5-15-2018

Credit Bureau of Eastern Idaho, Inc. v. Acedo Appellant's Brief Dckt. 45391

IN THE SUPREME COURT OF THE STATE OF IDAHO

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CREDIT BUREAU OF EASTERN IDAHO, INC., an Idaho corporation, Plaintiff-Appellant,

v.

CHARLENE A. HERMISOLLO and JESSE HERMOSILLO, wife and husband, Defendants-Respondents,

* * * * *

Supreme Court Docket Nos. 45391 and 45645

APPELLANT'S BRIEF ON APPEAL

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Appeal from the District Court of the Seventh Judicial District for Madison County. Honorable Gregory W. Moeller, District Judge, presiding.

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES: ***Pages***

STATUTES AND RULES:

STATEMENT OF THE CASE

This case arises out of unpaid medical bills. Jesse Acedo ("Jesse") lived with Charleane Hermosillo ("Charleane"), and together they had a child. During the course of their relationship, Charleane received medical treatment for herself and for the child at Madison Memorial Hospital. Neither Charleane nor Jesse paid the Madison Memorial Hospital for the medical services provided to her and the child. Because Charleane and Jesse failed to make any payments on the debt, Madison Memorial Hospital assigned the debt to its collection agency, Credit Bureau of Eastern Idaho, Inc., ("CBEI").

Through the course of its regular operation of business, CBEI demanded payments from Charleane and Jesse for the unpaid debt. Charleane and Jesse disregarded the notices from CBEI. CBEI then filed a complaint seeking a judgment on the unpaid debt. At the time of the filing of the complaint, CBEI had no information as to who was the father of the child that received medical services from Madison Memorial Hospital. CBEI sent out a process server to serve Charleane at her residence and any "John Doe." The process server spoke with Jesse at the residence of Charleane.[1] Jesse told the process server that Charleane was not present at the residence at that time, that he was living at that residence, and that he was the spouse of Charleane.[2] The process server personally handed Jesse a copy of the complaint and summons labeled as "John Doe" and informed him that he was served.[3] Neither Charleane nor Jesse

[1] R Vol. I, pp. 137-39.
[2] R Vol. I, pp. 137-39.
[3] R Vol. I, pp. 137-39.

responded to the complaint to deny any allegations or to assert any jurisdictional defense.

After default, Jesse voluntarily submitted to the judgment, made payments to CBEI, and did not contest several garnishments executed on his wages and bank accounts.[4] After years of inaction and submission, Jesse belatedly raised a third-party claim of exemption or jurisdictional defense to the judgment entered against him. The Magistrate Court first held that the proper procedure was not a third-party claim of exemption but rather a motion to set the judgment aside and the Magistrate Court did in fact set the judgment aside. CBEI appealed that decision and the District Court reversed the Magistrate Court and remanded the case back for a determination on the timeliness of the motion to set the judgment aside.[5] Despite clear direction on remand from the District Court to consider only the issue of the timeliness of the motion to set aside judgment, the Magistrate Court side stepped the issue that was remanded and arbitrarily ruled instead that it never had jurisdiction over Jesse and therefore Jesse had no standing to file a motion to set aside and granted Jesse's claim of exemption as a third-party.[6] The District Court affirmed the decision of the Magistrate Court and CBEI filed this appeal.

STATEMENT OF FACTS

On April 26, 2009, Jesse was personally served the complaint and summons.[7] Jesse identified himself as the husband of Charleane Hermosillo to the process server, who noted such declaration on the affidavit of process.[8] Despite purposefully misleading the process server about his relationship with the named defendant, Jesse took no steps to correct the

[4] R Vol. I, pp. 141-46.
[5] R Vol. I, pp. 325-40.
[6] R Vol. I, pp. 386-91.
[7] R Vol. I, pp. 137-39.
[8] R Vol. I, pp. 137-39.

misunderstanding or otherwise seek relief from or assert any defenses against the complaint that CBEI personally served upon him. On June 2, 2009, the Magistrate Court entered a default judgment against both Charleane and Jesse.[9]

On June 4, 2009, just two days after entry of judgment, Jesse called counsel for CBEI confirming that he received and opened his copy of the judgment entered against him.[10] On August 5, 2009, Jesse confirmed to CBEI that he had a daughter with Charleane, for whom some of the medical services were incurred.[11] On June 8, 2009, CBEI executed an Order for Continuing Garnishment on Charleane's and Jesse's personal and real property.[12] On July 7, 2009, CBEI issued an Order of Examination on Jesse.[13] On August 9, 2009, counsel for CBEI met with Jesse on the Order for Examination and Jesse informed CBEI that his correct surname was Acedo, that he did have a daughter with Charleane and that much of the debt subject to this action were for that daughter.[14] On August 19, 2009, CBEI executed a garnishment on Jesse's employer, H-K Contractors.[15] On September 9, 2009, counsel for Jesse sent a letter to CBEI claiming CBEI's garnishment attempts were improper because none of the bills that made up the judgment were Jesse's.[16] That same day, September 9, 2009, counsel for CBEI responded and explained that Jesse was liable for the majority of the judgment debt or $2,339.44 because these bills were for Jesse's minor daughter.[17] Neither Jesse nor his counsel responded to the

