10-26-2017

Medical Recovery Services v. Neumeier Appellant's Reply Brief Dckt. 44836

IN THE SUPREME COURT OF THE STATE OF IDAHO

MEDICAL RECOVERY SERVICES, LLC, an Idaho limited liability company,

Plaintiff/Appellant,

v.

Jared Neumeier

Defendants/Respondent

Supreme Court Docket No. 44836

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County.
Honorable Joel E. Tingey, District Judge, presiding.

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

Sean J. Coletti, Esq., residing at Idaho Falls, Idaho, for Defendant/Respondent,
Jared Neumeier

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ADDITIONAL STATEMENT OF FACTS

Neumeier's Statement of the Facts are inaccurate or misleading as follows:

1. Neumeier states as a fact that on May 16, 2015 he discovered a letter dated April 27, 2015 containing MRS's Complaint in this matter with an attached Notice Under the Federal Fair Debt Collection Practices Act. However, this Complaint was not prepared until May 18, 2015.[1] Nothing in the record substantiates Neumeier's claim otherwise.

2. Neumeier states that contrary to the assertions in the Complaint, Neumeier never received a single request or demand for payment until he opened his mailbox on Saturday, May 16, 2015. However, the Complaint does not state that Neumeier received anything. The Complaint merely alleges that "[d]espite the plaintiff's requests and demands, and without offering any reason or objection to the bill, the defendant has failed to pay the indebtedness in full."[2]

3. Neumeier states that "[n]ot only did both Dr. Baird's office and MRS continue to use the wrong address over time (sending mail to 'Skyline' instead of Neumeier's address on 'Skyview'), they never even attempted to contact Neumeier by telephone."[3] All Neumeier really knows is that MRS never successfully contacted him by phone because the record is silent on the issue of the number of times MRS tried to call Neumeier.

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[1] R Vol. I, p. 8.
[2] R Vol. I, p. 9.
[3] Respondent's Brief, pp. 2-3.

ARGUMENT

A. THE ISSUE OF WHO PREVAILED ON SUMMARY JUDGMENT IS PROPERLY BEFORE THIS COURT.

Neumeier argues that MRS did not challenge the Magistrate Court's decision to grant summary judgment to Neumeier in MRS' opening brief on appeal to the District Court; therefore, MRS waived any challenge to the Magistrate Court's decision on who prevailed on summary judgment. However, the District Court on appeal held as follows:

> Rule 35(a)(4), IAR, allows a court to consider subsidiary issues fairly raised by the issues cited by the appellant. Additionally, in this case, Neumeier, while arguing that MRS did not preserve the issue of whether the magistrate correctly granted summary judgment, nevertheless includes an argument supporting the grant of summary judgment. Accordingly, in considering MRS' claim that the magistrate erred in determining the prevailing party, the Court will first consider its grant of summary judgment to Neumeier.

Here, the District Court got it right because MRS raised as an issue on appeal before the District Court whether the Magistrate Court committed reversible error when it determined that Neumeier was the prevailing party. Obviously, a preliminary/subsidiary issue is who prevailed on summary judgment.

Also, since Neumeier seeks affirmative relief by way of reversal of the District Court's decision on appeal on this issue, absent Neumeier's filing a cross appeal on this issue under I.A.R. 15, the District Court's ruling on appeal remains law of the case. Given that Neumeier has not sought to challenge on appeal to this Court the District Court's ruling on this issue, Neumeier cannot seek affirmative relief that reverses the District Court's ruling on this issue. I.A.R. 15.

B. THIS COURT CANNOT ENFORCE NEUMEIER'S "EXPECTATION INTEREST" WITHOUT THE MUTUAL CONSENT OF BOTH PARTIES.

This case raises the issue whether a party, who has insurance to pay some or all the amount due under a contract, is obligated to pay the other party to the contract before the insurer's payment or whether the party's obligation to pay is excused until the insurer pays the amount it is obligated to pay. For all the reasons set forth in its Opening Brief on Appeal, MRS submits that without an agreement between the parties to the contrary, the obligation of the party with insurance to pay is not excused pending the insurer's payment.

