

Bryan D. Smith, Esq.
Idaho State Bar # 4411
McGRATH, MEACHAM & SMITH, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

FILED
JAN 10 10:10 AM '09
CLERK OF DISTRICT COURT

RICK CARNAROLI

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BANNOCK
MAGISTRATE DIVISION

MEDICAL RECOVERY SERVICES, LLC,
an Idaho limited liability company,

Plaintiff,

vs.

BILLY M. CARNES and JANE DOE,
husband and wife,

Defendants.

Case No. CN 07 300 DC

COMPLAINT

Fee Category: B.1

Fee: \$68.00

COMES NOW plaintiff, Medical Recovery Services, LLC, and for a claim against
defendants, alleges as follows:

1. The plaintiff is an Idaho limited liability company qualified to do business in the State of Idaho.
2. The defendant, Billy M. Carnes, is an individual residing in the State of Idaho.
3. The Doe defendant is sued herein under a fictitious name. The fictitiously named Doe defendant is the spouse of the defendant, Billy M. Carnes, who incurred the debt sued upon in furtherance of and for the benefit of the community between the defendants. Accordingly, the

Doe defendant is liable for the debt sued upon, and the plaintiff will amend this complaint by inserting the true name when the Doe defendant's true name is ascertained.

4. At all times mentioned herein the plaintiff was, and still is, a licensed and bonded collector under the laws of the State of Idaho, and before the commencement of this action the debt herein sued upon were assigned by Dr. Douglas Norman to the plaintiff for the purpose of collection. The plaintiff is now the holder thereof for such purposes. The defendants are husband and wife who incurred the debt as alleged herein for community purposes.

5. The defendants are indebted to the plaintiff by reason of the allegations herein and owe the plaintiff in the following stated amounts:

DR. DOUGLAS NORMAN	
Principal Amount Owing	\$ 759.00
Prejudgment Interest	<u>\$ 47.66</u>
Subtotal	\$ 806.66
TOTAL	\$ 806.66

6. The plaintiff is entitled to further prejudgment interest from the date the complaint is filed until judgment is entered.

7. Despite the plaintiff's requests and demands, and without offering any reason or objection to the bill, the defendants have failed to pay the indebtedness in full.

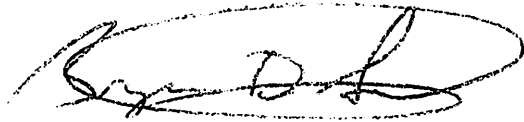
8. To obtain payment of the obligation due, the plaintiff has been required to retain the services of McGrath, Meacham & Smith, PLLC, attorneys at law. This action arises from an open account and/or from services provided. Moreover, written demand for payment on the defendants has been made more than 20 days prior to commencing this action. Pursuant to Idaho Code § 12-120(10 and 12-120(3) the plaintiff is entitled to recover the plaintiff's attorney's fees incurred herein in the sum of \$350.00 if judgment is taken by default and such greater amounts as may be evidenced to the court if this claim is contested. Pursuant to Idaho Rules of Civil

procedure § 54(d)(1) the plaintiff is further entitled to recover the plaintiff's costs incurred herein.

WHEREFORE, the plaintiff demands judgment against the defendants, and each of them, for the principal sum of \$759.00, together with legal interest on said sum in the amount of \$47.66, the filing fee of \$68.00 and attorney's fees incurred herein in the sum of \$350.00, for a combined total of \$1,224.66 plus the costs of suit to be proven to the court, and for such other and further relief as is equitable and just.

DATED: 5/15 January, 2007.

McGRATH, MEACHAM & SMITH, PLLC



Bryan D. Smith, Esq.
Attorneys for Plaintiff

**NOTICE UNDER
FEDERAL FAIR DEBT COLLECTION PRACTICES ACT
15 U.S.C. §§ 1692a to 1692o**

Billy M. Carnes and Jane Doe
722 Jefferson
Pocatello, Idaho 83201

1. Amount of Debt: **\$806.66**
2. Name of Creditor: **Medical Recovery Services, LLC**
3. Unless you dispute the validity of the above-described debt, or a portion thereof, within 30 days of your receipt of this letter, we will assume that the debt is valid.
4. If you notify us, in writing, within 30 days of your receipt of this letter that you dispute the debt, or a portion thereof, we will obtain verification of the debt, or a copy of any judgment, and will mail you a copy of the verification or judgment.
5. If you request, in writing, within 30 days of your receipt of this letter, we will provide you with the name and address of the original creditor, if different from the current creditor described above.
6. This Notice informs you of specific rights to information under federal law. Any judgment in this legal action will not be taken by default until 30 days after you have been served a summons and a copy of the complaint. Thus, no judgment will be taken within 30 days of this Notice. The 30 days allowed by this Notice are not in addition to the requirements of state law.

NOTE: This is an attempt to collect a debt. Any information obtained will be used for that purpose.

g

Billy m CARNES
Full Name of Party Filing This Document

722 JEFFERSON AVE
Mailing Address (Street or Post Office Box)

POCATELLO ID 83201
City, State and Zip Code

Telephone Number

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

Medical Recovery Services LLC
Plaintiff,

vs.

Billy m CARNES
Defendant.

Case No. W 07 306 DC

ANSWER

Fee Category: I
Filing Fee: \$ 58.00

(your name) Billy m CARNES, for his/her Answer to the
_____, states:

1. I admit the following paragraphs (list each paragraph number):

2. I deny the following paragraphs (list each paragraph number):

5. ^{not} INDEBTED

S

3. I deny the following paragraphs because I do not have enough information to admit or deny them (list each paragraph number): _____

4. [] I deny the portion of paragraph _____, that states: _____

_____ and I admit the remainder of that paragraph.

5. [] I deny the portion of paragraph _____, that states: _____

_____ and I admit the remainder of that paragraph.

6. I deny everything I did not admit.

7. [X] I want the Complaint dismissed.

AFFIRMATIVE DEFENSE(S)

(State each affirmative defense that applies in a separate paragraph - see I.R.C.P. 8(2))

I DO NOT FEEL I OWE THIS MONEY FOR SEVERAL REASONS
THE DOCTOR DID NOT FOLLOW MY INSTRUCTIONS AND
AND MUTILATE ME ON PURPOSE AS TO FORCE ME INTO
AN OPERATION I DID NOT WANT AND THE AMOUNT ASK FOR IS
TO MUCH

VERIFICATION: I swear I have read this Answer and state that all facts included are true.

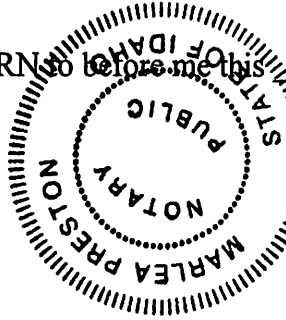


WHEREFORE, I ask the Court to enter the orders requested above.

DATE Feb 12, 2007.

Billy M Carnes
Signature of Defendant

SUBSCRIBED AND SWORN to before me this 12 day of Feb, 2007.



Marlea Preston
Notary Public for Idaho
Residing at: Proctor
My Commission expires: 3/4/08

CERTIFICATE OF SERVICE

I certify I served a copy to: (name all parties or their attorneys in the case, other than yourself)

Bryan Smith
(Name)
414 3rd Ave
(Street or Post Office Address)
Idaho Falls Idaho 83404
(City, State, and Zip Code)

- By Mail
- By fax to (number) _____
- By personal delivery

(Name)

(Street or Post Office Address)

(City, State, and Zip Code)

- By Mail
- By fax to (number) _____
- By personal delivery

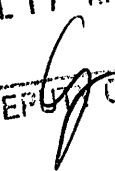
Date: _____

Billy M Carnes
Signature

Typed/printed Name of Party Signing

Bryan D. Smith, Esq.
Idaho State Bar # 4411
McGRATH, MEACHAM & SMITH, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

FILED
BANNOCK COUNTY
CLERK OF THE COURT

2007 JUL 17 AM 10:34
BY  CLERK

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK
MAGISTRATE DIVISION

MEDICAL RECOVERY SERVICES, LLC,
an Idaho limited liability company,

Plaintiff,

vs.

BILLY M. CARNES,

Defendants.

Case No. CV-2007-306-OC

**MOTION FOR SUMMARY
JUDGMENT**

COMES NOW the plaintiff, Medical Recovery Services, LLC, by and through its counsel of record, Bryan D. Smith, Esq., of the firm McGrath, Meacham & Smith, PLLC., and moves the Court for pursuant to I.R.C.P. 56 for an order granting summary judgment in favor of plaintiff.

This motion is made on the grounds that there is no genuine issue of material fact which must be decided and that plaintiff, MEDICAL RECOVERY SERVICES, LLC, an Idaho limited liability company, is entitled to a judgment in the above-entitled action as a matter of law.


This motion is based upon this Motion, the Notice of Hearing, the Brief in Support of Motion for Summary Judgment, the Affidavit of Kimball Jeppesen, and upon the court files and records herein.

Plaintiff requests oral argument on said motion.

DATED this 16th day of July, 2007.

McGRATH, MEACHAM & SMITH, PLLC

By:


Bryan D. Smith, Esq.

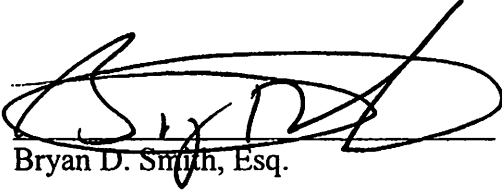
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of July, 2007, I caused a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT** 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:

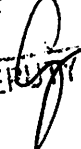
Billy M. Carnes
722 Jefferson
Pocatello, ID 83201

() Hand () Mail


Bryan D. Smith, Esq.

FILED
BANNOCK COUNTY
CLERK OF THE COURT

Bryan D. Smith, Esq.
Idaho State Bar # 4411
McGRATH, MEACHAM & SMITH, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

2007 JUL 17 AM 10:34
BY  DEPUTY CLERK

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK
MAGISTRATE DIVISION

MEDICAL RECOVERY SERVICES, LLC,
an Idaho limited liability company,

Plaintiff,

vs.

BILLY M. CARNES,

Defendants.

Case No. CV-2007-306-OC

**AFFIDAVIT IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

STATE OF IDAHO)
)ss.
County of Madison)

KIMBALL JEPPESEN, being first duly sworn, deposes and states as follows:

1. I am the Manager of Medical Recovery Services, LLC. As such, I am familiar with its accounts and the accounts of Dr. Douglas Norman assigned to Medical Recovery Services, LLC for collection.


2. This case arises out of Dr. Douglas Norman account numbers 9866. A true and correct copy of this account is attached as Exhibit "A." Exhibit "A" shows that Dr. Douglas Norman rendered services that the defendant, Billy M. Carnes, agreed to pay for. There remains an unpaid balance for these services in the amount of \$759.00.

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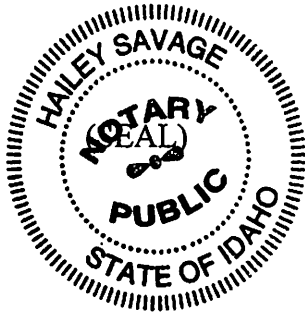
3. Attached as Exhibit "B" is a true and correct copy of assignment of account for the plaintiff's claim in this case. This document shows that Dr. Douglas Norman has assigned its claim against the defendant to Medical Recovery Services, LLC.


Further, your affiant sayeth naught.

DATED this 16th day of July, 2007.


Kimball Jeppesen

SUBSCRIBED AND SWORN before me this 16th day of July, 2007.




Notary Public for the State of Idaho
Residing at: Boise
My Commission Expires: 1/9/12

Bryan D. Smith, Esq.
ISB # 4411
McGRATH, MEACHAM & SMITH, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

FILED
BANNOCK COUNTY
CLERK

2007 OCT 11 AM 10:30

DEPUTY CLERK

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK
MAGISTRATE DIVISION

MEDICAL RECOVERY SERVICES,
LLC., an Idaho limited liability company,

Plaintiff,

vs.

BILLY M. CARNES,

Defendant.

Case No. CV-2007-306-OC

JUDGMENT

IN THIS MATTER, the Court having entered Summary Judgment in favor of
Medical Recovery Services, LLC. and against Billy M. Carnes.


NOW, ON THIS DAY, on application of Bryan D. Smith, Esq., of the firm
McGrath, Meacham & Smith, PLLC, attorneys for the plaintiff, Medical Recovery
Services, LLC., it is hereby ordered that judgment be entered herein against the
defendants, Billy M. Carnes, in accordance with the Court's Order granting Summary
Judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff has and recovers from the defendant the sum of \$ _____ said amount being itemized as follows, to-wit:

A.	Principal	\$	759.00
B.	Prejudgment interest from July 8, 2006, to September 17, 2007, at 12.00% for a per diem rate of \$0.25 for 436 days	\$	109.00
C.	Prejudgment Interest from September 17, 2007, to entry of Judgment at 12.00% for a per diem rate of \$0.25 for <u>3</u> days	\$	<u>.75</u>
D.	Attorney's Fees	\$	<u>731.30</u>
E.	Costs	\$	<u>148.00</u>
F.	Less payment(s)	\$	-0.00
TOTAL			\$ <u>1748.10</u> <i>SOT</i>

§1
Interest shall accrue on the total amount of this judgment at the rate provided by law, and execution may issue on this judgment.

DATED this 11th day of Oct, 2007.


Honorable Steven A. Thomsen
Magistrate Judge

KENNETH E. LYON, JR.
P.O. Box 4866
Pocatello, ID 83206
(208)233-1240
(208)232-8867 fax
ISB#1117

2008 APR 18 PM 12: 28

BY  DEPUTY CLERK

Attorney for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MEDICAL RECOVERY SERVICES, LLC,)
an Idaho limited liability company,)

Plaintiff,)

vs.)

BILLY M. CARNES,)

Defendant.)

Case No. CV-2007-306-OC

OBJECTION TO APPLICATION
FOR AWARD OF
SUPPLEMENTAL ATTORNEY
FEES, MOTION FOR TRIAL, AND
MOTION TO RETURN MONEY
WRONGFULLY TAKEN BY
PLAINTIFF'S ATTORNEY FROM
THE DEFENDANT

COMES NOW Kenneth E. Lyon, Jr., attorney appearing for the Defendant, and petitions the Court as follows:

1. The Defendant objects to Plaintiff's Application for Award of Supplemental Attorney Fees on the basis the fees are excessive, no proof they were properly earned, and in other ways are objectionable.
2. The Plaintiff filed a Motion for Summary Judgment. Under Idaho Rules of Civil Procedure, the Defendant is to be allowed 90 days to respond. The Judgment was

OBJECTION TO APPLICATION FOR AWARD OF SUPPLEMENTAL ATTORNEY FEES, MOTION FOR TRIAL, AND MOTION TO RETURN MONEY WRONGFULLY TAKEN BY PLAINTIFF'S ATTORNEY FROM THE DEFENDANT



signed on the 91st day after the Motion was mailed. This means the Defendant was not given the appropriate time frame to respond and the Judgment should be set aside and Trial should be scheduled.

- 36
3. The Plaintiff had the Defendant appear in Court. This was based upon a letter. When the Defendant appeared, he was illegally searched and informed he had to do anything and everything the Plaintiff's attorney told him to do. This is a violation of the Idaho State Constitution and the Federal Constitution. In addition, the attorney for the Plaintiff was informed all the earnings and money which the Defendant receives is either from Social Security and/or Disability. The Defendant has no other source of income. At the time, the Defendant had in his wallet \$1,640.00. He was instructed by the Plaintiff's attorney to give that money to him. This instruction was made under the pretext of law, when in fact the Plaintiffs attorney knew, or should have known, all of the money was exempt under Idaho law.

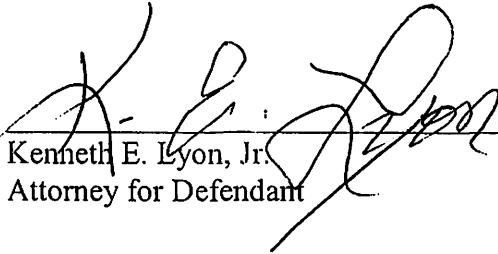
WHEREFORE, Defendant prays as follows:

1. The Court deny the Plaintiff's Application for Supplemental Attorney Fees.
2. The Court grant a trial setting in the above matter and set aside the Default Judgment which was improperly entered.
3. All money, namely the sum of \$1,640.00, which was wrongfully taken from the Defendant, be returned to him, together with interest from the time it was taken until the time it is returned.

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4. The Plaintiff pay a reasonable attorney fee for the necessity of bringing this action in order to protect the rights of the Defendant against the Plaintiff pursuant to Idaho law.

Dated this 18th day of April, 2008.

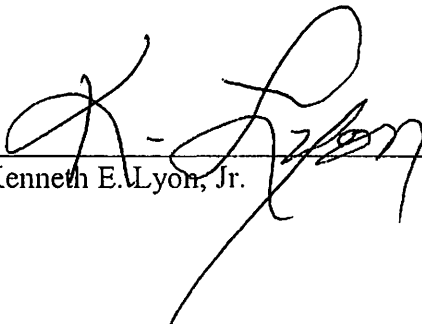

Kenneth E. Lyon, Jr.
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2008, I served a true and correct copy of the foregoing OBJECTION TO APPLICATION FOR AWARD OF SUPPLEMENTAL ATTORNEY FEES, MOTION FOR TRIAL, AND MOTION TO RETURN MONEY WRONGFULLY TAKEN BY PLAINTIFF'S ATTORNEY FROM THE DEFENDANT as follows:

Bryan D. Smith
Attorney at Law
P.O. Box 50731
Idaho Falls, ID 83405

] U.S. Mail
] Courthouse Mail Box
] Fax:


Kenneth E. Lyon, Jr.

