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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Case No. 47208-2019
Sixth District Court Case No. CV-2016-2442-OC

Medical Recovery Services, LLC, an Idaho limited liability company,

APPELLANT

vs.

Solomon Gepford,

RESPONDENT

Appeal from the District Court of the Sixth Judicial District for Bannock County.
Honorable Stephen S. Dunn, presiding.

APPELLANT'S AMENDED REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

There's no place for hyperbole in appellate briefs. But Respondent's prevailing party argument—though good for Solomon Gepford—is downright *terrible* for debtors generally. It would increase litigation costs and corresponding attorney fee awards against debtors for two reasons.

First, to preserve a right to a reasonable attorney fee, Gepford would require collection agencies to reject payments made to medical providers after suit is filed—litigating all cases to judgment or formal settlement for the full amount owed. To show why that's true, it's important to compare what Medical Recovery Services, LLC ("Medical Recovery") did below, with Gepford's rule—embraced by the lower courts.

After the lawsuit began, Gepford paid his medical provider the full amount Medical Recovery sought in its complaint. As soon as Medical Recovery found out, it credited the payment to Gepford's account and sought to advance the litigation to judgment so that the Court could adjudicate a reasonable attorney fee and prejudgment interest.

Gepford asks the Court to treat the payment to his medical provider as somehow different from a payment to Medical Recovery. Indeed, he asserts that paying his medical provider didn't benefit Medical Recovery at all, so it cannot make Medical Recovery the prevailing party. If the Court adopts that position, collection agencies will be forced to reject payments to providers as made to the wrong party—continuing the litigation until the debtor pays the collection agency or the court enters judgment. Differentiating between collection agencies and their medical provider clients only makes things more confusing for debtors. And requiring more litigation over these issues only adds to debtors' potential attorney fee liability. Neither situation is good for debtors, who often appear *pro se*.

The second problem with Gepford's argument has impacts for prevailing party analysis generally—not just debt collection actions. Allowing courts to determine prevailing party status based on prelitigation conduct or other facts extraneous to the relative success of the parties on the claims in the action would add greater expense and uncertainty to the prevailing party analysis. Whether the issue is prelitigation settlement efforts, post litigation likelihood of collection, or something else—parties would need discovery on any number of otherwise extraneous matters to argue that a party received little value from its otherwise successful lawsuit.

For good reason, the Idaho Code, rules of civil procedure, and rules of evidence reject Gepford's arguments. This Court should too. Gepford's payment in full to his medical provider shortly after Medical Recovery sued, together with the favorable prejudgment interest decision, afforded Medical Recovery everything it sought. Thus, Medical Recovery was a prevailing party as a matter of law entitled to costs as a matter of right.

As a prevailing party in a case "to recover on" an unpaid medical services contract, Idaho Code § 12-120(3) affords Medical Recovery a reasonable attorney fee. Gepford's argument to the contrary conflict with well-settled precedent and the plain text of Idaho Code § 12-120(3).[1]

As a party pursuing its right to a reasonable attorney fee in the lawsuit, the law also allows Medical Recovery a reasonable attorney fee on appeal.

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[1] Medical Recovery intended to appeal only the entitlement to attorney's fees under Idaho Code § 12-120(3). Medical Recovery did not intend to pursue on appeal entitlement to attorney's fees under Idaho Code § 12-120(1) but inadvertently included that issue on appeal before this Court. Thus, whether Medical Recovery "waived" the issue or not is moot because it withdraws any claim for attorney's fees under § 12-120(1) on this appeal and seeks an award of attorney's fees only under § 12-120(3).

