11-7-2017

Medical Recovery Services v. Ugaki-Hicks Appellant's Brief Dckt. 44927

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

MEDICAL RECOVERY SERVICES, LLC, an Idaho limited liability company,
Plaintiff-Appellant,

v.

YVONNE UGAKI-HICKS, Defendant-Respondent,

* * * * *

APPELLANT'S BRIEF ON APPEAL

* * * * *

Supreme Court Docket No. 44927-2017

Appeal from the District Court of the Sixth Judicial District for Bannock County.
Honorable Mitchell W. Brown, District Judge, presiding.

* * * * *

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

Yvonne Ugaki-Hicks, residing at Pocatello, Idaho, Respondent, Pro Se

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STATEMENT OF THE CASE

Appellant, Medical Recovery Services, LLC. (hereinafter "MRS"), sued the defendant Yvonne Ugaki-Hicks, (hereinafter "Hicks"), for the payment of a medical bill. The defendant was served with the Complaint and Summons and after the time for appearance had expired, MRS filed an application for entry of default and default judgment together with supporting affidavits. The Magistrate Court denied MRS' application based upon I.R.C.P. 55(b)(2), stating that MRS needed to provide written assignment of the debt. On appeal, the District Court agreed with MRS that the applicable rule of civil procedure was I.R.C.P. 55(b)(1) and not I.R.C.P. 55(b)(2) as this case deals with an amount that is a sum certain. But the District Court affirmed the Magistrate Court's denial of entry of judgment on the alternative ground that MRS had not provided an assignment evidencing its claim. MRS has alleged in its Complaint, which has been deemed admitted by lack of answer, that the account was assigned and has by way of affidavit testified to that assignment.

STATEMENT OF FACTS

Appellant, MRS filed a Complaint against Hicks, for the payment of a past due medical bill.[1] MRS served Hicks with the Complaint on August 29, 2015.[2] On or about November 2, 2015, MRS filed its Application for Entry of Default, Application for Entry of Default Judgment and Affidavit in Support of Application for Default Judgment.[3] On November 17, 2015, the Magistrate Court entered its Order Regarding Default wherein it denied entry of default

[1] R Vol. I pp 6-10.
[2] R Vol. I p 11.
[3] R Vol. I pp 12-16.

judgment stating "[s]ufficient proof of assignment of debt not shown as required in the court's discretion to determine the truth of the claim; (IRCP 55(b)(2)."[4] MRS filed a Motion for Reconsideration and Brief in Support of Motion for Reconsideration on December 16, 2015 explaining that because this case involved a sum certain, I.R.C.P. 55(b)(1) applied and not I.R.C.P. 55(b)(2).[5] On March 3, 2016, MRS submitted an additional Affidavit in Support of Application for Default Judgment again attaching an "original instrument" evidencing the claim and testifying by way of affidavit to the assignment of the debt.[6]

On March 10, 2016, the Magistrate Court entered a Minute Entry and Order Denying Motion to Reconsider explaining that the request for default was denied "because sufficient proof of the assignment of debt was not shown as required in the court's discretion to determine truth of the claim according to I.R.C.P. 55(b)(2)."[7] The Magistrate Court reasoned that although "[p]laintiff filed an additional Affidavit in Support of Application for Default Judgment, which Affidavit set forth that the debt was assigned to the Plaintiff, but did not include an attachment which constituted sufficient proof of the assignment. The Affidavit of Counsel is not sufficient proof." MRS filed a second Motion for Reconsideration and Brief in Support of Motion for Reconsideration on June 13, 2016.[8] The Magistrate Court entered a Minute Entry & Order Denying Second Motion for Reconsideration on June 15, 2016.[9] In that order, the Magistrate Court held that the "Court is still of the opinion, as it was on March 10,

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[4] R Vol. I pp 17-18.
[5] R Vol. I pp 19-22.
[6] R Vol. I pp 23-26.
[7] R Vol. I pp 27-28.
[8] R Vol. I pp 29-35.
[9] R Vol. I pp 36-39.

