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**IN THE IDAHO SUPREME COURT**

ACTION COLLECTION SERVICE, INC. )  
An Idaho Corporation ) SUPREME COURT No. 46116-2018  
Plaintiff/Respondent ) Canyon Co. Case No. CV 2012-3011  
)  
vs. )  
) **APPELLANT'S BRIEF**  
)  
HARMONY L. BLACK (f/k/a )  
McCULLOUGH, )  
an individual )  
)  
Defendant/Appellant )  
\_\_\_\_\_ )

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**APPELLANT'S BRIEF**

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Appeal from District Court of the Third Judicial District for Canyon County  
Honorable District Judge George D. Carey presiding

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## I.

### STATEMENT OF THE CASE

#### A. NATURE OF THE CASE

This is an appeal from the District Court's Second Memorandum and Order (dated June 28, 2018), where, upon having its original judgment in favor of the Respondent vacated on a prior appeal, the District Court awarded attorney's fees to the Appellant in the amount of \$4,000.00 after six years of litigation where the Appellant was unequivocally found to be the prevailing party and subsequently submitted a Memorandum of Costs and Attorney's Fees seeking her attorney's fees in the amount of \$62,190.00. Appellant contends that the amount of the award of attorney's fees by the District Court constitutes an abuse of discretion under IRCP 54 and I.C. §12-120(1) and is seeking reversal of the District Court or for a remand with specific instructions, for an award in the full amount of her attorney's fees.

#### B. COURSE OF PROCEEDINGS

On appeal to the Idaho Court of Appeals in the underlying matter of this case, Appellant Black was victorious in having the trial court judgment against her and in favor of the Respondent, Action Collection Service, Inc., vacated. The Opinion (#61) of the Idaho Court of Appeals was rendered and published on November 16, 2017. While both parties pursued subsequent petitions for rehearing, each was denied and the decision of the Idaho Court of Appeals became final on February 28, 2018 when the Remittitur was submitted by the Clerk of the Idaho Supreme Court / Idaho Court of Appeals and said remittitur was transmitted to the District Court on the same day.

The District Court determined Appellant Black was the prevailing party under both Rule 54 of the Idaho Rules of Civil Procedure and I.C. § 12-120 and as such was entitled to recover her costs and attorney's fees pursuant to I.C. 12-120(1). Judgment was entered on April 20,

2018.

As the prevailing party and pursuant to the timelines specified in IRCP 54(d)(4), Appellant Black filed her Post Judgment Memorandum of Costs and Attorney's Fees.

The District Court issued an Order and its first Memorandum on April 20, 2018 and then issued its *Second Memorandum and Order* (dated June 28, 2018) addressing the award of attorney's fees. R. Pp. 236-246, and Pp. 319-330, respectively.

### **C. STATEMENT OF FACTS**

This matter was initiated by Respondent Action when it asserted a claim for money allegedly owed to them by Appellant Black by first submitting a demand for payment of \$6,552.05 more than 10 days prior to the Respondent initiating litigation against Appellant Black and then arguing, variously, that the claimed amount was a past due account, a debt, an obligation, and a commercial charge. Those claims were false, wrongfully asserted due to a non-existent, expired, or ambiguously written contract between Appellant and the Idaho Department of Juvenile Corrections. Appellant Black had to defend against these non-meritorious claims in order to reclaim moneys illegally garnished from her and a potential judgment against her. Ultimately, the Idaho Court of Appeals agreed with her that these amounts claimed by the Respondent lacked merit.

The defense of this case by Appellant Black was necessitated by Respondent's wrongful actions. Respondent's own claims for its attorney's fees eventually dwarfed the original \$7,024.73 sought in the original Complaint. The District Court had determined the amount claimed by Respondent was less than \$25,000. See I.C. §12-120(1) and April 20, 2018 Memorandum Decision and Order, R. P. at 6-7. As is reflected in the record, Respondent had submitted fee requests in the amounts of \$2,595.00 (August 10, 2012), \$19,600 (July 31, 2015), and \$45,815.00 (July 22, 2016). Respondent's ongoing pursuit of this "debt" presented an

opportunity for a windfall for Respondent Action. However, a judgment of this magnitude would have been financially devastating for Appellant Black.

Appellant's attorney reasonably incurred approximately 207.3 hours of work in this matter excluding the additional hours separately billed for the prior appeal as this matter metastasized over the course of three years of protracted litigation. Eventually, the costs of defending this case became unsustainable for the Appellant. This necessitated research and frankly a bit of courage to assess and rely upon the likelihood of a recovery of attorney's fees from the Respondent to allow Appellant to not only defend herself, but to ultimately prevail in this matter.