ARGUMENT

I. MEDICAL RECOVERY PREVAILED AS A MATTER OF LAW.

No one likes the debt collector. Despite Medical Recovery collecting 100% of the debt and prejudgment interest after suing, the District Court denied Medical Recovery prevailing party status. Even on matters of discretion, courts must correctly apply the legal standard and act within the bounds of law. *Clarke v. Latimer*, 165 Idaho 1, 437 P.3d 1, 6 (2018). When a party receives "the most favorable outcome that could possibly be achieved," it is a prevailing party as a matter of law. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718–19, 117 P.3d 130, 132–33 (2005) (reversing the district court's prevailing party determination and remanding only for determination of the amount of the award).

"In baseball, it is said that a walk is as good as a hit. The latter, of course is more exciting." *Id.* at 719. When the defendant pays the plaintiff before answering the complaint, it's a home run—affording immediate relief without the added expense of contested proceedings. A later award of prejudgment interest just runs up the score. The District Court erred in denying Medical Recovery prevailing party status on these facts. *Id.* (holding that even "less than tremendous success" on a counterclaim together with successful defense of the plaintiff's claim made the defendant a "prevailing party").

Ignoring this straightforward analysis, the District Court erred when it credited four arguments Gepford reiterates on appeal. (A) The court treated payment to Gepford's medical provider as though it were different from what Medical Recovery sought. (R. 117–18, 334–35.)[2]

[2] The lower courts made the alternative finding that even if Medical Recovery prevailed, the reasonable fee would be $0 in attorney fees. (*E.g.*, R. 117.) But the premise of the Court's alternative conclusion rested on the same analysis as its prevailing party determination. (*E.g.*, R. 117.) This brief frames Medical Recovery's arguments in terms of the lower courts error in determining the prevailing party, but these arguments apply in equal measure to the alternative

(B) It based its prevailing party analysis on prelitigation conduct not the result of the action. (R. 117–18, 334–35.) (C) It denied fees due to Medical Recovery's purported lack of diligence in prelitigation settlement efforts. (R. 117–18, 334–35.) And (D) it clearly erred when it upheld the Magistrate Court's finding that Gepford lacked notice of the unpaid bill until after Medical Recovery sued. (R. 116, 335.)

A. There is no difference between paying the debt collector and paying the medical provider. The District Court erred in holding otherwise in its prevailing party analysis.

1. The Idaho Collection Agency Act prohibits treating payment to the medical provider different from payment to its debt collector.

To deny Medical Recovery prevailing party status, Gepford (and the District Court) point to the $0 summary judgment award and the fact that Gepford paid his medical provider—not Medical Recovery—in response to the lawsuit. (R. 117–18, 334–35; Resp't Br. at 11–12.) For example, Gepford asserts that Medical Recovery "failed to recover a single cent as a result of the lawsuit" because Gepford paid "the $416 to [his medical provider]"—not Medical Recovery. (Resp't Br. at 13–14.) "This alone," Gepford asserts, "precludes [Medical Recovery] from invoking prevailing party status." (Resp't Br. at 13–14.)

To be a prevailing party under Gepford's rule, Medical Recovery had to reject Gepford's payment because it was made to the wrong party and insist on being paid directly. *Bonanza Motors, Inc. v. Webb*, 104 Idaho 234, 236, 657 P.2d 1102, 1104 (Ct. App. 1983) ("The obligor is liable to the assignee if the funds assigned are subsequently paid to the assignor in violation of the assignment."). Not so.

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conclusion that $0 is a reasonable fee. If the Court reverses the prevailing party decision, it should also reverse the alternative conclusion that a reasonable fee is $0. And the matter should be remanded for a determination of a reasonable fee based on the correct legal standard.

Debt collectors are not ordinary assignees. The Idaho Collection Agency Act ("Act") strictly regulates collection assignments. *E.g.*, Idaho Code § 26-2221 *et seq.*; *Med. Recovery Servs., LLC v. Strawn*, 156 Idaho 153, 156–59 & nn.1–4, 321 P.3d 703, 706–09 & nn.1–4 (2014) (noting regulation on everything from fees collected to the terms of prejudgment settlement agreements).

