11-27-2019

Medical Recovery Services, LLc v. Gepford Appellant's Brief Dckt. 47208

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11/27/2019 9:01 AM
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 Geppford,

RESPONDENT

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

APPELLANT'S BRIEF ON APPEAL

Bryan N. Zollinger, Esq., of Smith, Driscoll & Associates, PLLC, residing at Idaho Falls, Idaho, for Appellant Medical Recovery Services, LLC

Andrew Hawes, Esq., of Snell & Wilmer, L.L.P., residing at Boise, Idaho for Respondent, Solomon Gepford

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STATEMENT OF THE CASE

The Respondent, Solomon Gepford, ("Gepford") received services from Valley View Anesthesia, ("VVA") on November 6, 2015. Gepford's insurance was billed and paid its portion on November 25, 2015. Gepford did not pay the balance due of $416, and VVA assigned the past due bill for services to Appellant, Medical Recovery Services, LLC, ("MRS") for collection. After sending out multiple demand notices and even speaking with Gepford on the telephone, MRS filed a Complaint against Gepford and served Gepford with the Complaint on August 2, 2016.

On August 18, 2016, over two weeks after being served the Complaint, Gepford paid the entire principal due of $416.00 directly to VVA. The next day, Gepford filed an Answer to the Complaint. MRS filed a motion for summary judgment, and the Magistrate Court granted that motion. Because Gepford had already paid the entire principal MRS had sought in the Complaint after the Complaint was filed, the Magistrate Court awarded MRS a judgment of zero dollars. MRS then made a motion for attorney's fees, costs, and prejudgment interest. The Magistrate Court awarded MRS prejudgment interest but denied all court costs or attorney's fees.

MRS appealed to the District Court, who remanded the case to the Magistrate Court because the Magistrate Court failed to make findings of fact for the appellate court to review. The District Court also stated that "the trial court's analysis appeared to focus on equitable principles relating to notice rather than the legal principles outlined above."

On remand, the Magistrate Court again declined to award MRS any attorney's fees or costs. The Magistrate Court ruled that (1) attorney's fees could not be award under I.C. § 12-120(3) because the services VVA provided Gepford were personal services and not services for a commercial transaction; (2) attorney's fees could not be awarded under I.C. § 12-120(1) because Plaintiff "failed to provide notice." Moreover, the Magistrate Court ruled that even if MRS was technically a prevailing party, the Magistrate Court believed that a fair and equitable award of attorney's fees and costs would be zero dollars because that was exactly what the Magistrate Court had awarded in the judgment. Ultimately, MRS timely appealed, and the District Court affirmed the decision of the Magistrate Court.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

On or about November 6, 2015, Gepford received anesthesia services from VVA and incurred charges of $664.00.[1] Gepford's insurance company, Blue Cross of Idaho, paid its contracted portion of $248.00 on November 25, 2015 leaving Gepford liable for the remaining balance of $416.00.[2] Gepford admits that he received notice of the $416 unpaid balance from VVA before MRS sued him.[3] Because Mr. Gepford failed to make any payments for the anesthesia services VVA provided, VVA assigned the account to MRS for collection.[4]

MRS sent multiple demand notices to Gepford and never received any returned in the mail.[5] One of MRS' notices was sent on June 14, 2016,[6] and in response to receiving that

[1] R. p. 35.
[2] Id.
[3] TR Vol. I p. 5. (p. 9 Ll. 7-21).
[4] R. p. 32.
[5] R. pp. 130-139.
[6] R. p. 139.

notice, Gepford called MRS on June 20, 2016.[7] In that phone conversation, Gepford explained that the bill was from an accident that insurance should have paid; however, when MRS told him that MRS could not bill insurance, Gepford told MRS, "I am not chasing down anyone or wasting my time to get this fix[ed]."[8]

On July 11, 2016, MRS filed a Complaint seeking the principal amount then owing of $416, costs, attorney's fees, and prejudgment interest.[9] On August 2, 2016, MRS served Gepford a copy of the complaint and summons.[10] Over two weeks after being served with the summons and complaint, on August 18, 2016, Gepford paid the entire principal amount of $416 directly to VVA.[11] The next day, August 19, 2016, Gepford filed an Answer to the Complaint .[12]

On September 16, 2016, MRS filed a motion for summary judgment because MRS had no practical way to recover costs, attorney's fees, or prejudgment interest without obtaining a judgment.[13] The Magistrate Court entered its written order granting MRS' motion for summary judgment on December 1, 2016.[14]

MRS filed a Memorandum of Attorney's Fees and Costs, Motion for Award of Prejudgment Interest, and set it for hearing on those motions.[15] Gepford filed motions in opposition to attorney's fees and prejudgment interest along with a supporting affidavit.[16]

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[7] P. 138.
[8] R. p. 135.
[9] R. pp. 14-16.
[10] R. p. 19.
[11] R. pp. 32-35.
[12] R. pp.21-25.
[13] R. pp. 36-37.
[14] R. p. 91.
[15] R. pp. 84-90
[16] R. pp. 55-83.

