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# Medical Recovery Services, LLC v. Lopez Appellant's Brief Dckt. 45019

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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

Plaintiff/Appellant,

v.

Robert Lopez,

Defendant/Respondent

Supreme Court Docket No. 45019-2017

**APPELLANT'S BRIEF ON APPEAL**

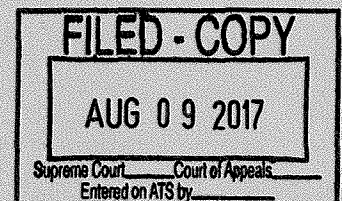
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Appeal from the District Court of the Fifth Judicial District for Lincoln County.  
Honorable John K. Butler, District Judge, presiding.

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

Robert Lopez, residing at Dietrich, Idaho, Defendant/Respondent



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## STATEMENT OF THE CASE

Appellant, Medical Recovery Services, LLC (“MRS”), appeals from that portion of the District Court’s Memorandum Decision on Appeal dated March 1, 2017, denying MRS attorney’s fees on Appeal. The District Court on Appeal reversed the decision of the Magistrate Court and remanded the matter back for the Magistrate Court to award reasonable post judgment attorney’s fees under I.C. § 12-120(5) but denied MRS any attorney’s fees on appeal. MRS is appealing only the Magistrate Court’s denial of MRS’ attorney’s fees on appeal. This appeal addresses the District Court’s refusal to award attorney’s fees to MRS as the prevailing party on appeal.

## STATEMENT OF FACTS

On June 2, 2015, MRS filed a complaint against Robert W. Lopez (“Lopez”) seeking to collect on a debt.<sup>1</sup> MRS obtained a Default Judgment on September 9, 2015 and incurred post judgment attorney’s fees in its attempts to collect on the judgment. Through MRS’ post judgment efforts, Lopez paid the underlying judgment on or about August 23, 2016. MRS filed an application for post-judgment attorney’s fees pursuant to I.C § 12-120(5) on September 6, 2016. On October 13, 2016, the Magistrate Court entered an order denying MRS’ Application for Supplemental Attorney’s Fees on the basis that the application was untimely because it was filed after the judgment had been paid. MRS filed a notice of Appeal on November 23, 2016 and the District Court reversed the decision denying the post-judgment attorney’s fees but denied MRS any attorney’s fees on appeal and entered a Memorandum Decision on Appeal on March 1, 2017. The District Court reasoned that because the appeal was “solely related to the

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<sup>1</sup> R Vol. I, pp. 5-7.

entitlement of post-judgment attorney fees” it could not be characterized as an attempt to collect on a judgment and therefore MRS was not entitled to an award of fees under I.C. § 12-120(5). In its appeal, MRS also sought fees under I.C. §§ 12-120(1) and (3), the District Court held that pursuant to *Credit Bureau of Eastern Idaho, Inc. v. Lecheminant*, 149 Idaho 467, 473 (2010) MRS was not entitled to fees as *Lecheminant* held that § 12-120(5) was the exclusive provision for post-judgment attorney’s fees on appeal.

### COURSE OF PROCEEDINGS

On June 2, 2015, MRS filed the Complaint<sup>2</sup> and subsequently served Mr. Lopez.<sup>3</sup> MRS sought a default judgment<sup>4</sup> and ultimately, an Amended Default Judgment was entered on September 9, 2015.<sup>5</sup> Subsequently, MRS took the following steps to enforce the judgment:

\*On April 9, 2016, MRS filed an Affidavit in Support of Writ of Execution and obtained a writ of execution and notice of garnishment directed to Robert Lopez’s employer;<sup>6</sup>

\*On March 14, 2016 MRS applied for an Order of Examination and schedule a hearing on the Order of Examination;<sup>7</sup>

\*On April 22, 2016 counsel for MRS spoke with Mr. Lopez and arranged for payments to begin in May 2016;<sup>8</sup>

\*On July 22, 2016, having not received a payment in June, MRS filed an Affidavit in Support of Writ of Execution and obtained a writ of execution and notice of garnishment directed to Robert Lopez’s employer;<sup>9</sup>

\*On August 26, 2016, MRS received the sheriff’s return showing that the original judgment balance had been paid through the garnishment;<sup>10</sup>

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<sup>2</sup> R Vol. I, pp. 5-7.