Unlike traditional assignees, Medical Recovery does "not step into the shoes of [its creditor clients]" when it receives an assignment for collection purposes. *Strawn*, 156 Idaho at 158, 321 P.3d at 708. Instead, a debt collection assignment authorizes the debt collector to seek payment for the original creditor. *See id.* Even when payments go directly to collection agencies, it's not their money. *Purco Fleet Servs., Inc. v. Idaho State Dep't of Fin.*, 140 Idaho 121, 126, 90 P.3d 346, 351 (2004) ("An assignee for collection holds any proceeds of the assigned claim in trust for the assignor."). Every penny must go into a trust account. *See* Idaho Code § 26-2233. There's even a bonding requirement to ensure compliance. *Id.* § 26-2232.

This encompasses "all moneys collected on behalf of such creditor clients" and all "payments made *to* such creditor clients . . . ." *Id.* § 26-2234(5) (emphasis added) (requiring written statements of such collections "within thirty (30) days following the end of each calendar month"). In other words, whether Gepford paid Medical Recovery or his medical provider—Medical Recovery had a duty to account for the payment. *See id.*

To be frank, if Medical Recovery had sought more than a $0 judgment on the principal debt after Gepford paid the full amount to his provider, it'd be committing a felony. *Id.* § 26-2238(1) ("Any person who . . . misappropriate, transfers, or converts to his own use or benefit, funds belonging to or held for another person, shall, upon conviction, be guilty of a felony . . . ."). It would also breach its statutory duty to "deal openly, fairly, and honestly without deception in" its collection efforts. *Id.* § 26-2229A.

Thus, the Act cuts off Gepford's argument that you can distinguish Medical Recovery from its creditor client. Medical Recovery collects for its client. *Strawn*, 156 Idaho at 158, 321 P.3d at 708. When its client gets paid 100% of the money Gepford owed, Medical Recovery prevails. The $0 summary judgment recognizes the fact of this payment and advances the proceedings to the attorney fee and prejudgment interest phase, without unnecessary litigation. It wouldn't be fair, open, or honest to do otherwise. Idaho Code § 26-2229A(1). The Court should reverse the District Court's decision. Medical Recovery is a prevailing party and the Court should remand for a determination of a reasonable amount of attorney fees.

2. If debt collectors can't count payments to the medical provider as success in the prevailing party analysis, they will be forced to reject these payments and continue litigating cases to judgment—increasing debtors' potential attorney fee liability.

Despite the conflict with Idaho collection law, Gepford asks the Court to adopt Oklahoma's rule in *Tulsa Adjustment Bureau, Inc. v. Calnan*, 2018 OK 60, 427 P.3d 1050, 1052. *Calnan* is on all fours factually with this case: "shortly after [defendant] Calnan was served a copy of [the debt collection action], Calnan paid his debt in full." *Id.* at 1051. (Resp't Br. at 15–16 (quoting this passage).) The creditor sought summary judgment and attorney fees—but the Oklahoma Supreme Court rejected its claim—holding that the voluntary payment mooted its claim and deprived it of prevailing party status. *See id.* at 1051–52. Advising creditors in future cases, the Oklahoma Supreme Court held that creditors "may reject [a debtor's post litigation] payment and seek to have the same awarded by judicial decision, in which case—should the [creditors] prevail—they will be entitled to seek a fee award." *Id.* at 1052 n.7.

Oklahoma's rule is good for Gepford, but terrible precedent for debtors generally. It forces creditors to reject tender of full payment after suing to preserve their right to attorney fees. *Id.* at 1051–52 ("[Creditor's] claims in this case may very well be fee-bearing . . .[,] but [t]o qualify as

such, the statute requires [creditor] to have prevailed on those fee-bearing claims, meaning that [creditor] must first have obtained a judgment in its favor on those claims before it could be eligible for an attorney-fee award.").

It's also bad for medical providers—and any other industry that provides goods or services without advance payment. Debtors have little incentive to pay bills on time when there's no penalty for waiting until the creditor (or its collection agent) files a lawsuit.