Gepford falsely alleged that he had not received any written demands for payment, that the bill was paid prior to his filing an answer, and that because the summary judgment was for $0 MRS should get $0 in attorney's fees.[17]

At the January 23, 2017 hearing on MRS' motions for prejudgment interest, costs, and attorney's fees,[18] the Magistrate Court never decided the "prevailing party issue" and denied MRS attorney's fees because Gepford claimed he had not received a demand notice and because Gepford already had paid the bill.[19] The Magistrate Court did not give a reason for the denial of costs or prejudgment interest at that hearing, stating only, "You're not going to get it [prejudgment interest]."[20]

On January 30, 2017, the Magistrate Court entered its order denying prejudgment interest, costs, and attorney's fees.[21] On February 6, 2017, MRS timely filed a Motion for Reconsideration and supporting brief and Gepford filed an opposition.[22] On April 17, 2017, the Magistrate Court held the hearing on the motion.[23] At that hearing, the Magistrate Court again denied all prejudgment interest, costs, and attorney's fees without making any specific findings except that the Magistrate Court said, "You may be right, but I still . . . don't believe that attorney's fees and costs are appropriate. . . ."[24] On June 5, 2017, the Magistrate Court entered

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[17] Id.
[18] R. p. 94.
[19] TR Vol. I p. 7 (p. 16 L. 21 – p. 17 L. 23).
[20] TR Vol. I p. 7 (p.14 Ll. 1-2).
[21] R. p. 94.
[22] R. pp. 95-102.
[23] R. p. 106.
[24] TR. Vol. I p. 10 (p. 29 Ll3-20).

its order denying the motion for reconsideration.[25] On August 10, 2017, the Magistrate Court entered Judgment.[26]

On September 20, 2017, MRS timely appealed the Magistrate Court's decision denying an award of prejudgment interest, costs, and attorney's fees.[27] On March 9, 2018, the District Court issued its Opinion on Appeal and remanded the case to the Magistrate Court explaining that the Magistrate Court had not entered findings sufficient for the District Court to review and stating that "the trial court's analysis appeared to focus on equitable principles relating to notice rather than the legal principles outlined above."[28]

On remand and after a hearing before the Magistrate Court on April 30, 2018, the Magistrate Court issued its Decision & Order on May 8, 2018 denying MRS' request for attorney's fees, costs, and prejudgment interest.[29] The Magistrate Court based its decision on the following (1) attorney's fees could not be awarded pursuant to I.C. § 12-120(3) because Gepford received services for a "personal purpose" rather than a commercial purpose;[30] (2) MRS is not entitled to attorney's fees under I.C. § 12-120(1) because it "failed to provide notice to the Defendant"[31]; and (3) "[e]ven if Plaintiff technically was a prevailing party the court finds that a fair and equitable award of attorney's fees and costs would be exactly what Plaintiff's counsel asked for in his motion for summary judgment. That would be $0.00."[32]

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[25] R. pp. 106-108.
[26] R. pp. 109-110.
[27] R. pp. 78-80.
[28] R. p. 253.
[29] R. pp. 116-119.
[30] R. p. 117.
[31] R. p. 118.
[32] R. p. 118.

On May 22, 2018, MRS again sought reconsideration, [33] and again Gepford opposed the motion.[34] The Magistrate Court held a hearing on MRS' motion for reconsideration on July 2, 2018 and denied MRS' motion as to attorney's fees and costs but granted MRS' motion for prejudgment interest.[35] On July 12, 2018, the Magistrate Court entered its Order denying MRS cost and attorney's fees but granting MRS' request for prejudgment interest.[36] Also on July 12, 2018, the Magistrate Court entered a Judgment.[37] On July 24, 2018, MRS timely appealed the Magistrate Court's decision denying and award of attorney's fees or costs.[38]