2016, that, whether it be under Rule 55(b)(1) or 55(b)(2), it has the authority, in its discretion, to require written proof of the assignment of the debt which, to this Court is part and parcel of providing the original instrument proving the debt since the Plaintiff also has to be the real party in interest in order to sue on that instrument." The Magistrate Court entered a Judgment dismissing MRS' Complaint on July 7, 2016.[10]

MRS filed a Notice of Appeal on August 9, 2016 and filed Appellant's Brief on Appeal on November 14, 2017.[11] The District Court issued its Memorandum Decision and Order on Appeal on February 17, 2017.[12] The District Court agreed "with MRS that I.R.C.P. 55(b)(2) has no application to the facts of this case and/or the issues raised in this appeal." However, the District Court affirmed the decision of the Magistrate Court holding that the phrase "instrument evidencing the claim" contained in I.R.C.P. 55(b)(1) allows the magistrate court to require a written assignment of debt. Specifically, the District Court stated that "[c]ertainly, if the debt has been assigned from the original creditor to another entity, such as M.R.S., part of 'evidencing the claim' would entail establishing the assignment. Otherwise any party could assert this claim even though they were not the original creditor on the underlying debt." MRS filed a timely Notice of Appeal on March 10, 2017.[13]

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[10] R Vol. I p 41.
[11] R Vol. I pp 43-45.
[12] R Vol. I pp 87-93.
[13] R Vol. I pp 94-96.

COURSE OF PROCEEDINGS

On August 17, 2015, MRS filed its Complaint and Summons.[14] On August 29, 2015, MRS served the Complaint and Summons on Hicks.[15] On November 6, 2015, MRS filed Applications for Entry of Default and Default Judgment.[16] On November 25, 2015, the Magistrate Court entered and order denying entry of default.[17] On December 16, 2015, MRS filed a Motion for Reconsideration along with a Brief in Support of Motion for Reconsideration.[18] On March 3, 2016, MRS filed an additional Affidavit in Support of Application for Default Judgment[19] which the Magistrate Court denied on March 10, 2016 by way of Minute Entry and Order.[20]

On June 8, 2016, MRS filed a second Motion for Reconsideration and an additional Brief in Support of Motion for Reconsideration.[21] On June 15, 2016, the Magistrate Court entered a Minute Entry and Order Denying Second Motion for Reconsideration.[22] On July 7, 2016, the Magistrate Court entered a Judgment of Dismissal without Prejudice.[23] On August 5, 2016, MRS filed a Notice of Appeal[24] and on November 15, 2016 MRS filed the Appellant's Brief on Appeal.[25]

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[14] R Vol. I pp 6-10.
[15] R Vol. I p 11.
[16] R Vol. I pp 12-16.
[17] R Vol. I pp 17-18.
[18] R Vol. I pp 19-22.
[19] R Vol. I pp 23-26.
[20] R Vol. I pp 27-28.
[21] R Vol. I pp 29-35.
[22] R Vol. I pp 36-39.
[23] R Vol. I p 41.
[24] R Vol. I pp 43-45.
[25] R Vol. I pp 66-74.

On January 6, 2017, the District Court held oral argument, Hicks did not appear and Joseph F. Hurley appeared on behalf of MRS.[26] On February 17, 2017, the District Court issued its Memorandum Decision and Order on Appeal affirming, on an alternative ground, the Magistrate Court's refusal to enter default judgment.[27]

On March 10, 2017, MRS filed a timely Notice of Appeal.[28]

ISSUES ON APPEAL

A. DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR WHEN IT CONCLUDED THAT DEFAULT JUDGMENT COULD NOT BE ENTERED AGAINST THE DEFENDANT AND WHEN IT DISMISSED THE PLAINTIFF'S COMPLAINT?

B. IS MEDICAL RECOVERY SERVICES ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER I.C. 12-120(1), (3) AND (5) AND I.A.R. 41?

STANDARD OF REVIEW

"When reviewing the decision of a district court sitting in its capacity as an appellate court:

> [t]he 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. *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012) (quoting *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008))."