Appellant now appeals again to validate her prior victory and to have this Court vindicate her right to collect the full amount of her attorney's fees.

## **II. ISSUES ON APPEAL**

### **A. THE AMOUNT OF THE AWARD OF ATTORNEY'S FEES WAS AN ABUSE OF DISCRETION BY THE DISTRICT COURT.**

#### **a. APPELLANT IS ENTITLED TO A FULL AWARD OF ATTORNEY'S FEES UNDER I.C. § 12-120(1) AND I.R.C.P. 54(E).**

The District Court ruled that the Appellant was the prevailing party in this matter. R. Pp. 242 & 325. As the prevailing party under I.C. §12-120(1), Appellant is substantively entitled to "a reasonable amount to be fixed by the court as attorney's fees." *Id.* Procedurally, under IRCP 54(3)(1), Appellant is entitled to an "award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract."

#### **b. THE AMOUNT OF THE AWARD OF ATTORNEY'S FEES SOUGHT BY APPELLANT IS REASONABLE.**



This matter was litigated for over five years prior to Appellant submitting her Memorandum of Costs and Attorney's Fees after the Judgment in her favor. The amount of requested attorney's fees was based on her attorney's detailed summary of accounts showing 207.3 hours at the date of submission of the Memorandum. There was no challenge to or question raised by the District Court as the number of hours claimed. The hourly fee claimed was \$300.00 and this too was not deemed excessive or unreasonable by the District Court, noting only that "[t]he court has no information on the going rate for litigators in the Third District in general; but this trial judge never previously has had a claim before him in the Third District for such a high hourly rate."<sup>1</sup> R. P. 327.

**B. APPELLANT IS ENTITLED TO AN AWARD OF COSTS AND ATTORNEY'S FEES ON APPEAL UNDER I.A.R. 40 AND I.A.R. 41.**

Appellant requests this Court to remand this matter to the District Court with specific instruction to make an award of Appellant's attorney's fees incurred in the District Court phase of this case pursuant to I.C. 12-120(1), since the original amount in dispute was under \$35,000. Appellant also requests this Court to issue an award of her attorney's fees and costs incurred on appeal pursuant to I.C. § 12-120(1) and IAR 40 and 41, since the original amount in dispute was under \$35,000. *See Action* at R. Vol. 1 p. 10.

### **III. ARGUMENT**

**A. STANDARD OF REVIEW**

The standard of review on appeal is that, "[t]his Court applies an abuse of discretion standard when reviewing a district court's award of attorney fees, . . .". *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 86, 278 P.3d 943, 956 (2012), citing *Taylor v. McNichols*, 149

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<sup>1</sup> The Court notes this matter was a Magistrate Court matter until disqualification of several judges and that the Court sat as a District Court. The previous assignment of the District Court judge, prior to senior status, was in the Fourth District.

Idaho 826, 848, 243 P.3d 642, 664 (2010).

“When reviewing an exercise of discretion on the part of a district court, this Court considers: ‘(1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason.’” *Taylor v. McNichols, Id.*, at 832, [citing *Spur Prod. Corp. v. Stoel Rives LLP*, 142 Idaho 41, 43, 122 P.3d 300, 302 (2005), (quoting *Estate of Becker v. Callahan*, 140 Idaho 522, 527, 96 P.3d 623, 628 (2004))]; see also *Sun Valley Shopping Center v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

**B. AS THE PREVAILING PARTY, APPELLANT IS ENTITLED TO REASONABLE ATTORNEY’S FEES.**

i. There is no dispute that Appellant is the prevailing party.

Upon remand from the Idaho Court of Appeals, the District Court had determined that Appellant was the unequivocal prevailing party. R. Pp. 242, 325.

ii. Prevailing parties are entitled to reasonable attorney’s fees under I.C. §12-120(1).

Idaho Code Title 12 Section 120(1) (I.C. §12-120(1)) is the applicable statute authorizing the recovery of attorney’s fees in this matter. It provides:

In any action where the amount pleaded is thirty-five thousand dollars (\$35,000) or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney’s fees. For the plaintiff to be awarded attorney’s fees, for the prosecution of the action, written demand for the payment of such claim must have been made on the defendant 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.

*Id.*

As the prevailing party under I.C. §12-120(1), Appellant is substantively entitled to “a reasonable amount to be fixed by the court as attorney’s fees.” *Id.*

The District Court recognized an award of Appellant Black's attorney's fees is mandated by I.C. §12-120(1), once the Court had determined Appellant Black was the prevailing party pursuant to IRCP 54(d)(1)(B). *April 20, 2018 Memorandum Decision*. R. P. 242.

Procedurally, under IRCP 54(e)(1), Appellant is entitled to an "award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract." *Id.*

iii. The District Court did not find that Appellant's requested amount for attorney's fees was unreasonable.