S

Bryan D. Smith, Esq.
Idaho State Bar # 4411
McGRATH, MEACHAM & SMITH, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

FILED
BY: *CA* 13
DEPUTY CLERK
PH: 12-4-7

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK
MAGISTRATE DIVISION

MEDICAL RECOVERY SERVICES, LLC,
an Idaho limited liability company,

Plaintiff,

vs.

BILLY M. CARNES,

Defendants.

Case No. CV-2007-306-OC

**REPLY TO OBJECTION TO
APPLICATION FOR AWARD OF
SUPPLEMENTAL ATTORNEY FEES,
MOTION FOR TRIAL, AND MOTION
TO RETURN MONEY WRONGFULLY
TAKEN BY PLAINTIFF'S ATTORNEY
FROM THE DEFENDANT**

COMES NOW, Plaintiff, Medical Recovery Services, LLC, and files this response to defendant's objection to application for award of supplemental attorney fees, motion for trial, and motion to return money wrongfully taken by plaintiff's attorney from the defendant.

1. Defendant has submitted no proof that plaintiff's fee request is excessive, nor properly earned, not "in other ways objectionable";

2. Contrary to defendant's assertion, a party has 28 days to respond to a motion for summary judgment, not 90 days. See I.R.C.P. 56(c); moreover, under I.R.C.P. 60(b), the defendant had six months to move to set aside the judgment. Here, the judgment was entered on October 11, 2008 giving the defendant until April 11, 2008 to file a motion to

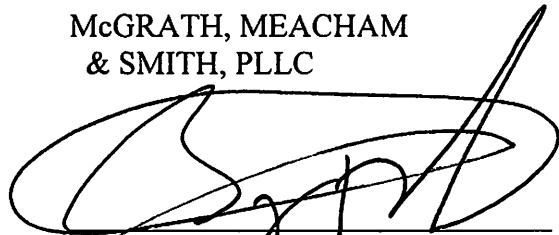
set aside the judgment. Given that the defendant has not filed such motion at all and is now time-barred, the court should not set aside the judgment; and

3. The defendant voluntarily appeared at his supplemental examination at which time the court swore the defendant in. Counsel for the plaintiff asked the defendant if he had any money in his wallet, and the defendant responded that he had \$1,640 that he carries around with him and that he had saved up over time. The defendant also said that he had two bank accounts, one of which was for his social security checks. Counsel for plaintiff asked the defendant to pay the money on the judgment or counsel for the plaintiff would ask that the court instruct him to pay the money on the judgment. The defendant voluntarily paid over the \$1,640 to apply to the judgment and further sent counsel for plaintiff another \$273.25 by mail on February 27, 2008 to pay the judgment off in full.

Accordingly, the plaintiff asks that the court grant plaintiff's motion for supplemental fees and deny the defendant the relief he requests.

DATED this 22nd of April, 2008.

McGRATH, MEACHAM
& SMITH, PLLC



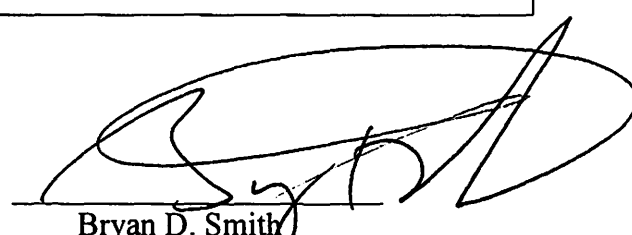
Bryan D. Smith, Esq.
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of April, 2008 I caused a true and correct copy of the foregoing **REPLY TO OBJECTION TO APPLICATION FOR AWARD OF SUPPLEMENTAL ATTORNEY FEES, MOTION FOR TRIAL, AND MOTION TO RETURN MONEY WRONGFULLY TAKEN BY PLAINTIFF'S ATTORNEY FROM THE DEFENDANT** to be served by placing the same in a sealed envelope and placing it in the United States Mail, postage prepaid, or by causing the same to be hand delivered to the following:

<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery	Bannock County Court House 624 E Center Pocatello, ID 83205
<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery	Kenneth E. Lyon Jr. PO Box 4866 Pocatello, ID 83205

By: _____


Bryan D. Smith

Bryan D. Smith, Esq.
ISB # 4411
McGRATH, SMITH,
& ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

FILED
BANNOCK COUNTY
CLERK
2008 APR 29 AM 9:18
BY CA
DEPUTY CLERK

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK
MAGISTRATE DIVISION

MEDICAL RECOVERY SERVICES, LLC,
an Idaho limited liability company,

Plaintiff,

vs.

BILLY M. CARNES,

Defendant.

Case No. CV-2007-306-OC

AMENDED JUDGMENT

IN THIS MATTER, the Court having entered an order awarding supplemental attorney's fees in favor of Medical Recovery Services, LLC, and against BILLY M. CARNES.

NOW, ON THIS DAY, on application of Bryan D. Smith, Esq., of the firm McGrath, Smith & Associates, PLLC, attorneys for the plaintiff, Medical Recovery Services, LLC., it is hereby ordered that judgment be entered herein against the Defendant, Billy M. Carnes, in accordance with the court's order awarding supplemental attorney's fees.

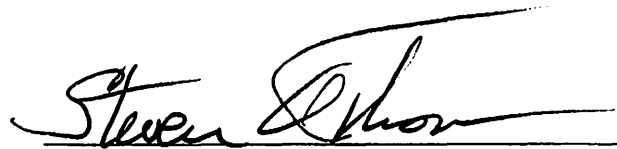
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff has and recovers from the defendant the sum of \$359.50 said amount being itemized as follows,

to-wit:

A.	Judgment	\$ 1,748.10
B.	Post Judgment Interest	\$ 63.15
C.	Supplemental Attorney's Fees	\$ 359.50
D.	Costs	\$ 102.00
E.	Less Payment(s)	\$-1,913.25
	TOTAL	\$ 359.50

Interest shall accrue on the total amount of this judgment at the rate provided by law, and execution may issue on this judgment.

DATED this 28th day of April, 2008.


Honorable Steven Thomsen
Magistrate Judge

KENNETH E. LYON, JR.
Attorney at Law
P.O. Box 4866
Pocatello, ID 83205
(208) 233-1240
Fax: (208) 232-8867

Attorney for Defendant

FILED
2008 JUL 13 PM 2:36
BY: CA

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MEDICAL RECOVERY SERVICES, LLC,)	
an Idaho limited liability)	
company,)	
	)	Case No. CV-2007-306-OC
Plaintiff/Counterdefendant,)	
	)	COUNTERCLAIM AND
vs.	)	DEMAND FOR JURY TRIAL
)	
BILLY M. CARNES,	)	Fee Category: <u>J</u>
	)	Fee: \$14.00
Defendant/Counterclaimant.)	
<hr/>		

COMES NOW the Counterclaimant, by and through his attorney, Kenneth E. Lyon, Jr., and for a cause of action against Counterdefendant alleges as follows:

I.

Billy M. Carnes is the Defendant and Counterclaimant in the above entitled action.

II.

The Plaintiff/Counterdefendant is guilty of unlawfully taking exempt property which belonged to the Defendant/Counterclaimant.

S

III.

The amount of the property unlawfully taken was \$1,640.00, together with the sum of \$273.25, for a total of 1,913.25.

IV.

All of the money taken from the Defendant/Counterclaimant was exempt under Idaho law, which should have been known by Plaintiff/Counterdefendant and/or its attorney.

V.

44 The property was not subject to collection or execution pursuant to I.C. § 11-201.

VI.

The supplemental proceedings which were alleged to have occurred by the Plaintiff/Counterdefendant were improper in that they did not follow the rules as set forth in I.C. § 11-501, etc.

VII.

The conduct of the Plaintiff/Counterdefendant and/or their attorney was egregious, oppressive, fraudulent, malicious, and outrageous, and contrary to both Idaho law and the U.S. Constitution.

VIII.

Defendant/Counterclaimant has had to retain the services of Kenneth E. Lyon, Jr. to defend against the conduct of Plaintiff/Counterdefendant. Defendant/Counterclaimant should be

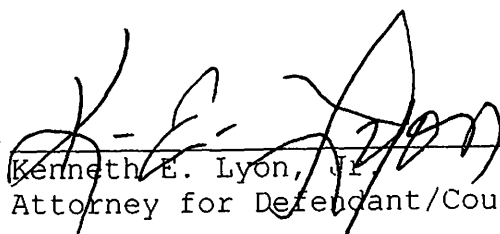
awarded attorney fees and costs in this matter pursuant to Idaho Law.

WHEREFORE, Defendant/Counterclaimant prays for judgment against the Plaintiff/Counterdefendant for the return of the unlawfully taken funds, reasonable attorney's fees and costs, and for such other and further relief as to the Court deems just and equitable in the premises.

DEMAND IS HEREBY MADE FOR A TRIAL BY JURY.

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DATED this 3 day of July, 2008.

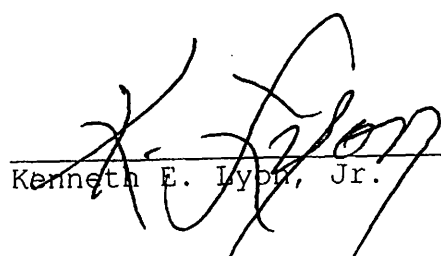
By:


Kenneth E. Lyon, Jr.
Attorney for Defendant/Counterclaimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of July, 2008, I mailed a true and correct copy of the foregoing Counterclaim to the following by placing the same in the U. S. Mail, postage prepaid thereon:

Bryan D. Smith
Attorney at Law
P.O. Box 50731
Idaho Falls, ID 83405
(also sent by fax)


Kenneth E. Lyon, Jr.

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IN THE DISTRICT COURT FOR THE SIXTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK
MAGISTRATES DIVISION

MEDICAL RECOVERY SERVICES, LLC,)	<u>T R A N S C R I P T</u>
)	
Plaintiff,)	<u>OF</u>
)	
vs.)	<u>DEBTORS EXAM HEARING</u>
)	
BILLY M. CARNES,)	
)	
Defendant.)	NO. CR-2007-0306-OC

COURT: This is the time and place set for a debtor's exam in Medical Recovery Services, LLC, versus Billy M. Carnes. This is CV-2007-0306-OC. Gentlemen, if you'd like to take a seat here at counsel table. Okay. Are you Billy M. Carnes?

CARNES: Yes, sir.

COURT: All right. Mr. Carnes, apparently there's been a Writ of Execution served that came back unsatisfied. And pursuant to the statute and rule, counsel for the plaintiff has the opportunity today to examine you concerning your assets and that means everything even the mint in your pockets. Okay? So he will ask you questions. I'm going to leave the courtroom and we'll leave the record running, so he will be able to examine you; ask you about what you own;

1 ask you about what you have and if he wants to see what's
2 in your wallet, you're going to show him. Okay?

3 CARNES: Sir, I was just telling him, I filed an answer
4 to the thing in there. I was never notified as to when the
5 Court was there, so I didn't get a chance to go to court to
6 defend myself.

7 COURT: You filed an answer?

8 CARNES: Yes, sir, I did. I've got a copy of it in my
9 pocket, if you'd like to see it.

10 COURT: Okay. Let's go through this. We have a
11 complaint that was filed by Bryan D. Smith of McGraff,
12 Mecham and Smith, PLLC, with the summons and there is a
13 Motion to Disqualify Judge Carnaroli and an order, an order
14 of assignment to Judge White, my predecessor. There is here
15 an answer in the file and a Motion for Summary Judgment
16 filed by Mr. Smith, an affidavit in support of the Motion
17 for Summary Judgment along with attached exhibits and a
18 brief in support of Motion for Summary Judgment and a
19 notice of hearing setting the case for hearing on the 4th of
20 September of 2007 at 2:00 p.m.

21 CARNES: I didn't know about that. Nobody told me. I
22 didn't get any notice whatsoever.

23 COURT: It shows it was mailed to 722 Jefferson,
24 Pocatello, Idaho 83201.

25

1 CARNES: That's my address, sir, but I didn't get any
2 notification. That's why I filed the answer here so that I
3 would get notified and I could come and explain the
4 situation.

5 COURT: Well, at this point in time a notice of hearing
6 is in the file stating that, and a certificate of service
7 on the notice of hearing mailed to your address by Mr.
8 Smith.

9 CARNES: I don't get mail all the time. There's bills
10 and all and all that I don't get. There's some things now
11 that I'm looking for that were supposedly mailed to me that
12 I didn't get. When they sent the thing in there, they had
13 the sheriff come out and do it and I got the original
14 thing. That's why I went down and did the answer.

15 COURT: Well, sir, all I can tell you is that the
16 Motion for Summary Judgment according to the affidavit and
17 certificate of service were mailed a proper manner to your
18 acknowledged address.

19 CARNES: Sir, I'm not...

20 COURT: Don't interrupt me while I'm speaking here.

21 CARNES: I'm sorry.

22 SMITH: Your Honor, I'll also note the Court sent him a
23 Judgment, the same address. He never said, "boo" about
24 that.

25

1 COURT: Here's a Memorandum of Attorney Fees and Costs
2 to that address. Here's an Order on Summary Judgment that I
3 signed on the 19th of September, sent to the same address
4 along with the Judgment sent to the same address. Then the
5 application for order of continuing garnishment,
6 examination, application for order of examination and order
7 of examination set for today. Mr. Carnes, all I can tell
8 you is that, let's see, this was done in September, the
9 Motion for Summary Judgment.

10 SMITH: September, October.

11 COURT: There are things that, there are remedies
12 available if Judgment was not entered in a proper manner,
13 but your time is running out so you need to consult with an
14 attorney. You certainly always have the right to do some of
15 this stuff yourself. You can...

16 CARNES: I can't afford a ...

17 COURT: You could let me, you could familiarize
18 yourself with the rules and you can file your own motions
19 and do what you need to do to set aside the Judgment under
20 the rules, but I have to follow the rules just like the
21 attorneys have to follow the rules and just like you have
22 to follow the rules.

23 CARNES: Yes, sir, I understand that.

24 COURT: When there is notice sent out it's presumed
25 that the notice was received. That's one of the rules. If

1 it wasn't received for some reason, you know, like I say,
2 you can do that yourself. It's a little complex and I
3 wouldn't try to do it myself. I would try to seek legal
4 counsel if I were you, but in the meantime we're here today
5 on a Motion for Examination. Okay? And in as much as there
6 is a valid judgment that has not been overturned and
7 there's been no motion to overturn it, counsel has a right
8 to ask questions and I'm going to allow him to do it.

9 CARNES: He was asking me questions like, have I ever
10 been married or am I married now and that doesn't have
11 anything to do with it.

12 COURT: I'll determine whether it has anything to do
13 with it or not.

14 CARNES: Well, yes, sir, I know, but I didn't think so.

15 COURT: What I'm telling you is right now answer the
16 questions. Okay.

17 CARNES: Yes, sir. This is new to me and I just didn't
18 know.

19 COURT: Sure. I understand that. It's new to a lot of
20 folks and it can be a very confusing process, but in the
21 meantime his job to ask the questions and your job is to
22 answer. Okay?

23 CARNES: All right.

24 COURT: All right. Please, does it bother you to stand
25 sir?

1 CARNES: Not once I get up, but getting up and down is
2 kind of hard.

3 COURT: Do you have a problem with him staying sitting?

4 SMITH: Yeah, he doesn't need to stand. He can sit.
5 That's fine.

6 COURT: Just raise your right hand for the clerk and
7 take the oath.

8 WITNESS SWORN

9 COURT: All right. Then we will be recess. You may
10 remain seated.

11 SMITH: Thank you.

12 **DEBTORS EXAM - SMITH**

13 Q: Mr. Carnes, when did you get divorced?

14 A: I don't know. It was right around 20 years ago.

15 Q: Okay. You haven't been married since then?

16 A: No.

17 Q: When was the last time you worked?

18 A: Last October.

19 Q: Where did you work at?

20 A: Simplot.

21 Q: What did you do there?

22 A: I was an operator.

23 Q: What were you making there?

24 A: I made sulfuric acid.

25 Q: How much were you making an hour?

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A: A little over \$20.

Q: Why did you leave employment there?

A: I was fired for, I had an injury and I was unable to work, so, because I couldn't go back to work, they terminated me.

Q: What's your source of income now?

A: Pardon?

Q: What's your source of income now?

A: Social Security.

Q: Are you on Social Security Disability?

A: No, just retirement. I've filed for disability, but I haven't got it yet.

Q: How much do you get paid from that?

A: \$1194.

Q: Do you live with anybody?

A: No.

Q: Do you live alone?

A: Yes, sir.

Q: How much is your rent?

A: \$550, actually with the insurance it's \$580.

Q: Do you have a car?

A: Yes, sir.

Q: Is there a payment on that?

A: Pardon?

Q: Tell me all your bills each month.