<sup>3</sup> R Vol. I, p. 8.

<sup>4</sup> R. Vol. I, pp. 11-14.

<sup>5</sup> R Vol. I, pp. 28-29.

<sup>6</sup> R Vol. I, pp. 30-38.

<sup>7</sup> R Vol. I, pp. 39-47.

<sup>8</sup> R Vol. I, p. 60.

<sup>9</sup> R Vol. I, p. 49-54.

On September 6, 2016, MRS filed an Application for Supplemental Attorney's Fees with supporting documents.<sup>11</sup> On September 30, 2016, a hearing is held on the Application for Supplemental Attorney's Fees and the magistrate court denies MRS' application.<sup>12</sup> On October 13, 2016, the magistrate court enters an Order on Application For Supplemental Attorney's Fees wherein the court denies MRS any post-judgment attorney's fees.<sup>13</sup> MRS filed a Notice of Appeal on November 23, 2016 and an Amended Notice of Appeal<sup>14</sup> and on March 1, 2017, the District Court entered a Memorandum Decision on Appeal reversing the decision of the magistrate court but declined to award MRS as the prevailing party any attorney's fees for the appeal.<sup>15</sup> MRS filed the Notice of Appeal with this Court on April 10, 2017.<sup>16</sup>

#### ISSUES PRESENTED ON APPEAL

1. DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR WHEN IT CONCLUDED THAT MEDICAL RECOVERY SERVICES, LLC WAS NOT ENTITLED TO ATTORNEY'S FEES ON APPEAL AS THE PREVAILING PARTY?
2. IS MEDICAL RECOVERY SERVICES, LLC ENTITLED TO AN AWARD OF ATTORNEY'S FEES ON THIS APPEAL UNDER I.C. § 12-120(1), (3) AND (5) AND I.A.R. 41?

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<sup>10</sup> R Vol. I, p. 52.

<sup>11</sup> R Vol. I, pp. 55-74.

<sup>12</sup> R Vol. I, p. 75.

<sup>13</sup> R Vol. I, pp. 76-77.

<sup>14</sup> R Vol. I, pp. 78-88.

<sup>15</sup> R Vol. I, pp. 109-116.

<sup>16</sup> R Vol. I, pp 122-124.



## ARGUMENT

I.

THIS COURT MUST REVERSE THE DECISION OF THE DISTRICT COURT BECAUSE MEDICAL RECOVERY SERVICES, LLC WAS THE PREVAILING PARTY ON APPEAL AND AS SUCH IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES ON APPEAL.

A. Standard of Review.

“When the district court acts in its appellate capacity, we review the decision of the district court to determine whether it correctly decided the issues presented to it on appeal.” *Idaho Dep't of Health & Welfare v. Doe*, 148 Idaho 124, 126 (2009). This case involves a decision to award attorney’s fees under I.C. §§ 12-120(1), (3) and (5). When reviewing the decision of a court to award attorney’s fees, courts apply an abuse of discretion standard. *Contreras v. Rubley*, 142 Idaho 573 (2006). “When an award of attorney fees depends on the interpretation of a statute, the standard of review for statutory interpretation applies”. *Action Collection Servs. Inc., v. Bingham 4*, 146 Idaho 286, 289 (Ct. App. 2008). Statutory interpretation is a matter of law, so courts should exercise free review. *Id.* In this case, the District Court based its decision on an improper interpretation of the statute and case law, and denied all the attorney’s fees. Therefore, this Court should exercise free review.

B. MRS Is Entitled To Attorney’s Fees As The Prevailing Party on Appeal.

Idaho Code § 12–120(1) provides:

Except as provided in subsections (3) and (4) of this section, ***in any action*** where the amount pleaded is thirty-five thousand dollars (\$35,000) or less, ***there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees.*** For the plaintiff to be awarded attorney's fees, for the prosecution of the action, written demand for the payment of such claim must have been made on the defendant

not less than ten (10) days before the commencement of the action; provided, that no attorney's fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety-five percent (95%) of the amount awarded to the plaintiff.