Fortunately, Oklahoma's rule is barred by the Act. *See supra* Section I.A.1. It's also precluded by this Court's precedent on the prevailing party standard. In Oklahoma, "'[p]revailing party[]' [is] a legal term of art" that "means the successful party who has been awarded some relief on the merits of his or her claim." *Calnan*, 2018 OK 60, 427 P.3d at 1052 n.6. Idaho law takes a broader view. There is no "judgment" requirement to be a prevailing party in Idaho. Indeed, the Court doesn't even have to render a merits decision on any claim to determine the prevailing party. Idaho law directs courts to consider "the final judgment *or result of the action in relation to the relief sought by the respective parties.*" I.R.C.P. 54(d)(1)(B). Whether settlement or voluntary payment, Idaho law recognizes that obtaining "the relief sought" is essential to prevailing party status—not a specific disposition on the merits. *E.g.*, *Clarke v. Latimer*, 165 Idaho 1, 437 P.3d 1, 6 (2018) (recognizing that "in the right case" the Court should "consider the 'result' obtained by way of settlement" (citation omitted)).[3]

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[3] *See also Bolger v. Lance*, 137 Idaho 792, 797 (2002) ("As noted by the Idaho Court of Appeals, it may be appropriate for the trial court, in the right case, to consider the 'result' obtained by way of a settlement reached by the parties"); *Jerry J. Joseph C.L.U. Ins. Associates, Inc. v. Vaught*, 117 Idaho 555 (Ct. App. 1990) (affirming decision of trial court that defendant was sole prevailing party when the defendant entered into settlement agreeing to all the substantive relief sought in the plaintiff's complaint); *Ladd v. Coats*, 105 Idaho 250 (Ct. App. 1983) (affirming trial court's determination that the plaintiff was the prevailing party under a settlement agreement without the plaintiff's having first obtained a monetary judgment). Gepford notes that there was no settlement agreement, claiming these cases do not apply. (Resp't Br. at 14 n.2). But he doesn't give any

Thus, Idaho law rightly rejects the Oklahoma rule. Debt collectors cannot "reject" a debtor's payment once a lawsuit is filed. *See* Idaho Code § 26-2229A(1); *supra* Section I.A.1. A debt collector does not forfeit a right to attorney fees when a lawsuit motivates the debtor to pay the "relief sought by the [complaint]." I.R.C.P. 54(d)(1)(B). Indeed, this Court "emphasize[d] that attorney fees are available to debt collection agencies under [Idaho Code] § 26–2229A(4), provided the fee sought falls within one of the five enumerated categories." *Strawn*, 156 Idaho at 158, 321 P.3d at 708.[4]

Medical Recovery got what it wanted when Gepford paid his provider. The $0 summary judgment appropriately credited Gepford's post-filing payment, without impacting Medical Recovery's prevailing party status. The lower courts were not free to disregard Gepford's voluntary payment of the precise amount Medical Recovery sought in its complaint or the prejudgment interest also awarded.[5] This Court should reverse the District Court and hold that Medical Recovery prevailed as a matter of law.

B. Idaho law limits prevailing party analysis to the "action"—not prelitigation conduct.

Gepford offers a second reason to deny Medical Recovery prevailing party status: it "incurred fees and costs only as a result of its own 'lack of diligence.'" (Resp't Br. at 12 (citing R.

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reasoned analysis for that statement. Like a settlement, Gepford's voluntary payment afforded Medical Recovery the relief it sought without a court ruling on the merits. There is no logical distinction between Gepford's payment and a settlement followed by an attorney fee motion.

[4] The first of the enumerated categories of appropriate fees are those "expressly authorized by statute." Idaho Code § 26–2229A(4)(a). Idaho Code §12-120(3) provides attorney fees for suits "to recover on" a "contract relating to the purchase or sale of . . . services . . . ." *Id.*; *infra* Section II.