1 A: Well, I've got normal utilities.
2 Q: How much is that a month?
3 A: Pardon?
4 Q: How much are your utilities a month?
5 A: Oh, it varies. It probably averages \$200 to \$250 a
6 month.
7 Q: Okay. What else do you have?
8 A: Television and internet, telephone.
9 Q: How much is the TV and internet?
10 A: \$112.
11 Q: How much is your phone?
12 A: \$65.00, I think. I just changed phones and I'm
13 thinking my bill will be 65. I don't know.
14 Q: How much is your food?
15 A: Well, I probably spend between \$300 and \$400
16 depending on the.
17 Q: Do you have a car payment?
18 A: No, sir.
19 Q: Well, that's like, \$1300 a month. Nothing for
20 clothes, nothing for anything else.
21 A: I don't hardly buy clothes.
22 Q: Do you have, how are you making up the difference
23 to afford these things?
24 A: I'm getting \$233 from Simplot disability.
25 Q: Any other income?

1 A: I'm making \$230 from VA.
2 Q: What is that, VA? Is that a retirement?
3 A: No. It's because of agent orange exposure and stuff
4 like that from the VA. That about does it.
5 Q: Any other income?
6 A: No.
7 Q: Where do you bank?
8 A: Pardon?
9 Q: Do you bank?
10 A: I got an account at Key Bank, yeah.
11 Q: What's the balance in your account?
12 A: I might have \$100 in that. I'm not sure.
13 Q: Do you have any other savings accounts or bank
14 accounts somewhere?
15 A: I got about \$100 in the, it just right out of my
16 head. It's the bank next door to Key, Wells Fargo.
17 Q: What's that account?
18 A: Pardon?
19 Q: What's that account for?
20 A: It's just a regular savings thing, checking,
21 savings, whatever you want to call it.
22 Q: And the other one at Key Bank?
23 A: Pardon?
24 Q: The account at Key Bank? What's that account used
25 for?

1 A: It's just a, if, I buy things off of e-bay once in
2 a while so I keep money, you know, a few dollars in there.
3 I don't have a lot of money to do nothing, but....

4 Q: I understand that but somewhere you've got to be
5 depositing your Social Security checks, the Federal
6 Government puts those in your account, correct?

7 A: No.

8 Q: They send it to your house?

9 A: Yeah.

10 Q: And your disability from Simplot and your
11 disability from VA?

12 A: Yeah, they send them to my house.

13 Q: I thought they were doing that all electronically?

14 A: I have the option to do it electronically I guess,
15 but it's just simpler to send it to my house.

16 Q: Okay. How much money do you have on you right now?

17 A: I'm not sure. I've got a few hundred dollars on me.

18 Q: Okay. Open up your wallet. How much is in the
19 account?

20 A: It looks like about \$1540.

21 Q: Where does that money come from? *

22 A: That's just money that I've saved.

23 Q: To pay for this?
24
25

1 A: Well, not necessarily, it's just money over the
2 last year I've saved a few dollars here and a few dollars
3 there just for.

4 Q: (To someone). Are you Mrs. Moon?

5 PERSON: No, sir.

6 Q: Who are you ma'am?

7 PERSON: I'm Mrs. Cairns.

8 Q: Are you his wife?

9 PERSON: No.

10 Q: Girlfriend or who is she sir. Is she with you?

11 A: No.

12 Q: Oh, okay. When you said Cairns, I thought, your
13 name is Carnes.

14 A: Carnes.

15 Q: You can see why I think those (inaudible)?

16 PERSON: No, we're the next case.

17 Q: Okay.

18 A: No, sir, I don't have no girlfriend.

19 Q: She said Cairns. Is that what you said, Cairns?

20 He's Carnes so you see why

21 PERSON: It's C-A-I-R-N-S.

22 EXAMINATION CONTINUED

23 Q: You can see why I was confused.

24 A: Yeah.

25 Q: Did you driver here today?

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A: Yes, sir.

Q: What kind of car do you have?

A: It's a '96 KIA.

Q: How old are you, sir?

A: I'll be 62 come May.

Q: How long did you work for Simplot?

A: 26 years.

Q: You don't have a retirement from them?

A: I haven't got it yet.

Q: How much is that going to be?

A: Well, I don't know for sure. I've got to talk to
the secretary.

Q: You haven't applied for it?

A: No, sir. I've been, like I say, I've been under a
doctor's care and I've been...

Q: What's your disability?

A: Pardon?

Q: What is your disability?

A: A back injury.

Q: Sir, it will just be one more minute and then we'll
be done.

A: Okay.

Q: Okay, sir. Here's where we are. You've got \$1540 on
your person and this is on the record so the record's
running.

1 A: I'm not trying to hide anything.

2 Q: I know you're not. I need to have you turn that
3 over to me and we'll apply it to your judgment. If you
4 don't want to do that we can wait, the judge is in a
5 hearing right now and we'll ask him to order you to do it,
6 so, the choice is yours.

7 A: Well, I've never, you know, run out on a debt in my
8 life that I figure I owed.

9 Q: I know.

10 A: But he's charging me, none of this doesn't have
11 being here not there or nothing like that, but he's
12 charging me partly for a bill I've already paid.

13 Q: The problem is it's already been ruled by the Court
14 that we're passed that. The Judgment in the case is
15 \$1816.72.

16 A: I thought it was 1700 something.

17 Q: Well, there's been some additional costs and
18 interest so \$1816.72, so if you pay \$1540 right now, the
19 balance will be 276.72. So, you can either pay for me or we
20 can wait around for the judge to come back and let him deal
21 with this. It's your choice.

22 A: Couldn't give me a break or something on it?

23 Q: No. I had to come all the way down here from Idaho
24 Falls. You didn't call me, didn't try to set up any
25 payments.

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A: I didn't know I was supposed to.

Q: I know. So, the answer is, no, I can't.

A: All right.

Q: Do you want me to count it out for you? Do you want to count it?

A: Yeah.

Q: Do you agree with me it's one, two, three, four, five, six, seven, eight, nine, 10, 11, 12, 13, 1400, 1450, 60, 70, 80, 90. Any more?

A: I must have miscounted.

Q: Here's another hundred right there, so, let's recount it. Anything else in there?

A: No, you can check if you want. I didn't see that other when you were counting it.

Q: Okay. One, two, three, four, five, six, seven, eight, nine, 10, 11, 12, 13, 14, 15, 1640. Do you agree?

A: Yep.

Q: Is that a yes?

A: Yep.

Q: Okay. We'll apply 1640 on your account, sir, and you're free to leave.

END

1 **REPORTERS CERTIFICATE**

2 I, **SHERRILL L. GRIMMETT**, Do hereby certify:

3 That I an independent contracted legal
4 transcriptionist and the person designated to transcribe
5 the Debtors Exam Hearing as recorded on the mechanical
6 recording device at the foregoing Hearing; That the above
7 proceedings and evidence is a full, true and correct
8 transcript of the Hearing as taken down by the mechanical
9 recording device at said Hearing, as reported by me to the
10 best of my ability.
11

12 DATED this 25th day of July, 2008.
13

14
15
16 Sherrill L. Grimmett
17 SHERRILL L. GRIMMETT

18
19 Reporter's Certificate
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Idaho State Bar # 4411
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Idaho Falls, Idaho 83405
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK
MAGISTRATE DIVISION

64
MEDICAL RECOVERY SERVICES, LLC,
an Idaho limited liability company,

Plaintiff,

vs.

BILLY M. CARNES,

Defendants.

Case No. CV-2007-306-OC

**RESPONSE TO DEFENDANT'S
MOTION FOR TRIAL AND TO
RETURN MONEY**

COMES NOW, plaintiff, Medical Recovery Services, LLC, by and through
counsel of record, Bryan D. Smith, Esq., of the firm of Smith, Driscoll & Associates,
PLLC and files this response to the defendant's motion for trial and to return money.

ANALYSIS

The defendant has sought relief specifically seeking the return of \$1,640.00 the
defendant paid at a hearing held February 20, 2008. The defendant argues that counsel
for plaintiff forced him to make the payment without giving him the opportunity to file a
claim of exemption. Plaintiff claims that the defendant was not entitled to file a claim of
exemption because he made a voluntary payment at the hearing. This court has ruled that
the transcript should be prepared to determine whether counsel for plaintiff forced the

defendant to make the payment or whether the defendant in fact made his payment voluntarily. Counsel for the defendant has also argued that the court never swore in the defendant.

The transcript shows at pages five through six that the court did in fact swear in the defendant. The transcript further shows that counsel for plaintiff discovered that the defendant had \$1,540.00 cash on his person at which time the following took place:

Q: Okay, sir, Here's where we are. You've got \$1,540.00 on your person and this is on the record so the record's running.

A: I'm not trying to hide anything.

Q: I know you're not. I need to have you turn that over to me and we'll apply it to your judgment. *If you don't want to do that we can wait, the judge is in a hearing right now and we'll ask him to order you to do it, so, the choice is yours.*¹

A: *Well, I've never, you know, run out on a debt in my life that I figured I owed.*

Q: I know.

A: But he's charging me, none of this doesn't have being here not there or nothing like that, but he's charging me partly for a bill I've already paid.

Q: The problem is it's already been ruled by the Court that we've passed that. The Judgment in the case is \$1,816.72.

A: I thought it was \$1,700.00 something.

Q: Well, there's been some additional costs and interest so \$1,816.72, so if you pay \$1,540.00 right now, the balance will be \$276.72. *So, you can either pay for me or we can wait around for the judge to come back and let him deal with this. It's your choice.*²

After counsel for plaintiff told the defendant twice that he had a "choice" to pay the money or address the issue formally with the court, the defendant counted out what

¹ Idaho Code Section 11-506 authorizes the judge to order any money of the judgment debtor in the hands of such debtor to be applied toward the satisfaction of the judgment.

² Emphasis added.

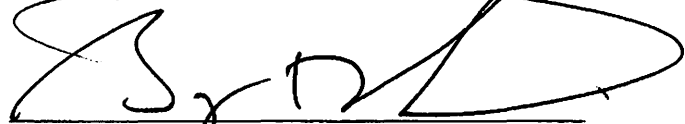
turned out to be \$1,640.00, not \$1,540.00. He even agreed to allow counsel to help count the money to avoid any miscounting. True to the word of plaintiff's counsel, plaintiff gave the defendant credit for the amount he paid at the hearing. One week after the hearing, the defendant subsequently paid another \$273.24 to pay the judgment balance.

CONCLUSION

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The transcript proves that the defendant was sworn in as a witness even though the defendant says he was not sworn in as a witness. More importantly, the transcript proves that counsel for the plaintiff did not force the defendant to pay the money but in fact gave the defendant the choice either to make a voluntary payment or address the issue with the court formally. The defendant, who says he has "never, you know, run out on a debt in his life," chose to pay the money to counsel for plaintiff. Accordingly, this court should deny defendant's motion for trial and to return the money. Moreover, the court should dismiss the defendant's counterclaim that seeks relief on the very same issues.

DATED: 4th August, 2008.

~~SMITH, DRISCOLL & ASSOCIATES, PLLC~~



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Attorneys for Plaintiff

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Attorney at Law
P.O. Box 4866
Pocatello, ID 83205
(208) 233-1240
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Attorney for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MEDICAL RECOVERY SERVICES, LLC,)
an Idaho limited liability)
company,)
Plaintiff/Counterdefendant,)
vs.)
BILLY M. CARNES,)
Defendant/Counterclaimant.)

Case No. CV-2007-306-OC

BRIEF

89

This Brief is in response to the Plaintiff's Response to Defendant's Motion to Return Money. The first page of the Analysis correctly sets forth the facts. In the latter material is where errors begin to occur.

At no time did counsel argue the court never swore in the Defendant. The subject was only brought up to show the Defendant could not stand up and had a disability. This disability was obvious to counsel for the Plaintiff. The reason this is important will be addressed later.

S

The transcript and the law will be used to show why the money should be returned. The first place to start the analysis is with the law pertaining to what property can be ordered to satisfy a judgment by the court. The Plaintiff in its first footnote on page 2 of its brief correctly refers to Idaho Code 11-506. This section of Idaho law sets out what debtor's property may be used to satisfy a judgment. Contrary to what the Plaintiff alleges in its Response the statute is not as all inclusive. The statute contains a large qualifier. This qualifier states the statute does not apply to property "exempt from execution".

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Chapter 6, Title 11 of the Idaho Code set out "Exemption of Property from Attachment or Levy". Specifically, I.C. 11-604 A (3) spells out the main exemption relevant to this case. This section states all "disability allowance" and "retirement allowances" are exempt with no limitations on amount.

A further relevant exemption statute is found in Idaho Code 11-605(10). This statute provides for an exemption of "tangible personal property" not to exceed a value of \$800.00. Cash money is certainly deemed tangible personal property.

At this point it is time to look at the transcript and examine its illuminating material before citing further law or answering Plaintiff's arguments.

Prior to the Defendant being sworn in by the Court, the Court made two comments to the Defendant. These two comments set the stage for what followed. First, the Court stated "counsel for the Plaintiff has the opportunity today to examine you concerning your assets and that means everything even the mint in your pockets". Second, the court stated "if he wants to see what's in your wallet, you're going to show him".

The debtor's exam followed. A number of significant issues were established. One of them was Defendants disability. The Defendant had not worked since "last October". R. T. p. 6. The Defendant gets \$1,194.00 from social security retirement. R. T. p.7. Debtor gets \$233.00 from Simplot disability. R. T. p. 8. The Defendant also gets \$230.00 from the VA for exposure to agent orange. R. T. p.9. The Defendant's total income per month since October, 2006 has been \$1,657.00 per month.

The Defendant stated he spends at least \$1,342.00 a month for basic living expenses. R. T. p. 7-8.

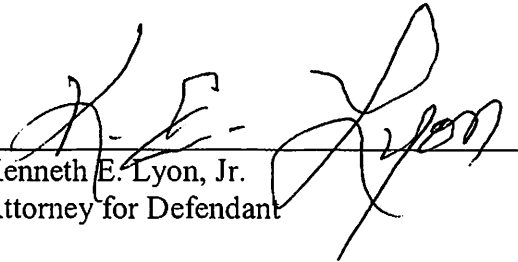
91
Plaintiff's counsel asked Defendant how much money he had on him "right now". R.T. p. 10. Defendant had the sum of \$1,640.00 in his wallet. R. T. p. 14. Plaintiff's counsel asked where the money came from. Defendant replied it was money he had saved. Plaintiff's counsel then asked "to pay for this?" R. T. p. 10. The Defendant responded by stating "well, not necessarily,..." R. T. p.11. Later Plaintiff's counsel stated the following to the Defendant: "I need to have you turn that over to me and we'll apply it to your judgment. If you don't want to do that we can wait, the judge is in a hearing right now and we'll ask him to order you to do it, so, the choice is yours". It was also stated "you can either pay for me or we can wait around for the judge to come back and let him deal with this. It's your choice". R. T. p. 13. After asking for a break and being told "no" the Defendant was the told "Do you want me to count it out for you? Do you want to count it"? The money was then counted and the amount agreed upon and Plaintiff's counsel said "Okay. We'll apply \$1640 on your account, sir, and you're free to leave". R. T. p.14.

The Plaintiff's argument is the Defendant gave the money to the attorney after being given a choice. No where in the transcript does the Defendant give the money to the Plaintiff for the bill. The Defendant did show Plaintiff's counsel the money, but did not give it to him. Plaintiff's counsel took it. He also threatened Defendant if Plaintiff's counsel could not have the money he would have the court order the money turned over to him. Some choice, either let the Plaintiff take the money or have the court order the money given to Plaintiff.

92
At no time did the court or counsel explain to Defendant he had any exemption rights. This is important because the Defendant was not represented by an attorney and knew nothing about exemptions. So what should Plaintiff's counsel have done? While he probably did not violate any rules of professional conduct these rules do give some guidance as to how to proceed. IRPC 3.3 would indicate he should have told the Court about the Defendant's income and how it is all exempt and the court could not order any money entitled to exemption to be turned over to Plaintiff. The Court could then explain the exemption statute to Defendant and recommend he get an attorney. This idea is also referred to in IRCP 4.3. Once the whole concept was clear and understood by the Defendant if he voluntarily decided to give Plaintiff the money there would be no need for further legal involvement. Unfortunately none of the above happened so the only fair thing to do is to return to Defendant the money taken from him.

THEREFORE, it is respectfully requested the Court grant Defendant's motion and enter an Order requiring the money taken at the Exam be returned to Defendant.

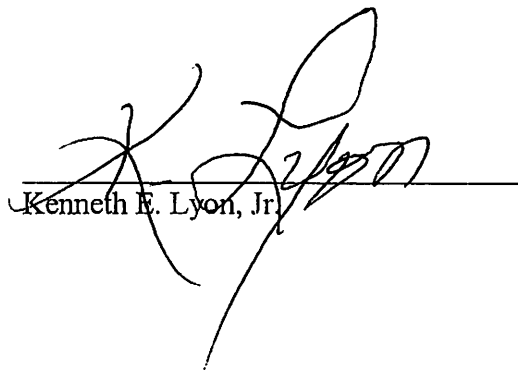
Dated this 14 day of August, 2008.


