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# MFG Financial, Inc. v. Vigos Appellant's Brief Dckt. 44718

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IN THE SUPREME COURT FOR THE STATE OF IDAHO

MFG FINANCIAL, INC., an Arizona  
Corporation

Plaintiff,

vs.

JUSTIN VIGOS,

Defendant.

Magistrate Case No. CV-OC-15-16099

Supreme Court Case No. 44718

**APPELLANT'S BRIEF**

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Appeal from the District Court of the Fourth Judicial District of the  
State of Idaho, in and for the County of Ada

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Honorable Gerald F. Schroeder, Senior District Judge.

Honorable Patricia Young, Senior Magistrate Judge.

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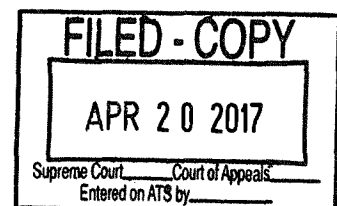
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## **I. STATEMENT OF THE CASE**

### **A. Nature of the Case**

MFG Financial, Inc. is an out-of-state debt buyer (a purchaser of charged-off consumer accounts) that sued Idaho resident Justin Vigos on the basis that MFG Financial allegedly purchased the right to enforce a contract for an automobile which was repossessed prior to MFG Financial's alleged purchase of the account and which the original creditor had deemed uncollectable. MFG Financial sued to collect on the alleged assigned account and was unsuccessful in recovering on the contract.

### **B. The Course of Proceedings Below**

On September 16, 2015, Plaintiff filed a complaint based on a straight-forward breach of contract claim. On October 6, 2015, Defendant filed an Answer. The parties did little else in the next three months, other than exchange a single set of discovery per side. On January 6, 2016, the Court set a summary judgment hearing for March 1 and a trial for March 23. On February 2, Plaintiff filed a cross-motion for summary judgment.

On March 1, 2016, the magistrate court indicated that it was likely prepared to rule on the issues of standing and breach of contract, while reserving the issue of statute of limitations for a later date if the first two issues were resolved. Due to Defendant not being at the hearing, the magistrate court continued the hearing until March 7. At that hearing, the Court granted summary judgment to Mr. Vigos based on MFG Financial's failure to prove standing or a breach of contract and denied MFG Financial's motion for

summary judgment. The magistrate court signed the judgment dismissing Plaintiff's complaint on March 19.

On April 25, Plaintiff filed an appeal to the district court. On November 17, the district court, sitting in its appellate capacity, reversed the decision granting Mr. Vigos' summary judgment motion, but affirmed the decision denying MFG's motion for summary judgment.

Mr. Vigos filed a notice of appeal of the district court's decision on December 15. MFG filed a notice of cross appeal on January 4, 2017, with an amended notice on January 10.

### **C. Statement of the Facts**

In early 2007, Mr. Vigos entered into a contract for the purchase and financing of a 2000 Nissan Sentra with Karl Malone Toyota. (R., p. 101). Karl Malone Toyota then allegedly assigned its rights in the contract with Mr. Vigos to Courtesy Auto Credit. (R., p. 102). Respondent alleges in 2011, Mr. Vigos was in breach of the contract. (R., p. 65). The vehicle was repossessed from Mr. Vigos and sold through auction in June 2011. (R., p. 65). The sale of the vehicle through auction purportedly left a deficiency balance of \$6,020.10. (R., p. 65). Respondent asserts on January 10, 2014, Courtesy Auto Credit, assigned and sold its "right, title and interest" in the deficiency balance to MFG Financial, Inc. (R., p. 66).

## II. ISSUES ON APPEAL

- A. Did the district court err in reversing the magistrate court's decision granting Mr. Vigos' motion for summary judgment?
- B. Did the district court err by failing to consider the admissibility of the evidence?
- C. Did the record contain sufficient admissible evidence to support a finding that there were genuine issues of material fact which precluded the court from granting summary judgment to Mr. Vigos?
- D. Is Mr. Vigos entitled to attorney's fees on appeal?