I.C. § 12-120(1) (emphasis added).

I.C. § 12-120(3) states:

***In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.***

I.C. § 12-120(3) (emphasis added).

Finally, I.C. § 12-120(5) provides:

***In all instances where a party is entitled to reasonable attorney's fees and costs under subsection (1), (2), (3) or (4) of this section, such party shall also be entitled to reasonable post judgment attorney's fees and costs incurred in attempting to collect on the judgment. Such attorney's fees and costs shall be set by the court following the filing of a memorandum of attorney's fees and costs with notice to all parties and hearing.***

I.C. § 12-120(5) (emphasis added).

These sections provide the basis for which MRS was entitled to attorney's fees on the underlying case and the basis for an award of attorney's fees on appeal. This Court has held that "[t]he mandatory attorney fee provisions of I.C. § 12-120 govern on appeal as well as in the trial court." *Daisy Mfg. Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 263 (Ct. App. 2000) *abrogated by BECO Const. Co. v. J-U-B Engineers Inc.*, 149 Idaho 294, (2010). The Court in *Daisy Mfg. Co.* held that I.C. § 12-120 "does not apply to an appeal that challenges only the *amount* of an award below, ***but that it does apply if the appeal is concerned with the entitlement to***

*an award below.*" (emphasis added). However, in *BECO Const. Co. v. J-U-B Engineers Inc.*, 149 Idaho 294, 298 (2010) this Court found that "[w]here he had a legal right to recover attorney fees as the prevailing party in the action, litigation over the amount of the attorney fee award is also part of the legal action for which he is entitled to an award of attorney fees." *BECO Const. Co.* at 298. This Court has now held that the mandatory provisions of I.C. § 12-120 govern on appeal as well as in the trial court both when the appeal concerns an entitlement to attorney's fees and the amount of the award. See *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 721 (2005) and *BECO Const. Co. v. J-U-B Engineers Inc.*, 149 Idaho 294, 298 (2010).

In this case, the District Court held that pursuant to *Action Collection Services, Inc. v. Bingham*, attorney's fees under § 12-120(1) and (3) were not appropriate as I.C. § 12-120(5) is the exclusive provision for post-judgment attorney fees and since "the fees sought were for the efforts of counsel to collect on the judgment, the provisions of I.C. § 12-120(1) or (3) are not a basis for an award of attorney fees on appeal."<sup>17</sup> The District Court held further that MRS was not entitled to attorney's fees on appeal under I.C. § 12-120(5) citing footnote number 4 from *Magleby v. Garn*, 154 Idaho 194, 200 (2013) which commented that the Magelbys were not entitled to attorney's fees under I.C. § 12-120(5) as this "appeal cannot be reasonably characterized as an 'attempt to collect on the judgment.'" *Magleby* at 200, fn. 4. (2013). Importantly, in *Magleby*, this Court awarded attorney's fees to the prevailing party, *Magleby*, under I.C. § 12-120(3).

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<sup>17</sup>R.Vol. I, p. 32.

Because this Court has consistently held that I.C. § 12-120 “mandates the award of attorney fees on appeal to the prevailing party,” this Court should reverse the decision of the District Court and award MRS its appellate attorney’s fees pursuant to I.C. § 12-120(1) and (3). Unlike the recent decision in *Med. Recovery Servs., LLC v. Siler*, 162 Idaho 30 (2017), wherein MRS only sought appellate attorney’s fees under I.C. § 12-120(5), in this case, MRS did seek fees on appeal under I.C. § 12-120(1), (3) and (5). So even if this “appeal cannot be reasonably characterized as an attempt to collect on the judgment,” MRS should be entitled to attorney’s fees under I.C. § 12-120(1) and (3) as it was entitled to fees under those code sections in the underlying matter and this Court has consistently held that the mandatory provisions of I.C. § 12-120 govern on appeal. In fact, the Idaho Court of Appeals has already held in another post judgment fee case, *Action Collection Servs., Inc., v. Bigham*, 146 Idaho 286 (Ct. App. 2008) that “I.C. §§ 12–120(1) and (3) entitled Action to an award of attorney fees before the magistrate in its efforts to obtain the judgment. The mandatory attorney fee provisions of I.C. § 12–120 govern on appeal as in the trial court. *Sainsbury Cons. Co., Inc. v. Quinn*, 137 Idaho at 275, 47 P.3d at 778. The statute applies if the appeal is concerned with the entitlement to an award below. Id. Action's appeal concerns its entitlement to an award in the trial court.” *Action Collection Servs.* at 291. This ruling is in line with a long line of precedent already discussed in this brief that I.C. § 12-120 “applies if the appeal is concerned with the entitlement to an award below.” *Sainsbury Cons. Co., Inc.* at 275.