Kenneth E. Lyon, Jr.
Attorney for Defendant

CERTIFICATE OF SERVICE

9th I HEREBY CERTIFY that on this 14 day of August, 2008, I mailed a true and correct copy of the foregoing Brief to the following by placing the same in the U. S. Mail, postage prepaid thereon:

Bryan D. Smith
Attorney at Law
P.O. Box 50731
Idaho Falls, ID 83405


Kenneth E. Lyon, Jr.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE
COUNTY OF BANNOCK, MAGISTRATE DIVISION

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MEDICAL RECOVERY SERVICES, LLC,)
)
Plaintiff,)
)
v.)
)
BILLY M. CARNES,)
)
Defendant.)

Case No. CV 2007-306 OC

ORDER

The Court has before it Plaintiff's Application for Award of Supplemental Attorney's Fees filed April 1, 2008. Defendant filed an Objection, Motion for Trial, and Motion to Return Money Wrongfully Taken by Plaintiff's Attorney. Plaintiff filed its Reply on April 23, 2008. Following the hearing, the Court granted Plaintiff's Motion for Supplemental Attorney's Fees. On July 14, 2008, the Court heard Defendant's Motions. Defendant withdrew his objection to supplemental attorney's fees and his motion for a new trial, but insists that money taken from the Defendant should be returned. The Court ordered a transcript of a debtor's examination conducted by Plaintiff's attorney on February 20, 2008. The transcript has been prepared and reveals that funds taken from the Defendant were voluntarily turned over to the Plaintiff's attorney.

Based upon the argument of counsel for the parties and briefs on file herein, Defendant's motion for return of funds is DENIED. The Status Conference scheduled for September 9, 2008, is hereby VACATED.

IT IS SO ORDERED.

DATED this 19th day of August 2008.

Steven A. Thomsen
STEVEN A. THOMSEN
Magistrate Judge

Copies to:

Bryan Smith, PO Box 50731, Idaho Falls, ID 83405

Ken Lyon, PO Box 4866, Pocatello, ID 83205

DALE HATCH, Clerk of the District Court

By Rosie McBride

Deputy Clerk

95

PETER D. McDERMOTT

KENNETH E. LYON, JR.
Attorney at Law
P. O. Box 4866
Pocatello, ID 83205
(208) 233-1240

2009 SEP 30 PM 3:42
BY *[Signature]*
DEPUTY CLERK

Attorney for Defendant/Appellant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MEDICAL RECOVERY SERVICES, LLC,)	
an Idaho limited liability company,)	
	)	Case No. CV-2007-306-OC
Plaintiff/Respondent,)	
)	
vs.	)	Supreme Court No.
)	
BILLY M. CARNES,	)	<u>NOTICE OF APPEAL</u>
)	
Defendant/Appellant.	)	Fee Category: R(1)(c)
	)	Fee: \$53.00

TO: The above-named Plaintiff/Respondent, MEDICAL RECOVERY SERVICES, LLC, and their attorney, Bryan D. Smith, and Dale Hatch, Clerk of the above-entitled Court:

NOTICE IS HEREBY GIVEN THAT:

I.

The above-named Appellant, Billy M. Carnes, through his attorney of record, Kenneth E. Lyon, Jr., appeals against the above-named Respondent from the Bannock County Magistrate Court of the Sixth Judicial District, in and for the State of Idaho, to the Bannock County District Court of the Sixty Judicial District, in

and for the State of Idaho, from the Order of August 19, 2008, denying Defendant's Motion to Return Money. The alleged errors were made by the Honorable Steven A. Thomsen, Magistrate Judge.

II.

Appellant has the right to appeal to the District Court, and the Order described in Paragraph I above is an appealable order under and pursuant to Rule 83, Idaho Rules of Civil Procedure.

III.

The Issues, which are both matters of law and matters of fact, are:

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1. Whether the Court erred in not informing and/or inquiring into the Defendant's right to claim an exemption.

2. Whether the Court's Order of August 19, 2008 was proper.

3. Whether the court erred in denying Defendant/Appellant's Motion to return money, and in allowing the Plaintiff to take property from Defendant which was not subject to execution.

IV.

Appellant requests preparation of the reporter's transcript, as defined in Rule 83(k), Idaho Rules of Civil Procedure, for the hearing held July 14, 2008. The hearing was recorded and is in the possession of the Clerk of the above named Magistrate Court.

V.

Appellant requests the following document(s) be included in the Clerk's record in addition to those automatically included:

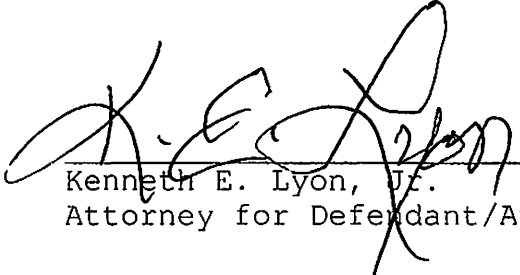
1. Transcript of Debtor's Examination on February 20, 2008.

VI.

I certify this notice of appeal was properly mailed in the United States Mail with postage prepaid, or hand delivered, to all of the parties required to be served and further certify:

(a) A copy of this Notice of Appeal has been served on the Clerk of the Magistrate Court.

DATED this 30 day of September, 2008.



Kenneth E. Lyon, Jr.
Attorney for Defendant/Appellant

Bryan D. Smith, Esq.
ISB # 4411
McGRATH, SMITH,
& ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731

2007 DEC 26 PM 3:15
DEPUTY CLERK

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK
MAGISTRATE DIVISION

MEDICAL RECOVERY SERVICES, LLC,
an Idaho limited liability company,

Plaintiff,

vs.

BILLY M. CARNES,

Defendant.

Case No. CV-2007-306-OC

AMENDED JUDGMENT

IN THIS MATTER, the Court having entered an order awarding supplemental attorney's fees in favor of Medical Recovery Services, LLC, and against BILLY M. CARNES.

NOW, ON THIS DAY, on application of Bryan D. Smith, Esq., of the firm McGrath, Smith & Associates, PLLC, attorneys for the plaintiff, Medical Recovery Services, LLC., it is hereby ordered that judgment be entered herein against the Defendant, Billy M. Carnes, in accordance with the court's order awarding supplemental attorney's fees.

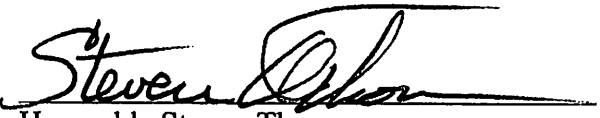
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IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff has and recovers from the defendant the sum of \$1,436.31 said amount being itemized as follows, to-wit:

A.	Judgment	\$ 359.50
B.	Post Judgment Interest	\$ 21.31
C.	Supplemental Attorney's Fees	\$ 961.50
D.	Costs	\$ 94.00
E.	Less Payment(s)	\$ -0.00
TOTAL		\$ 1,436.31

Interest shall accrue on the total amount of this judgment at the rate provided by law, and execution may issue on this judgment.

DATED this 26th day of December, 2008.


Honorable Steven Thomsen
Magistrate Judge

CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on this 29 day of December, 2008, I served a true and correct copy of the foregoing **AMENDED JUDGMENT** on the persons listed below by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

Persons Served:

- U.S. Mail
- Facsimile Transmission
- Hand Delivery
- Overnight Delivery

Bryan D. Smith, Esq.
McGRATH, SMITH,
& ASSOCIATES, PLLC
P.O. Box 50731
Idaho Falls, Idaho 83405

- U.S. Mail
- Facsimile Transmission
- Overnight Delivery
- Hand Delivery

Kenneth Lyon
P.O. Box 4866
Pocatello, Idaho 83205


Clerk of the Court

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MEDICAL RECOVERY SERVICES, LLC,)
an Idaho limited liability company,)
Plaintiff/Respondent,)
vs.)
BILLY M. CARNES,)
Defendant/Appellant.)

Case No. CV-2007-306-OC

BRIEF OF APPELLANT

Appeal from the Magistrate Court of the Sixth Judicial District of the
State of Idaho, in and for the county of Bannock

HONORABLE STEVEN A. THOMSEN
Magistrate Judge

Kenneth E. Lyon, Jr.
Attorney at Law
P.O. Box 4866
Pocatello, Idaho 83205-4866

ATTORNEY FOR DEFENDANT/APPELLANT

Bryan D. Smith
Attorney at Law
P.O. Box 50731
Idaho Falls, Idaho 83405

ATTORNEY FOR PLAINTIFF/RESPONDENT

Bryan D. Smith, Esq.
ISB # 4411
Bryan N. Zollinger, Esq.
ISB # 8008
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

MEDICAL RECOVERY SERVICES, LLC,
an Idaho limited liability company,

Plaintiff/Respondent,

vs.

BILLY M. CARNES,

Defendant/Appellant.

Case No. CV-2007-306-OC

**RESPONDENT'S REPLY
BRIEF ON APPEAL**

I. INTRODUCTION.

This matter comes before the Court on appeal from the magistrate's order dated August 19, 2008 denying the motion for return of funds filed by Billy M. Carnes ("Appellant"). In his order, the magistrate held that the funds were "voluntarily turned over to the Plaintiff's attorney."¹ Appellant has filed this appeal seeking the return of \$1,640.00 the Appellant paid at a hearing held February 20, 2008. The Appellant argues that counsel for Medical Recovery Services, LLC ("Respondent") forced him to make the payment without giving him the opportunity to file a claim of exemption. Respondent

¹ See Magistrate Court's Order dated August 19, 2008.

asserts that Appellant was not entitled to file a claim of exemption because he made a voluntary payment at the hearing.

II. STATEMENT OF FACTS.

The facts in this case are undisputed and fully contained in the Transcript of Debtors Exam Hearing attached to the Brief of Appellant as Exhibit "A". The portion of the Transcript of Debtors Exam Hearing that is relevant to this appeal reads as follows:

Q: Okay. How much money do you have on you right now?

A: I'm not sure. I've got few hundred dollars on me.

Q: Okay. Open up your wallet. How much is in the account?

A: It looks like about \$1540.

Q: Where does that money come from?

A: That's just money I've saved.

Q: To pay for this?

A: Well, not necessarily, it's just money over the last year I've a few dollars here and there just for...

A: I'm not trying to hide anything.

Q: I know you're not. I need to have you turn that over to me and we'll apply it to your judgment. *If you don't want to do that we can wait, the judge is in a hearing right now and we'll ask him to order you to do it, so, the choice is yours.*²

A: Well, I've never, you know, run out on a debt in my life that I figured I owed.

Q: I know.

A: But he's charging me, none of this doesn't have being here not there or nothing like that, but he's charging me partly for a bill I've already paid.

² Idaho Code Section 11-506 authorizes the judge to order any money of the judgment debtor in the hands of such debtor to be applied toward the satisfaction of the judgment. (Emphasis added.).

Q: The problem is it's already been ruled by the Court that we've passed that. The Judgment in the case is \$1,816.72.

A: I thought it was \$1,700.00 something.

Q: Well, there's been some additional costs and interest so \$1,816.72, so if you pay \$1,540.00 right now, the balance will be \$276.72. *So, you can either pay for me or we can wait around for the judge to come back and let him deal with this. It's your choice.*³

III. STANDARD OF REVIEW.

I.R.C.P. Rule 83(u) states that:

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“[t]he district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court under the statutes and law of this state, and the appellate rules of the Supreme Court.”

The Idaho Supreme Court has clarified that:

“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.

Losser v. Bradstreet, 145 Idaho 670 (2008). Therefore, this Court should review the record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact. The magistrate's findings “that are supported by substantial and competent evidence will not be set aside, and those findings will be liberally construed in favor of the judgment entered.” (Citations omitted). *Nguyen v. Bui*, 146 Idaho 187 (Ct. App. 2008).

IV. APPELLANT IS NOT ENTITLED TO RECOVER THE MONEY HE VOLUNTARILY PAID TO RESPONDENT.

³ Transcript of Debtors Exam Hearing pages 10-13 attached to Brief of Appellant as Exhibit “A”. (Emphasis added).

Idaho courts follow the well settled rule “that a person cannot-by way of set-off, counterclaim or direct action-recover money which he or she has voluntarily paid with full knowledge of all the facts, and without any fraud, duress or extortion, although no obligation to make such payment existed.” (Citations omitted). *Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 591 (Ct. App. 1989). Although in Idaho, this rule has not been specifically applied to an action for collection of money owed other states have applied this rule and clarified its application to such cases. The court in *Hassen v. Mediaone of Greater Florida, Inc.*, has elaborated on how the above cited rule applies to an action for collection of money owed. *Hassen v. Mediaone of Greater Florida, Inc.*, 751 So.2d 1289 (Fla.App. 1 Dist., 2000). In *Hassen*, the district court affirmed the decision of the lower court when a party appealed the denial of a return of funds appellants claimed were taken by imposition. *Id.* The *Hassen* court explained that:

“[t]he pressure or advantage must be of such an extent as to remove the situation from the ordinary debtor-creditor relationship and negate the voluntariness of the payment. See *Greene v. Alachua General Hospital*, 705 So.2d 953 (Fla. 1st DCA 1998); *Greenfield v. Manor Care Inc.*, 705 So.2d 926 (Fla. 4th DCA 1997). Otherwise, the voluntary payment may bar recovery, in accordance with the usual rule as applied in cases such as *Hall v. Humana Hospital Daytona Beach*, 686 So.2d 653 (Fla. 5th DCA 1996). See also *Pacific Mutual Life Insurance Company of California v. McCaskill*, 126 Fla. 82, 170 So. 579 (1936); *New York Life Insurance Company v. Lecks*, 122 Fla. 127, 165 So. 50 (1935). It does not matter that the payment may have been made upon a mistaken belief as to the enforceability of the demand, or liability under the law, as long as payment is made with knowledge of the factual circumstances. *Hall*; see also *City of Miami v. Keton*, 115 So.2d 547 (Fla.1959). And as indicated in *Pacific Mutual*, payment should ordinarily be deemed voluntary unless the circumstances present some constraint or compulsion of such a degree as to impose a necessity of payment sufficient to overcome the mind and will of a person of ordinary firmness.”

Id. Here, Appellant had full knowledge of the facts and voluntarily paid without any fraud, duress, or extortion. Appellant had a legal duty to pay Respondent the amount of

the judgment. The record establishes that counsel for the Respondent made it clear that Appellant had the “choice” of turning the money over or waiting for the judge to decide. Appellant’s decision to make a voluntary payment is also clear, as he chose not wait for the judge to decide, but simply paid the money. Even if the Appellant paid upon the “mistaken belief as to the enforceability of the demand”, the payment must be deemed voluntary. *Id.* In this case, the payment should be deemed voluntary because there was no fraud, duress, or extortion. Thus, the magistrate’s decision that the payment was voluntary should be affirmed because it is supported by substantial and competent evidence.

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V. APPELLANT RELIES ON SEVERAL IDAHO CODES SECTIONS THAT ARE NOT APPLICABLE TO THIS CASE.

Appellant relies on Idaho Code § 11-506 to support the position that certain property cannot be used to satisfy a judgment in Idaho.⁴ This interpretation of Idaho Code § 11-506 is incorrect. This section only establishes that the “judge or referee may order any money or property of a judgment debtor not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment.” Idaho Code § 11-506. This section does not state that certain property cannot be used to satisfy a judgment, but only states that a judge may not order certain exempt property be applied toward the satisfaction of the judgment. In this case, there is no order from a judge or referee and Idaho Code § 11-506 is not applicable. Further, Appellant has not cited any law supporting the assertion that an individual may not use certain property to satisfy a judgment. In fact, an individual is free to use any property legally owned to satisfy a judgment. If Idaho Code § 11-506

⁴ See Brief of Appellant at page 5.

he has not even attempted to undertake. Appellant has failed to support the allegation that the money turned over to Respondent was from exempt sources with any admissible evidence.

Appellant has relied on sections of the Idaho Code that are not applicable to this case because there was no order by a judge or referee to turn this money over and there has been no attachment or levy against the money. Accordingly, the code sections Appellant relies upon should not be considered in this proceeding.

VI. THE MAGISTRATE COURT CORRECTLY RULED THAT RESPONDENT MADE A VOLUNTARY PAYMENT AND THEREFORE I.C. § 11-506 DID NOT APPLY.

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The facts contained in the Transcript of Debtors Exam Hearing show that there is substantial and competent evidence to support the magistrate's findings of fact that Appellant made a voluntary payment. The magistrate's conclusion that Appellant was not entitled to have the money returned necessarily follows that finding. As explained in the preceding section, I.C. §11-506 is not applicable to a voluntary payment and the magistrate could not have waived Appellants rights under that statute as no rights existed. Furthermore, Appellant did not assert any rights under I.C. §11-506 in his Motion for Return of Money filed on April 18, 2008 and neither the magistrate nor counsel for the Respondent had a duty to assert the rights of the Appellant.

Appellant argues that counsel for Respondent violated the "law by taking the money and at no time informing the defendant of any of his rights to claim an exemption".⁸ Appellant further argues that the situation is analogous to a sheriff informing a debtor of his rights of exemption before he seizes property and that the same

⁷ Transcript of Debtors Exam Hearing at page 6, attached to Brief of Appellant as Exhibit "A".

⁸ See Brief of Appellant at page 7.

