

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN MEDRAIN dba
EXCELLENCE HEATING AND COOLING,

Plaintiff/Respondent,

vs.

JADE LEE an individual, and GOLDEN CHINA
LIMITED LIABILITY COMPANY, an Idaho
limited liability company,

Defendants/Appellants,

and

BING LEE, an individual,

Defendant.

Supreme Court Docket No. 46819-2019

RESPONDENT'S RESPONSE BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR
BINHAM COUNTY

HONORABLE DARREN B. SIMPSON
District Judge, presiding

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STATEMENT OF THE CASE AND FACTUAL BACKGROUND

This appeal stems from an underlying breach of contract case related to the installation of HVAC equipment by the Respondent, Brian Medrain d/b/a Excellence Heating and Cooling (“Medrain”), at a restaurant owned by the Appellants, Jade Lee and Golden China, LLC, (“Jade and Golden China”); and the Defendant Bing Lee (“Bing”).

This matter was heard as a Court trial on October 3 and 4, 2017 before the Honorable Scott Hansen. Following the Trial, Judge Hansen issued Findings of Fact and Conclusions of Law on October 6, 2017. R., pp. 41-45. Judge Hansen filed an initial Judgment on November 1, 2017. R., pp. 46-48. Medrain timely file a Motion for Fees and Costs. Judge Hansen filed a second Judgment Re: Attorney Fees and Costs on December 1, 2017. R., pp. 49-51. Due to a clerical error¹, amended judgments were ordered and issued on January 29, 2018, *nunc pro tunc*. R., pp. 60-65.

On December 12, 2017, Bing, *pro se*, filed a Notice of Appeal. R., pp. 52-59. The caption of the Notice of Appeal identifies Bing as being “Pro Se”. R., p. 52. The Notice of Appeal was signed only by Bing Lee “Appellant”. R., p. 58. Paragraph 1 of the Notice of Appeal provides, in pertinent part, “The above-named appellant, Jade Lee, an individual, Bing Lee, an individual, and Golden China Limited Liability Company, an Idaho limited liability company, appeals . . .” R., p. 52.

¹ The judgments contained the word “hereby”, which was deemed improper. The error was raised *sua sponte* by the Court. Medrain submitted amended judgments.

Immediately upon receipt of the Notice of Appeal, Medrain's counsel notified the Defendant's counsel of record, Mr. Parmenter, of the defective filing. Aug., pp. 1-7. On January 25, 2018, Bing and attorney David Parmenter executed a Stipulation for Substitution of Counsel (sic) and filed it with the Court. Aug., pp. 8-9. The Notice of Substitution was between Bing and Mr. Parmenter only. *Id.*

On June 27, 2018, absent any objections to the transcript, the Transcript on Appeal was lodged with the District Court. R., p. 8. The District Court set the matter for a status conference on August 6, 2018, which gave notice to Medrain's counsel, Bing and Mr. Parmenter. *Id.* On August 2, 2018, Mr. Parmenter filed a Motion to Withdraw as attorneys for Jade Lee and Golden China Limited Liability Company. *Id.* That matter was heard on August 6, 2018, and Mr. Parmenter's Motion was granted. On August 8, 2018, the Court served the Order to Withdraw. R., p. 9. On August 28, 2018, there was an Order Staying Appeal issued by the District Court. Also, on August 28, 2018, Jeremy Brown entered a Notice of Appearance ostensibly on behalf of all Defendants. *Id.* On September 28, 2018, Mr. Brown filed an Amended Notice of Appeal and Motion for Trial De Novo. R., p. 10. Medrain file a Motion to Dismiss the appeal, which was granted in part as to Jade and Golden China. Jade and Golden China filed a timely appeal to this Court. R., p. 11.

I. ISSUES PRESENTED ON APPEAL

- A. Did the District Court properly rule as a matter of law that Bing Lee, a pro se individual, could not file a Notice of Appeal on behalf of Jade Lee and Golden China Limited Liability Company?
- B. Did the District Court properly rule that it did not therefor have subject matter jurisdiction to consider the appeal of Jade Lee and Golden China Limited Liability Company?

