10-13-2017

Medical Recovery Services, LLC v. Merritt Appellant's Brief Dckt. 45024

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

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

v.

MARY LOU MERRITT, Defendant-Respondent,

* * * * *

APPELLANT'S BRIEF ON APPEAL

* * * * *

Appeal from the District Court of the Sixth Judicial District for Caribou County.
Honorable David R. Kress, Magistrate Judge, presiding.

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STATEMENT OF THE CASE

Appellant, Medical Recovery Services, LLC. sued Mary Lou Merritt for payment of a medical bill that was approximately one year past due. MRS obtained a Default Judgment and Merritt failed to pay the amount due on the judgment. MRS undertook certain post-judgment legal proceedings to collect the judgment. After two years of attempting to collect on the judgment, Merritt paid the balance of the judgment and MRS sought post-judgment attorney's fees pursuant to I.C. § 12-120(5). The Magistrate Court denied all post judgment attorney's fees and MRS appealed. The District Court reversed the Magistrate Court's decision not to award any post judgment attorney's fees but affirmed that part of the Magistrate Court's decision to not award any attorney's fees after MRS had met with the defendant on an order of examination.

STATEMENT OF FACTS

On September 14, 2012, the defendant, Mary Lou Merritt, ("Merritt"), received medical services from Oregon Trail Eye Care, PC.[1] Merritt did not pay for the services received, and Medical Recovery Services, LLC., ("MRS"), filed a Complaint and Summons on August 15, 2013.[2] MRS served Merritt with a Complaint and Summons on August 29, 2013 and filed for a default judgment on December 10, 2103 as Merritt did not respond to the Complaint or Summons.[3] The Magistrate Court entered a Default Judgment on December 11, 2015.[4] Two weeks later on December 23, 2015, having not received any payments from Merritt since entry of default

[1] R Vol. I, p. 8.
[2] R Vol. I, pp. 7-9.
[3] R Vol I. pp. 13-18.
[4] R Vol. I. pp. 22-23.

judgment, MRS filed an Application for Order of Continuing Garnishment and Affidavit in Support of Writ of Execution.[5] The Caribou County Sheriff returned the writ of execution unsatisfied in July 22, 2015 having garnished $131.57 which was applied to the judgment leaving a balance of $565.37.[6]

Again, there being no payments or contact with Merritt, MRS filed an Application for Order of Examination, which the Magistrate Court issued and MRS served on Merritt.[7] On September 2, 2014, counsel for MRS met with Merritt and agreed upon a payment plan which Merritt honored for three months ending on December 1, 2014.[8] On January 15, 2015, having not received a payment for 45 days, MRS filed another Application for Order of Continuing Garnishment and Affidavit in Support of Writ of Execution.[9] The Magistrate Court signed the writ of execution on January 21, 2015, but Merritt resumed payments on January 26, 2015. Therefore, MRS chose to accept payments rather than serve the writ of execution.[10]

Merritt made additional payments in February and April 2015. Merritt did not make another payment for over 90 days and because the prior writ of execution had expired, MRS filed another Application for Order of Continuing Garnishment and Affidavit in Support of Writ of Execution on July 13, 2015.[11] The Caribou County Sheriff returned that writ of execution

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[5] R Vol I. pp. 24-26.
[6] R Vol I. p. 31.
[7] R Vol. I pp. 34-36.
[8] R Vol I. p. 66.
[9] R Vol. I pp-37-39.
[10] R Vol. I pp. 41, 66.
[11] R Vol. I pp. 42-46.

unsatisfied on August 10, 2015[12] and on August 25, 2015, MRS filed another Affidavit in Support of Execution.[13] Merritt paid the remaining balance of the judgment on August 28, 2017.[14]

On September 8, 2015, after the balance of the judgment was paid, MRS filed its Application for Award of Supplemental Attorney's Fees with a supporting affidavit.[15] Merritt did not file any objection to the application for post judgment attorney's fees and the Magistrate Court held a hearing on September 24, 2015 wherein the Court requested additional information which MRS provided on September 24, 2015.[16] The Magistrate Court denied all Supplemental Fees on September 29, 2015 stating "[b]ased on the defendants payment record at the original debt owed, Court denies application for supplemental fees."[17]