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requirement "should also apply to the attorney during a debtor's exam".⁹ Appellant does not cite to any authority for this position. In fact, this situation is more analogous to a person on social security or retirement coming into the office of someone to whom he legally owes money and voluntarily applying some of these funds to his debt. A person has an absolute right to use any funds legally belonging to him to pay off his debts.

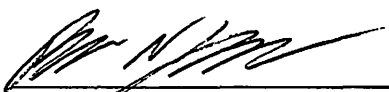
Next, Appellant cites to several sections contained in Title 28 of the Idaho Code to argue that counsel for the Respondent has "failed in its duty to enforce its contract in good faith and should not benefit from this breach of law."¹⁰ The code sections cited are applicable to commercial transactions and cannot be relied upon in this appeal because the subject matter of this appeal is not governed by any section of the uniform commercial code as defined by I.C. §28-1-102.

VII. CONCLUSION.

For all the reasons set forth above, Medical Recovery Services, LLC respectfully requests that the Court affirm the order of the magistrate court denying Billy M. Carnes' Motion to Return Money and that the court award attorney's fees on appeal against Appellant.

DATED this 9th day of January, 2009.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 
Bryan N. Zollinger, Esq.
Attorneys for Plaintiff

⁹ See Brief of Appellant at page 8.

¹⁰ See Brief of Appellant at page 8.

**BRIEF OF APPELLANT
BILLY M. CARNES**

**Appeal from the Magistrate Court of the Sixth
Judicial District of the State of Idaho,
in and for the County of Bannock**

**HONORABLE STEVEN A. THOMSEN
Magistrate Judge**

**Kenneth E. Lyon, Jr.
Attorney at Law
P.O. Box 4866
Pocatello, ID 83205-4866**

ATTORNEY FOR DEFENDANT/APPELLANT

and

**Brian D. Smith
Attorney at Law
P.O. Box 50731
Idaho Falls, ID 83405**

ATTORNEY FOR PLAINTIFF/RESPONDENT

FILED THIS ____ DAY OF DECEMBER, 2008.

CLERK OF THE COURT

**BY: _____
DEPUTY CLERK**

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE LOWER COURT

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The plaintiff obtained a summary judgment against the defendant for the sum of \$1,748.10 on October 11, 2007. The plaintiff filed an execution with J.R. Simplot but received nothing because defendant was not an employee of Simplot. Subsequently the plaintiff obtained an Order for a debtor's exam which was held on February 20, 2008. It was at this exam where money was taken from the defendant which is the issue of this appeal. On March 31, 2008, a motion was filed for supplemental attorney fees in the amount of \$359.50. On April 18, 2008, an objection was filed to Plaintiff's Motion and the objection also included a Motion to return money wrongfully taken by the plaintiff's attorney from defendant at the debtor's exam. This matter was heard on July 14, 2008 (See R.T.). Prior to this time the defendant was never represented by an attorney. At this hearing the Court order a transcript of the debtors exam be transcribed and the attorneys submit supplemental briefs (The transcript of the debtor's exam is the key document in this case but was not included in the Reporter's transcript; so a copy of it is attached hereto as Exhibit A). The Court later entered an order on August 19, 2008 stating the taking of the funds by plaintiff's counsel was not improper, and denied defendant's motion. It was from that Order this Appeal was timely filed on September 20, 2008.

II. STATEMENT OF FACTS

The facts in this case are undisputed. It is their interpretation and legal effect which is in dispute. The relevant facts are all set forth in defendant's Exhibit A. It is important to keep in mind the defendant had no attorney representing him. The facts the defendant deem the gravamen of the case consists of all materials contained in Exhibit A, and the main facts will be

set forth below. All quotations are from defendant's Exhibit A. The abbreviation (TDEH) stands for Transcript of Debtors Exam Hearing.

A. Statements by the Judge

"pursuant to the statute and rule, counsel for the plaintiff has the opportunity today to examine you concerning your assets and that means everything even the mint in your pockets."
(TDEH, p.1; L, 20-23)

"Don't interrupt while I'm speaking here." (TDEH, p3; L.20)

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"so he will be able to examine you; ask you about what you own; ask you about what you have and if he wants to see what's in your wallet, you're going to show him." (TDEH, p.1-2; L, 24-25 on p.1 & L. 1-2 on p 2)

"does it bother you to stand sir?" (TDEH, p.5; L24-25)

"Do you have a problem with him staying sitting?" (TDEH, p.6; L3)

B. Statements by the Plaintiff's Attorney

"When was the last time you worked?" (TDEH, p6; L17)

"What's your source of income now?" (TDEH, p.7; L6)

"Are you on Social Security Disability?" (TDEH, p.7; L10)

"How much do you get paid for that?" (TDEH, p.7; L.13)

"Any other income?" (TDEH, p.8; L 25)

"Any other income?" (TDEH, p.9; L 5)

"I understand that but somewhere you've got to be depositing your Social Security checks, the Federal Government puts those in your account, correct?" (TDEH, p.10; L4-6)

"And your disability from Simplot and your disability from VA?" (TDEH, p.10; L 10-11)

“Okay, how much money do you have on you right now?” (TDEH, p.10; L 16)

“Okay. Open up your wallet. How much is in the account?” (TDEH, p10; L 18-19)

“Where does that money come from?” (TDEH, p.10; L 21)

“To pay for this?” (TDEH, p.10; L. 23)

“What is your disability?” (TDEH, p.12; L 18)

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“I need to have you turn that over to me and we’ll apply it to your judgment. If you don’t want to do that we can wait, the judge is in a hearing right now and we’ll ask him to order you to do it, so, the choice is yours.” (TDEH, p.13; L 2-6)

“So, you can either pay for me or we can wait around for the judge to come back and let him deal with this. It’s your choice.” (TDEH, p.13; L 19-21)

“Do you want me to count it out for you? Do you want to count it?” (TDEH, p.14; L4-5)

“Here’s another hundred right there, so, let’s recount it. Anything else in there?” (TDEH, p.14; L.11-12)

“Okay. We’ll apply \$1640 on your account, sir, and you’re free to leave.” (TDEH, p.14; L 20-21)

C. Statements by the Defendant

“Not once I get up. but getting up and down is kind of hard.” (TDEH, p.6; L1-2)

“Last October.” (TDEH, p.6; L18)

“I was fired for, I had an injury and I was unable to work, so, because I couldn’t go back to work, they terminated me.” (TDEH, p7; L3-4)

“Social Security.” (TDEH, p.7; L9)

“No, just retirement. I’ve filed for disability, but I haven’t got it yet.” (TDEH, p.7; L11-12)

"I don't hardly buy clothes." (TDEH, p.8; L 21)

"I'm getting \$233 from Simplot disability." (TDEH, p.8; L 14)

"I'm making \$230 from VA." (TDEH. P.9; L 1)

"No." (TDEH, p.9; L. 6)

"It looks like about \$1540." (TDEH, p.10; L 20)

"That's just money that I've saved." (TDEH. P.10; l. 22)

"Well, not necessarily, it's just money over the last year I've saved a few dollars here and a few dollars there just for." (TDEH, p.11; L.1-3)

"A back injury." (TDEH, p.12; L. 19)

"I didn't know I was supposed to." (TDEH, p.14; L. 1)

ISSUES ON APPEAL

1. Whether the Magistrate Court erred in finding "funds taken from the Defendant were voluntarily turned over to the Plaintiff's attorney".
2. Is the defendant entitled to attorney fees on appeal?

STANDARD OF REVIEW

I.R.C.P. Rule 83(u) sets forth the manner in which the district court is to review an appeal from a magistrate court. Rule 83(u)(1) provides "the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court...). This statement thus converts the inquiry as to what is the standard of review on an appeal from the district court to the Supreme Court?

This question was answered in the case of *State v. Peugh*. In that case the Court of Appeals stated "the Supreme Court has recently altered the standard by which we review a

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decision of the district court acting in its appellate capacity. Rather than directly reviewing the magistrate court's decision independently of, but with due regard for, the district court's decision, we instead review the district court's decision. *Losser v. Bradstreet*, 145 Idaho 670, 183 P.3d 758,760 (2008). We do examine the 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 there from and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure." (cits. omitted) *State of Idaho v. Russell Phillip Peugh*, Docket No. 34819, Court of Appeals, Filed September 4, 2008.

ATTORNEY FEES ON APPEAL

Attorney fees may be awarded on appeal under I. R. A. 41 and I. C. § 12-120 and § 12-121. Attorney fees should be awarded to the Appellant because the appeal has pointed out the mistakes made by the court in stating the Appellant voluntarily gave his exempt property voluntarily to the plaintiff's attorney. Because of this error the appellant should be deemed the prevailing party on appeal. *Chadderdon v. King*, 104 Idaho 406, 659 P2d 160 (Ct. App. 1983).

ARGUMENT AND AUTHORITY

The magistrate court held the defendant voluntarily gave his money to the plaintiff's attorney. The magistrate court erred in this holding. By making this statement the magistrate stated the defendant gave up his right to keep his money. This raises first the issue regarding the defendant's right to keep his money.

Idaho Code § 11-506 set forth what debtor's property mat be used to satisfy a judgment in Idaho. This statute states most property can be used to satisfy a judgment. However, some property can not be used for this purpose. The main property which can not be used to satisfy a

judgment is all property "exempt from execution". I.C. § 11-506. Was the property taken from the defendant exempt from execution? As will be shown, it was exempt and could not be taken by the plaintiff.

Chapter 6, Title 11 of the Idaho Code sets out the Idaho "Exemption of Property from Attachment or Levy". Specifically, I.C. § 11-604A(3) spells out two exemptions relevant to this case. It states all monies received from "disability allowance" are exempt in their entirety and with no limitations on amount. The defendant stated he had three sources of money: disability from Simplot, disability from the federal government, and social security. Social security money is exempt with out limitation under I.C. § 11-603(3). An additional exemption is found in Idaho Code § 11-605(10). This statute provides an exemption to all "tangible personal property" not to exceed a value of \$800.00. This means the property taken by plaintiff was not property subject to satisfy a judgment under I.C. § 11-506, and the money should be returned to defendant.

The magistrate court ruled the defendant voluntarily gave his money to the plaintiff. In effect the court ruled the defendant waived his rights under I.C. § 11-506. Do the facts of this case give rise to a waiver of rights? What did the defendant say when he gave up his rights? When asked by plaintiff's attorney if the money in defendant's wallet was "to pay for this?" he responded "well, not necessarily..." Do these facts constitute a waiver of one's rights under the law?

The legal definition of waiver is "the intentional or voluntary relinquishment of a known right". Black's Law Dictionary, fourth edition. The response by defendant of "well, not necessarily" is clearly not a positive response to the question "to pay for this?" In other words the defendant did not say or imply he was intentionally or voluntarily giving the plaintiff's attorney money to pay for the bill.

The definition of waiver also contains a second element which, although known by the court and the plaintiff's attorney, was not known by the defendant. This second element one must give up is a "known right", in this case the right of the money to be exempt and not subject to a taking. If the sheriff had served an execution on the defendant the sheriff would have given defendant an explanation of exemptions and a list of all the Idaho exemptions. The defendant would have had ten days to exercise his right to the exemptions. The money would not have just been taken as it was by plaintiff.

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The court did not inform the defendant of any exemption rights. The court did know the defendant may have a disability. Although the Judge was new to the bench he did set the stage for the taking of the money when he told defendant "if he wants to see what's in your wallet, you're going to show him." The court did not have the benefit of the information latter developed in the hearing so could not anticipate what was to happen. However he did set the stage and attitude which was not fair or equitable towards the defendant.

The plaintiff's attorney was very familiar with the facts of the case when he took the money. He knew the money was exempt. How do we know this? In his affidavit for supplemental attorney fees he states he has practiced law since 1989 and "a substantial portion of my practice has been involved in civil practice." He went on to express how his rate was reasonable based on "his experience (particularly in the area of law involved in this case)". See AFFIDAVIT OF BRYAN D. SMITH IN SUPPORT OF APPLICATION FOR AWARD OF SUPPLEMENTAL ATTORNEY'S FEES AND COSTS, dated September 22, 2008.

Filled with the above knowledge and experience Mr. Smith should have known of the law heretofore set out. Yet he violated this law by taking the money and at no time informing the defendant of any of his rights to claim an exemption. In the magistrate court file are a number of

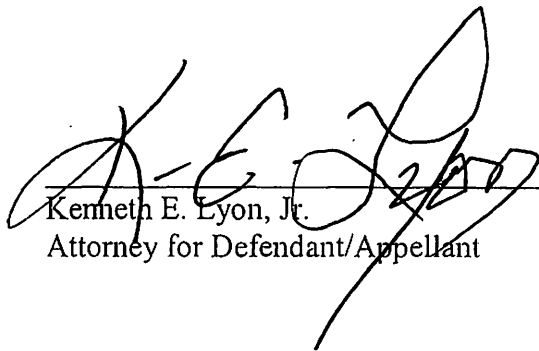
documents prepared by the plaintiff's attorney or the Ada County sheriff. The titles of these documents are as follows: STATUTORY INTERROGATORIES, NOTICE OF CONTINUING GARNISHMENT, WRIT OF EXECUTION, INSTRUCTIONS TO THE DEFENDANT(S) AND CLAIM OF EXEMPTION AND/OR THIRD PARTY CLAIM (A copy of these documents are attached to this brief and marked exhibit B). These documents must be made part of one's motion for a debtor's exam and the plaintiff's attorney would be very familiar with them. Since the sheriff must inform the defendant of his rights to exemptions this requirement should also apply to an attorney during a debtor's exam when it is obvious all of the debtor's property is exempt.

The above requirement is also supported by law. Idaho Code § 28-1-203 provides "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement". "Good faith" is defined as "honesty in fact in the conduct or transaction concerned." I.C. § 28-1-201(19). It is submitted in order to act in good faith in the enforcement of the contract the plaintiff's attorney should have given notice to the defendant of his right to claim the money exempt. Idaho Code § 28-1-203(25)-(26) discusses how a person is given notice and how notice is to be given. The plaintiff did not comply with any of this law. Thus the plaintiff failed in its duty to enforce its contract in good faith and should not benefit from this breach of law.

CONCLUSION

For the above reasons the magistrate court did not apply the proper law in reaching its decision. Its decision should be reversed and the money taken from the defendant should be returned and attorney fees should be awarded against the plaintiff/respondent on appeal.

DATED this 17 day of December, 2008.

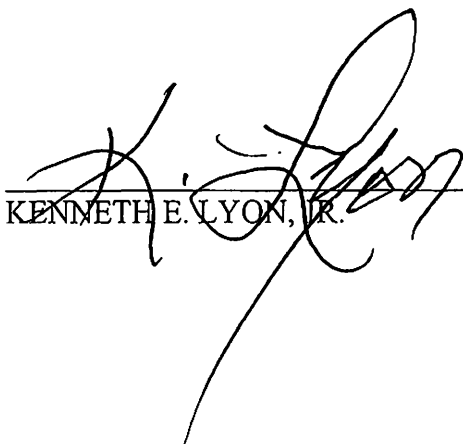

Kenneth E. Lyon, Jr.
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 17 day of December, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Idaho Rules of Civil Procedure, to the following person(s):

Brian D. Smith
Attorney at Law
P.O Box 50731
Idaho Falls, ID 83405

U.S. Mail
 Facsimile
 Hand delivered


KENNETH E. LYON, JR.

2009 APR 14 AM 11:21

BY: *[Signature]*
DEPUTY CLERK

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

MEDICAL RECOVERY SERVICES, LLC)	
	)	Case No. CV-2007-306-OC
Plaintiff/Respondent,)	
)	
vs.	)	MEMORANDUM DECISION
	)	and ORDER
BILLY M. CARNES,)	
)	
Defendant/Appellant.)	

NATURE OF THE CASE

This case comes before this Court pursuant to an appeal entered by Billy M. Carnes (“the Appellant” or “Mr. Carnes”) of an Order issued by Magistrate Judge Steven A. Thomsen on August 19, 2008, denying the Appellant’s motion for return of funds. That motion was made following a debtor’s exam held on February 20, 2008, wherein the Appellant paid \$1,640.00 to the attorney representing Medical Recovery Services, LLC (“the Respondent” or “the Plaintiff”). The Appellant argues that counsel for the Respondent forced him to make the payment without giving him the opportunity to file a claim of exemption. (See Br. of Appellant, Dec. 17, 2008, 6.) The Respondent argues the “Appellant was not entitled to file a claim of exemption because he made a voluntary payment at the hearing.” (Resp’t’s Reply Br. on Appeal, Jan. 9, 2009, 1-2.)

On March 31, 2008, the Respondent filed a Motion for Supplemental Attorney Fees. The Appellant filed an objection to that request, as well as a motion to return the money he alleges was wrongfully taken during the debtor’s exam. Prior to the filing of that motion, the Appellant “was never represented by an attorney.” (Br. of Appellant at 1.) In his Order denying the

Appellant's motion for return of funds, the magistrate determined that the "funds taken from [Mr. Carnes] were voluntarily turned over to the Plaintiff's attorney." (Order, Aug. 19, 2008.) This appeal follows. Two issues were presented for this Court's consideration, including the following: "1. Whether the Magistrate Court erred in finding 'funds taken from the Defendant were voluntarily turned over to the Plaintiff's attorney'. 2. Is the defendant entitled to attorney fees on appeal?" (Br. of Appellant at 4.)