II. STANDARD OF REVIEW

The Court is “procedurally bound to affirm or reverse the decisions of the district court.” *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008); *Pelayo v. Pelayo*, 154 Idaho 855, 858-59, 303 P.3d 214, 217-18 (2013). When reviewing the decision of a district court sitting in its capacity as an appellate court, the standard of review is as follows:

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 decision as a matter of procedure.

Pelayo v. Pelayo, 154 Idaho 855, 858-59, 303 P.3d 214, 217-18 (2013). However, the

Court exercises free review over questions of law. *Campbell v. Parkway Surgery Center, LLC*, 158 Idaho 957, 961, 354 P.3d 1172, 1176 (2015).

III. ARGUMENT

A. The District Court correctly held that Bing Lee could not file a Notice of Appeal on behalf of Jade Lee or Golden China Limited Liability Company.

Appellants focus on the *Amended Notice of Appeal* as having corrected the signature issue is misplaced. The District Court correctly focused on Bing's act of filing a pleading on behalf of another individual and a company as being improper. R., pp. 89-90. The District Court's determination was correct and should be upheld as a matter of law.

Idaho Code Section 3-104 provides that no person shall practice law without having been previously admitted to practice by the Idaho Supreme Court. *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 744, 215 P.3d 457, 464 (2009). Preparing a notice of appeal is a legal instrument "by which legal rights are secured" and is undeniably the practice of law. *Idaho State Bar v. Villegas*, 126 Idaho 191, 193, 879 P.2d 1124, 1126 (1994). A non-attorney may appear *pro se* on his own behalf, but that right is personal to the individual. *Indian Springs*, 147 Idaho at 745. 215 P.3d at 465. Thus, Bing's preparation of the Notice of Appeal may have been proper to him but was improper as to Jade and Golden China.

Although not in the evidentiary record, Jade and Golden China argue for the first

time on appeal that Bing merely completed a “fill in the blank” form of a Notice of Appeal and thus he did not practice law. *Appellant’s Brief*, p. 9.² Appellants misconstrue the intent of the Court’s comments in *Citibank, N.A. v. Carroll*, 148 Idaho 254, 260, 220 P.3d 1073, 1079 (2009). This Court did not condone the actions of Capps in the *Carroll* case but rather chastised him and the district court in the wake of the *Indian Springs* case, *supra*. Unlike the district court in *Carroll*, the District Court here properly recognized the improper activity and enforced the law. The “fill in the blank” passage from *In Re: Matthews*, 58

² The form provided by the Court embedded in I.A.R. 17(o) contains at the end, the following passage, which was not filled out and completed by anyone -Bing, Jade or Golden China (although Bing’s signature was notarized):

(When certification is made by a party instead of the party's attorney the following affidavit must be executed pursuant to Rule 17(i))

State of Idaho

County of _____ ss. _____ }

_____ being sworn, deposes and says:

That the party is the appellant in the above-entitled appeal and that all statements in this notice of appeal are true and correct to the best of his or her knowledge and belief.

Signature of Appellant

Subscribed and Sworn to before me this _____, day of _____, 20____.

Title

Residence

Idaho 772 (1938) cited in *Carroll* predates the amendment to I.C. § 3-104 by three decades. *See, State v. Bettwieser*, 143 Idaho 582, 586, 149 P.3d 857, 861 (Ct.App.2006). Even if the Court considers these unsubstantiated allegations, they essentially establish that Bing was the one that improperly prepared the Notice of Appeal. *Villegas*, 126 Idaho at 193, 879 P.2d at 1126. That conclusively proves that the failure to sign the document by Mr. Parmenter -which is implicitly alleged to be the technical defect, cannot be the case. Mr. Parmenter did not prepare and inadvertently forget to sign anything. Aug., p. 006. To the contrary, as is clear, Bing prepared and signed a document pro se on behalf of himself and two “persons” that he could not legally represent. *Bettwieser*, 143 Idaho at 586, 149 P.3d at 861.

B. Even if the Court were to consider the District Court’s decision as hinging on the signature issue, the District Court would nevertheless be correct.