## III. ARGUMENT

### A. Standard of review

The standard of review applicable when this Court reviews the decision of a district court sitting in its capacity as an appellate court is as follows:

The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Pelayo v. Pelayo*, 154 Idaho 855, 858–59, 303 P.3d 214, 217–218 (2013) (citations omitted).

Thus, this Court does not review the decision of the magistrate court. *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012). Rather, the Supreme Court is procedurally bound to affirm or reverse the decisions of the district court. *Id.*



The standard of review in an appeal from an order granting summary judgment is *de novo*. *Shea v. Kevic Corp.*, 156 Idaho 540, 544, 328 P.3d 520, 524 (2014). Summary judgment is proper “if the pleadings, depositions, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” IRCP 56(c).

“Summary judgment proceedings are decided on the basis of admissible evidence.” *Campbell v. Kvamme*, 155 Idaho 692, 696, 316 P.3d 104, 108 (2013). “The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter to be addressed before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial.” *Fragnella v. Petrovich*, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012). “This Court applies an abuse of discretion standard when determining whether testimony offered in connection with a motion for summary judgment is admissible.” *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15, 175 P.3d 172, 177 (2007). “A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason.” *O’Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008).

**B. The district court erred in reversing the magistrate court's decision granting Mr. Vigos' motion for summary judgment.**

The primary problem with the district court's decision on appeal is that it misapplied the standard of review. The district court made the following assessment of the standard of review, which it then carried throughout its decision:

If a party moves for summary judgment on the basis that no genuine issue of material fact exists with regard to an element of the non-moving party's case, the nonmoving party must establish the existence of an issue of fact regarding that element. The non-moving party is not required to present evidence on every element of his . . . case at that time, but must establish a genuine issue of material fact regarding the element or elements challenged by the moving party's motion. . . . The non-moving party must 'make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.' *Opinion on Appeal*, page 6-7. (Citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272-273, 869 P.2d 1365, 1367- 68 (1994)).

The defect in this reasoning is that the district court should have applied a two-step analysis: first, is the evidence admissible?, and only if the answer is yes, then, does the evidence create a genuine issue of material fact?

When considering evidence presented in support or opposition to a motion for summary judgment, a court can only consider material which would be admissible at trial. *Vanderford Co., Inc. v. Knudson*, 150 Idaho 664, 672, 249 P.3d 857, 865 (2011). Thus if a party questions the admissibility of evidence on a motion for summary judgment, the court must first decide the admissibility of evidence before examining whether summary judgment is appropriate. *Gem State Ins. Co. v. Hutchinson*, 134 Idaho 10, 14, 175

P.3d 172, 176 (2007). The general rule that all inferences are drawn in favor of the non-moving party does not apply to the initial question of admissibility. *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 784, 839 P.2d 1192, 1198 (1992).

The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial.” *J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford*, 146 Idaho 311, 314–15, 193 P.3d 858, 861–62 (2008).

The United States Supreme Court, in interpreting Federal Rule of Civil Procedure 56(c), which is identical in all relevant aspects to I.R.C.P. 56(c), stated:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial. The moving party is “entitled to judgment as a matter of law” because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (citations omitted). The language and reasoning of *Celotex* has been adopted in Idaho. *Dunnick v. Elder*, 126 Idaho 308, 312, 882 P.2d 475, 479 (Ct.App.1994)

The problem with applying the wrong standard of review is shown even more clearly when viewed through the lens of the two issues the district court was tasked with deciding: 1) Had MFG proving it was the real party in interest?, and 2) had MFG proven the elements of its breach of contract claim?

**1. The district court failed to consider the admissibility of evidence to support MFG's claim that is the real party in interest.**

MFG Financial claims it was assigned Mr. Vigos' contract by Courtesy Auto Credit, which then made MFG the real party in interest to the contact and gave it the right to pursue collection of the alleged debt and gave it standing to bring this action.