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[9] R Vol. I, pp. 29-32.
[10] R Vol. I, pp. 141-46.
[11] R Vol. I, pp. 141-46.
[12] R Vol. I, pp. 36-37.
[13] R Vol. I, pp. 41-42.
[14] R Vol. I, pp. 141-46.
[15] R Vol. I, pp. 55-56.
[16] R Vol. I, p. 266.
[17] R Vol. I, p. 268.

letter from CBEI. After additional attempts at garnishment, Jesse began making voluntary payments to CBEI via personal checks. Jesse made $50 payments via check on June 21, 2011, and July 12, 2011.[18] On August 24, 2011, CBEI executed a second garnishment on Jesse's employer, H-K Contractors, and again Jesse failed to file any claim of exemption.[19] On February 29, 2012, CBEI executed a third garnishment on Jesse's bank account.[20]

Prior to March of 2012, Jesse never denied being responsible for the debt nor did he deny having held himself out as the husband of Charleane to the process server who served him his copy of the complaint and summons. However, on March 14, 2012, and after more than 33 months of having knowledge of the judgment against him, being aware that the judgment referred to him, acting in accordance with the enforcement of the judgment, and failing to raise any defenses to the complaint personally served upon him and the judgment properly executed against him, Jesse filed a third-party claim of exemption claiming to not be a party to the lawsuit.[21]

COURSE OF PROCEEDINGS

On April 26, 2009, Jesse was personally served the complaint and summons.[22] Jesse identified himself, to the process server, as the husband of Charleane Hermosillo, who noted such declaration on the affidavit of process.[23] On June 2, 2009, the Magistrate Court entered a motion for name change from John Doe to Jesse Hermosillo and entered a default judgment

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[18] R Vol. I, pp. 141-46.
[19] R Vol. I, pp. 75-80.
[20] R Vol. I, pp. 83-84.
[21] R Vol. I, pp. 87-89.
[22] R Vol. I, pp. 137-39.
[23] R Vol. I, pp. 137-39.

against both Charleane and Jesse.[24] As explained more fully in the statement of facts, CBEI issued multiple garnishments, met with Jesse on an order of examination and received voluntary payments from Jesse until after the third writ of execution was issued against Jesse. On March 13, 2012, 33 months after the judgment was entered and after numerous writs, orders of examination, personal communications with Jesse and voluntary payments were made, Jesse filed a Verified Third Party Claim of Exemption claiming not to be a party to the action as he was identified as Jesse Hermosillo and not Jesse Acedo.[25]

On March 27, 2012, the Magistrate Court held a hearing on the Third Party Claim of Exemption.[26] On April 24, 2012, the Magistrate Court entered an order granting CBEI's motion to contest the claim of exemption but held that the garnished funds be held in trust until it could determine whether Jesse was a party.[27] On May 25, 2012, the Magistrate Court held a hearing on whether to set aside the order issued on April 24, 2012 because the Magistrate Court had inadvertently signed the incorrect proposed order in which CBEI had included a time limit for Jesse to file the motion to set aside the judgment.[28] On June 4, 2012, the Magistrate Court entered its Minute Entry and Order which set aside the April 24, 2012 order because the order contained an unagreed upon deadline for Jesse to file a motion to set the judgment aside.[29] The Magistrate Court also ordered that Jesse file a motion to set aside the judgment by June 8, 2012 and awarded attorney's fees to Jesse for that motion.[30]

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[24] R Vol. I, pp. 27-32.
[25] R Vol. I, pp. 87-89.
[26] R Vol. I, p. 147.
[27] R Vol. I, pp. 147-49.
[28] R Vol. I, p. 172.
[29] R Vol. I, pp. 172 & 188-89.
[30] R Vol. I, pp. 172 & 188-89.

On July 13, 2012, CBEI appealed the Magistrate Court's decision to award Jesse fees.[31] On August 22, 2012, the Magistrate Court ordered that the default judgment against Jesse be set aside because the court "did not have jurisdiction" over Jesse, the "lack of service resulted in a void judgment" and that all funds obtained from Jesse as part of the default judgment be returned to Jesse.[32] On August 29, 2012, CBEI filed an Amended Notice of Appeal to include the August 22, 2012 Order.[33]

On March 25, 2013, the District Court heard the appeal.[34] On May 9, 2013, the District Court held that the Magistrate Court "failed to make a finding that the motion to set aside was timely under Rule 60(b)(4)" and that the "Magistrate Court erred in failing to state the authority upon which it based its award of attorney fees against CBEI."[35] The District Court on appeal vacated the orders of June 4, 2012 and August 22, 2012 and remanded the case back to the Magistrate Court for additional findings consistent with the decision of the District Court.[36]