[5] *E.g.*, R. 117–18, 334–35. Gepford's argument that Medical Recovery achieved nothing, Resp't Br. at 11–12, improperly ignores the benefit Gepford's voluntary payment conferred on Medical Recovery and the favorable award of prejudgment interest. (R. 332 (identifying prejudgment interest was included in the final judgment below).)

118)). Gepford argues that he "was not 'afforded the opportunity to pay the bill' because [Medical Recovery] 'sent notices to an incorrect and non-existent address.'" (Resp't Br. at 12 (quoting R. 118).) This argument is wrong, on both the law and the facts.

1. Prevailing party status does not turn on prelitigation conduct.

Rule 54(d)(1)(B) directs courts to consider "all of the issues and claims involved *in the action*"—not prelitigation conduct. I.R.C.P. 54(d)(1)(B) (emphasis added). Considering prelitigation conduct in its prevailing party analysis, the District Court erred "as a matter of law." *Clarke v. Latimer*, 165 Idaho 1, 5–6, 437 P.3d 1, 5–6 (2018). Like the district court in *Clarke v. Latimer*, here, the lower courts improperly analyzed facts outside the action to minimize the degree of success Medical Recovery obtained on its single claim for relief in the suit. (R. 117–18, 334–35.) In *Clarke*, it was the plaintiff's earlier judgment against a spouse that caused the court to find the plaintiff's success "largely inconsequential." *Clarke*, 165 Idaho at 6, 437 P.3d at 6. Given the earlier judgment, the court felt the "net effect" of the case before it was "like rearranging the deck chairs on the titanic"—with "no net gain or loss by either party, except in attorney fees and costs to argue a rather esoteric legal issue." *Id.* at 5–6. This Court rejected that analysis, directing courts to focus on the result of the action—not prelitigation conduct or other facts outside the simple analysis of whether a party got what it wanted as a result of the lawsuit. *Id.* at 6.

Like Medical Recovery, "the Clarkes raised a single claim, presenting a single issue . . .; there were no counterclaims." *Id.* The Clarkes had to slog all the way through a bench trial before receiving the "relief on their claim." *See id.* at 4, 6. Medical Recovery got what it wanted after filing its complaint—without the expense of contested proceedings on the merits. (*E.g.*, R.15, 32, 81.) Rather than credit Medical Recovery's success "*in the action*," I.R.C.P. 54(d)(1)(B) (emphasis added), the lower courts *faulted* Medical Recovery for its purported lack of prelitigation

"diligence." (*See* R. 117–18, 334–35.) But prelitigation diligence "does not fall within the considerations required by Rule 54(d)(1)(B)." *Clarke*, 165 Idaho at 6, 437 P.3d at 6.

2. Sound policy supports the rule's focus on the action.

There's good reason to prohibit consideration of factors outside the straightforward assessment of who prevailed on the claims in the case. It means judges don't have to decide whether the legal issue is "esoteric" or the relief no more than "rearranging the deck chairs on the Titanic." *See id.* Judges often lack important information about facts outside the record of the pending litigation over which they preside: whether those facts are the existence or non-existence of a spouse's separate property, *id.*, or a party's prelitigation efforts to settle a dispute, (R. 117–18, 334–35.).

Litigating these extra-record issues in attorney fee disputes would be a nightmare. Attorney fees are often much of the relief sought in an action. If facts outside the result of the action are relevant to deciding who prevailed, you can expect parties to conduct discovery and request judicial fact finding on these matters. Because the only relevance of this material would be the attorney fee issue, parties would need additional evidentiary hearings to prove the limited effect of the judgment or a party's lack of prelitigation diligence. Idaho law rightly rejects these inquiries, directing courts to consider success "in the action." I.R.C.P. 54(d)(1)(B). The Court should reverse the District Court and remand for a decision on the reasonable amount of Medical Recovery's fees and costs.