An assignment is a transfer of rights or property from one person to another. *Purco Fleet Servs., Inc. v. Idaho State Dep't of Fin.*, 140 Idaho 121, 125, 90 P.3d 346, 350 (2004) (quoting Black's Law Dictionary 115 (7th ed.1999); 6 Am.Jur.2d Assignment § 1 (1999)). An assignment “confers a complete and present right in the subject matter to the assignee.” *Id.* (quoting 6 Am.Jur.2d Assignment § 1 (1999)).

"Standing presents essentially a question of the plaintiff's 'qualification' to bring the action." *Student Loan Fund of Idaho, Inc. v. Payette Cnty.*, 125 Idaho 824, 826, 875 P.2d 236, 238 (Ct. App. 1994). The doctrine of standing is closely entwined with the merits of this case because MFG Financial must assert an actionable injury for which it is entitled to relief. This concept was explained in *Miles v. Idaho Power*, 116 Idaho at 641, 778 P.2d at 763:

The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has "alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions." As refined by subsequent reformation, this requirement of "personal stake" has become to be understood to require not only a "distinct palpable injury" to the plaintiff, but also a "fairly traceable" causal connection between the claim injury and the challenged conduct. (Citations omitted.)

Thus, to satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief request will prevent or redress the claimed injury.

*Id.* (quoting *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59, 79 (1978))

In an effort to prove an assignment from Courtesy Auto Credit to MFG Financial, Appellant provided an affidavit from Courtesy employee Jay Jeffs. (R., pg. 64) That affidavit had as one exhibit a Bill of Sale and as one page within a separate exhibit, a single sheet with information about Mr. Vigos. That document is referred to in MFG Financial's Mark Gasser's affidavit (R., pg. 124) as being the "Asset Schedule" that goes along with the Bill of Sale, yet Mr. Jeffs does not include it as the attached Exhibit A that the Bill of Sale references. There is no label that the document is an "Asset Schedule." It is not known who created the document, where it came from, and if it actually goes along with the Bill of Sale. Additionally, it is highly unlikely that the "Asset Schedule" referenced in the Bill of Sale only contained one line; if this is the actual "Asset Schedule" it has been heavily redacted and questions about its data integrity and

admissibility come into question. Even if the "Asset Schedule" was introduced with more foundation, it still lacks the hallmarks of a business record.

The district court specifically recognized the evidentiary issues MFG faced in its effort to show it was the real party in interest, but then again applied the wrong standard of review:

The bill of sale does not specifically provide that Courtesy Finance, Inc. was assigning its rights in the Karl Malone Toyota car contract involving Vigos to MFG. According to the magistrate the references to the affidavits cited by MFG are insufficient to show that Vigos was a party to an enforceable contract with either MFG or a party who assigned its cause of action to MFG. While these questions raise evidentiary issues sufficient to deny MFG's motion for summary judgment, they do not lead to the conclusion that Vigos' motion should be granted. He did not establish these facts do not exist, only that he doesn't know. *Opinion on Appeal*, Page 10.

The correct analysis should have been that because MFG had failed to prove that it was the real party in interest with admissible evidence, that summary judgment was correctly granted in favor of Mr. Vigos by the magistrate court. Mr. Vigos' assertion that he did not know whether MFG had been assigned the alleged debt and his claim that MFG could not prove such an assignment was sufficient to shift the burden to MFG to come forward with admissible evidence to prove its standing. It was not Mr. Vigos' burden of proof to show that an assignment did not take place.

The requirement of a party to prove a negative has previously been referred to by this Court as "an absurdity." *Hilden v. Ball*, 117 Idaho 314, 341, 787 P.2d 1122, 1149

(1989). Yet, that is what the district court required of Mr. Vigos in this case, to prove that MFG was not the real party in interest, which it would be impossible for him to do.