Despite the clear instruction on remand found in the District Court's Decision on Appeal, Jesse filed two new motions on July 22, 2013, entitled Request for Hearing on Sanctions and Attorney Fees and Jesse Acedo's Renewed Third Party Claim of Exemption Request for Sanctions and Attorney Fees.[37] Importantly, Jesse did not file an appeal on any issue. Rather than follow the clear instructions from the District Court on remand, on November 19, 2013,

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[31] R Vol. I, pp. 242-44.
[32] R Vol. I, pp. 248-49.
[33] R Vol. I, pp. 251-54.
[34] R Vol. I, pp. 322-24.
[35] R Vol. I, p. 340.
[36] R Vol. I, pp. 325-40.
[37] R Vol. I, pp. 352-63.

the Magistrate Court heard the newly filed motions.[38] On January 28, 2014, the Magistrate Court entered an order granting Jesse's third party claim of exemption and awarding attorney's fees as a sanction against CBEI.[39] On March 11, 2014, CBEI filed a Notice of Appeal challenging the Magistrate Court's disregard of the District Court's instructions on remand and granting of Jesse's third-party claim of exemption.[40] On March 14, 2014, CBEI filed an Amended Notice of Appeal to include a request for transcripts.[41] On November 24, 2014, the District Court held a hearing and found that there was not a proper final judgment entered by the Magistrate Court.[42] On July 27, 2016, the Magistrate Court entered a final judgment on the matter.[43] On September 6, 2016, CBEI filed a Notice of Appeal to the District Court appealing from the Judgment entered July 27, 2016, the Order dated January 28, 2014, and the Order dated August 22, 2012, all entered by the Magistrate Court.[44]

On July 20, 2017, the District Court entered its second decision on appeal, which affirmed that part of the Magistrate Court's Order granting Jesse's Third-Party Claim of Exemption and requiring the garnished funds to be returned but reversing the order granting attorney fees to Jesse under I.R.C.P. 11(a)(1), the District Court also awarded Jesse costs and fees on appeal.[45]

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[38] R Vol. I, pp. 386-87.
[39] R Vol. I, pp. 388-92.
[40] R Vol. I, pp. 400-403.
[41] R Vol. I, pp. 407-410.
[42] R Vol. I, p. 486-87.
[43] R Vol. I, p. 498.
[44] R Vol. I, pp. 500-503.
[45] R Vol. I, pp. 565-76.

On August 29, 2017, CBEI filed its appeal of the District Court's decision to the Idaho Supreme Court.[46] On December 15, 2017, CBEI filed an Amended Notice of Appeal to include the Memorandum Decision Re: Attorney Fees on Appeal.[47] On January 9, 2018, this Court entered its order consolidating CBEI's appeal filed on August 29, 2017, Supreme Court Docket No. 45391 with CBEI's Amended Notice of Appeal filed on December 15, 2017, Supreme Court Docket No. 45645.[48]

ISSUES ON APPEAL

A. DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR WHEN IT AFFIRMED THE MAGISTRATE COURT'S ORDER GRANTING JESSE'S THIRD-PARTY CLAIM OF EXEMPTION?

B. DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR WHEN IT AWARDED JESSE COSTS AND ATTORNEY'S FEES ON APPEAL?

C. IS CREDIT BUREAU OF EASTERN IDAHO, INC., 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."

Portfolio Recovery Associates, LLC., v. MacDonald, 162 Idaho 228, 395 (2017)(Internal citations omitted).

In determining the appropriate standard of review for a motion for relief

[46] R Vol. I, pp. 585-88.
[47] R Vol. I, pp. 632-35.
[48] R Vol. II, pp 6-7.

> under Rule 60(b), the Court must consider what subsection of the rule is being invoked. "Where discretionary grounds are invoked, the standard of review is abuse of discretion." Accordingly, the Court must examine: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." However, where nondiscretionary grounds are asserted, the question presented is one of law, upon which the Court exercises free review.

Berg v. Kendall, 147 Idaho 571, 576 (2009) (internal citations omitted). Finally, "relief from a void judgment pursuant to I.R.C.P. 60(b)(4) is nondiscretionary." *Dragotoiu v. Dragotoiu*, 133 Idaho 644, 647 (Ct. App. 1998).

This issue in this case revolves around I.R.C.P. 60(b)(4) from which relief is nondiscretionary. The District Court in affirming the Magistrate Court failed to apply the nondiscretionary provisions of I.R.C.P. 60(c)(1) when determining the issue of timeliness and whether the judgment was enforceable against Jesse. Additionally, the Magistrate Court ignored the nondiscretionary instructions given it by the District Court on remand. Therefore, the questions presented on this appeal are nondiscretionary and present questions of law and this Court shall exercise free review.

When reviewing the decision of a court to award attorney fees, courts apply an abuse of discretion standard. *Contreras v. Rubley,* 142 Idaho 573 (2006). However, when an award of attorney's fees depends on statutory interpretation, courts apply a different standard of review. The interpretation of a statute is a question of law over which a court exercises free review. *Id.* In this case, the District Court based its decision on an improper interpretation of I.C. § 12-120 and I.R.C.P. Rule 41. Therefore, this appeal is based upon statutory interpretation, and this Court should also exercise free review on the issue of attorney's fees.