Here, there is nothing in the record to support a finding that the parties had any agreement to excuse Neumeier's obligation to pay pending the insurer's payment. Accordingly, Neumeier's obligation to pay was not excused until Neumeier's insurer paid the amount it owed as the District Court wrongly concluded. Although the District Court never used the phrases "condition precedent," "implied in law condition," or for that matter, "excuse of performance," the District Court did, in fact, apply such principles of law to reach its decision. To argue otherwise exalts form over substance. It is also a little difficult for MRS to know precisely what the District Court was thinking because it did not cite to ***any*** law in its analysis.

Neumeier knows there are no facts in the record to support a finding that the parties agreed that Neumeier's obligation to pay was excused pending his insurer's payment. The absence of facts in the record to support such a finding explains why Neumeier argues that "[t]he District Court's decision was based on common knowledge and common sense" and not on the factual record on appeal.[4] However, a court cannot use "common knowledge and

[4] Respondent's Brief, p. 10.

common sense" as a substitute for facts and rewrite a contract for a party. *See Losee v. Idaho Co.*, 148 Idaho 219, 223 (2009) ("Courts do not possess the roving power to rewrite contracts in order to make them more equitable.")

Neumeier's "common knowledge and common sense" argument also subtly raises the issue of applying Neumeier's "expectation interest" as a term of the contract without any agreement by Dr. Baird. After discussing the insurance process, Neumeier states that "Neumeier ***expected*** this process to occur when he gave his insurance information to his doctor."[5] Neumeier again raises his "expectation interest" arguing that he provided his "insurance information" for the very purpose "so that his insurance could be billed and he would receive a bill for the balance."[6] Again, Neumeier's self-proclaimed purpose for his actions do not become terms of a contract unless the parties agree to those terms. Neumeier is forced to argue his "expectation" because he knows there are no facts in the record to support an agreement that Neumeier's obligation to pay was excused pending the insurer's payment.

This Court has "previously rejected the reasonable expectations doctrine in favor of traditional rules of contract. The traditional rules of contract construction avoid the danger of a court creating a new contract by the parties relying on the notion of reasonable expectations." *Ryals v. State Farm Mut. Auto. Ins. Co*, 134 Idaho 302, 304 (2000). This court should find no reason to revisit this holding.

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[5] Respondent's Brief, p. 10 (emphasis added).

[6] Respondent's Brief, p. 11.

C. PRINCIPLES OF STRICT LIABILITY THAT FLOW FROM CONTRACT LAW GOVERN THE OUTCOME OF THIS CASE AND NOT PRINCIPLES OF FAULT LIKE "REASONABLENESS."

Liability under a contract is strict and not determined by fault. *See Classic Cheesecake Company, Inc. v. JP Morgan Chase Bank, N.A.*, 546 F.3d 839, 846 (7th Cir 2008) ("Liability for breach of contract is strict, rather than based (as tort liability generally is) on fault.") In fact, "[l]iability for breach of contract is strict, which makes the performing party an insurer against the consequences of his failing to perform, even if the failure is not his fault." *Wisconsin Elec. Power Co. v. Union Pacific R. Co.*, 557 F.3d 504, 506 (7th Cir 2009) *citing* The Restatement (Second) of Contracts, introductory note to ch. 11, preceding Section 261.

Here, Neumeier tries to steer the court away from a contract analysis and toward a fault analysis. Specifically, Neumeier makes the following statements:

1. "[D]ue to a series of errors on the part of Dr. Baird and MRS, this process [the insurance process] never occurred until after suit was filed";[7]

2. "Neumeier did nothing to bring MRS's litigation upon him";[8]

3. "How was Neumeier to know that there was a bill for his November 2012 colonoscopy if he never received one?";[9]

4. "It was more reasonable for Neumeier to expect his insurance had paid the entire balance";[10]

5. Neumeier acted entirely "reasonably" in delaying contacting MRS because he thought MRS was a "scam" so he contacted his doctor initially, not MRS; and[11]

6. MRS sent one, solitary demand and draft complaint to the correct address, which Neumeier received only two days before suit was filed.[12]

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[7] Respondent's Brief, pp. 10-11.
[8] Respondent's Brief, p. 11.
[9] Respondent's Brief, p. 11.
[10] Respondent's Brief, p. 11.
[11] Respondent's Brief, p. 12.
[12] Respondent's Brief, p. 12.