By claiming MFG is not the real party in interest, Mr. Vigos met his burden of proof by establishing the absence of evidence of an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct.App.1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the non-moving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct.App.2000).

The facts needed to support MFG's claim needed be presented at summary judgment, rather than left to be established at trial, as explained in *Tri-State Bank*: "Mere denials, assertions of what 'might have [been],' of what one has 'been told' or 'advised,' of matters not stated from personal knowledge, of numerous legal conclusions (especially by laymen), and of what one hopes 'will be shown at trial' are not enough to create a 'genuine issue' " under IRCP 56(e). *Tri-State Nat'l Bank v. Western Gateway Storage Co.*, 92 Idaho 543, 447 P.2d 409 (1968).

Summary judgment is a proper procedural method for dismissing a claim based on a lack of standing. *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002).

Standing is not a mere procedural technicality, it is a required element of every lawsuit and can be raised as a defense at any stage of the litigation. It is imperative that Idahoans not be at risk of multiple law suits or judgments on the same debt if an unscrupulous debt collector re-sells a debt and still tries to collect on it. Ensuring that a plaintiff can trace its ownership rights is fundamental to protecting the rights of all Idahoans.

**2. The contract was inadmissible, therefore MFG's breach of contract claim fails and there cannot be any genuine issues of material fact.**

The district court acknowledged that MFG failed in proving the elements of its breach of contract claim, but then incorrectly left the door open for MFG to improve its evidence on remand to the magistrate court.

At trial MFG would bear the burden of proving the elements of its breach of contract claim. At the summary judgment stage it had the burden of proving there were no issues of material fact. The existence of the contract and its terms is the first of these elements, followed by proof the contract was breached. Proof of the assignment to MFG would be required. *Opinion on Appeal*, page 8.

The elements for a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages. *Mosell Equities, LLC v. Berryhill & Co., Inc.*, 154 Idaho 269, 297 P.3d 232 (2013)(quoting *O'Dell v. Basabe*, 119 Idaho 796, 813, 810 P.2d 1082, 1099 (1991)).



"Authentication or identification of documentary evidence is a condition precedent to its admissibility." *Harris, Inc., v. Foxhollow Constr. & Trucking, Inc.*, 151 Idaho 761, 770, 264 P.3d 400, 409 (2011) (citing I.R.E. 901).

The evidence presented by MFG to support its breach of contract claim was supported by an affidavit from Courtest Auto Credit's Jay Jeffs which sought to authentic a document titled "Retail Installment Contract and Security Agreement." That document was between Karl Malone Toyota and Mr. Vigos. Courtesy Auto Credit was not party to the contract. In order for the court to consider the "Retail Installment Contract and Security Agreement," it must first find that the document is admissible. The district court skipped that step of the analysis and went directly to whether it raised a genuine issue of material fact.

Mr. Jeffs does not state in his affidavit that he was present at the execution of this agreement, nor does he otherwise explain how he has personal knowledge that on or about February 21, 2007, Justin Vigos entered into the written agreement with Karl Malone Toyota. These lackings are sufficient to support the decision of the magistrate to deny MFG's motion for summary judgment. They do not, however, support grant of the Vigos' motion. His motion does not assert more than his lack of knowledge as to whether the assignment took place. The response of MFG is sufficient to raise a question of fact. *Opinion on Appeal*, page 9-10.

The "Retail Installment Contract and Security Agreement" and the information contained therein are hearsay. Hearsay is defined in Idaho R. Evid. 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The rule defines a statement as "an

oral or written assertion." Idaho R. Evid. 801(a)(1). At no point in the proceedings below did MFG ever argue that the contract was not hearsay, or that an exception to the hearsay rule applied. Instead, MFG pointed to statements made in briefing and in requests for admission that Mr. Vigos had entered into a contract with Karl Malone Toyota to support its argument that it then did not need to authenticate the contract it sought admission of.

