twelve-page memorandum decision justifying the amount of fees it awarded with application to the Rule 54(e)(3) factors. R. Supreme Court #46116-2018, pp. 319-330. This decision was preceded by two earlier opinions on the attorney fee question, each one evaluating the Rule 54(e)(3) factors. R. Supreme Court #44466-2016, pp. 755-766, R. Supreme Court #46116-2018, pp. 236-246. In each of those decisions, the district court perceived the granting of fees as a discretionary matter. [Id]. In the latter two opinions, the district court found that Ms. Black was a prevailing party and entitled to some attorney fees pursuant to the Idaho Code Section 12-120(1). R. Supreme Court #46116-2018, pp. 323, 325. The district court also recognized that it may not use the award or denial of attorney fees to vindicate its sense of justice beyond the judgment rendered on the underlying dispute, nor provide indirect relief from an adverse judgment, or penalize a party for misdeeds during the litigation. The district court further recognized that it need not blindly accept the figures advanced by the attorney, and should not conduct a minute evaluation of each phase or

category of counsel's work, but rather review the overall conduct of the case and the manner in which the attorney discharged her or her professional responsibilities to see if counsel tended to use efficient methods to expedite the case or tended to use methods which delayed or obstructed the proceedings, while also being mindful of the specific time and labor itemizations provided for by counsel. R. Supreme Court #46116-2018, p. 326. Thus, the district court reasoned that the time and labor actually expended by an attorney must be viewed in light of all the factors and for overall reasonableness.

The district court went on to evaluate all of the Idaho Rule of Civil Procedure 54(e)(3) factors. In doing so, the court reduced the amount of fees requested by Ms. Black to an amount it felt was reasonable under the circumstances of this case. Reviewing the district court's comments in their totality, it is evident that the award in this case was an assessment that encompassed an analysis of several Rule 54(e)(3) factors, including the relative simplicity of the issues, the requisite skill for collection services, the prevailing charges, the amount involved, and the results obtained. To support its determination, the court noted that it had not previously seen such a high hourly rate in the locality, that the case involved a relatively low principal amount, that the case was not complex, and that both ACS and Ms. Black were successful. R. Supreme Court #46116-2018, pp. 325-326. It is therefore evident that the district court did not disregard the factors set forth in I.R.C.P. 54(e)(3). Rather, the district court's opinion shows that its calculation was reached by an understanding of the legal principles involved, consistent with the legal standards applicable to the specific choices available to it, and through an exercise of reason. Thus, the district court's decision was not an abuse of its discretion.

C. Ms. Black has presented no argument supporting her claim for attorney’s fees on appeal.

Idaho Appellate Rule 35, requires that the appellant’s briefs “contain” and identify the issues on appeal, and support those issues with facts contained in the record and relevant legal authority. I.A. R. 35(a)(6). Failure to support a claim with argument, authority and reference to the record, in the argument section of the initial brief is deemed a waiver of the issue. *Bailey v. Bailey*, 153 Idaho 526, 532, 284 P.3d 970,976 (2012)(denying attorney fees on appeal, when the party failed to support the claim with argument and authority beyond citing to the statute).

In this case, Ms. Black failed to present argument or authority in the argument sections of her initial brief concerning her fee request on appeal. Ms. Black, at best, lists the issue of attorney’s fees on appeal, but does not support the issue with reference to facts properly within the record and application to relevant legal authority. Therefore, ACS respectfully requests that this Court deny Ms. Black’s request for attorney’s fees on appeal should she prevail. *Id.*

D. ACS is entitled to attorney fees on appeal.

Attorney fees in Idaho are dependent upon a statute or rule permitting such an award. *Allison v. John M. Biggs, Inc.*, 121 Idaho 567, 568, 826 P.2d 916, 917 (1992). Attorney fees on appeal are similarly dependent upon rule or statute. *Id.*; I.A.R. 41.