Each of these arguments ignores any contract interpretation and instead raises an argument of "reasonableness" under the circumstances. However, "reasonableness" or "fault" is not relevant to a contract interpretation. Accordingly, the Court should ignore these arguments and focus on the contract between the parties. Moreover, each of these arguments is either factually incorrect, misleading, or unfairly misdirects "fault" away from Neumeier:

1. Neumeier blames the timing of the belated insurance processing on Dr. Baird and MRS, but in reality Neumeier's mistaken belief that (1) his insurer had paid the bill; and that (2) MRS's letter was a scam caused the insurance process to occur after the complaint was filed. Thus, one could argue that Neumeier is at "fault";

2. Neumeier says that he did nothing to bring MRS's litigation upon him, but really his failure to pay Dr. Baird before the lawsuit was filed brought the litigation upon him. Neumeier also did not contact MRS the day he got back from vacation even though MRS warned him that he could be sued if he failed to timely act. Thus, Neumeier cannot say he did "nothing" to bring MRS' litigation upon him, and so one could argue that Neumeier is at "fault";

3. Neumeier says that he could not know there was a bill for his November 2012 colonoscopy since he never received one, and it was more reasonable for him to expect his insurance had paid the entire balance. Only two possibilities exist: (1) Dr. Baird performed the colonoscopy for free; or (2) Dr. Bair expected to get paid for the colonoscopy. Without an agreement with Dr. Baird that he would do the procedure for free, Neumeier knew that Dr. Baird expected to get paid. And before the lawsuit was ever filed, Neumeier knew he had never paid Dr. Baird himself and had never received

an Explanation of Benefits ("EOB") form from his insurer because he never received one until after MRS filed suit. Therefore, Neumeier knew that Dr. Baird expected to be paid and had not been paid before the lawsuit was filed. These conclusions are far more reasonable than Neumeier's subjective "belief" that Neumeier's insurer had paid the entire balance—again, particularly given that Neumeier never received any EOB form from his insurer for Dr. Baird's services until after MRS filed suit. Thus, one could argue that Neumeier is at "fault";

4. Neumeier says he acted "reasonably" in delaying contacting MRS because he thought MRS was a "scam" so he initially contacted his doctor, not MRS. MRS is not a scam. MRS is licensed with the Department of Finance and bonded pursuant to law. Neumeier might claim that he thought there was a mistake. But there are simply no objective facts to support Neumeier's subjective thought that MRS was a scam. In fact, according to Neumeier, enclosed in the MRS letter was a draft complaint. In this case, the complaint contains the names of Bryan Zollinger and Smith Driscoll & Associates, PLLC at the heading. Did Neumeier really think that Bryan Zollinger and Smith Driscoll & Associates, PLLC were part of the scam too?[13] And one phone call to MRS on the Monday after Neumeier returned from vacation to tell MRS that Neumeier had insurance would have prevented the lawsuit because it would have placed his account on "insurance hold."[14] Thus, one could again argue that Neumeier is at "fault"; and

[13] In all fairness to Neumeier, he is simply mistaken on this point. There was no draft complaint with the demand letter. But if the Court takes Neumeier's factual claims on their face, then Neumeier never reasonably really thought there was a scam because he would have had to believe that MRS, Bryan Zollinger, and Smith Driscoll & Associates, PLLC were all part of a scam. This is just too much reasonably to assume.

[14] R Vol. I, p. 72.

5. Neumeier claims MRS sent only one, solitary demand and draft complaint to the correct address, which Neumeier received only two days before suit was filed.[15] The truth is that the record nowhere supports this statement that MRS sent a draft complaint to Neumeier. Moreover, it takes only one solitary demand letter to put a person on notice of an unpaid bill. Since Neumeier admits he got one and read it before suit was filed, one could argue that Neumeier is at "fault."