C. Settlement efforts are off limits in the prevailing party analysis.

Not only is prelitigation conduct generally out of bounds in the prevailing party analysis, denying fees because a party did not diligently work to settle the dispute also conflicts with this Court's precedent. Evidence of settlement negotiations "is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim . . . ." I.R.E. 408.

This Court gives Rule 408 a "broad, not narrow, interpretation in order to encourage settlement negotiations." *Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP*, 148 Idaho 479, 495, 224 P.3d 1068, 1084 (2009).

The Court has gone so far as to say that parties have "no duty . . . to conduct reasonable settlement negotiations" and courts have "no authority to impose sanctions for 'bad faith' [settlement] bargaining." *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 276, 824 P.2d 841, 851 (1991) (second alteration in original) (quoting *Ross v. Coleman Co.*, 114 Idaho 817, 836, 761 P.2d 1169, 1188 (1988). Indeed, in *Ross v. Coleman Co.*, the court awarded the plaintiff attorney fees "in substantial part upon its finding that the defense counsel had failed to conduct settlement negotiations in good faith." 114 Idaho at 836, 761 P.2d at 1188. This Court reversed holding "there is no authority in a trial court to insist upon, oversee, or second guess settlement negotiations, if any . . . ." *Id.* Here, the lower courts *denied* fees because Medical Recover purportedly failed to engage Gepford in adequate prelitigation settlement efforts. (R. 117–18, 334–35.) That's not allowed under the *Ross* rule. *Id.*

This is a bright line rule. The "validity or amount of a disputed" attorney fee claim does not turn on the contents or quality of settlement efforts. I.R.E. 408; *Ross*, 114 Idaho at 836, 761 P.2d at 1188. This rule fosters a degree of openness, candor, and willingness to bargain that would be destroyed if parties knew they might later be litigating over settlement negotiations.

If the legislature intends to depart from this rule, it does so expressly. *See* Idaho Code § 12-120(1) (allowing attorney fees in cases seeking $35,000 or less only if there is a "written demand for payment . . . not less than ten (10) days before the commencement of the action" and barring fees when "the defendant tender[s] to the plaintiff, prior to the commencement of the action, an

amount at least equal to ninety-five (95%) of the amount awarded to the plaintiff"). Rule 54(d)(1)(B) lacks this exception, as does Idaho Code § 12-120(3).

In sum, the rules of evidence, this Court's precedent, and sound policy reject Gepford's argument that Medical Recovery can be denied prevailing party status because it didn't engage Gepford in prelitigation settlement efforts. The Court should reverse the District Court and remand for decision on the reasonable amount of fees.

D. Even if prelitigation conduct mattered, substantial evidence does not support the lower courts' finding that Medical Recovery was not diligent. Gepford knew of the bill and would not pay until Medical Recovery sued.

Even if the prelitigation settlement efforts could be considered, Gepford is not the sympathetic, unknowing debtor he claims to be. The record is undisputed that Gepford got the original bill from his medical provider (R. 116.) Medical Recovery sent every prelitigation notice to the *same address on the original bill Gepford admits he received.* (*Compare* R. 35 (identifying Gepford's address on the medical bill as 538 E. Holliday, Pocatello, ID 83201), *with* R. 135 (showing Gepford's address in Medical Recovery's business records as 538 E. Holliday, Pocatello, ID 83201), *and* R. 130 (identifying Medical Recovery's testimony that this was the address used for prelitigation notices and that none were returned undeliverable)). The Magistrate Court's contrary conclusion rested exclusively on evidence that a post litigation notice was sent to "538 West Holliday" and was returned. (R. 116, R. 62 (identifying an August 2, 2016 letter sent after the complaint was filed that was returned "No such number").) None of the pre-litigation notices were returned in the mail. (R. 130.) What's more, Gepford called Medical Recovery before the lawsuit—refusing to pay the bill and swearing at Medical Recovery's employees. (*See* R. 138) So he must have received the prelitigation notices Medical Recovery sent. When asked about the call during the litigation, Gepford didn't deny it—saying only he couldn't remember. (Transcript R. Vol. I at p. 22, Tr. 24:8–25 ("Like I said, I do not -- like I said, I cannot stand on that, whether or

not I received a phone call or not from him.").) Even after paying the bill, Gepford's briefing below shows that he rejected Medical Recovery's attempt to settle—insisting on litigating the attorney fee issue. (*See* R. 72.).