On February 9, 2009, this Court heard oral arguments regarding the appeal, taking the case under advisement. (See Min. Entry and Order, Feb. 20, 2009.) After being fully briefed in the Appellant's and the Respondent's allegations and the law, this Court issues this Memorandum Decision and Order.

STATEMENT OF FACTS

The facts important to this case are undisputed and found in the Transcript of Debtors Exam Hearing. The relevant exchanges are as follows:

COURT: All right. Mr. Carnes, apparently there's been a Writ of Execution served that came back unsatisfied. And pursuant to the statute and rule, counsel for the plaintiff has the opportunity today to examine you concerning your assets and that means everything even the mint in your pockets. Okay? So he will ask you questions. I'm going to leave the courtroom and we'll leave the record running, so he will be able to examine you; ask you about what you own; ask you about what you have and if he wants to see what's in your wallet, you're going to show him. Okay?

...

Q: When was the last time you worked?

A: Last October.

Q: Where did you work at?

A: Simplot.

Q: Why did you leave employment there?

A: I was fired for, I had an injury and I was unable to work, so, because I couldn't go back to work, they terminated me.

Q: What's your source of income now?

A: Social Security.

Q: Are you on Social Security Disability?

A: No, just retirement. I've filed for disability, but I haven't got it yet.

Q: How much do you get paid from that?

A: \$1194.

...

A: I'm getting \$233 from Simplot disability.

Q: Any other income?

A: I'm making \$230 from VA.

Q: What is that, VA? Is that a retirement?

A: No. It's because of agent orange exposure and stuff like that from the VA.

That about does it.

Q: Any other income?

A: No.

...

Q: [S]omewhere you've got to be depositing your Social Security checks, the Federal Government puts those in your account, correct?

A: No.

Q: They send it to your house?

A: Yeah.

Q: And your disability from Simplot and your disability from VA?

A: Yeah, they send it to my house.

Q: I thought they were doing that all electronically?

A: I have the option to do it electronically I guess, but it's just simpler to send it to my house.

Q: Okay. How much do you have on you right now?

A: I'm not sure. I've got a few hundred dollars on me.

Q: Okay. Open up your wallet. How much is in the account?

A: It looks like about \$1540.

Q: Where does that money come from?

A: That's just money I've saved.

Q: To pay for this?

A: Well, not necessarily, it's just money over the last year I've saved a few dollars here and a few dollars there just for.

...

Q: Okay, sir. Here's where we are. You've got \$1540 on your person and this is on the record so the record's running.

A: I'm not trying to hide anything.

Q: I know you're not. I need to have you turn that over to me and we'll apply it to your judgment. If you don't want to do that we can wait, the judge is in a hearing right now and we'll ask him to order you to do it, so, the choice is yours.

A: Well, I've never, you know, run out on a debt in my life that I figure I owed.

Q: I know.

A: But he's charging me, none of this doesn't have being here not there or nothing like that [sic], but he's charging me partly for a bill I've already paid.

Q: The problem is it's already been ruled by the Court that we're passed that. The Judgment in the case is \$1816.72.

...

Q: [S]o if you pay \$1540 right now, the balance will be \$276.72. So, you can either pay for me or we can wait around for the judge to come back and let him deal with this. It's your choice.

A: Couldn't give me a break or something on it?

Q: No. I had to come all the way down here from Idaho Falls. You didn't call me, didn't try to set up any payments.

A: I didn't know I was supposed to.

Q: I know. So, the answer is no, I can't.

A: All right.

Q: Do you want me to count it out for you? Do you want to count it?

A: Yeah.

...

Q: Okay. We'll apply 1640 on your account, sir, and you're free to leave.

(Tr. of Debtors Exam Hr'g, July 25, 2008, 1:18-2:2, 6:17-7:14, 8:24-9:5, 10:4-11:3, 12:23-13:15, 18-14:6, 20.)

ISSUES

1. Whether the magistrate court erred in finding that the funds taken from Mr. Carnes were voluntarily turned over to the Plaintiff's attorney.
2. Whether the Appellant is entitled to attorney fees.

DISCUSSION

1. Whether the magistrate court erred in finding that the funds taken from Mr. Carnes were voluntarily turned over to the Plaintiff's attorney.

a. Standard of Review

This is an appeal from the magistrate division pursuant to Rule 83(a). Such appeals are generally heard by the district court as an appellate proceeding and are governed by the same standards and procedures used in an appeal to the Idaho Supreme Court. IDAHO RULES OF CIVIL PROCEDURE 83(b), 83(u)(1) (2008). When a district court is sitting in an appellate capacity under Rule 83(u)(1), the proper standard of review is whether there is substantial and competent evidence in the record that supports the magistrate's finding as a trial court. *Howard v. Cornell*, 134 Idaho 403, 405, 3 P.3d 528, 530 (2000) (citing *Shurtliff v. Shurtliff*, 112 Idaho 1031, 1033, 739 P.2d 330, 332 (1987)). See also *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990) (Trial courts' findings and conclusions that are based on substantial although conflicting evidence will not be disturbed on appeal. Such findings will not be set aside unless clearly erroneous); *Hentges v. Hentges*, 115 Idaho 192, 765 P.2d 1094 (Idaho Ct.App. 1988) (Where a district court sits as an appellate court for the purpose of reviewing a magistrate's judgment, the district court is required to determine whether there is substantial evidence to support the magistrate's findings of fact. If those findings are so supported, and if the conclusions of law demonstrate proper application of legal principles to the facts found, then the district court will affirm the magistrate's judgment). 'Evidence is substantial if a reasonable trier of fact would accept and rely upon it in determining whether a

disputed point of fact has been proven.’ *Doe I v. Doe*, 138 Idaho 893, 906, 71 P.3d 1040, 1053 (2003) (quoting *Weaver v. Millard*, 120 Idaho 692, 698, 819 P.2d 100, 116 (Idaho Ct.App. 1991)).

The proper standard of review, therefore, is for this Court to determine whether there is substantial and competent evidence in the record that supports the magistrate’s findings, and whether he properly applied the relevant legal principles. If such evidence can be found, this Court will not disturb his findings of fact and conclusions of law on appeal.

- b. There is not substantial and competent evidence to support the magistrate’s findings that the funds taken from the Appellant were “voluntarily” turned over to the Plaintiff’s attorney.**

The magistrate based his finding that the “funds taken from the [Appellant] were voluntarily turned over to the Plaintiff’s attorney” from a review of the Transcript of Debtors Exam Hearing. (Order, Aug. 19, 2008.) In reviewing that same transcript, this Court has determined the evidence does not support that finding.

Pursuant to Idaho Code (“IC”) § 11-506: “The judge or referee may order any money or property of a judgment debtor not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment.” Idaho Code § 11-603¹ pertains to “[p]roperty exempt without limitation” and states

¹ § 11-603. Property exempt without limitation

An individual is entitled to exemption of the following property:

- (1) a burial plot for the individual and his family;
- (2) health aids reasonably necessary to enable the individual or a dependent to work or to sustain health;
- (3) benefits the individual is entitled to receive under federal social security, or veteran's benefits, except the restrictions under this subsection shall not apply to enforcement of an order for the support of any person by execution, garnishment, or wage withholding under chapter 12, title 7, Idaho Code;
- (4) benefits the individual is entitled to receive under federal, state, or local public assistance legislation;

Memorandum Decision and Order

Case No. CV2007-306-OC

that “[a]n individual is entitled to exemption of ... federal social security, or veteran’s benefits” Furthermore, IC § 11-604A(3)² provides that monies received from a “disability allowance ... shall be exempt from execution, attachment, garnishment, seizure, or other levy by or under any legal process whatever.”

Although, the magistrate judge here did not “order” the Appellant to apply the money in his wallet toward the satisfaction of the judgment, neither the magistrate nor the Plaintiff’s attorney made any attempt to inform Mr. Carnes that certain property, particularly disability payments and social security money, are exempt. Furthermore, as set forth above, the magistrate did order the Appellant to show the Plaintiff’s attorney the contents of his wallet. The magistrate stated:

COURT: All right. Mr. Carnes, apparently there’s been a Writ of Execution served that came back unsatisfied. And pursuant to the statute and rule, counsel for the plaintiff has the opportunity today to examine you concerning your assets and that means everything even the mint in your pockets. Okay? So he will ask you questions. I’m

(5) benefits payable for medical, surgical, or hospital care;

(6) state unemployment compensation to the extent provided for in section 72-1375, Idaho Code.

² § 11-604A. Pension money exempt

...

(3) The right of a person to a pension, annuity, or retirement allowance or disability allowance, or death benefits, or any optional benefit, or any other right accrued or accruing to any citizen of the state of Idaho under any employee benefit plan, and any fund created by the benefit plan or arrangement, shall be exempt from execution, attachment, garnishment, seizure, or other levy by or under any legal process whatever. This subsection shall not apply to any child support collection actions, if otherwise permitted by federal law. This subsection shall permit benefits under any such plan or arrangement to be payable to a spouse, former spouse, child, or other dependent of a participant in the plan to the extent expressly provided for in a qualified domestic relations order that meets the requirements for those orders under the plan, or, in the case of benefits payable under a plan described in sections 403(b), 408, 408A or 457 of the Internal Revenue Code of 1986, as amended, or section 409 of the Internal Revenue Code as in effect before January 1, 1984, to the extent provided in any order issued by a court of competent jurisdiction that provides for maintenance or support. This subsection shall not prohibit actions against an employee benefit plan or fund for valid obligations incurred by the plan or fund for the benefit of the plan or fund.

...

going to leave the courtroom and we'll leave the record running, so he will be able to examine you; ask you about what you own; ask you about what you have and if he wants to see what's in your wallet, you're going to show him. Okay?

In addition, the Appellant clearly explained that he had only three sources of income, including social security, disability and certain veteran's benefits.

Q: When was the last time you worked?

A: Last October.

Q: Where did you work at?

A: Simplot.

Q: Why did you leave employment there?

A: I was fired for, I had an injury and I was unable to work, so, because I couldn't go back to work, they terminated me.

Q: What's your source of income now?

A: Social Security.

Q: Are you on Social Security Disability?

A: No, just retirement. I've filed for disability, but I haven't got it yet.

Q: How much do you get paid from that?

A: \$1194.

...

A: I'm getting \$233 from Simplot disability.

Q: Any other income?

A: I'm making \$230 from VA.

Q: What is that, VA? Is that a retirement?

A: No. It's because of agent orange exposure and stuff like that from the VA.

That about does it.

Q: Any other income?

A: No.

Moreover, before requiring the Appellant to hand over all the money contained in his wallet, the Plaintiff's attorney ascertained that those funds consisted of money the Appellant had "saved" over the "last year" but were not funds he had saved "necessarily" for the purposes of paying the subject debt.

Q: Okay. How much do you have on you right now?

A: I'm not sure. I've got a few hundred dollars on me.

Q: Okay. Open up your wallet. How much is in the account?

A: It looks like about \$1540.

Q: Where does that money come from?

A: That's just money I've saved.

Q: To pay for this?

A: Well, not necessarily, it's just money over the last year I've saved a few dollars here and a few dollars there just for.

...

Q: Okay, sir. Here's where we are. You've got \$1540 on your person and this is on the record so the record's running.

A: I'm not trying to hide anything.

Q: I know you're not. I need to have you turn that over to me and we'll apply it to your judgment. If you don't want to do that we can wait, the judge is in a hearing right now and we'll ask him to order you to do it, so, the choice is yours.

A: Well, I've never, you know, run out on a debt in my life that I figure I owed.

Q: I know.

Thus, based on the questioning, the Plaintiff's attorney was aware that the money in the Appellant's wallet was quite possibly subject to exemption according to the Idaho Code.

To be voluntary, a payment must be made "without compulsion or duress." 85 C.J.S. *Taxation* § 915 (2008). "This is what is known as the 'volunteer rule,' which provides that a party who, without mistake, fraud, or duress, voluntarily pays money on a demand which is not enforceable against him or her, cannot recover the amounts paid." *Id.*

[I]t is universally recognized that money voluntarily paid under a claim of right to payment and with knowledge of the facts by the person making the claim, cannot be recovered on the ground that the claim was illegal, or that there was no liability to pay in the first instance. Knowledge of all the facts by the payor and fraud or imposition by the payee are the two key factors in the application of the "voluntary payment doctrine." The determination of whether payments are made on a voluntary basis and thus are not recoverable under the "volunteer" rule, depends on the facts of a particular case and whether these facts indicate an intent on the part of the payor to waive his or her rights. The question of whether a payment is voluntary or involuntary is one of law where the facts are undisputed, but where the facts are in dispute it is for the jury to say whether the money was paid voluntarily or in consequence of compulsion or duress.

66 AM.JUR. 2D *Restitution and Implied Contracts* § 108 (2008). Furthermore, according to Black's Law Dictionary, "voluntary" is defined alternatively as "[d]one by design or intention" or "[u]nconstrained by interference; not impelled by outside influence." BLACK'S LAW DICTIONARY 753-54 (2nd ed. 2001).

Neither the magistrate judge nor the Plaintiff's attorney informed the Appellant of either his potential exemption rights nor made inquiry into the source of the funds before taking the money from him. As Mr. Carnes was not represented by counsel, it is clear that Mr. Carnes did not have "knowledge of all the facts" before handing over his money. The undisputed facts also clearly indicate the funds contained in the Appellant's wallet that day were potentially exempt. As set forth previously, Mr. Carnes explained that he had only three sources of income, including social security, disability and certain veteran's benefits. Furthermore, the transcript of the hearing indicates an element of intimidation and undue influence. As indicated above, the magistrate court informed the Appellant that he was required to show the Plaintiff's attorney the contents of his wallet, even "the mints in your pockets." The Plaintiff's attorney further informed Mr. Carnes:

Q: ... I need to have you turn [the money in your wallet] over to me and we'll apply it to your judgment. If you don't want to do that we can wait, the judge is in a hearing right now and we'll ask him to order you to do it, so, the choice is yours. ... [Y]ou can either pay for me or we can wait around for the judge to come back and let him deal with this. It's your choice.

A: Couldn't give me a break or something on it?

Q: No. I had to come all the way down here from Idaho Falls. You didn't call me, didn't try to set up any payments.

A: I didn't know I was supposed to.

Q: I know. So, the answer is no, I can't.

A: All right.

Q: Do you want me to count it out for you? Do you want to count it?

A: Yeah.

...

Q: Okay. We'll apply 1640 on your account, sir, and you're free to leave.

(Tr. of Debtors Exam Hr'g at 13:2-6, 19-14:6, 20-21.)

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Based on a review of the transcript from the Debtor's Exam, the facts indicate no intent on the part of the Appellant to waive his potential exemption rights. The Appellant should have been informed of those rights. Because he was not, the Appellant certainly did not have knowledge of all the facts; therefore, the evidence does not support a finding that the Appellant *voluntarily* relinquished the money from his wallet. On the contrary, since the Appellant was not informed of his rights and was additionally subject to intimidation by the judge's demands that he reveal the contents of his pockets and his wallet and the insistence by the Plaintiff's attorney that the judge could "order" him to hand over all of his money, the magistrate's finding "that funds taken from the Defendant were voluntarily turned over to the Plaintiff's attorney" is vacated. Furthermore, since the issue of whether or not the exemption applies to the subject funds involves questions of fact, this case is hereby remanded to Judge Thomsen for a determination regarding the status of that money.

2. Whether the Appellant is entitled to attorney fees.

Rule 54(e)(1)³ of the Idaho Rules of Civil Procedure (IRCP) provides a court with the discretion to award reasonable attorney fees to the prevailing party when authorized by statute or

³ **Rule 54(e)(1). Attorney fees.** In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or

contract. This Court has determined the magistrate court erred in his finding that the Appellant voluntarily turned over his funds to the Plaintiff's attorney. The Appellant is claiming a right to attorney's fees and costs pursuant to IC §§ 12-121 and 12-120(3).

a. The Appellant is not entitled to an award pursuant to IC § 12-121.

While IRCP 54(e)(1) allows a court, in its discretion, to award attorney's fees to the prevailing party when authorized by statute, that rule also limits an award of attorney fees pursuant to IC § 12-121⁴. Attorney fees may be awarded under that section of the Idaho Code only when the court is left with the abiding belief the case was "brought, pursued or defended frivolously, unreasonably or without foundation" IRCP 54(e)(1).

In thoroughly reviewing the record in this case, this Court, in its discretion, cannot find that this lawsuit was brought, pursued or defended frivolously, unreasonably or without foundation. Thus, this Court declines to grant the Appellant's request for attorney fees pursuant to IC § 12-121.

b. The Appellant is entitled to an award pursuant to IC § 12-120(3).

IC § 12-120(3) provides for an award of attorney fees in civil actions to recover on a bill.

Section 3 states in pertinent part:

(3) 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,

defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

⁴ § 12-121. Attorney fees. – In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

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.

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“I.C. § 12-120(3) holds that the prevailing party *shall* be allowed a reasonable attorney fee. Thus, the district court does not have discretion in awarding the prevailing party attorney fees under § 12-120(3) if the statute applies.” *Andrea v. City of Coeur d'Alene*, 132 Idaho 188, 189, 968 P.2d 1097, 1098 (Idaho Ct.App. 1998).