MRS filed an appeal and the District Court remanded the matter back to the Magistrate Court "to make specific findings on the issue of attorney fees.[18] The Magistrate Court entered Findings of Fact Regarding Requested Post Judgment Attorney's Fees again denying all post judgment attorney's fees.[19] MRS filed a Motion for Reconsideration with a supporting brief, affidavit and supporting documents.[20] The Magistrate Court denied the Motion for Reconsideration on September 12, 2016.[21] MRS filed a second Notice of Appeal on October 24, 2016.[22] The District Court issued a Memorandum Decision and Order on Second Appeal

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[12] R. Vol. I p. 47.
[13] R. Vol. I p. 48-49.
[14] R Vol. I p.67.
[15] R Vol. I pp. 54-67.
[16] R Vol I. pp. 70-72.
[17] R Vol. I pp. 73-74.
[18] R Vol. I pp. 75-109.
[19] R Vol. I pp. 117-126.
[20] R Vol. I pp. 127-149.
[21] R Vol. I pp. 150-51.
[22] R Vol. I pp. 158-160.

reversing the "denial of post judgment fees in their entirety" but affirming the denial of fees incurred after September 2, 2014.[23] The District Court held in relevant part:

> "Despite this Court sharing the Magistrate Court's aversion to the methods and practices employed by M.R.S. in pursuing its judgment against Merritt and its post-judgment collection practices, the fact is that M.R.S. did obtain a judgment against Merritt and has a right, when evaluated by a reasonableness standard, to take lawful steps towards the collection of said judgment. M.R.S. argues that there is no fact pattern, short of paying the judgment in full immediately after entry, where **all** post-judgment efforts to collect are unreasonable." Brief on Appeal, p. 6. {Bold Emphasis Supplied]. Unfortunately, the Court must agree with this contention. Upon obtaining Judgment, it cannot be found that M.R.S.'s initial attempts to collect this judgment were unreasonable under I.C. § 12-120(5)'s mandatory language. Certainly, one cannot conclude that it was unreasonable for M.R.S. to file its first Application for Order of Continuing Garnishment and an Affidavit in Support of Writ of Execution on December 23, 2013. M.R.S. had obtained a Judgment twelve (12) days earlier and the Judgment had not yet been satisfied; denying M.R.S. of this initial opportunity to avail itself of the collection tools available under Idaho law would make the judgment uncollectable, absent Merritt's voluntary payment. In fact, the December 23, 2014 Writ of Execution and Continuing Garnishment did result in M.R.S.'s recovery of a portion of its outstanding judgment. As reflected by the Interim Return of Service from the Caribou County Sheriff's Office of April 15, 2014 and June 18, 2014, M.R.S. collected $95.50 and $36.07 respectively through its Continuing Garnishment.
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> Further, upon indication by the Caribou County Sheriff that it was discontinuing the Continuing Garnishment (*See* Unsatisfied Return of Service file stamped July 23, 2013), M.R.S. elected to pursue the collection tool of a debtor's examination. The Magistrate Court authorized the use of this collection tool. Significantly, this debtor's examination appears to have resulted in an agreement between the parties concerning the payment of the remaining amount owed under the Judgment. *See* Footnotes Nos. 7 and 8. Certainly, this effort cannot be categorized as unreasonable. In fact, this is what the Court believes should have and likely could have been done pre-judgment. However, it is at this point, where the Court concludes that the Magistrate's refusal to award attorney fees and costs re-enters the bounds of its discretion. Certainly, the history of this collection case, the amount in controversy, the amount paid, and the methods utilized by M.R.S. can be view as excessive, "churning," as well as unnecessary and unreasonable from this point forward. As such, from September 2, 2014 forward, the Court will find that the Magistrate Court did not abuse its discretion, and in fact, acted within the outer limits of its discretion, in denying M.R.S.'s request for attorney's

[23] R Vol. I pp. 183-197.

fees and costs. Therefore, the Magistrate is **AFFIRMED** with respect to its denial of post judgment attorney fees and costs after September 2, 2014."[24]

MRS filed a Notice of Appeal on April 10, 2017.[25]