On appeal, the District Court concluded that "[n]either party contends that the basis of MRS' original claim was not a contract for the purchase of services and the evidence undisputedly supports that conclusion as a matter of law."[39] In other words, the District Court found that Gepford received services when he obtained anesthesia services from his doctors. However, the District Court then made the same analytical mistake as the Magistrate Court made and held that the Magistrate Court did not err when it found that the transaction in this case was for a personal purpose and not a commercial purpose. Therefore, according to the District Court, Idaho Code § 12-120(3) did not apply.[40]

The District Court did not rule on attorney's fees pursuant to I. C. § 12-120(1) but simply affirmed the decision of the Magistrate Court finding the that the Magistrate Court perceived

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[33] R. pp. 120-145.
[34] R. pp. 148-149
[35] R. p. 158-159.
[36] R. pp. 161-162.
[37] R. pp. 163-164.
[38] R. pp. 257-259
[39] R. p. 322.
[40] R. pp-323-324

the issue of attorney's fees as being discretionary and had "within the bounds of such discretion, acted consistent with legal standards and arrived at its decision through an exercise of reason."[41] Additionally, the District Court concluded that MRS was precluded from recovering attorney's fees and costs on appeal since "MRS is not the prevailing party on the appeal."[42] On July 23, 2019, MRS filed a timely Notice of Appeal.[43]

ISSUES ON APPEAL

I. DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR AFFIRMING THE DECISION OF MAGISTRATE COURT WHO RULED THAT MRS WAS NOT THE PREVAILING PARTY AND NOT ENTITLED TO AN AWARD OF ATTORNEY FEES UNDER I.C. § 12-120(1) AND (3) AND COSTS?

II. IS MRS ENTITLED TO RECOVER ITS ATTORNEY'S FEES AND COSTS ON APPEAL PURSUANT I.A.R. 40 AND 41?

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR AFFIRMING THE DECISION OF THE MAGISTRATE COURT WHO RULED THAT MRS WAS NOT THE PREVAILING PARTY AND NOT ENTITLED TO ATTORNEY'S FEES AND COSTS.

A. Standard of Review.

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

> The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Bailey*

[41] R. p. 319-326.
[42] Id.
[43] R. pp. 326-29.

v. Bailey, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012) (quoting *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008)).

Portfolio Recovery Assocs., LLC. v. MacDonald, 162 Idaho 228, 231 (2017).

"Thus, this Court does not review the decision of the magistrate court." *Pelayo v. Pelayo*, 154 Idaho 855, 859 (2013). "Rather, we [this Court] are 'procedurally bound to affirm or reverse the decisions of the district court.'" *Id.* (quoting *State v. Korn*, 148 Idaho 413, 415 n.1 (2009)).

"Prevailing party determinations are amongst the discretionary capacities of the trial courts; however, trial court discretion must be exercised consistently within the applicable legal standards. When the trial court incorrectly applies the appropriate legal standards regarding prevailing parties, this Court may correct the ruling as a matter of law." *Clarke v. Latimer*, 165 Idaho 1, 6 (2018)(Citations omitted).

"Under some circumstances application of these standards requires a holding that one party is the prevailing party on a particular claim as a matter of law." *Sanders v. Lankford*, 134 Idaho 322, 326 (Ct.App.2000) (Citations omitted). A reviewing court should apply this rule when application of the Rule 54(d)(1)(B) factors can lead only to a conclusion that the court got the prevailing party wrong. *Id*; *Clarke*, 165 Idaho at 1; *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719 (2005); *Sanders v. Lankford*, 134 Idaho 322 (Ct.App.2000); and *Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259 (Ct.App.2000)

B. MRS Is The Prevailing Party Because MRS Obtained The Most Favorable Outcome Possible On A Single Issue Complaint And In The Absence Of A Counterclaim Whereas Gepford Paid The Principal Amount In Full.

Idaho Rule of Civil Procedure 54(d)(1)(B) provides:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

"Thus, under I.R.C.P. 54(d)(1)(B), there are three principal factors the trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. The result obtained may be the product of a court judgment or of a settlement reached by the parties." *Sanders,* 134 Idaho at 325. (Citations omitted).