ARGUMENT

A. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT AFFIRMED THE MAGISTRATE COURT'S ORDER GRANTING JESSE'S THIRD-PARTY CLAIM OF EXEMPTION.

Although the facts of this case are relatively straight forward, the legal procedure followed in this matter is extremely convoluted. In March of 2012, the Magistrate Court correctly denied Jesse's third-party claim of exemption but ordered the funds be held in trust until the court could "figure" the case out.[49] Later, in August 2012, the Magistrate Court held that the "Court did not have jurisdiction over Jesse Acedo as he was not provided proper service" and that this "lack of service resulted in a void judgment against Acedo."[50] CBEI appealed.

In its first Decision on Appeal, the District Court correctly held that even if the judgment was void from the outset, that did not "eliminate the need to determine under Rule 60(b)(4) that the motion was timely."[51] After the matter was remanded to the Magistrate Court only "for proceedings consistent with this opinion," which was clearly to ascertain whether the motion to set aside the judgment was timely filed, Jesse improperly filed two new motions entitled Request for Hearing on Sanctions and Attorney Fees and Jesse Acedo's Renewed Third Party Claim of Exemption Request for Sanctions and Attorney Fees.[52] The Magistrate Court then completely ignored the simple and clear instructions on remand which were to make findings as to the timeliness of the motion to set aside the judgment, and instead summarily

[49] R Vol. I, p. 147.
[50] R Vol. I, pp. 248-49.
[51] R. Vol. 1, p. 337.
[52] R Vol. I, pp. 352-63.

granted the third-party claim of exemption because Jesse "is not a party" and the court "has no jurisdiction" over Jesse.

1. Even If A Judgment Is Void for Lack of Personal Jurisdiction As Jesse Claims, Jesse Must Still Make a Timely Motion to Have the Judgment Set Aside Just Like The District Court Ruled In The First Appeal.

In its first Decision on Appeal, the District Court correctly found that "the Magistrate made no findings on the timeliness of Jesse's motion to set aside" as is required to set aside a void judgment, even one that is void due to lack of personal jurisdiction.[53] The District Court then correctly remanded to the Magistrate Court for further proceedings based on the District Court's opinion and a factual determination whether the motion was timely made. The District Court specifically stated:

> [T]he Magistrate Court likely failed to make such a finding because it concluded that since the complaint was 'improperly served, it was void from the outset.' However, a finding that the judgment was void did not eliminate the need to determine under Rule 60(b)(4) that the motion was timely. *See* generally *First Sec. Bank v. Neibaur,* 98 Idaho 598, 605, 570 P.2d 276, 283 (1977) ("[A] void judgment does not affect the necessity of making a timely appeal. A party cannot perfect an appeal otherwise untimely on the grounds that the judgment appealed from is void.")[54]

On remand, the Magistrate court failed to make a finding on the timeliness of the motion and incorrectly concluded that because the judgment was void under Rule 60(b)(4), "[t]his court has no jurisdiction over Jesse Acedo."[55]

The problem is that the Magistrate Court's actions circumvent the order on remand of the District Court whose opinion became the law of the case. The District Court held that even

[53] R Vol. I, p. 337.
[54] R Vol. I, p. 337.
[55] R Vol. I, p. 389.

if a judgment may be found void under Rule 60(b), the judgment is nevertheless enforceable until a court sets it aside. And a motion to set aside a possibly void judgment must be brought within a reasonable time. Furthermore, although Rule 60(b) allows a judgment to be set aside when the judgment may be void (provided the motion is made within a reasonable time), Rule 60(b) does not permit that a defendant with an arguably void judgment is somehow a non-party to the suit. *First Sec. Bank v. Neibaur,* 98 Idaho 598, 605 (1977).

This is precisely where the District Court erred on the second appeal. The District Court allowed the Magistrate Court to ignore instructions on remand to determine whether the motion setting aside the judgment was timely. Instead, the District Court held that the Magistrate Court properly determined that Jesse is a non-party without standing to bring a Rule 60(b) motion in the first place. In essence, the District Court allowed the Magistrate Court to put the proverbial "cart before the horse" and thereby implicitly sanctioned the Magistrate Court's overruling the District Court's first opinion on appeal.

This Court has specifically held that the analysis of a void judgment does not begin with the determination that the judgment is void. In *Thiel v. Stradley,* 118 Idaho 86 (1990), cited by the District Court in its first decision on appeal, this Court found that a judgment was void but then remanded the case to the District Court because the District Court had failed to address the reasonableness of time in bringing the motion to set aside. Specifically, this Court after finding the judgment at issue to be void stated in *Thiel*:

> However, this does not end our inquiry. Under Rule 60(b), motions have to be made within certain specified time limits. Under Rule 60(b)(4) a litigant has a "reasonable time" within which to bring a motion to set aside a void judgment.