Portfolio Recovery Associates, LLC., v. MacDonald, 162 Idaho 228, 395 (2017). "Thus, this Court does not review the decision of the magistrate court." *Pelayo v. Pelayo*, 154 Idaho 855, 859 (2013). "Rather, we [this Court] are 'procedurally bound to affirm or reverse the decisions of

[26] R Vol. I pp 85-86.
[27] R Vol. I pp 87-93.
[28] R Vol. I pp 94-96.

the district court.'" *Id.* (quoting *State v. Korn*, 148 Idaho 413, 415 n.1 (2009)).

Here, the issue on appeal is the District Court's affirming the Magistrate Court's failure to enter default judgment pursuant to Idaho Rule of Civil Procedure 55(b)(1). The standard of review on questions of law is free review. *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 644 (2006). "Due process issues are generally questions of law, and this Court exercises free review over questions of law." *Meyers v. Hansen*, 148 Idaho 283, 287 (2009). The Magistrate Court's refusal to enter default judgment presents only a question of law as no questions of fact exist. Accordingly, this Court should exercise free review.

I.

ARGUMENT

A. THE DISTRICT AND MAGISTRATE COURTS COMMITTED REVERSIBLE ERROR WHEN THEY REFUSED TO ENTER DEFAULT JUDGMENT PURSUANT TO I.R.C.P. 55(b)(1).

I.R.C.P. 55(b)(1) states in relevant part:

> (1) *For Sum Certain.* ***If a claim is for a sum certain or a sum that can be made certain by computation***, the court, on the claimant's request, with an affidavit showing the amount due, ***must order judgment for that amount and costs against the party who has been defaulted for not appearing and who is neither a minor nor an incompetent person and has been personally served***, other than by publication or personal service outside of this state. The affidavit must show the method of computation, together with any original instrument evidencing the claim unless otherwise permitted by the court. An application for a default judgment must also contain written certification of the name of the party against whom judgment is requested and the address most likely to give the defendant notice of the default judgment. The clerk must use this address in giving the party notice of judgment.

I.R.C.P. 55(b)(2) states in relevant part that ***"[i]n all other cases***...[t]he court may conduct hearings or make referrals when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting; (B) determine the amount of damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other matter. (Emphasis added).

In this case, there is no dispute that MRS' claim against Hicks is for a sum certain and therefore should be decided under I.R.C.P. 55(b)(1) and not 55(b)(1). The District Court agreed and stated "I.R.C.P. 55(b)(2) has no application to the facts of this case and/or the issues raised in this appeal."[29] The District Court further stated that "to the extent that the trial court relied upon I.R.C.P. 55(b)(2) in denying M.R.S.'s application for default judgment, it was in error and subject to reversal."[30]

However, the District Court affirmed the Magistrate Court's refusal to grant MRS' application for default judgment on the "basis that M.R.S. has failed to comply with I.R.C.P. 55(b)(1) by failing to provide evidence of the claim."[31] The District Court reasoned that "[c]ertainly, if the debt has been assigned from the original creditor to another entity, such as M.R.S., part of 'evidencing the claim' would entail establishing the assignment. Otherwise any party could assert this claim even though they were not the original creditor on the underlying debt."[32]

Although the District Court says MRS failed to provide evidence of the claim because it failed to provide written evidence of an assignment, evidence of the assignment is properly before the District and Magistrate Courts. In fact, this evidence is undisputed.

1. <u>All Well-Pleaded Allegations in the Complaint are Deemed Admitted on Default, and MRS Has Clearly Pleaded An Assignment That Hicks Has Not Disputed</u>.

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[29] R Vol. I p 89.
[30] R Vol. I p 91.
[31] R Vol. I p 91.
[32] R Vol. I p 91.

The well-established rule in Idaho is that "[u]pon default by the defendant, the allegations contained in the complaint are taken as true, and the plaintiff is relieved of any obligation to introduce evidence in support of those allegations." *Dominguez ex rel. Hamp v. Evergreen Resources, Inc.* 142 Idaho 7, 13 (2005). Specifically, "While I.R.C.P. 55(b)(2) vests the court with discretion to conduct such hearings, or order such references as are necessary in order to determine the amount of damages for which a party is liable, that Rule does not permit the court to ignore the long-established precept that on default all well pleaded factual allegations in the complaint are deemed admitted." *Cement Masons'—Employers' Trust, v K.H. Davis*, 107 Idaho 1131, 1133 (Ct.App.1985) (Reversing trial court that did not accept well pleaded factual allegations in the complaint as admitted in connection with default entered under I.R.C.P. 55(b)(2)).