D. NO SUBSTANTIAL AND COMPETENT EVIDENCE EXISTS TO SUPPORT NEUMEIER'S CLAIM THAT HE OWED AND PAID NOTHING TO MRS.

Neumeier argues that the Magistrate Court's decision that he was the prevailing party is supported by substantial and competent evidence because Neumeier owed nothing to MRS. Similarly, Neumeier argues that "[i]t was fully within the Magistrate Court's discretion to decide that Neumeier—who paid nothing under the Complaint—was the prevailing party."[16] Neumeier goes so far as to say that "Neumeier paid nothing on MRS's claim"[17] and "[n]othing was owed, and nothing was paid by Neumeier."[18]

Neumeier's argument that he owed nothing to MRS and paid nothing under the complaint or on MRS' claim is disingenuous. The facts are undisputed that at the time MRS filed the Complaint Neumeier owed MRS for an unpaid medical bill. Instead, Neumeier focuses on the period of time after his insurer paid the medical bill to say that he owed MRS nothing. However, the proper time to determine whether a defendant owes a plaintiff any money is at the time the plaintiff files the complaint, not when the defendant pays the plaintiff after the

[15] Neumeier cites to no state or federal law that requires that he be sent or receive any notice, letter or bill before he can be liable for the bill in this case.
[16] Respondent's Brief, p. 14.
[17] Respondent's Brief, p. 17.
[18] Respondent's Brief, p. 18.

plaintiff files the complaint. Otherwise, no plaintiff would ever want to file suit even if the defendant owed the plaintiff money at the time of filing suit because the defendant could become the prevailing party and recover attorney's fees and costs simply by paying the plaintiff the amount he owed but only after the plaintiff filed the complaint.

Also, Neumeier is acting as if he did not pay anything when his insurer paid Dr. Baird. The fact is that Neumeier's insurer, who was contractually obligated with Neumeier to pay the bill, did pay the bill for and in behalf of Neumeier, and Neumeier was grateful for the payment; therefore, it is as if Neumeier paid it himself. Neumeier cannot have his cake and eat it too. In other words, Neumeier cannot say that "[i]ndividuals contract with insurance companies to get access to adjusted prices for services and then to have the insurance company pay a certain portion of that adjusted price,"[19] and also claim that the insurer does not pay anything for the insured or that the payment by the insurer is really not a payment "by the insured." Of course Neumeier paid the medical bill. He just had his insurer do it in his behalf.

E. MRS IS ENTITLED TO PREJUDGMENT INTEREST.

1. Neumeier's Prejudgment Interest Argument Is Faulty.

Neumeier argues that MRS cannot recover prejudgment interest because MRS did not get a judgment. Neumeier cites several cases on this point. However, none of the cases addresses the issue before this Court: Can a defendant defeat a plaintiff from recovering a judgment in the plaintiff's favor simply by paying the amount owed the plaintiff after the plaintiff files the complaint, and does Idaho law require a judgment to recover prejudgment interest?

[19] Respondent's Brief, p. 12.

The only relevant case the parties have provided this Court as authority is *State Drywall, Inc. v. Rhodes Design & Development*, 127 P.3d 1082 (Nev. 2006). In *State Drywall, Inc.*, the Supreme Court of Nevada reversed the District Court that did not award prejudgment interest on two payments a general contractor defendant made to a subcontractor plaintiff during litigation in a breach of contract case. Just like Neumeier urges the Court here, the District Court had declined prejudgment interest on the two payments because those payments were not part of the judgment and therefore they could not earn prejudgment interest. However, the Nevada Supreme Court reversed the District Court concluding, "that a plaintiff is entitled to prejudgment interest on money paid under the contract during a pending collection suit, ***even though that payment is not included in the principal amount of the subsequent judgment***." *Id.* at 113 (emphasis added).

Neumeier tries to distinguish *State Drywall, Inc.* by saying that "in *State Drywall*, the subcontractor received a judgment on the merits in its favor. In this case, MRS did not receive a judgment on the principal obligation in its favor."[20] However, Neumeier's "judgment distinction" was not a factor for the *State Drywall, Inc.* court. Specifically, in *State Drywall, Inc.*, the court awarded prejudgment interest on the payments made during litigation because under the plain language of Nevada's prejudgment interest statute, prejudgment interest must be allowed "upon all money from the time it becomes due." The court found that "[t]he statute in no way limits prejudgment interest only to amounts contained within the court's ultimate judgment. Rather, prejudgment interest should be calculated for 'all money' owed under the

[20] Respondent's Brief, pp. 18-19.

contract from the date it becomes due until the date it is paid. . . ." *State Drywall, Inc., supra*, 127 P.3d at 1086.