Thiel v. Stradley, 118 Idaho 86, 88 (1990).

Thiel v. Stradley, 118 Idaho 86, 88 (1990).

This is exactly the scenario in this case. The District Court affirmed the decision of the Magistrate Court who failed to make any finding as to the timeliness of the motion to set the judgment as the District Court had previously ruled on the first appeal. Instead, both the District Court and the Magistrate Court have side stepped the central issue by declaring that the judgment is void and therefore Jesse is a non-party without standing to file a 60(b) motion. There is no law to support this analysis. Instead, Idaho law is that Jesse is a party even if the judgment were void. More important, Idaho law requires that before an otherwise void judgment can be set aside, the defendant needs to file a timely motion to set aside the judgment. Here, Jesse failed to raise the issue in a timely manner

In the end, even if the judgment were void, Jesse would still be required to follow the requirements of Rule 60(b) and the lower courts are required to make findings as to the reasonableness of time within which Jesse raised the issue. At a minimum, this Court should reverse the decision of the District Court and remand the case for a determination as to whether Jesse raised the issue of a void judgment within a reasonable time. This is exactly what the District Court ordered the Magistrate Court to do after the first appeal but never did.

2. <u>This Court Should Find that 33 Months Is Not A Reasonable Time For Jesse To Delay Before Raising The Issue Of A Void Judgment</u>.

This Court has held that "to obtain relief from a void judgment under Rule 60(b)(4) of the Idaho Rules of Civil Procedure, a party must bring a motion for such relief within a reasonable time." *McGrew v. McGrew*, 139 Idaho 551, 559 (2003). In *McGrew*, this Court found that filing a Rule 60(b) motion twenty-one months after learning of the judgment was not

a reasonable amount of time. *Id.* This Court has also affirmed a District Court's denial of relief from an otherwise void judgment due to an unreasonable delay or 17 months after the movant had learned of the judgment. *Meyers v. Hansen*, 148 Idaho 283 (2009). Importantly, in *McGrew* this Court explained that "what constitutes a reasonable time is judged from the time that the party learned of the judgment." *McGrew v. McGrew*, 139 Idaho 551, 559 (2003).

Additionally, this Court has specifically held that collection efforts provide sufficient notice of a claim. In *Wright v. Wright,* 130 Idaho 918, 922 (1998), the Idaho Supreme Court commented on the effect collection efforts have on the reasonable time standard contained in Rule 60(b) stating "[h]ad there been prompt collection efforts, the Wrights would have been put on notice of the claim and any delay in failing to move to set aside the default and default judgment would have been attributable to them."

In its first Decision on Appeal, the District Court held that "[a]lthough the Magistrate Court properly found the judgment was void under Rule 60(b)(4), it erred by failing to make a finding that the motion to set aside was brought within a reasonable time."[56] The District Court then held that the "undisputed facts place the date Jesse learned of the judgment between July and September 2009—no less than 33 months before the motion to set aside judgment was filed."[57]

The facts of this case clearly demonstrate that Jesse did not bring his 60(b) motion within a reasonable time. On June 2, 2009, the Magistrate Court entered judgment against Jesse who then contacted CBEI's counsel on June 4, 2009, confirming he received and opened

[56] R Vol. I, p. 336.
[57] R Vol. I, p. 336.

the judgment sent from the court.[58] On July 25, 2009, CBEI served Jesse an order of examination. On August 5, 2009, Jesse personally met with counsel for CBEI.[59] On August 26, 2009, CBEI sent a continuous wage garnishment to Jesse's employer.[60] On September 9, 2009, CBEI received a letter from counsel for Jesse and that same day CBEI sent a reply letter to Jesse's counsel.[61] Counsel for Jesse did not respond to CBEI's letter and the garnishment on Jesse's wages remained in place. On June 21, 2011 and July 12, 2011, Jesse made two voluntary payments to CBEI.[62]

Given the sheer volume of collection efforts by CBEI, it is undeniable that Jesse knew the judgment was against him. Additionally, counsel for Jesse in this case had represented Jesse for over thirty months at the time Jesse brought his motion, further compounding the unreasonableness for the delay in seeking relief under Rule 60(b). In addition, and to further illustrate why there must be a reasonable time standard, CBEI has incurred considerable costs of service, attorney's fees, and other expenses during the three years CBEI has attempted to collect on the judgment. No case in Idaho has held that failing to raise a Rule 60(b) defense of a void judgment for anywhere near 33 months is reasonable. To the contrary, 21 and 17 months of delay in other cases have been held to be unreasonable. *See Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 71 (Ct. App. 2000) (unexplained delay of five months was unreasonable under Rule 60(b)); *Meyers v. Hansen*, 148 Idaho at 291 (Seventeen months delay unreasonable); *McGrew*, 139 Idaho at 559 (twenty-one months of delay unreasonable).