COURSE OF PROCEEDINGS

On August 15, 2013 MRS filed a Complaint and Summons.[26] The Magistrate Court entered Default Judgment on December 11, 2013.[27] On September 8, 2015, MRS filed its Application for Award of Supplemental Attorney's Fees with a supporting affidavit.[28] The Magistrate Court entered an Order Denying Supplemental Attorney Fees.[29] On October 9, 2015, MRS filed an appeal to the District Court.[30] On August 1, 2016, the District Court entered a Memorandum Decision and Order on Appeal remanding the case back to the Magistrate Court for further findings.[31]

The Magistrate Court entered Findings of Fact Regarding Requested Post Judgment Attorney's Fees again denying all post judgment attorney's fees.[32] MRS filed a Motion for Reconsideration with a supporting brief, affidavit and supporting documents.[33] The Magistrate Court denied the Motion for Reconsideration on September 12, 2016.[34] MRS filed a second Notice of Appeal on October 24, 2016.[35] The District Court issued a Memorandum Decision and

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[24] R Vol. I pp.193-95.
[25] R. Vol. I pp. 206-08.
[26] R Vol. I pp.7-12.
[27] R Vol. I pp. 22-23.
[28] R Vol. I pp. 54-67.
[29] R Vol. I pp. 73-74.
[30] R Vol. I pp. 75-77.
[31] R Vol. I pp. 100-109.
[32] R Vol. I pp. 117-126.
[33] R Vol. I pp. 127-149.
[34] R Vol. I pp. 150-51.
[35] R Vol. I pp. 158-160.

Order on Second Appeal reversing the "denial of post judgment fees in their entirety" but affirming the denial of fees incurred after September 2, 2014.[36] On April 10, 2017, MRS filed a timely Notice of Appeal.[37]

ISSUES ON APPEAL

1. DID THE DISTRICT COURT COMMITT REVERSIBLE ERROR WHEN IT CONCLUDED THAT THE PLAINTIFF WAS NOT ENTITLED TO SUPPLEMENTAL ATTORNEY FEES FOR ANY POST-JUDGMENT COLLECTION EFFORTS AFTER SEPTEMBER 2, 2014?

2. IS MEDICAL RECOVERY SERVICES, LLC ENTITELD TO COSTS AS A PREVAILING PARTY ON THE SECOND APPEAL TO THE DISTRICT COURT?

3. IS MEDICAL RECOVERY SERVICES, LLC ENTITLED TO AN AWARD OF COSTS AND ATTORNEY'S FEES UNDER I.C. 12-120(1), (3) AND (5) AND I.A.R. 40 AND 41?

ARGUMENT

I.

THIS COURT MUST REVERSE THE DECISION OF THE DISTRICT COURT AFFIRMING THAT PART OF THE DECISION WHEREIN THE MAGISTRATE COURT ARBITRARILY REFUSED TO AWARD POST-JUDGMENT ATTORNEY'S FEES AFTER SEPTEMBER 2, 2014.

A. Standard of Review.

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

> 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

[36] R Vol. I pp. 183-197.
[37] R. Vol. I pp. 206-08.

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, Docket No. 43346, 2017 WL 2376426, at *1, *2 (Idaho June 1, 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 the district court.'" *Id.* (quoting *State v. Korn*, 148 Idaho 413, 415 n.1 (2009)).

B. The District Court Committed Reversible Error When It Determined That MRS Was Not Entitled To Any Post Judgment Fees For Collection Efforts After September 2, 2014.

In holding that MRS is not entitled to any post judgment attorney's fees after September 2, 2014, the District Court held:

> The Court recognizes that the Magistrate Court ***likely believed***, based upon the facts and circumstances which are evident upon reviewing this file, ***that upon contact by M.R.S. or its representative, Merritt would have arranged to pay-off the judgment without all of the legal maneuvering and additional attorney involvement and fees.*** She had paid $109.00 between the time the Complaint was filed and judgment entered. *See* Footnote No. 4. She appears to have entered into an agreement to pay the judgment following the debtor's examination. *See* Footnote Nos. 10 and 12. Finally, when M.R.S. filed its last Affidavit in Support of Writ of Execution, Merritt arranged to pay the remaining debt in full. *See* Footnote No. 13. (Emphasis added).[38]

The District Court chose to arbitrarily select the date of September 2, 2014 as the cutoff point at which all further post judgment attorney's fees were not reasonable. The District Court appears to have chosen this arbitrary date based upon a second hand "belief" of the Magistrate Court's opinion that "Merritt would have arranged to pay-off the judgment" had MRS or its representative simply "contacted" Merritt after the order of examination. The

[38] R Vol. I p. 220 Fn. 16.