With respect to these three principal factors, "Rule 54(d)(1)(B) directs the court to consider, among other things, the extent to which each party prevailed relative to the 'final judgment or result.'" *Clarke*, 165 Idaho at 6 *citing Hobson Fabricating Corp. v. SE/Z Constr., LLC*, 154 Idaho 45, 49 (2012). "'[I]t may be appropriate for the trial court, in the right case, to consider the 'result' obtained by way of settlement reached by the parties.'" *Id. citing Bolger v. Lance*, 137 Idaho 792, 797 (2002). A court abuses its discretion when the court's prevailing party analysis "does not fall within the considerations required by Rule 54(d)(1)(B)." *Clarke*, 165 Idaho at 6. A plaintiff that raises a single claim, presents a single issue, and obtains the

most favorable outcome that could possibly be achieved in the absence of a counterclaim is a prevailing party as a matter of law. *Clarke*, 165 Idaho at 1.

See also Houpt v. Wells Fargo Bank, Nat. Ass'n, 160 Idaho 181 (2015) (although the defendant claimed that the bank on its foreclosure claim should not be deemed the prevailing party because the bank "prevailed" only due to the defendant's voluntary stipulation to sell the property, the bank obtained "the most favorable outcome that could possibly be achieved"); *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho at 719 (noting that the prevailing parties were those that obtained "the most favorable outcome that could possibly be achieved"); and *Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho at 259 (reversing a trial court's determination of prevailing party where the trial court ignored that one party's "result obtained" was the most favorable outcome that could possibly be achieved on a single claim in the absence of any counterclaim).

While plaintiff has been unable to locate any Idaho case law on this issue, at least one California case has held that a defendant cannot pay a plaintiff the amount at issue ***after*** filing the complaint to prevent the plaintiff from being a prevailing party. *Joseph Magnin Co. v. Schmidt*, 89 Cal. App. 3d Supp. 7, 152 Cal. Rptr. 523 (App. Dep't Super Ct. 1978). In *Schmidt*, the debtor paid the bill on a retail installment contract only after the creditor had filed a complaint. *Id.* In that case, as in this case, the single issue of the case was whether the creditor was entitled to attorney's fees and costs as the prevailing party pursuant to statute. The trial court found that the creditor was not the prevailing party and rendered judgment in favor of the debtor. *Id.*

The court on appeal reversed the trial court holding that where the debtor paid the creditor the balance due on a retail installment contract after the creditor filed the complaint to recover the money due on the retail installment contract, the creditor was the prevailing party and thus entitled to an award of attorney's fees and costs from the debtor. *Id.* Although the precise issue in *Schmidt* was framed a little differently than here, the appellate court's reasoning is spot on:

> That neither law, equity, fairness nor justice requires that a defendant debtor be entitled to delay payment of a debt in circumstances such as these until after a lawsuit has been filed and thus defeat a plaintiff-creditor's entitlement to attorney's fees and costs. What respondent seeks here is not merely a liberal interpretation of section 1811.1 but an emasculation of its purpose to reward defendants with good defenses who risk sums for attorney's fees and advance costs in behalf of those good defenses.

Id. at 12.

Similarly, the decision to reward a defendant who delays payment until after a complaint has been filed "emasculates" the purpose of Rule 54(d)(1)(B) that allows a creditor to file a complaint to recover what it is owed including prejudgment interest, costs and attorney's fees incurred to collect the debt. The Magistrate Court's decision here, if allowed to stand, would frustrate the purpose of what it means to be a prevailing party. The Magistrate Court's decision would also encourage unnecessary litigation because debtors would be incentivized not to pay until a complaint is filed—after all, if the creditor does not file a complaint, the debtor never has to pay, but if the creditor sues, the debtor pays the creditor what the debtor owed the creditor anyway without risk of paying the plaintiff's attorney's fees, costs, or prejudgment interest. And a creditor would be punished for taking necessary steps to collect

what it is rightfully owed because the creditor would not recover attorney's fees, costs and prejudgment interest.[44]

Here, the facts are undisputed that MRS filed a complaint raising a single claim that Gepford owed MRS as assignor of the original creditor $416 as the principal amount of a debt. Sixteen days after being served with the Complaint, Gepford paid the original creditor the entire amount owing of $416. Gepford did not file any counterclaims. MRS achieved "the most favorable outcome that could possibly be achieved" while Gepford did not file any counterclaim. In fact, the Magistrate Court even awarded a judgment in favor of MRS for all prejudgment interest.[45] The Magistrate Court's findings and conclusions that MRS is not a prevailing party are therefore not supported by substantial and competent evidence. Accordingly, this Court should reverse the District Court's decision affirming the Magistrate Court's decision on the prevailing party issue.