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[58] R Vol. I, pp. 141-46.
[59] R Vol. I, pp. 141-46.
[60] R Vol. I, pp. 55-56.
[61] R Vol. I, pp. 266-68.
[62] R Vol. I, pp. 141-46.

Because a 33-month delay in making a motion to set aside a judgment cannot be found to be reasonable based upon the facts of this case, and given the Magistrate Court's proclivity to help Jesse, and given the District Court's not enforcing its order on remand after appeal requiring the Magistrate Court to make specific findings on this issue, this Court should reverse the decision of the District Court granting the third-party claim of exemption and hold that 33 months is as a matter of law untimely thus making the judgment valid and enforceable against Jesse.

3. This Court Should Reverse the Decision of the District Court as the Judgment Was Not Void For Improper Service.

The District Court affirmed the Magistrate Court's determination that the judgment was void because the complaint incorrectly identified Jesse's last name as "Hermosillo" instead of "Acedo." However, "[t]he constitutional validity of service of process hinges on whether the process is in itself reasonably certain to inform those affected." *Herrera v. Estay*, 146 Idaho 674, 681, (2009). The United States Supreme Court has long held that service of process is valid if notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In *Mullane*, the court stated that the "reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Id* at 315. More recently, the United States Supreme Court unanimously found in *Krupski v. Costa Crociere S. P. A.*, 560 U.S. 538 (2010) that a plaintiff's failure to properly name a defendant does not defeat jurisdiction if the proper defendant knew or should have known it

was the intended party to the suit.

This Court has held similarly regarding the issue of failing to name a defendant by its true legal name and whether it was fatal to the complaint. This Court has held that although a complaint did not name the defendant by "its legal name and inaccurately described it," the fact that the defendant "was served, filed an answer, and moved for summary judgment" show "every indication [plaintiff's] complaint put [defendant] on notice that [plaintiff] brought a suit against [defendant]." *Youngblood v. Higbee*, 145 Idaho 665, 668 (2008). Specifically, this Court in *Youngblood* held that in Idaho:

> Our Rules of Civil Procedure establish a system of notice pleading. A complaint need only contain a concise statement of the facts constituting the cause of action and a demand for relief. A party's pleadings should be ***liberally construed to secure a just, speedy and inexpensive resolution of the case. While we will make every intendment to sustain a complaint that is defective, e.g., wrongly captioned or inartful***, a complaint cannot be sustained if it fails to make a short and plain statement of a claim upon which relief may be granted. ***We look at whether the complaint puts the adverse party on notice of the claims brought against it.***

Id. (Internal citations omitted) (Emphasis added.) Idaho is not alone in this line of reasoning. Courts in other jurisdictions have held that:

> [A] mistake in the names is not always a fatal error, and as a general rule a mistake in the given name of a party who is served will not deprive the court of jurisdiction. ***Names are to designate persons, and where the identity is certain a variance in the name is immaterial. Where service of process is made on the party intended to be sued, a misnomer which does not leave the name of the party to be sued in doubt, may be corrected by amendment at any stage of the suit.***

Olschesky v. Houston, 84 N.C. App. 415, 418, (N.C. Ct. App. 1987) (Internal citations omitted) (Emphasis added).

See also Aman Collection Serv., Inc. v. Burgess, 612 S.W.2d 405, 408 (Mo. Ct. App. 1981) ("If a party is personally served with process, even though in the wrong name, he is obligated to

appear and call attention to the defect. If he fails to do so and allows judgment to go against him by default, the misnomer is waived."); *Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); *King v. Davis*, 137 F. 198, 206 ("As the service was personal, and not constructive, the weight of American authority is to the effect that the defendant sued in the wrong name, even if he does not appear, is bound by the judgment.")

In addition, this Court has said that Rule 10(a)(4) of the Idaho Rules of Civil Procedure, which deals with unknown parties, is substantially the same as the California statute from which it was adopted and that "[t]his court has consistently held that a statute which is adopted from another jurisdiction will be presumed to be adopted with the prior construction placed upon it by the courts of such other jurisdiction." *Chacon v. Sperry Corp.*, 111 Idaho 270, 273 (1986) (Internal citations omitted). At least one California court has held that proof of service on a doe defendant as "John Doe" was not facially void. *Trackman v. Kenney*, 187 Cal. App. 4th 175, 185 (Cal. Ct. App. 2010). In that case, the plaintiff served a complaint on the defendant as "John Doe, co-resident" and was granted a default judgment. The defendant appealed arguing "that the proof of service was void on its face, because the true name of the person given the summons was not used." *Id.* at 182. The court reasoned that people often refuse to give their true legal names and for that reason "it is an accepted practice to name such a person as John Doe or similar fictitious name or by description." *Id.* at 183. The court clarified that "minor, harmless deficiencies will not be allowed to defeat service" and that a "liberal construction rule, it is anticipated, will eliminate unnecessary, time-consuming, and costly

disputes over legal technicalities, without prejudicing the right of defendants to proper notice of court proceedings." The court further made clear that:

> The evident purpose of the requirement that the proof of service recites or in other manner show the name of the recipient, is to enable the recipient to be located in the future, should the claim of service be challenged. The statement that "John Doe, co-resident" received service at a specific address satisfies this purpose. Generally speaking, it would not be difficult for Kenney to determine who was living at the house he concededly owned on the relevant date, in order to contest service.