As set forth above, the District Court focused on Bing’s act of filing a Notice of Appeal -and not on the signature issue. Jade and Golden China have evolved that determination into an appeal revolving around someone’s failure to sign the notice of appeal -although it is not clear whether the allegation is that Mr. Parmenter, or Jade or Golden China (or a combination thereof) was the dilatory party. As a business entity, Golden China may not appear *pro se*. *Indian Springs*, 147 Idaho at 745, 215 P.3d at 465. Thus, as a practical matter, Golden China could not ever file its own notice of appeal -

unsigned or otherwise. It is also clear in the record that Mr. Parmenter never filed a Notice of Appeal on behalf of anyone. R., pp. 52-59; Aug., p. 6.

Appellants' focus on *Becker v. Montgomery*, 532 U.S. 757, 121 S.Ct. 1801 (2001) is similarly misplaced because it relies upon the federal rule in interpreting the signature requirement for a notice of appeal. In that case, Becker himself typed but did not sign his signature on a notice of appeal. *Id.* at 759-60, 121 S.Ct. at 1804. The federal rule specifically has a clause permitting the correction of the signature requirement. Fed.R.Civ.P. 11(a). This Court has noted that the federal case law may only have very limited persuasive authority on such signatory issues because of differences between the rules. *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 14, 81 P.3d 416, 419 (2003).

It is true that Idaho Rule of Civil Procedure 83(d) does not list a signature as a requirement for the content of the Notice of Appeal. However, Idaho Rule of Civil Procedure 83(q) directs that "Any appellate procedure not specified in this rule must be in accordance with the Idaho Rules of Civil Procedure or the Idaho Appellate Rules." I.R.C.P. 83(q). Idaho Appellate Rule 11.2 directs that a notice of appeal "shall" be signed by either a licensed attorney or by the unrepresented person(s). I.A.R. 11.2. There is no corrective mechanism embodied in I.A.R. 11.2 in contrast to Fed.R.Civ.P. 11(a). Although Idaho Rule of Civil Procedure 11 is similar to the federal rule, Idaho Appellate Rule 11.2 is more specific to the matter at hand and is controlling. *Hansen v. State*, 138 Idaho 865, 868-69,

71 P.3d 464, 467-68 (Ct.App.2003). As the District Court correctly noted, the attempts to correct the defective *Notice of Appeal* were not merely seeking to correct facts or information in accordance with I.A.R. 17(m) -but rather was an attempt to add parties. R., p. 89. (emphasis in original).

This Court has previously addressed the issue of a nonlawyer signing a notice of appeal in passing. In *Black*, 139 Idaho at 513-14, 81 P.3d at 418-19, the Court looked favorably on the case of *Gonzales v. Wyatt*, 157 F.3d 1016, 1021-22 (5th Cir. 1998). In *Gonzales*, the Fifth Circuit Court of Appeals held that “a notice of appeal signed by a nonlawyer on his own behalf and on behalf of another effects and appeal only as to the signer.” *Id.* Citing to *Gonzales*, this Court ruled that an agent could not sign a pleading for unrepresented parties. *Id.* Additionally, in a similar circumstance, this Court dismissed an appeal brought by pro se litigants on behalf of various entities. *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 215 P.3d 457 (2009) (dismissing the appellate claims of a Partnership, an LLC and two separate trusts where claims were filed by unlicensed persons). Based on the controlling law, the Notice of Appeal signed by Bing cannot be valid as to Jade and Golden China.

C. The District Court properly determined that the failure to timely file an appeal was jurisdictional.

In this case, the District Court correctly focused on the record before it. Only Bing

filed a notice of appeal. Jade and Golden China did not. Jade and Golden China did not forget to sign or type their names. Thus, *Becker* is completely distinguishable from the case at bar. Because those two Defendants failed to timely file an appeal, the District Court properly ruled it was without jurisdiction to hear an appeal on their behalf. Appeals to the District Court from the Magistrate Division must be filed within 42 days of entry of the judgment. IRCP 83(b)(1)(A). The timely filed of a notice of appeal is jurisdictional. *BHC Intermountain Hospital, Inc. v. Ada County*, 148 Idaho 294, 294, 221 P.3d 520, 520 (2009).