C. The District Court Committed Reversible Error When It Affirmed The Magistrate Court's Determination That MRS Was Not Entitled To Attorney's Fees Pursuant to I.C. § 12-120(1).

Idaho Code Section 12-120(1) states in relevant part:

> Except as provided in subsections (3) and (4) of this section, 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. 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;

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[44]This case illustrates this point perfectly. The only reason Gepford paid anything is that MRS filed suit. In fact, Gepford paid VVA on August 18, 2016 and filed his answer on August 19, 2016. This tends to establish that if MRS had not sued the defendant, Gepford never would have paid anything.

[45]R. pp. 260-61.

The Magistrate Court found that "[b]ecause the Plaintiff failed to provide notice to the Defendant, attorney's fees cannot be awarded to Plaintiff per Idaho Code § 12-120(1)."[46] However, the uncontested, unimpeached, and unopposed Declaration of Taylor Lugo dated May 22, 2018 establishes that MRS sent the first demand notice on February 29, 2016 (more than ten days before the Complaint was filed) and that MRS never received any returned mail.[47]

Additionally, the Declaration Taylor Lugo also shows that Gepford called MRS after MRS sent and Gepford received the demand notice.[48] Specifically, Exhibit "B" attached to the Declaration of Taylor Lugo shows that MRS sent a second demand notice to Gepford on June 14, 2016 and that six days later on June 20, 2016 Gepford called MRS and had an extended conversation.[49] It is impossible that without having received the demand notice of the debt from MRS that Gepford would have known the debt had been assigned MRS and called MRS regarding the debt. At the hearing held on July 2, 2018, Gepford did not deny making that phone call but stated, "I don't know for a fact, your Honor" and "I cannot stand on that, whether or not I received a phone call."[50]

Even assuming Mr. Gepford did not receive the demand notices, contrary to the evidence that he called MRS and therefore must have received at least one of the demand notices, it cannot be disputed that MRS sent demands. Gepford never opposed, impeached, or objected to Taylor Lugo's Declaration that establishes that MRS sent the demand notices.

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[46] R. p. 118.
[47] R. pp. 130-39.
[48] Id.
[49] R. pp. 130-39.
[50] TR Vol. I p. 22 (p. 24 Ll. 21-25).

Importantly, MRS has complied with the requirement contained in I.C. § 12-120(1) that demand be made on the defendant 10 days prior to filing the action. There is no requirement that the defendant receive the demand.

The record shows that the Magistrate Court's decision was not supported by "substantial and competent evidence to support the magistrate's findings of fact" nor "the magistrate's conclusions of law follow from those findings." *Portfolio Recovery Assocs., LLC. v. MacDonald*, 162 Idaho at 231. Therefore, this Court should reverse the decision of the District Court affirming that part of the Magistrate Court's decision and remand this action to the Magistrate Court to award reasonable attorney's fees under I.C. § 12-120(1).

D. The District Court Committed Reversible Error When It Affirmed The Magistrate Court's Determination That MRS Was Not Entitled To Attorney's Fees Pursuant to I.C. § 12-120(3).

Idaho Code Section 12-120(3) states:

> 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. (Emphasis added).

The Magistrate Court correctly explained that "Idaho Code § 12-120(3) governs a trial court's award of attorney's fees to the prevailing party ***in an action dealing with a contract related to the purchases of services***" and that if the requirements set forth therein are met, an award of attorney's fees ***is mandatory***."[51] The Magistrate Court even correctly stated that

[51] R. p. 117.

"there is no dispute that the bill in question here is for services rendered by Valley View Anesthesia."[52]

However, the Magistrate Court's analysis entered a "forbidden path" when the Magistrate Court determined that "the only question is whether the rendering of services is a commercial transaction."[53] The Magistrate Court incorrectly conflated the "services" portion of Section 12-120(3) with the "commercial transaction" portion of Section 12-120(3). In the end, the Magistrate Court improperly believed that "services" must be for a "commercial transaction" before MRS could recover attorney's fees under Section 12-120(3). Thus, the Magistrate Court found and concluded that MRS was not entitled to recover attorney's fees under Section 112-120(3) because "medical treatment provided to a patient could not be for anything other than a personal purpose. Therefore, Idaho Code § 12-120(3) does not allow for the award of attorney's fees to this Plaintiff."[54] This faulty analysis lead the Magistrate Court to the conclusion that "[t]herefore, Idaho Code § 12-120(3) does not allow for the award of attorney's fees to this Plaintiff."