Trackman, 187 Cal. App. at 183-184.

The facts of this case are similar to the facts of *Trackman* where the defendant was served as a "John doe, co-resident." Even though Jesse was personally served not by his "legal name and inaccurately described it," as John Doe, Husband of Charleane, the facts of service via personal delivery show "every indication [plaintiff's] complaint put [defendant] on notice that [plaintiff] brought a suit against [defendant]." *Youngblood v. Higbee*, 145 Idaho 665, 668 (2008); *See also King v. Davis*, 137 F. 198, 206.

Jesse argues that since his true name "Jesse Acedo" was not used at the time of service and that since the complaint has not been correctly amended to reflect his true name this "voids" the courts personal jurisdiction over him. However, as stated above by this Court in *Youngblood*, ***"[the court must] look at whether the complaint puts the adverse party on notice of the claims brought against it."*** And this Court has recently reemphasized that in situations of minor errors by counsel (especially those errors caused by the opposing party who is trying to assert the defense of an error), the correct standard is to "promote 'the overriding policy to have issues between litigants be decided on the merits.'" *First Fed. Sav. Bank of Twin Falls v. Riedesel Eng'g, Inc.*, 154 Idaho 626, 301 (2012); *See also Conley v. Gibson*, 355 U.S. 41, 48

(1957).

The mistake giving rise to the name "Jesse Hermosillo" ending up on the pleadings and the inaccurate caption was caused by Jesse himself, as shown by the Affidavit of Peg Hoekstra-Erickson. CBEI properly amended the complaint pursuant to Rule 10(d) of the Idaho Rules of Civil Procedure when Defendant gave his name to the process server and held himself out as the husband of Charleane Hermosillo, which only underscores the fact that Defendant knew or should have known that the complaint referred to him and him alone as the spouse of Charleane Hermosillo.

More importantly, Jesse took no steps to correct CBEI's confusion or to seek relief from the judgment entered against him as detailed in the complaint that he was personally served with as required by *Mullane*. It is entirely reasonable to expect that Jesse could easily have been able to determine that the complaint and summons he was personally served with by a process server who told him that he was served could only have referred to him. This is especially true since part of the debts listed in the complaint were incurred for the care of his own daughter. In fact, on June 4, 2009, only two days after entry of judgment, and after receiving his copy of the judgment, Jesse called counsel for CBEI confirming that he received and opened his copy of the judgment entered against him.[63] Obviously, at this point in time Jesse knew that the judgment debtor "Jesse Hermosillo" referred to him, "Jesse Acedo." Further, on August 5, 2009, Jesse appeared pursuant to an order of examination and confirmed to CBEI that he had a daughter with Charleane, for whom some of the medical services were

[63] R Vol. I, pp. 141-46.

incurred.[64] From these facts in the record, it is clear that Jesse had sufficient notice and that he did in fact understand that the judgment referred to him.

Additionally, the court also mailed a copy of the Order for Name Change and the Order for Default and Entry of Default Judgment to the address where Jesse was personally served, which Default and Default Judgment Jesse confirmed that he received at that address and that he had opened.[65] If Jesse had no reason to think that the complaint or the judgment referred to him and him alone, then why did he himself open documents addressed to "Jesse Hermosillo" and then contact CBEI about resolving the matter? Jesse did it because he was reasonably certain it was directed to him and to him only.

Undeniably, CBEI personally served "Jesse" the complaint and summons in a manner reasonably calculated to apprise him of the pendency of the action against him and afford him an opportunity to present his objections to both the name used in the caption of the action and the action itself. Therefore, CBEI provided "Jesse" with sufficient due process as required under both the United States Constitution and the Idaho Rules of Civil Procedure.

B. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY AWARDING JESSE COSTS AND ATTORNEY'S FEES ON APPEAL.

The District Court relied on Idaho Code § 12-120 as the statutory authority for awarding attorney's fees to Jesse on appeal. I.C. § 12-120(1) states as follows:

> 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.

[64] R Vol. I, pp. 141-46.
[65] R Vol. I, pp. 141-46.

I.C. § 12-120(2) additionally states that "[t]he provisions of subsection (1) of this section shall also apply to any counterclaims, cross-claims or third party claims which may be filed after the initiation of the original action." Here, the District Court found that the appeal was taken from a "third party claim" within the meaning of § 12-120(2) and awarded Jesse attorney's fees on this basis.

The District Court confuses a "third party claim" found in § 12-120(2) with a "third party claim" found in I.C. § 11-203. The two legal procedures are distinct and separate. The common denominator in § 12-120(1) and (2) is that a complaint, counter-claim, cross-claim and third-party claim all seek affirmative relief from another party. I.C. § 5-335. And specifically, a third-party claim is brought by "[a] defending party . . [against] a nonparty who is or may be liable to it for all or party of the claim against it." I.R.C.P. 14. By contrast, a "third-party claim" under § 11-203 is a specific remedy made by motion and available to a third party who claims a property interest in garnished funds as provided for in I.C. § 11-203.