There's no substantial, competent evidence to support the lower courts' finding that Medical Recovery exhibited a "lack of diligence in this matter prior to filing suit." (Resp't Br. at 13; R. 117–18, 334–35.) The Court should reverse, even if it gets into the issue of Medical Recovery's diligence.

II. IDAHO CODE § 12-120(3) PROVIDES ATTORNEY FEES TO THE PREVAILING PARTY IN CASES TO RECOVER ON UNPAID SERVICE CONTRACTS.

Gepford's right that this case doesn't involve a commercial transaction under Idaho Code § 12-120(3). (Resp't Br. at 24–27.) But that doesn't matter. Decades of judicial precedent and the plain language of the statute make clear that fee shifting is mandatory in cases to recover on a services contract. The Court should reaffirm this precedent and reverse.

A. This isn't a new issue. Longstanding precedent authorizes attorney fees in cases to collect on service contracts under § 12-120(3).

For decades, Idaho like other states, has allowed fee shifting in cases to collect unpaid services contracts. *E.g.*, *Swanson & Setzke, Chtd. v. Henning*, 116 Idaho 199, 200, 774 P.2d 909, 910 (Ct. App. 1989) (holding that section 12-120(3) "authorizes . . . a fee award" in a case to collect unpaid legal services—without reference to the commercial transaction portion of the statute, but concluding that a *pro se* attorney does not qualify for fees); *see also Calnan*, 2018 OK 60, 427 P.3d at 1052 n.5 (quoting Oklahoma's fee shifting statute with similar language to Idaho's).[6]

[6] *Cf. Spidell v. Jenkins*, 111 Idaho 857, 860, 727 P.2d 1285, 1288 (Ct. App. 1986) (holding (before the legislature enacted the "commercial transaction" language) that § 12-120 "mandates an award of attorney fees . . . to the prevailing party in a civil action brought to recover on a note"), *abrogated*

As recently as 2018, the Court has reaffirmed this rule in the medical services context—without analyzing whether the transaction had a commercial purpose. *Med. Recovery Servs., LLC v. Neumeier*, 163 Idaho 504, 513 (2018) ("In this case, [Medical Recovery] brought its action to recover on a bill arising from a contract for medical services. Thus, Neumeier is entitled to fees under section 12–120(3) as the prevailing party.").

What's more, the Idaho Court of Appeals analyzed and rejected Gepford's argument that medical services contracts must involve a commercial transaction to qualify for attorney fees under Idaho Code § 12-120(3). In *Eriksen v. Blue Cross of Idaho Health Services, Inc.*, 116 Idaho 693, 695, 778 P.2d 815, 817 (Ct. App. 1989), the defendant argued "that the statute's reference to 'services' [was] limited by the subsequent mention of a 'commercial transaction.'" *Id.* The Court disagreed. Applying the canons of "parity of construction" and avoiding "surplusage," the Court held "the Legislature put the term 'commercial transaction' in this statute, not to narrow its scope, but to extend its coverage to litigation arising from commercial disputes as well as from certain non-commercial disputes." *Id.* "This intent is evinced by the Legislature's use of the conjunctive phrase "*and* in any commercial transaction." *Id.* (emphasis in original).

As further evidenced below, both this Court and the Court of Appeals have had this right for more than thirty years—there's no reason to upend the apple cart now. The District Court should be reversed.