Here, the Complaint alleges the following:

> 3. At all times mentioned herein the plaintiff was, and still is, a licensed and bonded collector under the laws of the State of Idaho, and before the commencement of this action the debt herein sued upon was assigned by SEI Anesthesia to the plaintiff for the purpose of collection. The plaintiff is now the holder thereof for such purposes.

Paragraph three of the Complaint is a well-pleaded factual allegation of an assignment that Hicks has admitted to by failing to file an Answer. Given the well-established rule that all well-pleaded factual allegations of a complaint are deemed admitted, this Court must accept as true and conclusively proven the fact that the original creditor assigned the debt to MRS. Although the Court has some discretion under Rule 55(b)(2), the Court does not have discretion to ignore the fact that defendant has admitted the allegations of paragraph three of the

Complaint and that those allegations are deemed conclusively proven.

2. MRS Has Presented Uncontradicted Testimony of a Credible Witness That The Debt Has Been Assigned to MRS.

This Court has explained another well-established rule which governs this situation:

> The rule applicable to all witnesses, whether parties or interested in the event of an action, is, that either a board, court, or jury must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or trial. *Manley v. Harvey Lumber Co.*, 175 Minn. 489, 221 N.W. 913, 914. In *Jeffrey v. Trouse*, 100 Mont. 538, 50 Pac.2d 872, 874, it is held that neither the trial court nor a jury may arbitrarily or capriciously disregard the testimony of a witness unimpeached by any of the modes known to the law, if such testimony does not exceed probability. And, in *Arundel v. Turk*, 16 Cal.App.2d 293, 60 Pac.2d 486, 487, 488, the rule is stated thus: 'Testimony which is inherently improbable may be disregarded, * * * but to warrant such action there must exist either a physical impossibility of the evidence being true, or its falsity must be apparent, without any resort to inferences or deductions.

Dinneen v. Finch, 100 Idaho 620, 626–27 (1979).

Here, MRS has submitted the Affidavit in Support of Application for Default Judgment stating in relevant part:

> 7. As the Attorney for MRS I have personal knowledge of the contract(s) between the providers and MRS assigning the accounts in this case to MRS for collection. The applicable contract(s) designate the original service provider as "Assignor" and MRS as "Assignee". The applicable contract(s) state, in relevant part: "Assignor desires, from time to time during the term of this agreement, to submit to Assignee for collection certain claims, accounts or other evidences of indebtedness." Accordingly, the account(s) at issue in this case were assigned at the moment MRS received account information in this case from the provider for collection.
>
> 8. Each of the accounts identified in Exhibit "A" have been assigned to MRS because MRS has received the account information from the provider attached to this Affidavit.

The testimony provided by MRS is from a credible witness, the testimony is uncontroverted and is not inherently improbable. The District and Magistrate Courts "must

accept as true" the statement regarding assignment of the debt. Therefore, this Court should reverse the decision of the District Court and reverse the Judgment entered by the Magistrate Court dismissing MRS' Complaint without prejudice and remand this matter to the Magistrate Court with instructions to enter default and default judgment against Hicks in the amount specified by the plaintiff pursuant to I.R.C.P. 55(b)(1).

3. The District Court and the Magistrate Court Committed Reversible Error by Requiring Evidence of a Written Assignment Because Assignments Are Not Required to Be in Writing.

Both the Magistrate and District Courts are of the opinion that they can require written proof of the assignment of debt. However, neither Court provides any legal authority that an assignment for collection of a debt must be in writing. To the contrary, case law old and new and far and wide universally rejects the rule that assignments generally, and assignments for the collection of debt specifically, must be in writing.