Here, Jesse called his pleading "Jesse Acedo's Renewed Third Party Claim of Exemption Request For Sanctions And Attorney Fees" and specifically sought relief under I.C. § 11-203.[66] To be clear, under § 11-203, a party to an action files a "claim of exemption" in which the party claims that the property otherwise subject to garnishment is exempt from execution. Under § 11-203, a nonparty can file a "third party claim" in which a nonparty claims an interest in the garnished property and does not seek any affirmative relief in the matter but rather seeks to keep his own property. And there is no such thing as a "third party claim of exemption."

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[66] R Vol. I, p. 355.

In any event, the District Court mistakenly treated Jesse's "third party claim of exemption" under § 11-203 as a "third party claim" under § 12-120(2). Whereas a prevailing party can recover attorney's fees under § 12-120(2), a prevailing party under § 11-203 can recover only costs. See I.C. § 11-203(b). Accordingly, the District Court erred in awarding Jesse any attorney's fees.

Additionally, the District Court erroneously cited to I.A.R. 41 as authorizing such an award of attorney fees to Jesse. Rule 41 provides only for an award of attorney's to the prevailing party 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 (Ct. App. 2008). Thus, absent the necessary statutory authority before the lower court, there can be no award of fees on appeal to Jesse.

Importantly, if two statutes appear as if they both can be construed to apply to the same case or subject matter, the more specific statute will control over the more general statute. *State v. Barnes*, 133 Idaho 378, 382 (1999). Here, even if there were some construction such that both I.C. § 12-120 and I.C. § 11-203(b) applied, I.C. § 11-203(b) is the more specific statute as it deals directly with third party claims seeking to exempt property from execution. Because I.C. § 11-203 allows only costs, Jesse would be entitled to costs and not fees for the appeal of the order granting the Third-Party Claim of Exemption by CBEI.

Finally, Jesse makes no citation to the record in support of his request for attorney's fees nor does he make any argument such that the District Court could even award attorney's fees. See *Med. Recovery Servs., LLC v. Olsen*, 160 Idaho 836, 841 (2016)(A party must include argument in its appellate brief as to why a statute is applicable to be entitled to an award of

attorney fees under the statute). Instead, Jesse's entire argument for fees in his Brief on Appeal was "Jesse Acedo requests attorney fees and costs on appeal pursuant to I.A.R. 40, I.C. §§ 12-120(1), (2), (3), and 12-123."[67]

C. CBEI IS ENTITLED TO RECOVER ITS COSTS AND ATTORNEYS FEES ON APPEAL PURSUANT TO I.C. §§ 12-120(1), (3), AND (5), AND I.A.R. 41.

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, CBEI 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). Additionally, I.C. § 12-120(5) entitles a party to post-judgment attorney's fees for attempting to collect on a judgment:

> 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 for hearing.

The Idaho Court of Appeals has held that "[t]his section provides a basis for an award of reasonable attorney fees and costs incurred during post-judgment attempts to collect on the judgment if the party was entitled to attorney fees and costs under the statute in the

[67] R Vol. I, p. 539.

underlying proceeding that resulted in the judgment." *Action Collection Services, Inc* at 289.

CBEI was entitled to and awarded attorney's fees in the underlying proceeding that resulted in the judgment pursuant to I.C. §§ 12-120(1) & (3) 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).[68] 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.[69] CBEI had to file a motion to contest the claim of exemption and to bring this appeal to collect on its underlying judgment.

Therefore, CBEI is entitled to attorney's fees pursuant to I.C. § 12-120(5) as it has brought this appeal as a post-judgment attempt to collect on the judgment against Jesse. Additionally, because CBEI was entitled to fees pursuant to I.C. § 12-120(1) & (3) before the Magistrate Court, CBEI 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, CBEI respectfully requests that this Court reverse the District Court's decision affirming the Magistrate Court's decision and remand the case with instructions to deny defendant's "Third-Party Claim of Exemption" and to make findings as to whether the motion to seek relief under Rule 60(b) has been timely made. This Court should also reverse the decision of the District Court awarding fees to Jesse on appeal and award CBEI its costs and attorney's fees on appeal.

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[68] R Vol. I, pp. 12-14.
[69] R Vol. I, pp. 12-14.

DATED this 15th day of May, 2018.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____
Bryan N. Zollinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of May, 2018, 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 by causing the same to be delivered by hand, facsimile or overnight delivery, addressed to the following:

[✓] U.S. Mail
[ ] Facsimile Transmission
[ ] Hand Delivery

Charleane Hermosillo
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[✓] U.S. Mail
[✓] Facsimile Transmission
[ ] Hand Delivery

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By: _____
Bryan N. Zollinger