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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

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 REPLY BRIEF ON APPEAL

* * * * *

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

* * * * *

Bryan N. Zollinger, Esq., residing at Idaho Falls, Idaho, for Appellant, Credit Bureau of Eastern
Idaho, Inc.

Larren Covert, Esq., residing at Idaho Falls, Idaho, for Respondents, Charleane and Jesse
Hermosillo

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ADDITIONAL STATEMENT OF FACTS

The Respondent, Jesse Acedo's ("Jesse") Statement of the Facts are inaccurate or misleading as follows:

1. Jesse was served with a summons and complaint stating that he was "hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court"¹ on April 27, 2009.² When served with the complaint and summons, Jesse informed the process server that "Charleane Hermosillo was not home" and he "indicated he was her husband."³

2. There is no dispute that the majority of the medical bills contained in the complaint were for the minor child of Charleane Hermosillo and Jesse. Jesse admits this fact in Respondent's Brief at page 6 and as confirmed this fact to counsel for CBEI on multiple occasions.⁴

3. The magistrate court mailed copies of the judgment to Jesse at the address where he was served. Jesse contacted counsel for CBEI on June 4, 2009, just two days after the magistrate court entered default. Jesse personally spoke with counsel for CBEI and explained that he and Charleane Hermosillo had a child together and agreed to make voluntary payments.⁵

4. CBEI made a motion to change the name of John Doe to Jesse Hermosillo based upon the representation that Jesse made to the process server indicating he was Charleane

¹ R Vol. I, pp. 15-16.

² R Vol. I, p. 17.

³ R Vol. I, pp. 136-40.

⁴ R Vol. I, pp. 141-42.

⁵ R Vol. I, pp. 141-42.

Hermosillo's husband.⁶ CBEI did use Jesse's social security number, given to counsel for CBEI during an order of examination, to identify him in garnishment proceedings.⁷

5. CBEI garnished Jesse on multiple occasions and collected \$3,651.70 from Jesse's wages and Jesse never filed a claim of exemption until the bank garnishment was sent nearly 33 months later.⁸ Jesse was represented by counsel in this matter from early on in the proceedings, never filed a claim of exemption and agreed to voluntary payments after the garnishment was returned partially satisfied. 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.⁹ That same day, September 9, 2009, counsel for CBEI responded and explained that Jesse was liable for the majority of the judgment debt because these bills were for Jesse's minor daughter.¹⁰ Neither Jesse nor his counsel responded to the 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, 2011.¹¹

ARGUMENT

A. THE DISTRICT COURT ERRED IN AFFIRMING THE DECISION OF THE MAGISTRATE COURT BECAUSE THE ISSUE OF A THIRD-PARTY CLAIM OF EXEMPTION WAS NOT PROPERLY BEFORE THE COURT.

Jesse does not respond to any of the arguments contained in Appellant's Brief on Appeal but instead argues only that the issues CBEI raised in the notice of appeal and discussed

⁶ R Vol. I, pp. 21-22.

⁷ R Vol. I, pp. 120-21.

⁸ R Vol. I, pp. 44-52.

⁹ R Vol. I, p. 266.

¹⁰ R Vol. I, p. 268.

¹¹ R Vol. I, pp. 141-46.

in Appellant's Brief are not properly before this Court. However, the issues that CBEI appealed from are properly before this Court as they address the precise reasons the District Court erred in affirming the decision of the Magistrate Court granting the Renewed Third-Party Claim of Exemption. Specifically, CBEI appeals from and addresses the issue of whether the District Court erred in affirming the Magistrate Court's order granting of the renewed claim of exemption. Both lower courts erred, by abruptly holding that the judgment was void for lack of jurisdiction, without following the District Court's own order to determine if the proper procedure for obtaining relief from a potentially void judgment was followed.

1. Jesse's Renewed Third-Party Claim of Exemption Was Not Properly Before the Magistrate Court.

The record in this case is clear that the issue throughout this entire case is whether Jesse moved to have the judgment against him set aside in a timely manner. In the very first hearing on the original third-party claim of exemption, the Magistrate Court correctly concluded that to determine the issue of a third-party claim of exemption, it first had to determine whether or not Jesse was a third party. For that reason, the Magistrate Court correctly denied the original claim of exemption and held that the appropriate remedy was for Jesse to seek to have the judgment set aside.