See Mangum v. Susser, 764 So.2d 653 (Ct.App.Fla.2000) (An assignment need not be in writing to be valid); *Dale, Inc. v. Killilea*, 94 So.2d 146, 147 (Ct.App.La.1957)(A writing is not required for assignment of a debt); *Reisman v. Independence Realty Corp*, 195 Misc. 260, 262, 89 N.Y.S.2d 763, 766 (1949) ("an assignment need not be in writing"); *Ratsch v. Rengel*, 23 A.2d 680, 682 (Md.1942) ("The law is also well settled that, in the absence of statutory requirement, an assignment, or gift of a chose in action is not required to be in writing. It may effectively be done by parole"); *Mitchell v. Shoreridge Oil Co.*, 24 Cal.App.2d 382, 284, 75 P.2d 110, 111 (1939) ("With respect to the fact that the assignment of the claims for the purchase price of the materials furnished by appellants was oral it is settled that there is no legal requirement that

such an assignment must be in writing"); *Harlow v. Cook*, 240 P.74 (Okla.1925) ("It is not error to admit oral testimony to prove the sale or assignment of an account, where the plaintiff pleads a verbal assignment, which defendant denies only by general denial, when there is no conclusive proof that the assignment was in writing"); *Goetz v. Zeif*, 195 N.W. 874 (Wis.1923)(Assignment need not be in writing); *Reynolds v. Gregg*, 258 S.W. 1088 (Ct.App.Tx.1924) (Assignment of note need not be in writing); *Lombard v. Balsley*, 181 Ill.App. 1 (1913) (Assignment of insurance policy as security need not be in writing); *Singletary v. Goeman*, 123 S.W. 436 (Ct.App.Tx.1909) (An assignment of a debt need not be in writing.)

See also Hurley v. Bendel, 69 N.W. 477 (Minn.1896) (An assignment of accounts need not be formal and need not be in writing where the owner of an account turns it over with an agreement that it should be collected from the debtor); *Donovan v. Halsey Fire-Engine Co.*, 24 N.W. 819 (Mich.1885) (It is not necessary to the valid transfer of a claim for money paid be in writing); and *Noyes v. Brown*, 33 Vt. 431 (Vt.1860) (An oral assignment of a chose in action (i.e, cause of action on a claim for recovery for money) is valid though not in writing.)

Although Idaho courts have not specifically ruled on whether an assignment must be in writing, contracts in general in Idaho can be oral. *See Bailey v. Peritus I Assets Mgmt., LLC*, 162 Idaho 458, 398 (2017) (general rule in Idaho is that oral contracts are enforceable unless they fall in one of five primary categories). "'An assignment is a contract between the assignor and the assignee.'" *Purco Fleet Services, Inc. v. Idaho State Dept. of Finance*, 140 Idaho 121, 125 (2004) quoting Black's Law Dictionary 771 (7th ed. 1999).

Idaho Code § 9-505 identifies only five agreements in Idaho that must be in writing.

These are (1) an agreement which by its terms cannot be performed within one year; (2) promise to pay the debt of another; (3) certain agreements made upon consideration of marriage; (4) leasing real property longer than one year; and (5) lending money or extending credit exceeding $50,000. Idaho law also requires that contracts for the sale of goods in excess of $500 must be in writing. Idaho Code § 28-2-201(3)(b). Importantly, no requirement exists under § 9-505 that an assignment must be in writing, and this case is not for the sale of goods. And no Idaho case law supports the Courts' opinions that the assignment in this case must be in writing. Accordingly, both the Magistrate and District Courts are requiring MRS to provide written evidence in the form of an assignment that the law does not require to be in writing.

Because the law does not require assignments to be in writing, because the factual allegations in MRS' Complaint are deemed admitted, and because MRS has by way of affidavit established an assignment in this matter, this Court should reverse the decision of the District Court and reverse the Judgment entered by the Magistrate Court dismissing MRS' Complaint without prejudice and remand this matter to the Magistrate Court with instructions to enter default and default judgment against Hicks pursuant to I.R.C.P. 55(b)(1).