The issuance of an amended judgment that does not alter or correct any of the terms upon which a party is appealing will not extend the time for filing an appeal. *State v. Payan*, 128 Idaho 866, 867, 920 P.2d 82, 83 (Ct.App. 1996). Thus, the pertinent date for filing a timely notice of appeal is 42 days after November 1, 2017, which would be December 13, 2017. The Defendants were represented by Mr. Parmenter on December 12, 2017. Mr. Parmenter did not attempt to file or sign a Notice of Appeal at any time prior to his withdrawal on August 6, 2018. Aug., p. 006. The filing of the improperly signed document was immediately brought to Mr. Parmenter's attention and was not promptly cured. Aug., pp. 1-7. The issue was raised again at the August 6, 2018 hearing. Aug., p. 2. In fact, no effort was made to cure the defective *Notice of Appeal* until September 28, 2018 -some nine and one-half months later.

The *Amended Notice of Appeal* filed by Mr. Brown some ten months later is not

sufficient to cure this jurisdictional defect and should be stricken as to Jade and Golden China. It is irrelevant that Medrain filed his Motion to Dismiss subsequent to the *Amended Notice of Appeal*. The issue of subject matter jurisdiction cannot be waived and may be raised at any time by a party or by the Court. *State v. McIntosh*, 160 Idaho 1, 6, 368 P.3d 621, 626 (2015).

IV. CONCLUSION

Based on the foregoing, the District Court properly held that any appeal filed by Jade Lee and Golden China Limited Liability Company was dismissed. Accordingly, the appeal should be denied.

V. ATTORNEY FEES

Medrain moves for an award of attorney fees and costs related to this appeal in accordance with I.A.R. 40, 41, *Idaho Code* section 12-120(1)(3).

A. Medrain is entitled to an award of attorney fees under I.C. § 12-120(1).

Idaho Code § 12-120(1) provides, in pertinent part:

. . . [i]n 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).

In this case, Brian Medrain clearly made repeated demand for payment on the Defendants more than ten days prior to the commencement of the suit. R., p. 20. The amount pleaded for damages was \$6,400.00 which is an amount less than \$35,000. *See, Loftus v. Snake River School Dist.*, 130 Idaho 426, 942 P.2d 550 (1997) (holding that the District Court could award fees under I.C. §12-120(1) where a specific dollar amount was plead that was “clearly less than” the jurisdictional cap.). Accordingly, it is appropriate for the Court to award fees under I.C. § 12-120(1) in this case.

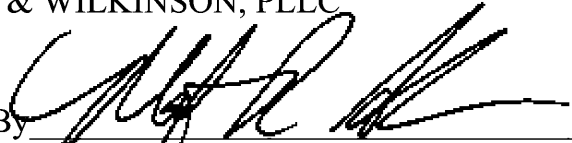
B. Medrain is entitled to an award of attorney fees under I.C. § 12-120(3).

Idaho Code § 12-120(3) provides for an award of attorney fees to the prevailing party in a civil action to recover on any commercial transaction. “Commercial transactions,” as defined in I.C. § 12-120(3), include all transactions except transactions for personal or household purposes. “Attorney's fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover.” *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990); *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728, 152 P.3d 594, 599 (2007). The measuring stick for the Court is whether the commercial transaction is “integral to the claim.” *Brower*, 117 Idaho at 784, 792 P.2d

345. In this case, there can be doubt that the underlying commercial transactions are integral to Medrain's claims. The restaurant was a commercial business. Medrain performs HVAC services to make money. Thus, an award of attorney fees and costs is proper under I.C. § 12-120(3).

DATED this 23th day of October, 2019.

SMITH WOOLF ANDERSON
& WILKINSON, PLLC

By 

Marty R. Anderson
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 23rd of October, 2019, I caused a true and correct copy of the foregoing RESPONDENT'S BRIEF to be served upon the following persons as set forth below.



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