The only exception to the hearsay rule that might apply is Idaho Rule of Evidence 803(6), which states:

Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the opponent shows the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Idaho R. Evid. 803(6)

In *State v. Hill*, the Idaho Court of Appeals described the foundational requirements for a party to use the business records exception:

Rule 803(6), the business record exception to the hearsay rule, allows admission of a record or report if it was made and kept in the course of a regularly conducted business activity and if it was the regular practice of that business to make the report or record. These foundational requirements must be shown through the testimony of the custodian or other qualified witness. That is, the record must be authenticated by someone who has custody of the record as a regular part of his or her work or who has supervision of its creation. A document is not admissible under I.R.E. 803(6) unless the person testifying has a

personal knowledge of the recordkeeping system used by the business which *created* the document.

*State v. Hill*, 140 Idaho 625, 628-29, 97 P.3d 1014, 1017-18 (Ct. App. 2004)(internal citations omitted).

IRE 803(6) requires that the record be created: "at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business." Additionally, the person authenticating the business record must be a qualified witness. This Court explained what makes one a qualified witness in *Henderson v. Smith*:

The records or reports sought to be admitted into evidence under the business records exception to the hearsay rule need not be authenticated by the person who made the records, but it is necessary that the records be authenticated by a person who has custody of the record as a regular part of his or her work or who has supervision of its creation. The custodian of the records may testify and explain the record keeping processes of the organization and need not have personal knowledge of the actual creation of the document when the record was made. The requirement is that the person testifying have the knowledge of the record keeping system.

*Henderson v. Smith*, 128 Idaho 444, 450, 915 P.2d 6, 12 (1996)(internal citations omitted).

Without a qualified witness to authenticate the contract, it was inadmissible. That is what the magistrate court ruled. The district court incorrectly left open the possibility that MFG could prove the elements of its breach of contract claim at trial when the case law cited above makes it evident that if the documents relied on to prove the elements of the breach of contract claim are not admissible, then summary judgment should have been granted to Mr. Vigos.

### **C. Appellant is entitled to attorney's fees on appeal.**

If found to be the prevailing party, Appellant requests an award of attorney's fees on appeal pursuant to I.C. § 12-120(1).

Under I.C. § 12-120(1), fees are mandatory for the prevailing party in matters plead for less than \$35,000. The total sum plead by MFG was approximately \$11,000.

At the magistrate level, Mr. Vigos avoided all liability to MFG Financial, which is a significant value and was rewarded accordingly.

Avoiding liability is a significant benefit to a defendant. In baseball, it is said that a walk is as good as a hit. The latter, of course, is more exciting. In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff. The point is, while a plaintiff with a large money judgment may be more exalted than a defendant who simply walks out of court no worse for the wear, courts must not ignore the value of a successful defense.

*Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005).

Idaho Code sections 12-120(1) mandates an award of attorney's fees to the prevailing party. *Safaris Unlimited, LLC v. Von Jones*, 158 Idaho 846, 851, 353 P.3d 1080, 1085 (2015), *Med. Recovery Servs., LLC v. Bonneville Billing & Collections, Inc.*, 157 Idaho 395, 401, 336 P.3d 802, 808 (2014). Because attorney fees were awarded under I.C. § 12-120(1) at the trial court level, they are also awardable on appeal under the same section. See, e.g. *Chavez v. Barrus*, 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008).

#### IV. CONCLUSION

Based on the argument above, Appellant requests this Court reverse the ruling of the district court denying Mr. Vigos' motion for summary judgment.

DATED this 19th day of April, 2017.



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Ryan A. Ballard

Attorney for Respondent

**CERTIFICATE OF SERVICE**

I certify that on the 20th day of April, 2017, I served true and accurate copies of the foregoing document on the following person(s), either by deposit in the U.S. Mail, addressed as follows, or by Facsimile, or by hand-delivery, as indicated below:

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