4. The District and Magistrate Courts' Decisions Rewrite Rule 55(b)(1).

The express language of Rule 55(b)(1) states that "[t]he affidavit must show the method of computation, together with *any* original instrument evidencing the claim unless otherwise permitted by the court." (Emphasis added). This rule requires the plaintiff to attach to the affidavit for default judgment any original instrument evidencing the claim *to the extent an original instrument evidencing the claim exists*. The express wording of Rule 55(b)(1) does not

say that the plaintiff must attach an original instrument evidencing the claim. There may not be any original instrument evidencing the claim. For example, a plaintiff seeking to recover on an oral contract can never attach an original instrument evidencing the claim. With respect to assignment of debt, the District and Magistrate Courts are interpreting Rule 55(b)(1) that MRS provide written evidence of an oral assignment or that MRS create a written assignment to evidence their prior oral assignment. Rule 55(b)(1) requires neither.[33]

B. The District Court's Alternative Ground For Affirming The Magistrate Court Is Also In Error.

After going through its assignment analysis, the District Court then held in a footnote that alternative grounds exist to affirm the Magistrate Court's refusal to enter a default judgment.[34] In this regard, an exhibit MRS attached to an affidavit in support of default judgment could not be found by the District Court on appeal. MRS filed this exhibit to satisfy the Magistrate Court's concerns that MRS provide an "original instrument evidencing the claim." Because that exhibit cannot be found in the appellate record, the District Court stated the following:

> As a result, regardless of this Court's decision regarding the merits of the issues raised on this appeal, it appears that the Court must **AFFIRM** the trial court's refusal to enter default judgment on alternative grounds. M.R.S.'s failure to provide the 'original

[33] The District and Magistrate Courts are essentially mandating what they feel is the necessary quantum of proof they need before they will accept evidence establishing an assignment of debt. In this process, they reject Hicks' admission of fact by virtue of her failure to dispute the well-pleaded allegations of the Complaint on the assignment issue and they reject the credible and uncontroverted Affidavit of Attorney Bryan N. Zollinger establishing an assignment of debt. In fact, the District Court goes so far as to say that an affidavit from the original creditor "would certainly qualify as evidence of the claim." But apparently an affidavit from the collection agency or its attorney licensed under the laws of Idaho and therefore subject to ethical rules of honesty in fact is not sufficient. *See* R Vol. pp. 91-92 fn. 4. The bottom line is that the District and Magistrate Courts are weighing the evidence on default rather than ruling on its admissibility.

[34] Vol 1, p. 98, fn. 2.

instrument evidencing the claim' as required by I.R.C.P. 55(b)(1). [35]

But the District Court's alternative ground for affirming the Magistrate Court is also in error because there is no "original instrument evidencing the claim." MRS appears frequently before the Magistrate Court involved in this appeal. This Magistrate Court requires that MRS provide some document to serve as an "original instrument evidencing the claim" before MRS can obtain a default judgment just like it requires MRS to provide some document to serve as an original instrument evidencing the assignment. To satisfy the Magistrate Court, MRS routinely submits electronic "billing statements" to the Magistrate Court who accepts them as "original instruments evidencing the claim." MRS does not believe nor has it ever believed that an electronic billing statement constitutes an original instrument. The term instrument is a legal term of art defined as follows:

> A formal or legal document in writing, such as a contract, deed, will, bond, or lease. A writing that satisfies the requisites of negotiability prescribed by U.C.C. Art. 3. A negotiable instrument (defined in U.C.C. § 3-104, or a security (defined in U.C.C. § 8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment.

Black's Law Dictionary 801 (6th ed. 1995).

Given this definition, MRS submits that an "instrument" is a document whose writing conveys independent legal significance. For example, contracts, wills, liens, deeds, mortgages, recorded judgments, etc. are all written documents. But because they are written documents that convey independent legal significance they are also written instruments. Electronic billing statements do not convey any independent legal significance. They simply convey information.

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[35] Vol 1, p. 98, fn. 2.

Therefore, they are documents but not "instruments."

Although a contract for medical services could very well be a written contract and therefore an "original instrument evidencing the claim," most of the time when a person receives medical services, there is no formal written agreement but instead an implied in fact agreement between the parties where the doctor provides care and treatment for which the patient agrees to pay the reasonable value of those services. This case illustrates this point because the original creditor was SEI Anesthesia. Patients rarely if ever even know the identity of their anesthesiologist let alone sign a written contract for anesthesiology services. Therefore, in the world of medical collections, most of the time there is no "original instrument evidencing the claim" because the patients most often do not sign a written contract.