MRS’ appeal to the District Court clearly dealt with an entitlement to an award of attorney’s fees and this Court should continue to follow the precedent set in numerous cases

and should reverse the decision of the District Court denying MRS attorney's fees on appeal pursuant to I.C. § 12-120(1), (3) or (5).

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, "Costs 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. Bingham*, 146 Idaho 286 (Ct. App. 2008).

Here, MRS is entitled to attorney's fees under Idaho Code §§ 12-120(1), (3) and (5) for its post-judgment attorney's fees incurred in attempting to collect on the judgment. Specifically, MRS sought in its Complaint attorney's fees under Idaho Code Sections 12-120(1) and 12-120(3).<sup>18</sup> Plaintiff satisfied the requirements of obtaining an award of attorney's fees under Section 12-120(1) because the Complaint alleges that "written demand for payment on the defendant has been made more than 20 days prior to commencing this action" and defendant failed to pay anything in response to the demand.<sup>19</sup> Plaintiff satisfied the requirements of obtaining an award of attorney's fees under 12-120(3) because the Complaint

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<sup>18</sup> R Vol. I. p. 9.

<sup>19</sup> R Vol. I. pp. 9 and 17.

alleges that “[t]his action arises from an open account and/or from services provided.”<sup>20</sup>

Moreover, the Magistrate Court entered an Order for Default Entry and Default Judgment on the Complaint in which the court awarded attorney’s fees as requested in the Complaint.<sup>21</sup>

Even if this Court were to find that MRS is not entitled to fees pursuant to I.C. § 12-120(5) because this is not an attempt to collect on a judgment, this Court should grant MRS fees pursuant to I.C. §§ 12-120(1) and (3) as this appeal dealt with entitlement to an award below.

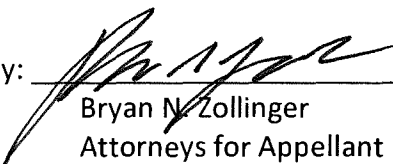
Finally, a court may award reasonable attorney’s fees incurred in connection with the effort to secure a reasonable amount of attorney’s fees. *Beco Const. Co., Inc. v. J-U-B Engineers, Inc.* 149 Idaho 294 (2010). Accordingly, MRS is entitled to an award of reasonable attorney’s fees on appeal to this Court and before the District Court.

#### CONCLUSION

For all the reasons set forth in this brief, MRS respectfully requests that this Court reverse the decision of the District Court and remand the matter to the District Court for consideration of an award of fees and costs pursuant to I.C. § 12-120(1), (3) or (5). This Court should also award MRS its fees and costs on appeal before this Court.

RESPECTIVELY SUBMITTED this 8<sup>th</sup> day of August, 2017.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By:   
Bryan N. Zollinger  
Attorneys for Appellant

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<sup>20</sup> R Vol. I. p. 9.

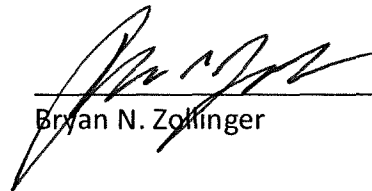
<sup>21</sup> R Vol. I. pp. 18, 19, 21 and 22.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 8<sup>th</sup> day of August, 2017, I caused a true and correct copy of the foregoing **APPELLANT'S BRIEF ON APPEAL** to be served, by placing the same in a sealed envelope and depositing it in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

- U.S. Mail
- Facsimile
- Hand Delivery
- Overnight Delivery

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