In this case, the Plaintiff's claims against Mr. Carnes arise from the alleged failure of the Appellant to pay an indebtedness owed to the Plaintiff. (Compl., Jan. 19, 2007.) Therefore, the Appellant is entitled to attorney fees pursuant to IC § 12-120(3), as this case involves allegations regarding the type embraced by that statute. Since this Court has determined Mr. Carnes prevailed on his appeal, he is hereby awarded attorney fees pursuant to § 12-120(3) for the work associated with the pursuit of that appeal. The Appellant shall submit an appropriate Memorandum of Costs for this Court's consideration within ten (10) days of the date of this Memorandum Decision and Order.

CONCLUSION

The facts contained in the Transcript of Debtors Exam Hearing demonstrate there was not substantial and competent evidence to support the magistrate's findings of fact that the Appellant made a voluntary payment. As such, the magistrate's finding “that funds taken from the Defendant were voluntarily turned over to the Plaintiff's attorney” is hereby vacated. Based on a review of the transcript, the facts indicate no intent on the part of the Appellant to waive his potential exemption rights. The Appellant should have been informed of those rights. Because


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he was not, the Appellant certainly did not have knowledge of all the facts and the evidence therefore does not support a finding that the Appellant *voluntarily* relinquished the money from his wallet. Furthermore, the Appellant was additionally subject to intimidation by the judge's demands that he reveal the contents of his pockets and his wallet and the insistence by the Plaintiff's attorney that the judge could "order" him to hand over all of his money. Since the issue of whether or not the exemption applies to the subject funds involves questions of fact, this case is hereby remanded to Judge Thomsen for a determination regarding the status of that money.

In addition, this Court also hereby GRANTS the Plaintiff's request for attorney fees pursuant to IC § 12-120(3). The Appellant shall submit an appropriate Memorandum of Costs explaining the amount expended for the work associated with the pursuit of this appeal within ten (10) days of the date of this Memorandum Decision and Order.

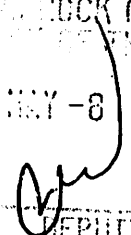
Based on the foregoing, this case is hereby remanded to the Sixth District Magistrate Court Honorable Steven A. Thomsen presiding to make a determination whether the money taken from the Appellant was subject to an exemption pursuant to the Idaho Code. This Court, as an appellate court, is not a finder of fact, thus the magistrate judge shall conduct further proceedings to determine whether or not the \$1640 was exempt.

IT IS SO ORDERED.

Dated this 13 day of April, 2009.


Peter D. McDermott
District Judge

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BANNOCK COUNTY
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

MEDICAL RECOVERY SERVICES, LLC,
an Idaho limited liability company,

Plaintiff/Respondent,

vs.

BILLY M. CARNES,

Defendant/Appellant.

Case No. CV-2007-306-OC

**OBJECTION TO DEFENDANT'S
MEMORANDUM OF COSTS
AND FEES**

COMES NOW, Medical Recovery Services, LLC by and through its attorney of record,
Bryan D. Smith, Esq., of the firm of Smith, Driscoll & Associates, PLLC, and objects to Billy M.
Carnes' Memorandum of Costs and Fees dated April 27, 2009 on the following grounds:

1. Medical Recovery Services, LLC ("MRS") objects to fees and costs being sought
on the grounds that defendant's Memorandum of Costs and Fees was not timely filed. The
District Court's Memorandum Decision and Order dated April 13, 2009 and entered April 14,
2009 states that "[t]he Appellant shall submit an appropriate Memorandum of Costs explaining
the amount expended for the work associated with the pursuit of this appeal within ten (10) days
of the date of this Memorandum Decision and Order". Thus the defendant's memorandum of
costs and fees was to be filed no later than April 24, 2009. However, the defendant's

OBJECTION TO COSTS AND FEES – PAGE 1

F:\CLIENTS\BDS\Collections\MRS\7341.1432\Pleadings\0015 Objection to Costs and Fees.doc


Memorandum of Costs on Fees was filed on April 28, 2009. Because defendant's Memorandum of Costs and Fees was not timely filed, defendant has waived his right to costs and fees.

2. MRS objects to fees being sought on the grounds that defendant has failed to attach an "affidavit setting forth the method of computation of the attorney fees claimed" to the Memorandum of Costs and Fees as required by the I.A. R. Rule 41(d).

3. MRS objects to the amount of fees being sought on the grounds that the amount of time is excessive. For example, defendant claims fees for research on waiver, estoppel, and the UCC. The issues involved in this matter are clearly outside the scope of the UCC and defendant has not raised any of these issues in his briefing.

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DATED this 7th day of May, 2009.

SMITH, DRISCOLL & ASSOCIATES, PLLC


By 
Bryan N. Zollinger
Attorneys for Defendant

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on this 7th day of May, 2009, I caused a true and correct copy of the foregoing **OBJECTION TO DEFENDANT'S MEMORANDUM OF COSTS AND FEES** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Kenneth E. Lyons, Esq.
P.O. Box 4866
Pocatello, ID 83206

U.S. Mail
 Fax: (208)232-8867


Bryan N. Zollinger

Bryan D. Smith, Esq.
ISB # 4411
Bryan N. Zollinger, Esq.
ISB # 8008
McGRATH, SMITH & ASSOCIATES, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, Idaho 83405
(208) 524-0731
Attorneys for Plaintiff

FILED
BANNOCK COUNTY
2009 MAY 11 AM 11:52
BY 
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MEDICAL RECOVERY SERVICES, LLC,
an Idaho limited liability company,

Plaintiff,

vs.

BILLY M. CARNES,

Defendant.

Case No. CV-2007-306-OC

NOTICE OF APPEAL

TO: THE ABOVE NAMED DEFENDANT/APPELLANT, BILLY M. CARNES, AND HIS ATTORNEY, KENNETH E. LYON, JR., ESQ., 602 SOUTH FIFTH AVENUE, P.O. BOX 4866, POCA TELLO, IDAHO 83205, AND TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named plaintiff, Medical Recovery Services, LLC., appeals to the Idaho Supreme Court from the District Court's Memorandum Decision and Order dated April 13, 2009 in which the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock, Honorable Peter D. McDermott, District Judge, presiding, vacated and remanded the Magistrates Court's Order Denying defendants Motion for Return of Funds dated August 19, 2008.

2. Plaintiff has the right to appeal to the Idaho Supreme Court from the pleadings described in paragraph one pursuant to Rule 11(a), Idaho Appellate Rules.

3. The issues which plaintiff intends to assert on appeal are the following:

a. Was the magistrate's finding that the funds were voluntary turned over to the plaintiff's attorney supported by substantial and competent evidence?

b. Did the district court commit error by applying Idaho Section 11-506 when there has been no court order?

c. Did the district court commit error by finding that the plaintiff's attorney and the court had a duty to inform the defendant of exemption rights when there had been no garnishment or court order to turn the funds over to plaintiff?

d. Is the defendant entitled to attorney's fees as a prevailing party where plaintiff was found to be the prevailing party in the underlying matter and is attempting to enforce the judgment within the meaning of I.C. § 12-120(5)?

e. Is plaintiff entitled to attorney's fees on appeal?

4. There has been no order entered sealing any portion of the record in this case.

5. Plaintiff requests that the reporter not prepare a transcript of the prior proceedings in this case.

6. Plaintiff requests that the following documents be included in the clerk's record in addition to those automatically included under Rule 28, Idaho Appellate Rules:

✓ a. Judgment entered October 11, 2007;

✓ b. Order of Examination dated December 5, 2007;

c. Motion to Contest Claim of Exemption dated October 16, 2007;

✓d. Objection to Application for Award of Supplemental Attorney Fees, Motion for Trial, and Motion to Return Money wrongfully Taken by Plaintiff's Attorney from Defendant dated April 18, 2008;

✓e. Reply to Objection to Application for Award of Supplemental Attorney Fees, Motion for Trial, and Motion to Return Money wrongfully Taken by Plaintiff's Attorney from Defendant dated April 22, 2008;

✓f. Order for Transcript dated July 15, 2008;

? ✓g. Transcript of Debtors Exam Hearing dated February 20, 2008 before the Honorable Steven A. Thomsen;

✓h. Response to Defendant's Motion for Trial and to Return Money dated August 4, 2008;

✓i. Affidavit in Support of Response to Defendant's Motion for Trial and to Return Money dated August 4, 2008;

✓j. Brief dated August 14, 2008;

✓k. Order entered August 19, 2008 by the Magistrate Court;

✓l. Notice of Appeal dated September 30, 2008;

✓m. Order entered on October 24, 2008 by the District Court;

✓n. Motion for Further Supplementation of Appeal File dated December 11, 2008;

✓o. Amended Judgment dated December 26, 2008;

✓p. Brief of Appellant dated December 17, 2008;

✓q. Respondent's Reply Brief on Appeal dated January 9, 2009;

✓ r. Minute Entry and Order entered February 18, 2009 by the District Court sitting as an appellant court;

✓ s. Memorandum Decision and Order entered on April 13, 2009 by the District Court sitting as an appellant court.

7. I certify:

(a) That a copy of this notice of appeal has not been served on the reporter because appellant requests the reporter not prepare a transcript of the prior proceedings in this case;

(b) That the plaintiffs are exempt from paying the estimated transcript fee because the plaintiff requests that no transcript be prepared;

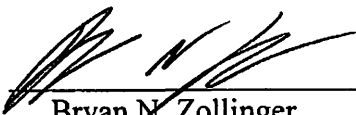
(c) That the estimated fee for preparation of the clerk's record has been paid;

(d) That the appellate filing fee has been paid;

(e) That service has been made upon all parties required to be served pursuant to Rule 20, Idaho Appellate Rules.

DATED this 7th day of May, 2009.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 
Bryan N. Zollinger
Attorneys for Plaintiffs/Appellants

CLERK OF DISTRICT COURT
COUNTY OF BANNOCK
IDAHO

2009 MAY 13 PM 3:03

BY [Signature]
DEPUTY CLERK

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE STATE OF IDAHO, COUNTY OF BANNOCK**

**MEDICAL RECOVERY SERVICES)
LLC, an Idaho limited liability company)**

Plaintiff/Respondent,)

CASE NO. CV2007-306-OC

vs.)

JUDGMENT

BILLY M CARNES,)

Defendant/Appellant.)

_____)

On April 13, 2009, this Court issued a Memorandum Decision and Order remanding this case to Magistrate Division of District Court, Honorable Steven A. Thomsen presiding to make a determination whether the funds at issue were subject to Idaho laws on exemption and awarded appellant's attorney, attorney fees on appeal.

On April 28, 2009, appellants counsel filed a Memorandum of Costs and Fees requesting \$53.00 for filing fee and attorney fees for 21.2 hours at \$175.00 per hour for a total of \$3,710.00.

On May 8, 2009, counsel for respondent filed an objection to appellant's Memorandum of Costs and Fees.

Although this Court requested appellant submit a memorandum of costs within ten (10) days of the date of this Court's Order dated April 13, 2009, IRCP54(d)(5) provides the memorandum of costs shall be filed no later than Fourteen (14) days after entry of Judgment.

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This Court's Memorandum Decision and Order was filed with the Bannock County Clerk's Office on April 14, 2009, and appellant's Memorandum of Costs was filed with the Bannock County Clerk's office on April 28, 2009, making the filing timely per the Idaho Rules of Civil Procedure.

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This Court has reviewed the factors contained in IRCP 54(e)(3), prevailing charges for attorney fees of \$175.00 per hour are reasonable, due to the experience and ability of Mr. Lyon, the skill necessary to perform the legal services rendered herein and time devoted to briefing. This Court has also considered the objections of counsel for respondent and concludes Mr. Lyon is awarded attorney fees for Fifteen (15) Hours at \$175.00 per hour for total fees of \$2,625.00 plus \$53.00 filing fee for a total of \$2,678.00.

NOW, THEREFORE, IT IS HEREWITH ORDERED Judgement is herewith entered in favor of Appellant Billy M. Carnes against Respondent Medical Recovery Services, LLC, an Idaho limited liability company in the sum of TWO THOUSAND SIX HUNDRED SEVENTY EIGHT and no/100s (\$2,678.00).

IT IS SO ORDERED.

DATED this 13th day of May, 2009.


PETER D. McDERMOTT
District Judge

Copies to:
Bryan D. Smith
Kenneth E. Lyon, Jr.

Case No. CV2007-306-OC
Judgment
Page 2 of 2

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IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36500

MEDICAL RECOVERY SERVICES, LLC,)	
an Idaho limited liability company,	)	2010 Opinion No. 20
)	
Plaintiff-Appellant,	)	Filed: March 25, 2010
)	
v.	)	Stephen W. Kenyon, Clerk
)	
BILLY M. CARNES,)	
)	
Defendant-Respondent.)	
)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bannock County. Hon. Peter D. McDermott, District Judge; Hon. Steven A. Thomsen, Magistrate

District court’s appellate decision reversing magistrate court’s order denying motion for return of money, reversed, and case remanded.

Smith, Driscoll & Associates, PLLC, Idaho Falls, for appellant. Bryan N. Zollinger argued.

Kenneth E. Lyon, Jr., Pocatello, for respondent.

LANSING, Chief Judge

This appeal arises from Billy M. Carnes’s motion to return the money that he gave, during a judgment debtor examination, to Medical Recovery Services, LLC (MRS). The magistrate denied Carnes’s motion, but the district court reversed and remanded for further factual determinations and awarded Carnes attorney fees. On appeal, MRS argues that the district court erred in reversing the decision of the magistrate court because substantial and competent evidence supports the magistrate’s findings and the district court misapplied the law.

I.

BACKGROUND

MRS brought an action against Carnes to collect an unpaid bill for medical services. After Carnes filed an answer pro se, MRS moved for summary judgment. Carnes did not respond to the motion and, after a hearing at which Carnes did not appear, the magistrate court

granted MRS's motion and awarded it attorney fees and costs. In MRS's subsequent attempt to collect on this judgment, it obtained an order for a judgment debtor examination. Carnes appeared for the examination, and at the outset of that proceeding the magistrate made the following comments:

Mr. Carnes, apparently there's been a writ of execution served that came back unsatisfied. And pursuant to the statute and rule, counsel for the plaintiff has the opportunity today to examine you concerning your assets and that means everything even the mint in your pockets. Okay? So he will ask you questions. I'm going to leave the courtroom and we'll leave the record running, so he will be able to examine you; ask you about what you own; ask you about what you have and if he wants to see what's in your wallet, you're going to show him. Okay?

In the course of the examination that followed, upon discovering that Carnes had money in his wallet, MRS's attorney told Carnes:

I need to have you turn that over to me and we'll apply it to your judgment. If you don't want to do that we can wait. The judge is in a hearing right now and we'll ask him to order you to do it, so, the choice is yours.

After some discussion, Carnes gave the money to MRS's attorney.

Thereafter, MRS made a motion for supplemental attorney fees. Carnes, through a newly acquired attorney, filed an "Objection to Application for Award of Supplemental Attorney Fees, Motion for Trial, and Motion to Return Money Wrongfully Taken by Plaintiff's Attorney from the Defendant." Carnes subsequently withdrew the objection to the attorney fees and the motion for trial, but pursued his motion to return the money given to MRS's attorney at the debtor examination. Although Carnes did not dispute the validity of the underlying judgment, he argued that because MRS's attorney knew or should have known that the money taken was exempt from execution under several Idaho statutes, the attorney's instruction to Carnes to turn over the money was wrongful. The magistrate court denied the motion for return of the funds, holding that Carnes voluntarily gave the money to MRS's attorney.

Carnes appealed to the district court, which held that the magistrate's finding of voluntary payment was not supported by substantial and competent evidence. The district court reasoned that because neither the judge nor MRS's attorney had informed Carnes of his potential exemption rights, Carnes's payment could not have been voluntary because he did not have "knowledge of all the facts." Additionally, the district court found that both the magistrate judge and MRS's attorney intimidated and unduly influenced Carnes at the examination. Because of this, the district court vacated the magistrate's order and remanded the case to the magistrate

court to determine whether the money had been exempt from execution. The district court also awarded attorney fees to Carnes as the prevailing party pursuant to Idaho Code § 12-120(3).

MRS appeals from the district court's decision. MRS argues that the district court erred in reversing the magistrate's decision because substantial and competent evidence supports the finding that Carnes's payment was voluntary. MRS also argues that the district court erred in applying Idaho's exemption laws because they were not applicable where there had been no court order to pay the money. MRS also seeks a reversal of the district court's award of attorney fees to Carnes and requests an award of its attorney fees and costs incurred in both the intermediate and present appeal.

II.

ANALYSIS

A. Did the District Court Err by Reversing the Magistrate's Finding that Carnes Paid Voluntarily and by Utilizing Inapplicable Law in its Decision?

In an appeal from a decision of the district court rendered in its appellate capacity, we review the decision of the district court directly. *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008); *Nicholls v. Blaser*, 102 Idaho 559, 561, 633 P.2d 1137, 1139 (1981). We examine the record before the magistrate, however, 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. *Id.* Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Bradford v. Roche Moving & Storage, Inc.*, 147 Idaho 733, 736, 215 P.3d 453, 456 (2009); *Carter v. Carter*, 143 Idaho 373, 378, 146 P.3d 639, 644 (2006); *Bouten Const. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 761, 992 P.2d 751, 756 (1999).