B. The text of § 12-120(3) also supports attorney fee awards in actions to collect on unpaid service contracts.

Gepford purports to ground his interpretation the plain language of the statute—asserting that Medical Recovery's reading requires a statutory re-write. (Resp't Br. at 28.) The opposite is

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on other grounds by BECO Const. Co. v. J-U-B Engineers Inc., 149 Idaho 294, 233 P.3d 1216 (2010).

true. Gepford and the lower courts re-wrote the statute, not Medical Recovery. As the Court of Appeals held more than thirty years ago, the statute mandates fee shifting in "certain non-commercial disputes" *and* in "litigation arising from commercial disputes." *Eriksen*, 116 Idaho at 695, 778 P.2d at 817. The statute reads:

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

Idaho Code § 12-120(3) (emphasis added). The verb "to recover" is followed first by the preposition "on" and later by the preposition "in." *See id.* "[O]n" modifies the first set of listed transactions, allowing fees "to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services." *Id.* The preposition "in" modifies the second category—suits "to recover . . . in any commercial transaction." *Id.* The conjunctive "and" (highlighted above) makes clear that the "commercial transaction" language is a second *added* category of claims eligible for statutory fee shifting. *Eriksen*, 116 Idaho at 695, 778 P.2d at 817.

Gepford's reading renders the second preposition "in" surplusage. It also conflicts with the statute's expansive additive language: "and in any." *See* Idaho Code § 12-120(3). If the Legislature intended to limit the scope of the statute, you'd expect a limiting phrase like "only in commercial transactions" rather than "and in any commercial transaction." *See id.*

Thus, Gepford's argument (adopted by the lower courts) creates surplusage and conflicts with the statute's plain language. This Court should reverse. *Ada Cty. Prosecuting Attorney v. 2007 Legendary Motorcycle*, 154 Idaho 351, 353, 298 P.3d 245, 247 (2013) ("The interpretation of a statute 'must begin with the literal words of the statute; those words must be given their plain,

usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.'" (quoting V*erska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011)).

III. MEDICAL RECOVERY SHOULD BE GRANTED REASONABLE ATTORNEY FEES ON APPEAL.

This Court "may award reasonable attorney fees incurred in connection with the effort to secure a reasonable amount of attorney fees." *BECO Constr. Co. v. J-U-B Eng'rs Inc.*, 149 Idaho 294, 298 (2010), *overruled on other grounds by Keybank Nat'l Ass'n v. PAL I, LLC*, 155 Idaho 287, 311 P.3d 299 (2013). Because Medical Recovery prevailed below, sought attorney fees under Idaho Code § 12-120(3), (*E.g.*, R. 84, 95, 98, 335), and meets the criteria for a statutory award of fees, this Court should also grant fees on appeal. Gepford relies on a line of cases addressing a different provision of the statute: Idaho Code § 12-120(5), efforts to collect a judgment. (Resp't Br. at 32.) This isn't a judgment collection case. Medical Recovery sued for payment of a debt, and this appeal arises from the denial of attorney fees in that underlying action. As the prevailing party on a claim to recover on an unpaid medical services contract, the Court should grant Medical Recovery attorney fees on appeal. Idaho Code § 12-120(3).

CONCLUSION

Medical Recovery prevailed. As a prevailing party on a claim to recover an unpaid medical services contract, Medical Recovery is entitled to costs as of right and attorney fees under Idaho Code § 12-120(3). The Court should reverse the District Court and remand for determination of the reasonable amount of fees—both below and on appeal.

DATED this 6th day of March 2020.

PARSONS BEHLE & LATIMER

John E. Cutler

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 6, 2020 I caused a true and correct copy of the foregoing **APPELLANT'S AMENDED REPLY BRIEF** to be served on the following:

Persons Served:

[ ] U.S. Mail
[ ] Facsimile
[ ] Hand Delivery
[ ] Overnight Delivery
[ ] Email
[X] Efile/iCourt

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