The minutes from the first hearing on the original claim of exemption clearly state that the "[m]otion for exemption – denied."¹² The record is very clear that the claim of exemption was denied and that the magistrate court determined the appropriate remedy was for Jesse to seek to have the default set aside. The order prepared by Jesse's counsel and signed on June 4,

¹² R Vol. I, p. 147.

2012 makes this clear as it states “Jesse shall file any motions to have this matter set aside by June 8, 2012.”¹³ This fact is further supported by the fact that on June 1, 2012, Jesse filed a Motion to Set Aside Default Judgment and for Sanctions, CBEI opposed the motion but the Magistrate Court improperly set the judgment aside and was later overturned on appeal.¹⁴

Neither the briefing for those hearings or the transcript of those hearings mentions the third-party claim of exemption as it had clearly already been decided. The only issue discussed in the briefing leading up to those hearings and argued at the hearings was the issue of setting the judgment aside. It is only logical that to determine a third-party claim of exemption, you must first determine whether Jesse is a party to the matter or a third-party. For these reasons the Magistrate Court and the District Court, on the first appeal, were only deciding whether the judgment should be set aside pursuant to I.R.C.P. 60(b).

It is crucial to this appeal to take notice that Jesse never filed a reconsideration or an appeal on the issue of the claim of exemption and the only issues raised at any time on appeal were those raised by CBEI arguing that the Magistrate Court erred in setting the judgment aside. This fact is clear from the record, the only issues on appeal were those contained in CBEI’s Amended Notice of Appeal filed August 29, 2012, importantly, the issue of the claim of exemption was not appealed from or even mentioned after the original hearing on the motion to contest.¹⁵ By not filing a motion to reconsider or appeal the denial of the third-party claim of exemption and moving forward with a motion to set the judgment aside, Jesse waived the issue of the third-party claim of exemption. Thus, from that point forward in the in the case the decision on the

¹³ R Vol. I, pp. 220-24.

¹⁴ R Vol. I, pp. 173-219.

¹⁵ R Vol. I, pp. 251-53.

claim of exemption was the law of the case and the only issue moving forward was the issue of whether the Magistrate Court erred in setting the judgment aside.

2. The District Court Erred in Affirming the Order of the Magistrate Court Granting the Renewed Third-Party Claim of Exemption Without First Making a Finding on Whether Jesse Followed the Proper Procedure for Seeking Relief from the Judgment.

The fact that the issue of claim of exemption was settled and that the Magistrate Court correctly concluded, during the first hearing on the third-party claim of exemption, that it must first determine whether Jesse was a party to the case or a third party is logical and clear from the record before this Court. The District Court's decision on the first appeal makes this fact even more clear as that decision deals exclusively with the Magistrate Court's setting the judgment aside.¹⁶ On remand the District Court's Decision on Appeal has an entire section titled "The Magistrate Court's rulings were predicated upon its findings of (1) lack of personal jurisdiction and (2) voidness under Rule 60(b)(4)."¹⁷ The District Court found the judgment was void under Rule 60(b)(4) but held that the Magistrate Court "erred by failing to make a finding that the motion to set aside was brought within a reasonable time."¹⁸ The District Court also explained that there must be a determination of a meritorious defense to set the judgment aside.¹⁹

The District Court in reversing the decision of the Magistrate Court and remanding it back, specifically stated that the "order setting aside the judgement should be vacated and the matter remanded **for further proceedings on Acedo's motion** not inconsistent with this opinion."²⁰ (Emphasis added). The further proceedings were to be on "Acedo's motion," which can only

¹⁶ R Vol. I, pp. 325-340.

¹⁷ R Vol. I, p. 331.

¹⁸ R Vol. I, p. 336.

¹⁹ R Vol. I, p. 336.