Here, Idaho Code Section 28-22-103 governs the award of prejudgment interest. Idaho Code Section 28-22-103(2) contains nearly identical language as the Nevada prejudgment interest statute. Instead of requiring prejudgment interest "upon all money from the time it becomes due," the Idaho statute is equally plain and unambiguous allowing prejudgment interest upon "[m]oney after the same becomes due." The point is that Idaho's statute in no way limits prejudgment interest only to amounts claimed in a judgment or when the plaintiff recovers a judgment.

The court also relied on an important public policy goal in allowing prejudgment interest on contract amounts paid during litigation:

> If interest were not recoverable on amounts owed to the plaintiff and paid by the defendant after the complaint was filed but before trial, then a defendant worried about losing at trial could pay some or all the money before trial and avoid paying interest on that amount. Such a result is fundamentally unfair. A defendant in a collection case could then avoid interest, yet still delay payment until just before trial. Permitting this tactic would circumvent the mandates of our prejudgment interest statute.

State Drywall, Inc., supra, 127 P.3d at 1087.

In the end, the subcontractor in *State Drywall, Inc.* recovered prejudgment interest even though he never recovered a judgment on the principal amounts he recovered prejudgment interest on. The fact that the subcontractor did recover a judgment on the amount the general did not pay is of no consequence. The *State Drywall, Inc.* court would have allowed the subcontractor to recover prejudgment interest even if the general contractor had paid all amounts due and owing thereby depriving the subcontract of any affirmative judgment.

Similarly, this Court should rule that Neumeier owes MRS prejudgment interest even though MRS did not recover any affirmative money judgment.

2. Neumeier's Balance Is Capable Of Mathematical Computation.

Neumeier argues that his balance was an "ever-changing" and "unliquidated" amount and therefore not subject to a prejudgment interest calculation. Neumeier even pokes fun at the math skills of counsel for MRS because counsel for MRS mistakenly calculated interest on the entire balance before any contractual adjustment in the Appellant's Brief on Appeal before the District Court ($315.16) whereas counsel for MRS has corrected the mistake and calculated interest only on the balance due after applying the contractual adjustment before this Court ($114.86).[21] However, the balance has never been "ever-changing" or not subject to mathematical computation. The formula is straightforward. You take the amount the insurer and Dr. Baird agreed upon for the procedure Neumeier received and apply 12% interest. One of the advantages of having insurance is that the insurer and the physician have already agreed to the price in advance before the procedure. A physician can bill whatever amount he wants to bill, but the amount he can charge and recover is the amount he has already agreed to with the insurer before the physician performs the procedure.

Neumeier also raises an argument the Magistrate Court raised, but that the District Court did not rely upon. Neumeier points out that "the Magistrate Court found that MRS was judicially estopped from requesting prejudgment interest because it argued for $0 on summary judgment." This is not technically correct. MRS did not argue for $0 on summary judgment.

[21] The fact that counsel for MRS could recognize the mathematical error and correct it with such precision is further evidence that the prejudgment interest calculation is a matter of mathematical computation.

MRS simply did not seek any prejudgment interest at the summary judgment stage for two reasons: First, generally speaking, MRS does not know the exact amount to calculate for prejudgment interest until the court enters judgment. Therefore, MRS usually seeks prejudgment interest only after the court enters judgment.

Second, it is not mandatory that MZRS raise the issue of prejudgment interest before the court enters judgment because MRS can seek prejudgment interest after judgment is entered. I.R.C.P. 59(e). This happens routinely in jury trials where a jury may return a verdict for a plaintiff and the court then enters judgment on the verdict. The plaintiff has 14 days to file a motion to alter or amend the judgment to raise a claim for prejudgment interest. It would seem silly to have the jury or the court determine prejudgment interest before entry of judgment--what if the plaintiff loses on summary judgment? Interest of judicial economy support a post-judgment motion for prejudgment interest to prevent the court and counsel from raising and considering issues that the court may never reach. In any event, none of the elements of judicial estoppel exist to deny MRS prejudgment interest on the facts of this case. Specifically, MRS did not take "clearly inconsistent" positions by means of "sworn statements" to obtain a judgment, advantage or consideration. *Heinze v. Bauer*, 145 Idaho 232 (2008).