Here, the District Court's alternative ground for affirming the Magistrate Court is that there is no evidence in the record of an "original instrument evidencing the claim" because the document purporting to show such was not attached to the affidavit in support of default judgment. MRS does not know why the exhibit attached to the affidavit in support of default judgment is not in the record on appeal. Nor does it really matter because MRS will agree on appeal that there is no evidence in the record of an "original instrument evidencing the claim"—not because the exhibit is missing from the record, but because there simply is no "original instrument" or "written contract" between SEI Anesthesia and Hicks.[36] And the missing billing statements that are not attached to the affidavit in support of default do not constitute "original instruments evidencing a claim." The fact that these billing statements are

[36] The only reason MRS attached the electronic billing statements was to satisfy the Magistrate Court who routinely accepts them as "original instruments."

not part of the record on appeal is irrelevant because even if they were part of the record they would not constitute "original instruments evidencing a claim."

Moreover, the Magistrate Court limited its decision to the assignment issue. It never raised any issue about a lack of any "original instrument evidencing the claim." If the Magistrate Court had denied entry of default judgment because the exhibit was missing from the affidavit in support of default, MRS could have taken steps to address the issue. But it was not an issue for the Magistrate Court presumably because it had what it felt it needed to satisfy the "original instrument evidencing the claim" requirement. In any event, the missing exhibit was not an issue for the Magistrate Court, and MRS admits on appeal that the missing exhibit was not an "original instrument evidencing a claim" because no such document exists. Therefore, the District Court's alternative ground for affirming the Magistrate Court is in error.

II.

MRS IS ENTITLED TO RECOVER ITS COSTS AND FEES ON APPEAL

Rule 40 of the Idaho Appellate Rules permits the award of costs to the prevailing party on appeal. Rule 40 states, "[c]osts shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." As the prevailing party on appeal, MRS is entitled to recover its costs pursuant to Rule 40. Similarly, Rule 41 provides for an award of attorney's fees. A prevailing party on appeal is entitled to attorney's fees on appeal if that prevailing party was entitled to attorney's fees before the lower court. *Action Collection Servs., Inc., v. Bigham*, 146 Idaho 286, 291, 192 P.3d 1110, 1115 (Ct. App. 2008).

In this case, MRS was entitled to attorney's fees pursuant to I.C. §12-120(1) & (3) before

the Magistrate Court because this matter was filed as a civil action to recover on an open account, account stated, or contract relating to the purchase or sale of services within the meaning of Idaho Code § 12-120(3).[37] Moreover, the amount pleaded in the Complaint was also less than thirty-five thousand dollars and written demand for payment was made not less than ten days before commencement of the action.[38] Because MRS was entitled to fees pursuant to I.C. § 12-120(1) & (3) before the Magistrate Court, MRS is also entitled to its appellate attorney's fees pursuant to I.A.R. 41.

CONCLUSION

For all the reasons set forth in this Brief, MRS respectfully requests that this Court reverse the District Court's Memorandum Decision and Order on Appeal which affirmed on alternative grounds the Magistrate Court's refusal to enter default judgment. MRS further requests that this Court remand this matter to the Magistrate Court with instructions to enter default and default judgment against the defendant in the amount specified by the plaintiff pursuant to I.R.C.P. 55(b)(1).

DATED this 17th day of November, 2017.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____
Bryan N. Zollinger
Attorneys for Appellant

[37] R Vol. I p 7.
[38] R Vol. I p 7.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of November, 2017, I caused a true and correct copy of the forgoing **APPELLANT'S BRIEF ON APPEAL** to be served, by placing the same in a sealed envelope and depositing it in the U.S. Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Persons Served:

Yvonne Ugaki-Hicks
556 S Main St Apt. 4
Pocatello, ID 83204

( ) Hand (✓) Mail ( ) Fax

Bryan N. Zollinger, Esq.