²⁰ R Vol. I, p. 336.

mean the motion that was appealed from, the motion the entire District Court's opinion was focused on, the motion to set the judgment aside, and not some previous motion that had not been appealed. The District Court's conclusion was very clear, the Magistrate Court "failed to make a finding that the motion to set aside was timely under Rule 60(b)(4)," that the "Magistrate Court erred in failing to state the authority upon which it based its award of attorney fees against CBEI" and that the District Court "remands this matter to the Magistrate Court for further proceedings consistent with this opinion."²¹ Meaning the Magistrate Court was to make a finding on the timeliness of the motion to set aside and the authority upon which it based its award of attorney fees. There was never any mention of reconsidering the claim of exemption. However, rather than rule on the only issues on remand, the Magistrate Court considered and ultimately ruled on Jesse Acedo's Renewed Third-Party Claim of Exemption Request of Sanctions and Attorney Fees.²²

CBEI filed a timely appeal on the issues of whether the Magistrate Court committed reversible error by disregarding the decision of the District Court by not making a finding on the timeliness of the motion to set aside and Jesse not having a meritorious defense for setting the judgment aside among other issues.²³ The District Court on the second appeal admits that:

In its decision on appeal, the Court instructed the magistrate court to make findings as to whether Acedo's motion to set aside the default judgment pursuant to Rule 60(b) was brought in a reasonable time. ***On remand, the magistrate court revised its decision, concluding for the first time*** that Acedo, as a non-party, has no basis for setting aside the judgment pursuant to Rule 60(b). Instead, the magistrate court decided the issue based on Acedo's filing of a third party claim of exemption." (Emphasis added).²⁴

²¹ R Vol. I, p. 340.

²² R Vol. I, pp. 341-91.

²³ R Vol. I, pp. 500-03.

²⁴ R Vol. I, p. 569.

The District Court then held that “[a]lthough this issue [the issue of the timeliness of filing the Rule 60(b) motion] was raised on appeal,” “[i]n light of the magistrate court’s revised ruling, it is no longer necessary to make the required findings on remand to complete the Rule 60(b) analysis.”²⁵ The District Court erred in not enforcing its order on the first appeal and by affirming the decision of the Magistrate Court granting Jesse’s Renewed Third Party Claim of Exemption, an issue that was never appealed from by Jesse, that had become the law of the case, and that was not appropriately before the Magistrate or the District Court.

From the record in this case and for the reasons explained in this brief, the issue of whether the District Court committed reversible error, by affirming the Magistrate Court’s order granting the third-party claim of exemption, hinges on whether that issue was even properly considered. The record shows that the only issue on the first appeal was the determination on the motion to set the judgment aside. To even get to the issue of granting the third-party claim of exemption, the Magistrate Court and in turn the District Court first had to determine whether Jesse was a party to the case or a third party. The District Court clearly understood this and held that even if the judgment were void for lack of jurisdiction, Jesse had to file a timely Rule 60(b) motion. The Magistrate Court also understood this when it denied the original claim of exemption and ordered a motion to set aside the judgment be filed. However, the second time around, the Magistrate Court completely circumvented the actual issue before the court and simply found the judgment void again failing to rule on the timeliness of Jesse’s Rule 60(b) motion as ordered by the District Court. Thus, because the issue of whether the Magistrate and District

²⁵ R Vol. I, p. 569.

Court improperly granted the Renewed Third-Party Claim of exemption, because the judgment was void, without determining whether Jesse filed a timely motion for relief from the judgment, is the central issue on this appeal and is properly before this Court.

B. JESSE IS NOT ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL.

Jesse seeks attorney's fees on appeal under Idaho Appellate Rule 41 and Idaho Code Sections 12-120(1),(2) and (3). The Court should deny this request because CBEI should be the prevailing party on appeal. Jesse also seeks attorney's fees under Idaho Code Section 12-121 because Jesse claims that CBEI "has continued a frivolous pursuit of collecting money from Jesse" and that therefore the appeal is without foundation. However, CBEI's continued attempts to collect on its properly obtained judgment, against a defendant who admittedly owed the money, cannot be considered frivolous. Additionally, the arguments being made in this appeal show that the appeal is with foundation and is being pursued for the specific purpose of correcting errors in the lower courts' conclusions. Jesse is therefore not entitled to attorney's fees under Section 12-121.

CONCLUSION

For all the reasons set forth in this Brief and Appellant's Brief on Appeal, 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.

DATED this 2nd day of August, 2018.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: /s/ Bryan N. Zollinger
Bryan N. Zollinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of August, 2018, I caused a true and correct copy of the foregoing **APPELLANT'S REPLY 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
 Email

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By: /s/ Bryan N. Zollinger
Bryan N. Zollinger