Subsequently, the District Court perpetuated the conflation error by accepting the Magistrate Court's improper analysis of Idaho Code § 12-120(3),[55] even after the District Court had explicitly found, as a matter of law, that the claim involved a contract for the purchase of services.[56] Because MRS plead this claim as a contract for purchase of services in its

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[52] Id.
[53] Id..
[54] R. p. 117.
[55] R. p. 324.
[56] R. p. 322.

Complaint,[57] and because the Magistrate Court found that the contract was for the purchase of services,[58] the Magistrate Court's conclusions of law do not follow from its findings. Accordingly, this Court should reverse the decision of the District Court affirming the Magistrate Court's decision on this issue.

E. The District Court Committed Reversible Error When It Affirmed The Magistrate Court's Determination That MRS Was Not Entitled To Costs.

Idaho Rule of Civil Procedure 54(d)(1)(A) states that "[c]osts are allowed as a matter of right to the prevailing party." Here, MRS is the prevailing party and thus entitled to costs as a matter of right. Because the Magistrate Court's findings and conclusions on the prevailing party issue were not supported by substantial and competent evidence, this Court should reverse the decision of the District Court that affirmed the Magistrate Court's decision denying MRS costs as a matter of right.

F. On Remand This Court Should Help Guide The Magistrate Court To Award An Amount Of Reasonable Attorney's Fees Based on the Factors Found In Rule 54.

On remand from the District Court after the first appeal, the Magistrate Court in its Decision and Order, stated that even if I.C. § 12-120(3) were to apply, MRS "should be awarded the sum of $0.00 as attorney fees" because "[t]his is the sum Plaintiff's counsel requested in his Brief in Support of Motion for Summary Judgment."[59] Gepford paid the amount sought in the complaint but only after the lawsuit was filed and served. Thus, MRS faced the practical problem of how to obtain a judgment that would trigger filing post judgment motions for

[57] R. pp. 14-16.
[58] R. p. 322.
[59] R. p. 117.

attorney's fees, costs and prejudgment interest. MRS filed summary judgment to obtain this judgment but recovered zero dollars only because Gepford had paid the claim in full after being served with process. The Magistrate Court believed that even if MRS were entitled to an award of attorney's fees and costs, zero dollars should be awarded because that is what MRS sought on summary judgment.

The Magistrate Court on remand will be presented with another discretionary decision, i.e., the amount of reasonable attorney's fees to be awarded. What constitutes a reasonable fee is a discretionary determination for the Magistrate Court, to be guided by the criteria of I.R.C.P. 54(e)(3). *Kelly v. Hodges,* 119 Idaho 872 (Ct.App.1991). These criteria include the "time and labor required," I.R.C.P. 54(e)(3)(A), and "any other factor which the court deems appropriate in the particular case," I.R.C.P. 54(e)(3)(L). However, "the court may not focus upon such 'other' factors to the exclusion of the 'time and labor' and the remaining factors listed" in Rule 54(e)(3). *DeWils Interiors, Inc. v. Dines,* 106 Idaho 288, 290 (Ct.App.1984).

MRS asks this Court to provide the Magistrate Court on remand with some comments that MRS' requesting a zero-dollar judgment was for the purpose of obtaining a judgment to trigger post judgment motions. MRS' request for a zero-dollar judgment is not a factor in awarding a reasonable amount of attorney's fees.

II. MRS IS ENTITLED TO RECOVER ITS ATTORNEY'S FEES AND COSTS ON APPEAL PURSUANT TO I.A.R. 40 AND 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,

MRS is entitled to recover its costs pursuant to Rule 40. Similarly, Rule 41 provides for an award of attorney's fees. A prevailing party on appeal is entitled to attorney's fees on appeal if 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 (Idaho Ct. App. 2008).

In this case, MRS was entitled to attorney's fees pursuant to I.C. §12-120(1) & (3) before the Magistrate Court 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).[60] 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.[61] Because MRS was entitled to fees pursuant to I.C. § 12-120(1) & (3) before the Magistrate Court, MRS 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, MRS respectfully requests that this Court reverse the decision of the District Court Affirming the Magistrate Court's Decision that MRS is not entitled to an award of attorney's fees and costs as the prevailing party. Additionally, MRS requests that this Court award it attorney's fees and costs on appeal.

[60] R. p. 15.
[61] R. pp. 14-15.

DATED this 27th day of November, 2019.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____
Bryan N. Zollinger
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 27th, 2019 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 hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Persons Served:

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