This matter was litigated for over five years prior to Appellant submitting her Memorandum of Costs and Attorney's Fees after the Judgment in her favor. The amount of requested attorney's fees was based on her attorney's detailed summary of accounts showing 207.3 hours at the date of submission of the Memorandum. There was no challenge to or question raised by the District Court as the number of hours claimed. The hourly fee claimed was \$300.00 and this too was not deemed excessive or unreasonable by the District Court, noting only that "[t]he court has no information on the going rate for litigators in the Third District in general; but this trial judge never previously has had a claim before him in the Third District for such a high hourly rate." R. P. 327

**C. THE DISTRICT COURT ABUSED ITS DISCRETION IN THE AMOUNT OF THE AWARD OF ATTORNEY'S FEES TO APPELLANT.**

**i. The District Court did not make a reasoned decision as required under *Taylor*.**

The starting point for determining the amount for a reasonable fee is the number of hours reasonably expended on litigation multiplied by the reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (aka the "Lodestar figure"). The Lodestar figure can be adjusted up or down by the Court based several factors. *See* IRCP 54(e)(3) (IRCP 54(e)(3)(H))

the undesirability of the case and IRCP 54(e)(3)(E) whether the fee is fixed or contingent) and *Kerr v. Screen Extras Guild, Inc.* 526 F. 2d 67, 70 (9<sup>th</sup> Cir. 1975). Ultimately, this case became a contingent case in the sense that the amount of the fees incurred defending an ever-increasing claim of Respondent's attorney's fees became unaffordable to Appellant. *Declaration of Counsel in Support of Post Judgment Memorandum of Costs and Attorney's Fees.* (Paragraphs 6-10).

First, the District Court appears to take issue with the \$300 hourly rate charged by Appellant's counsel. It is certainly within the Court's discretion to judge the reasonableness of this hourly rate. However, the Court does not provide an alternate or reduced rate by which Appellant and an appellate Court can judge the reasonableness of the reduction. In light of the 94% reduction to Appellant's fee request this Court has applied in making its award, is a reviewing court to conclude even first-year attorneys (which Appellant's counsel is not) are only entitled to bill at \$18/hour (6% of \$300/hour)? The lack of explanation on the hourly rate applied by the Court in reaching its \$4,000 award sends a chilling message to any attorney who might desire to represent someone of limited means based on an assessment that a mandatory fee shifting statute would provide compensation.

There is no legal support for what amounts to a 94% reduction in the amount of fees Appellant sought in her originally-filed Memorandum of Costs and Attorney's fees. *See* IRCP 54(d)(4).

“Thus, although the time and labor actually expended by an attorney is to be considered, it is also to be evaluated under a standard of reasonableness.” *Medical Recovery Services, LLC, v. Jones*, 145 Idaho 106, 110 175 P.3d 795, 799, (2007), citing *Daisy Mfg. Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 263, 999 P.2d 914, 918 (Ct.App.2000).

However, the District Court's *April 20, 2018 Memorandum Decision* appeared to deny Appellant the bulk of her attorney's fees (approximately 94% of Appellant's fees) without

analysis of the several factors in IRCP 54(e). Instead, in its *Second Memorandum and Order* (dated June 28, 2018), the District Court made a rote recitation of the factors and then concluded, again without any explanation or analysis, that:

“From the factors outlined above the court concludes that it has sufficient information from which to reach a reasoned decision concerning an attorney’s fee award. Considering all the factors, a reasonable attorney’s fee to be awarded in favor of Ms. Black and against Action Collection is the amount of \$4,000.00. In reaching this conclusion, the court emphasizes that the amount to be awarded is the amount it feels is reasonable to assess against Action Collection in view of the factors outlined in IRCP 54(e)(3). It is not necessarily the amount that Ms. Black may be obligated to pay her attorney for all the services performed. IRCP 54(e)(7).”

*Id.*, R. P. 329.

Inexplicably, the District Court “conclude[d]” it reached a “reasoned decision” without reference to any factor that was lacking, unreasonable, or construed against the Appellant or in favor of the Respondent. Nor did the District Court apply logic as to why the amount awarded of “\$4,000.00” was “reasonable”. There simply was no reasoning whatsoever by the District Court where instead it merely offered a conclusory statement after a seemingly arbitrary selection of a round number. Without analysis, perfunctorily stating that a conclusion is reasonable does not make it so. Thus the District Court’s decision was an abuse of discretion because it failed to meet the third prong of the three part test of *Taylor and Sun Valley Shopping Center* by failing to “reach[] its decision by an exercise of reason”. *Id.*

Second, the Court takes issue with Appellant’s counsel providing advice and counseling to Appellant before entering his formal appearance in the case. Idaho’s Supreme Court has specifically allowed the recovery of pre-litigation attorney’s fees under I.C. § 12-121. *Bogner v. State Dept. of Revenue and Taxation, State Tax Com’n*, 107 Idaho 854 (1984).