District Court provides no legal basis in support of this position and is simply assuming that Merritt would have paid had MRS simply contacted her. There is nothing in the record to support this conclusion.

In fact, the post judgment efforts MRS took after the order of examination were completely reasonable and necessary as Merritt had not honored the agreement to make voluntary payments. Therefore, this Court is procedurally bound to reverse the arbitrary decision of the District Court to not award any post judgment attorney's fees after the date of the order of examination.

C. The District Court Abused Its Discretion By Failing To Award Reasonable Post-Judgment Attorney's Fees Based Upon Its Own Subjective Belief Rather Than The Criteria Of I.R.C.P. 54(e)(3).

The District Court abused its discretion by failing to consider the reasonableness of MRS post judgment collection efforts and instead relying on assumptions not supported by the record.

> What constitutes a 'reasonable' fee is a discretionary determination for the trial court, to be guided by the criteria of I.R.C.P. 54(e)(3). These criteria include '[t]he time and labor required,' I.R.C.P. 54(e)(3)(A), and '[a]ny other factor which the court deems appropriate in the particular case.' I.R.C.P. 54(e)(3)(L). The time and labor actually expended by an attorney is to be considered, but it is also to be evaluated under a standard of reasonableness. 'A court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney. . . . An attorney cannot 'spend' his time extravagantly and expect to be compensated by the party who loses at trial.' Hence, a court may disallow fees that were unnecessarily and unreasonably incurred or that were the product of attorney churning.' Daisy Manufacturing Company, Inc. v. Paintball Sports, Inc., 134 Idaho 259, 263 (Ct. App. 2000) (citations omitted).

"Other appropriate factors" do not include the court's "own sense of justice," such as "poor communication" and "uncooperative attitudes." Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc., 141 Idaho 716 (2005). The court "may not use the award or denial of attorney fees to vindicate his sense of justice beyond the judgment rendered on the underlying dispute between the parties.' Id. citing Evans v. Sawtooth Partners, 111 Idaho 381, 387 (Stapp. 1986).

Here, the District Court did not rely on the factors contained in I.R.C.P. 54(e)(3). Instead, the Court apparently relied on inappropriate factors, such as (1) the court making business decisions for Medical Recovery Services, LLC; (2) the court relied on its factually unsupported view of what Merritt would have done had MRS just contacted her; (3) the court arbitrarily selected September 2, 2014 as the date upon which further legal attempts to collect the judgment became unreasonable without regard to the factors in I.R.C.P. 54(e)(3); (4) the court speculated that "[p]erhaps a phone call rather than filing all this new paper work and incurring all this expense would be in order."[39]; (5) the Court speculated that "all it would have taken at this point in the process was for M.R.S., its counsel or agent to have place a call with Merritt and she would have continued making her payments";[40] and (6) the Court considered the amount of principal debt in relation to the attorney's fees sought.

From the record, it is evident that the District Court did not consider the factors of I.R.C.P. 54(e)(3) but instead imposed its own sense of justice. The Court failed to look at the necessity of plaintiff incurring the attorney's fees to collect on its judgment, the cooperation of

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[39] R Vol. I p.188 Fn.10.
[40] R Vol. I p. 195 Fn. 18.

the judgment defendant, or the reasonableness of the actions plaintiff took in incurring the attorney's fees. From the District Court's analysis, it appears that the only I.R.C.P. 54(e)(3) criteria it attempted to apply was I.R.C.P. 54(e)(3)(G) when it mentioned the amount of principal. However, the Idaho Court of Appeals has clearly explained that unlike fees on a default judgment, supplemental attorney's fees awarded under I.C. 12-120(5) "need not be less than the amount of debt due in the judgment." *Action Collection Servs., Inc., v. Bigham* at 291.