Under Idaho Code Section 12-120(1), a prevailing party is entitled to a reasonable attorney’s fee fixed by the court. To be awarded fees under this statute, the claim must be plead in an amount less than \$35,000 and the plaintiff must have given the defendant “written demand for the payment . . . not less than ten (10) days before the commencement of the action; provided,

that no attorney's fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety-five percent (95%) of the amount awarded to the plaintiff." I.C. § 12-120(1). Idaho Code Section 12-120(2) governs attorney's fees in counterclaim cases. I.C. § 12-120(1). It states: "subsection (1) of this section shall also apply to any counterclaims, cross-claims or third party claims which may be filed after the initiation of the original action. Except that a ten (10) day written demand letter shall not be required in the case of a counterclaim." I.C. § 12-120(2).

In this case, ACS made written demand on Ms. Black more than ten days prior to the filing of this lawsuit. The amount in controversy was alleged to be less than \$35,000.00 and Ms. Black made two separate counterclaims against ACS. Judgment was entered against Ms. Black on both of her counterclaims, and Ms. Black does not appeal those judgments here. R. Supreme Court #44466-2016, p. 244; R. Supreme Court #46116-2018, pp. 233-234. Similarly, Ms. Black does not challenge that ACS prevailed on her counterclaims. Thus, ACS would be entitled to costs and attorney's fees on appeal should it prevail. I.C. § 12-120(2); *Latham Motors, Inc. v. Phillips*, 123 Idaho 689, 697, 851 P.2d 985, 993 (Ct.App. 1989). Further, because this lawsuit involved claims for good and services provided under an alleged contract, Idaho Code Section 12-120(3) would also be applicable.

Idaho Code Section 12-120(3) provides that a prevailing party shall be allowed attorney fees in any action to recover "on an open account, accounts stated, note, bill, negotiable

instrument, guaranty, or contract relating to the . . . sale of goods . . . or services.” I.C. § 12-120(3).

Attorney’s fees on appeal are likewise supported by Idaho Code Section 12-121. This appeal is nothing more than an attempt to second guess the district court’s application of the Rule 54 factors in light of Ms. Black’s partial success below, with hopes that this Court will increase the attorney fee award based on the application of the rejected Lodestar Method. *Perkins v. U.S. Transformer West*, 132 Idaho 427, 974 P.2d 73 (1999). Idaho Code Section 12-121 attorney’s fee are appropriate when the claim is frivolous, without foundation or unreasonable. *In re SRBA Case No. 39576 Subcase No. 61-12301*, 163 Idaho 393, 398, 414 P.3d 215, 220 (2018)(awarding 12-121 attorney fees on appeal when the Holdens, through their attorney, Thomas J. Katsilometes, simply requested the Supreme Court to second guess the trial court); *In re: The Contest of the Election for the State Representative in Legislative District No. 7, Position “B”*., 164 Idaho 102, 425 P.3d 1245, 1252 (2018)(finding that the appellant’s appeal, also represented by Thomas J. Katsilometes, was frivolous). This same statutory authority extends to appeals. *Id.*

In this case, Ms. Black argues that the Lodestar Method governs the evaluation of the attorney fee award. Nevertheless, the law in this area is clear. The Lodestar Method is inapplicable when the basis for the attorney fee request is a state statute. *Perkins*, 132 Idaho 427, 974 P.2d 73 (1999). Idaho Rule of Civil Procedure 54(e)(3) controls. I.R.C.P. 54(e)(8). Thus, this Court could find that this appeal was pursued frivolously, unreasonably, and without foundation.

IV.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the District Court, and award Respondent its costs and attorney's fees on appeal.

DATED this 14th day of January, 2019.

/s/ Shaun R. Bonney

By _____

Shaun R. Bonney, Of the Firm
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of January, 2019, I served a true and correct copy of the foregoing by delivering the same to each of the following, by the method indicated below, addressed as follows:

Thomas J. Katsilometes
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- U.S. Mail, postage prepaid
- Hand-Delivered
- Email
- Electronic Mail (iCourt Filing)

/s/ Shaun R. Bonney

Shaun R. Bonney