F. THIS COURT SHOULD GIVE NEUMEIER'S POLICY CONCERNS NO WEIGHT.

1. Neumeier's Policy Concerns Are Better Left For The Idaho Legislature.

Neumeier admits that "[m]edical billing is a complex field full of codes, adjustments, and varying insurance contracts," yet argues "as a matter of public policy, it is better for medical service providers to be held accountable for responsible billing practices" and that public policy

should be "to protect innocent consumers from the billing mistakes of other parties."[22] Neumeier's reasoning is that patients' expectations are reasonable that "medical providers competently bill valid insurance for their services if insurances is provided" and that "medical providers and collection companies . . . send insurance-adjusted bills to the proper address with adequate notice."[23]

MRS respectfully requests that the court decline Neumeier's invitation to decide this case based on billing practices and patient billing and collection expectations. Instead, these complex topics are best suited for the Idaho legislature.

2. Neumeier's Other Policy Arguments Already Exist In A Remedy Neumeier Refuses To Seek.

Neumeier argues that his "plight is the exact opposite of the debtor who refuses to pay a known debt until after suit. As such, MRS's policy concerns are ill-founded."[24] Although Neumeier did not "refuse" to pay his debt until after suit, the result he asks the Court to impose would have the adverse policy effects MRS raises in its Opening Brief; therefore, MRS's policy concerns are well-founded.

Neumeier fits into another category of the person who gets a medical service and then fails to take any responsibility to pay for it. Instead, Neumeier took the approach "out of sight out of mind." Neumeier did not take personal responsibility for his contractual obligation. He simply provided "insurance information" to Dr. Baird (whatever "insurance information" means) and left it to everyone else to make sure his bill got paid. He ultimately went on

[22] Respondent's Brief, pp. 12-13.
[23] Respondent's Brief, p. 13.
[24] Respondent's Brief, p. 20.

vacation, returned, and even when he admittedly did receive a notice from MRS of the unpaid bill before filing suit, Neumeier did not even call MRS when he had the chance. But according to Neumeier, that was not his "fault" either even though he complains that MRS is at "fault" because MRS never called him.[25] So now he asks this Court to impose an implied in law condition in all physician/patient contracts where patients with insurance see their physician for care and treatment. In these cases, Neumeier asks that the patients have no responsibility for payment of their medical bills until their insurer pays its part of the bill so that the patient can be "protected" from the process.

According to Neumeier, without this new judicially imposed rule, medical patients will continue to face the litany of "offenses" that Neumeier claims he was forced to endure, adding: "[n]o one should have had to go through what Neumeier has had to go through and continues to go through in this case."[26] Neumeier then identifies portions of the Fair Debt Collection Practices Act (FDCPA) that Neumeier says apply here and "which was [were] specifically passed to protect consumers from the issues seen in this case."[27] Interestingly, Neumeier never filed a counterclaim for violations of the FDCPA. In fact, Neumeier has filed no complaint or made any claims under the FDCPA even though the FDCPA, according to Neumeier, "was specifically passed to protect consumers from the issues seen in this case."

MRS submits that Neumeier's actions speak louder than his words. Here, Neumeier's actions in not filing or making any claims under the FDCPA against MRS are because he knows MRS has complied with the FDCPA in every respect. This Court should not use this case as a

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[25] Respondent's Brief, pp. 2-3.
[26] Respondent's Brief, p. 20.
[27] Respondent's Brief, pp. 20-21.

means of engaging in consumer protection activism when the FDCPA already exists, according to Neumeier, "to protect consumers from the issues seen in this case." And for the same reasons this Court should not accept Neumeier's invitation to impose an implied constructive condition that excuses patients with medical insurance from paying their bills until their insurer pays.