From the facts contained in the record it is obvious that the post judgment collection efforts that MRS undertook were not only reasonable but necessary in order to collect the judgment. Specifically, MRS only sought writs of execution or other post judgment collection efforts when Merritt was not making voluntary payments. After the September 2, 2014 debtor's examination, MRS accepted Merritt's voluntary payments for three months and did not seek a writ of execution until Merritt had not paid for 45 days. After not receiving the agreed upon payment for 45 days, MRS sought a writ of execution. The writ of execution was signed by the court and Merritt resumed payments. MRS chose to again accept voluntary payments and not serve the writ of execution.[41] MRS accepted Merritt's payments again in February and April but did not receive another payment for over 90 days. After waiting 90 days for the agreed upon monthly payment from Merritt, MRS again sought a writ of execution on July 13, 2015.[42] The sheriff returned that writ of execution as unsatisfied on August 10, 2015.[43] Again, there being no voluntary payment made, MRS sought another writ of execution

[41] R Vol. I pp. 41, 66.
[42] R Vol. I pp. 42-46.
[43] R. Vol. I p. 47.

on August 25, 2015.[44] It is after MRS obtained this writ of execution, that Merritt finally paid the remaining balance of the judgment.

From this record, it is obvious that MRS only took action and sought to avail itself of the collection tools provided by the Idaho Legislature when Merritt was not making payments and otherwise honoring her agreement to pay. Thus, it cannot be said that MRS' post judgment efforts taken after the debtor's examination were not reasonable. Based on the facts in the record, specifically that Merritt did not make the agreed upon monthly payments until after MRS filed and obtained writs of execution, it is more reasonable to assume that had MRS not taken action to collect, this judgment would still not be paid. Therefore, this Court should reverse the arbitrary decision to not award any fees after September 2, 2014 and remand this case with instructions to consider the amount of post-judgment attorney's fees in light of the appropriate criteria for awarding reasonable fees.

II.

MRS IS ENITITLED ITS COSTS AS A PREVAILING PARTY ON THE APPEAL TO THE DISTRICT COURT.

In its Memorandum Decision and Order on Second Appeal, the District Court reversed the decision of the Magistrate Court to deny all post judgment attorney's fees and remanded the matter for the Magistrate Court "to make a determination concerning the reasonableness" of MRS' post judgment fees. Following that decision, MRS, having been the prevailing party on appeal, submitted a Memorandum of Attorney's Fees on Appeal supported by affidavit asking

[44] R. Vol. I p. 48-49

for attorney's fees and costs.[45] 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.

The District Court issued a Second Memorandum Decision and Order on Attorney Fees on Appeal on May 10, 2017.[46] In its decision, the District Court analyzed MRS' request for attorney's fees and costs on appeal and denied attorney's fees on appeal pursuant to this Court's holding in *Medical Recovery Services, LLC v. Siler*, 162 Idaho 30 (2017). However, the District Court did not make any findings regarding the costs MRS sought. Pursuant to I.A.R. 40, MRS's costs should have been awarded "as a matter of course." Therefore, this Court should reverse the decision of the District Court to deny appellate costs and remand this matter for an award of costs on appeal to MRS as the prevailing party.

III.

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

[45] R Vol. I pp. 198-205.
[46] R Vol. I pp.271-77.

that prevailing party was entitled to attorney's fees before the lower court. *Action Collection SERV's., Inc., v. Bingham*, 146 Idaho 286 (Ct. App. 2008).

Here, MRS is entitled to attorney's fees under Idaho Code Section 12-120(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).[47] 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 the amount owed in response to the demand.[48] Plaintiff satisfied the requirements of obtaining an award of attorney's fees under 12-120(3) because the Complaint alleges that "[t]his action arises from an open account and/or from services provided."[49] 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.[50]

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 for consideration of an award of fees

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[47] R Vol. I. p. 8.
[48] R Vol. I. p. 8.
[49] R Vol. I. p. 8.
[50] R Vol. I. pp. 22-23.

and costs pursuant to I.C. § 12-120(5). This Court should also award MRS its fees and costs on appeal before the District Court and this Court.

DATED this 10th day of October, 2017.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____
Bryan N. Zollinger
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2017, I caused a true and correct copy of the forgoing **APPELLANT'S BREIF 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:

Mary Lou Merritt
750 E 1st S
Soda Springs, ID 83276

( ) Hand (✓) Mail ( ) Fax

_____
Bryan N. Zollinger, Esq.