“The clear purpose of [I.C. § 12–121] ... is to reimburse the successful party for legal fees incurred in prosecuting his or her legal rights.” We find nothing in § 12–121 which establishes that the legislature intended to deny awards of attorney’s fees for costs incurred in pursuing an administrative remedy prior to instigating the very civil action which necessarily resulted when that effort failed.

*Bogner* at 858.

There does not appear to be a case addressing the right to recover pre-litigation attorney's fees under I.C. § 12-120(1), however the same rationale should apply. Specifically, a party should not be penalized for taking necessary steps (in this case trying to save money by not having an attorney enter his appearance) to defend their legal rights. IRCP 54(e)(1) permits the Court to make an award of reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided by any statute or contract. Importantly, the statute providing for a mandatory award in this case, I.C. § 12-120(1), does not state that an attorney must enter his appearance in a case in order for the fees incurred by the party to become recoverable, should they prevail.

Finally, the Court takes issue with the amount of the fees Appellant incurred in light of the damages sought by Respondent. As the Court in *Moreno v. City of Sacramento*, 534 F. 3d 1106, 1112 (9<sup>th</sup> Cir. 2008) stated, "By and large, the court should defer to the winning lawyer's professional judgement as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker." Here the District Court provides little to no analysis by which its 94% reduction of Appellant's fees can be judged in light of the factors outlined in *Fox*. Idaho's Supreme Court requires a more thorough analysis.

In addition to the trial court's methodical evaluation of the criteria listed by Rule 54(e)(3), the court reviewed the itemized memoranda and affidavits of costs and removed from the award costs for attorney time it deemed excessive. The trial court's review of fees complies with Rule 54(e)(3) and demonstrates an exercise of reason.

*P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 239 (2007)

By and large, it appears the Court has based its award based on the amount of damages sought in the original Complaint. *April 20, 2018 Memorandum* at 4 and 9. However, this rationale ignores the fact Appellant was required to defend against Respondent's ever increasing

claim for its own attorney's fees.

Other than IRCP 54(e)(3)(G) (referring to the amount involved and the results obtained) the Rule contains no proportionality test. If this Court is of the opinion that proportionality is within the scope (3)(G) or the catchall provision of IRCP 54(e)(3)(L), then Appellant suggests the proper measure of proportionality is the fees claimed by Respondent throughout this litigation. As of its last submission on July 22, 2016, Respondent had claimed \$45,815 in fees. Since that time the litigation has continued for an additional 1 ½ years. Though Appellant was denied her fees on appeal, it is reasonable to infer Respondent incurred additional fees which it would have sought had Respondent prevailed in this action. Thus, it is entirely reasonable to conclude there is a direct proportionality in the liability Appellant would have been exposed to had she not prevailed due to the assistance of her counsel.

Appellant was fortunate to find legal counsel who would work behind the scenes to help keep her litigation costs down and successfully kept her out of "financial ruin." Appellant tried numerous times to settle this matter with Respondent, which would have left her responsible for her legal fees, yet Respondent pressed forward. This District Court's 94% reduction in Appellant's fees sends a strong message to attorney's who might be sympathetic to taking on an undesirable case, such as a defense of a debt collection, in the hope that they might recover their fees from the opposing party at the conclusion of the litigation.

- ii. **This Court should reverse the District Court's reduction in the amount of the attorney's fee award or remand this case to the District Court with specific instructions to award the entire amount of attorney's fees sought by Appellant with interest.**

In the interest of justice and because of the protracted nature and lengthy procedural history of this case, Appellant respectfully requests this Court simply reverse the District Court and award Appellant all of her attorney's fees. Alternatively, Appellant respectfully requests that this matter be remanded to the District Court with specific instructions awarding all

attorney's fees and costs already claimed plus those costs and fees incurred for this appeal.

#### **IV. CONCLUSION**

Based on the foregoing, the District Court's decision was an abuse of discretion and Appellant is entitled to her attorney's fees as claimed. In the interest of justice and because of the protracted nature and lengthy procedural history of this case, Appellant respectfully requests this Court simply reverse the District Court and award Appellant all of her attorney's fees. Alternatively, Appellant respectfully requests that this matter be remanded to the District Court with specific instructions awarding all attorney's fees and costs already claimed plus those costs and fees incurred for this appeal.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of December 2018.

By: s/ Thomas J. Katsilometes  
THOMAS J. KATSILOMETES  
Attorney for Appellant/Defendant