G. NEUMEIER IS NOT ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL.

Neumeier seeks attorney's fees on appeal under Idaho Appellate Rule 41 and Idaho Code Section 12-120(1). The Court should deny this request because MRS should be the prevailing party on appeal. Neumeier also seeks attorney's fees under Idaho Code Section 12-121 because Neumeier claims that MRS brought its appeal frivolously, unreasonably, or without foundation and merely asks the appellate court to "second guess" the lower court's opinion. However, MRS's appeal before this Court cannot fall under any of the provisions of Section 12-121 because the District Court cited no authority whatsoever for its new proposition of law that MRS now challenges on appeal before this Court. "[T]his Court typically does not award attorney fees in matters of first impression." *Arnold v. City of Stanley,* 158 Idaho 218, 224 (2015). Neumeier is therefore not entitled to attorney's fees under Section 12-121.

CONCLUSION

Neumeier had an implied in fact contract with Dr. Baird for a colonoscopy. Dr. Baird performed the colonoscopy, and Neumeier did not pay for it for about three years. Although the record on appeal is undeveloped to explain why Dr. Baird did not initially bill Neumeier's insurer (whether that was because Neumeier's "insurance information" was incorrect, incomplete or whether Dr. Baird simply made some error), the record does establish that Dr. Baird sent the bill to the wrong address.

MRS got the account from Dr. Baird, and MRS also sent the initial demand letters to Neumeier's wrong address. However, ultimately, MRS got the right address and sent a demand letter to Neumeier giving him 10 days to pay the account in full or face a possible lawsuit. Because Neumeier was on an extended vacation, he had only one day to contact MRS and explain that he had insurance that Dr. Baird could bill. If Neumeier had done that, MRS would have put an "insurance hold" on his account and not filed a lawsuit, but instead would have waited until Dr. Baird billed Neumeier's insurance, and the whole matter would have been concluded favorably for everyone.

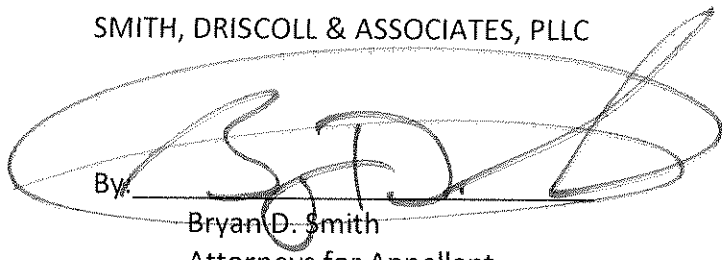
Before MRS filed the lawsuit, Neumeier never went to Dr. Baird for about 2.5 years asking him why Neumeier never got a bill for the colonoscopy procedure Dr. Baird did for him. Instead, according to Neumeier, he just thought the bill was paid even though he never received a bill and even though he never received an EOB form from his insurer showing that the insurer processed and paid anything on the bill.

Now Neumeier comes to the Court asking that it adopt a new rule of law that medical patients who have insurance are excused from paying anything on their medical bills until after their insurer pays under the insurance contract. Neumeier says this rule is necessary to protect people from unfair collection and billing practices for which he stands proudly as the "class representative," when actually Neumeier could have contacted MRS before suit was filed and resolved the matter without MRS' ever filing suit. Importantly, under the FDCPA, people who are victims of unfair collection practices already have a federal remedy, which, according to Neumeier, "was specifically passed to protect consumers from the issues seen in this case."

Moreover, the rule of law Neumeier asks this Court to apply in this case has broad sweeping policy implications that are better left to the legislature. Accordingly, MRS respectfully requests that the Court reverse the decision of the District Court and remand the matter to the Magistrate Court with instructions that MRS was the prevailing party and for consideration of an award of prejudgment interest with specific instructions to the Magistrate Court that the absence of an affirmative judgment is not a bar to the recovery of prejudgment interest.

DATED this 23rd day of October, 2017.

SMITH, DRISCOLL & ASSOCIATES, PLLC



By: _____
Bryan D. Smith
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2017, I caused a true and correct copy of the forgoing **APPELLANT'S REPLY BRIEF** 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:

Persons Served:

[ ] U.S. Mail
[ ] Facsimile Transmission
[XX] Hand Delivery
[ ] Courthouse Mail Box
[XX] Email: seancoletti@hopkinsroden.com

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