The questions presented here center on application of the voluntary payment rule. Under that rule, a person may not--by way of set-off, counterclaim, or direct action--recover money that he or she voluntarily paid with full knowledge of all the facts and without any fraud, duress or extortion, although no obligation to make such payment existed. *Breckenridge v. Johnston*, 62 Idaho 121, 133, 108 P.2d 833, 838 (1940); *Chinchurreta v. Evergreen Management Inc.*, 117 Idaho 591, 593, 790 P.2d 372, 374 (Ct. App. 1989); *McEnroe v. Morgan*, 106 Idaho 326, 335, 678 P.2d 595, 604 (Ct. App. 1984). Therefore, money voluntarily paid in satisfaction of an unjust or illegal demand with full knowledge of the facts, and without any mistake, fraud, duress, or extortion, cannot be recovered by the payor. *Breckenridge*, 62 Idaho at 133, 108 P.2d at 838.

Carnes maintains that his payment was involuntary because he delivered the money to MRS's attorney without knowing that it was exempt from execution under certain Idaho statutes. He relies upon I.C. § 11-506, which provides, "The judge . . . may order any . . . property of a judgment debtor not exempt from execution . . . to be applied toward the satisfaction of the judgment," and upon statutes exempting various categories of property from execution, I.C. §§ 11-603(3) (exempting federal social security and veteran's benefits), 11-604A(3) (exempting employee benefits such as pensions, retirement allowances, and disability allowances), and 11-605(10) (exempting an interest in tangible personal property not to exceed \$800). The district court accepted Carnes's argument, holding that Carnes had shown his payment was involuntary.

We conclude that the district court erred. First, to the extent that the district court held that MRS's attorney violated I.C. § 11-506 by demanding the cash in Carnes's pocket, the court's interpretation of the statute was incorrect. Section 11-506 applies only to preclude a judge from ordering payment from the protected classes of funds. It does not forbid a creditor from requesting such payment. As the magistrate here did not order Carnes to pay, I.C. § 11-506 was not implicated and the exemption statutes were not violated.

Second, Carnes's unawareness of the exemption statutes did not render his payment involuntary. As the *Bradford*, *Carter*, and *Bouten Const.* decisions indicate, the rule disallowing recovery of voluntary payment does not operate if the payment was made without full knowledge of all the *facts*; lack of knowledge concerning the law, however, does not render a payment involuntary. *Cf. Powers v. Canyon County*, 108 Idaho 967, 970, 703 P.2d 1342, 1345 (1985) ("Our entire legal system is based upon the principle that persons are charged with constructive knowledge of the statutes and laws."); *Breckenridge*, 62 Idaho at 127-34, 108 P.2d at 835-38 (holding that where a county paid interest on an overdue bond in reliance on a statute that did not authorize such payment, the county could not recover the interest already paid because the payment was voluntary even though the county was mistaken in its understanding of the law); *Indep. Sch. Dist. No. 6 of Caribou County v. Mittry*, 39 Idaho 282, 285, 226 P. 1076, 1076 (1924) ("The rule that voluntary payments made by reason of mistake of law cannot be recovered applies to individuals . . ."). Carnes was aware of the relevant facts but claims to have been unaware only of Idaho statutes exempting certain types of property from execution by judgment creditors. Carnes has shown only a lack of knowledge concerning the law and its application, which is insufficient to exclude his payment from the voluntary payment rule.

Nor has Carnes shown that his payment was induced by duress. Although we acknowledge that Carnes's payment may not seem "voluntary" in the common usage of the word, "voluntary" for purposes of the voluntary payment rule has a narrower legal meaning. As explained above, payment is voluntary unless there was mistake of fact, duress, fraud, or extortion. *Breckenridge*, 62 Idaho at 133, 108 P.2d at 838; *Chinchurreta*, 117 Idaho at 593, 790 P.2d at 374; *McEnroe*, 106 Idaho at 335, 678 P.2d at 604. Duress, coercion, or compulsion has been found when the payor made the payment on an unjust demand in order to prevent being deprived of an immediate and extreme necessity. *Gess v. Nampa & Meridian Irrigation Dist.*, 33 Idaho 189, 195, 192 P. 474, 476 (1920). Payment is also considered coerced "when it is made to avoid the loss of a necessity or to prevent an injury to a person, business, or property that is different from and disproportionately greater than the unlawful demand." *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 667 (7th Cir. 2001). Duress does not occur, however, merely because a person declares an intent to use the courts to pursue a legal right to which he reasonably believes he is entitled absent other oppressive circumstances. Thus, in *McGill v. Idaho Bank & Trust Co.*, 102 Idaho 494, 499, 632 P.2d 683, 688 (1981) the Idaho Supreme Court held that the threat of civil proceedings does not constitute duress if made in good faith and without other oppressive circumstances. Other states are in accord. See *Adams v. Crater Well Drilling, Inc.*, 556 P.2d 679, 681 n.6 (Or. 1976) ("It is the well-established general rule that it is not duress to institute or threaten to institute civil suits, or take proceedings in court, or for any person to declare that he intends to use the courts wherein to insist on what he believes to be his legal rights."); *Hawkinson v. Conniff*, 334 P.2d 540, 544 (Wash. 1959) ("[A] threat of civil proceedings does not constitute duress if it is made in good faith and without coercion.").

In this case, the district court held that Carnes's payment was involuntary because the debtor examination had "an element of intimidation and undue influence" as Carnes was "subject to intimidation by the judge's demands that he reveal the contents of his pockets and his wallet and the insistence by the Plaintiff's attorney that the judge could 'order' him to hand over all of his money." However, the fact that legal proceedings can be intimidating does not amount to such coercion or duress as would render payment involuntary. The magistrate committed no error and applied no duress by informing Carnes that he was required to answer all of MRS's counsel's questions concerning his assets. Although the magistrate could have used more friendly terminology, informing Carnes that he would need to answer questions concerning even

“the mint in [his] pockets” is not duress or coercion. The magistrate never instructed Carnes that he would need to deliver anything to MRS’s attorney on that date and specifically told Carnes, “[MRS’s counsel’s] job [is] to ask the questions and your job is to answer.” The magistrate’s comments were in the nature of an explanation of the debtor examination process and of the judgment creditor’s right to discover all of Carnes’s assets. Any element of intimidation in the magistrate’s comments are attributable primarily to the nature of the proceeding itself, which was an effort by a creditor to collect a valid judgment that had not been satisfied. Because threats to use the courts to enforce a legal right do not amount to duress, there was no duress or coercion in the statement of MRS’s attorney that he would seek a court order if Carnes did not relinquish the money. There is no meaningful distinction between this situation and one where a creditor’s attorney sends a demand letter to a debtor threatening to institute a collection action if a debt is not paid. Although Carnes may have delivered the money reluctantly, the evidence does not show that he did so involuntarily in the legal sense of the word.

The district court also erred in holding that MRS’s attorney had a duty to advise Carnes of his potential exemption rights.¹ Neither the district court nor Carnes cite any authority for recognition of such a duty.² Indeed, such an advisement likely would have been a violation of the attorney’s professional and ethical obligations. Idaho Rule of Professional Conduct 4.3 directs that a “lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the

¹ Carnes’s argument, and the district court’s assumption, that MRS’s attorney knew or should have known that the exemptions were applicable is not supported by the record. Although at the debtor examination Carnes did indicate his only *current* source of income was disability benefits, veteran’s assistance, and social security, he also stated he had been saving the money in his wallet for a year and that he had worked up until about four months prior to the examination. Thus, the source of the savings could have been from wages earned while Carnes was employed and not exempt under any of the statutes cited.

² Carnes does cite to I.C. § 28-1-203, which is part of Idaho’s Uniform Commercial Code, to support an argument that MRS’s attorney was under an obligation of good faith and fair dealing to notify Carnes of any potential exemption rights. However, the Uniform Commercial Code, which applies only to the sale of goods, negotiable instruments, bank deposits and collections, letters of credit, documents of title, investment securities, secured transactions, and leases, is inapplicable to either the underlying contract for medical services or the instant proceeding to collect on a judgment. I.C. tit. 28, ch. 1-12.

client.” To the extent that Carnes contends that the magistrate was obligated to inform Carnes of his exemption rights, Carnes again cites no authority. A party waives an issue on appeal if either argument or authority is lacking, *Powell v. Sellers*, 130 Idaho 122, 128, 937 P.2d 434, 440 (Ct. App. 1997). The fact that Carnes was then acting pro se did not vest him with a right to receive legal advice from either the opposing attorney or the magistrate court. In Idaho, pro se litigants are held to the same standards as attorneys. *Huff v. Singleton*, 143 Idaho 498, 500, 148 P.3d 1244, 1246 (2006); *Everhart v. Washington County Road & Bridge Dep’t*, 130 Idaho 273, 275, 939 P.2d 849, 851 (1997); *Schneider v. Curry*, 106 Idaho 264, 267, 678 P.2d 56, 59 (Ct. App. 1984).

Accordingly, we conclude that the magistrate did not err in its determination that Carnes’s payment was unrecoverable under the voluntary payment rule, and we therefore reverse the decision of the district court.

B. Attorney Fees and Costs for the Intermediate and Present Appeals

The district court awarded attorney fees and costs to Carnes on the intermediate appeal. Because we have held that the district court erred in reversing the magistrate’s decision, Carnes is no longer the prevailing party and the district court’s award of fees and costs must, accordingly, be reversed.

MRS requests an award of attorney fees incurred for the intermediate appeal and the present appeal pursuant to I.C. §§ 12-120(1), (3) and (5). We conclude that MRS is entitled to such an award under I.C. §§ 12-120(3) and (5), and therefore we do not address its claim under § 12-120(1). Idaho Code § 12-120(3) mandates an award of reasonable attorney fees to the prevailing party in any civil action to recover on a contract for services. Section 12-120(5) states that “[i]n all instances where a party is entitled to reasonable attorney’s fees and costs under subsection (1), (2), (3) or (4) of this section, such party shall also be entitled to reasonable postjudgment attorney’s fees and costs incurred in attempting to collect on the judgment.” Here, MRS is the prevailing party in an action to collect on a contract for provision of medical services, so it was entitled to an award of attorney fees under I.C. § 12-120(3). By terms of I.C. § 12-120(5), that entitlement includes a right to attorney fees incurred in a reasonable attempt to collect on the judgment. *See Action Collection Servs., Inc. v. Bigham*, 146 Idaho 286, 289, 192 P.3d 1110, 1113 (Ct. App. 2008). Thus, MRS is entitled to attorney fees for the intermediate appeal and the present appeal, as well as costs on both levels of appeal pursuant to I.A.R. 40.

Therefore, this matter must be remanded to the district court to determine an appropriate award of costs and attorney fees incurred by MRS in the intermediate appeal.

III.

CONCLUSION

The district court's decision reversing the magistrate's order denying Carnes's motion for return of his payment to MRS is reversed. Costs and attorney fees on this appeal are awarded to MRS. The matter is remanded to the district court for determination of costs and attorney fees to which MRS is entitled for the proceedings below.

Judge MELANSON **CONCURS.**

Judge GUTIERREZ, **DISSENTING**

I respectfully dissent. In my view the district court correctly determined that Carnes was subjected to intimidation as a result of the actions by the magistrate and the plaintiff's attorney. I would distinguish the cases that hold that a person merely declaring an intent to use the courts to pursue a legal right does not constitute duress. Here, Carnes found himself in an actual court proceeding being ordered to comply with the requests of plaintiff's attorney. Based on the existence of duress I would affirm the district court's intermediate appellate decision.

DISTRICT
4-23-10

Bryan D. Smith, Esq.
Idaho State Bar # 4411
Bryan N. Zollinger, Esq.
Idaho State Bar # 8008
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Avenue
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Idaho Falls, Idaho, Idaho 83405
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MEDICAL RECOVERY SERVICES,
LLC., an Idaho limited liability company,

Plaintiff,

vs.

BILLY M. CARNES,

Defendant.

Supreme Court Case No. 36500-2009

**MEMORANDUM OF ATTORNEY'S
FEES AND COSTS**

COMES NOW, appellant, Medical Recovery Services, LLC, an Idaho limited liability company, by and through its counsel of record, Bryan N. Zollinger, Esq., of the firm of Smith, Driscoll & Associates, PLLC, and moves the court pursuant to the Court's Opinion No. 20, filed March 25, 2010 and Idaho Appellate Rules 40 and 41 for an award of costs and attorney's fees.

I. COSTS AS A MATTER OF RIGHT.

- | | |
|------------------------------------------|----------|
| 1. Court Filing Fees | \$101.00 |
| 2. Clerk's Record Fee | \$220.00 |
| 3. Production costs of Appellant's brief | \$180.00 |

FILED - ORIGINAL

APR - 7 2010

Supreme Court _____ Court of Appeals _____
Entered on ATS by *[Signature]*

TOTAL COSTS CLAIMED.

Plaintiff hereby claims as total costs \$ 501.00

II. ATTORNEY'S FEES.

Plaintiff hereby claims as total attorney's fees \$13,835.50

TOTAL FEES AND COSTS: \$14,336.50

To the best of plaintiff's knowledge and belief, the costs claimed above are correct and the costs claimed comply with Appellate Rules 40 and 41.

DATED this 5th day of April, 2010.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

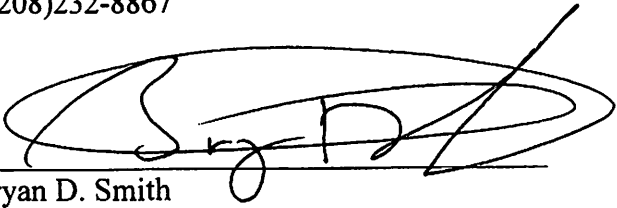
Bryan D. Smith, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of April, 2010, I caused a true and correct copy of the foregoing **MEMORANDUM OF ATTORNEY'S FEES AND COSTS** to be served by placing the same in a sealed envelope and depositing it in the United States Mail, postage prepaid, or by hand delivery, facsimile transmission, or overnight delivery, addressed to the following:

Kenneth E. Lyons, Esq.
P.O. Box 4866
Pocatello, ID 83206

U.S. Mail
 Fax: (208)232-8867


Bryan D. Smith

Sm...l, Driscoll & Associates, . LLC

414 Shoup Avenue
P.O. Box 50731
Idaho Falls, ID 83405
TIN: 82-0518512
(208) 524-0731

Invoice submitted to:

Medical Recovery Services, LLC

April 05, 2010

In Reference To: Medical Recovery Services, LLC vs. Billy Carnes

Account # 7341.1432

Professional Services

		<u>Hours</u>	<u>Amount</u>
5/7/2009	PLT Letter to court clerk (.10); issue checks for appeal (.10);	0.20	13.00
	BNZ Preparation of notice of appeal (1.50);	1.50	225.00
5/14/2009	BDS Receipt and review of judgment (.20);	0.20	37.00
5/21/2009	PLT Letter to court clerk (.10);	0.10	6.50
	BNZ Receipt and review of appellate settlement conference notice (.10);	0.10	15.00
	BDS Receipt and review of letter from Kenneth Lyon (.10);	0.10	18.50
	BDS Receipt and review of clerk's certificate of appeal (.20); receipt and review of letters from court clerk (.10);	0.30	55.50
5/28/2009	PLT Letter to court clerk (.10);	0.10	6.50
	BNZ Preparation of amended notice of appeal (1.0);	1.00	150.00
6/1/2009	BNZ Letter from court clerk (.10);	0.10	15.00
6/2/2009	PLT Letter to court clerk (.10);	0.10	6.50
	BDS Receipt and review of Appellate Settlement Conference (.10);	0.10	18.50
6/8/2009	PLT Receipt and review of letter and billing from court clerk (.20);	0.20	13.00
6/9/2009	BDS Receipt and review of letter from court clerk (.10);	0.10	18.50

		<u>Hours</u>	<u>Amount</u>
6/23/2009	BNZ Research voluntary payment doctrine statutes and case law (1.70);	1.70	255.00
6/24/2009	BNZ Research voluntary payment case law (1.0); preparation of appellate brief (.30);	1.30	195.00
6/26/2009	BNZ Research voluntary payment doctrine case law (1.10); preparation of appellate brief (1.0);	2.10	315.00
6/27/2009	BNZ Research Idaho code and case law regarding exemption rights (2.10);	2.10	315.00
6/29/2009	BNZ Research rules of professional conduct and case law regarding attorney's duty to advise opposing parties (2.20);	2.20	330.00
6/30/2009	BNZ Research case law regarding liability of attorney's for giving counsel to opposing parties (2.30);	2.30	345.00
7/1/2009	BNZ Preparation of appellate brief (2.30);	2.30	345.00
	BDS Preparation of appellate brief (1.50);	1.50	277.50
7/9/2009	BNZ Status update with Supreme Court (.20);	0.20	30.00
7/16/2009	BNZ Research standard of review, application of 11-506; prepare appellate brief (2.80);	2.80	420.00
7/17/2009	BNZ Research case law regarding application of 11-506, application of claim of exemption without court order; prepare appellate brief (2.20);	2.20	330.00
7/20/2009	BNZ Research case law regarding pro se litigants (1.30); preparation of appellate brief (1.40);	2.70	405.00
7/21/2009	BNZ Research availability of attorney's fees on appeal in collections case (1.10);	1.10	165.00
7/22/2009	BNZ Preparation of appellate brief (3.30);	3.30	495.00
8/13/2009	BNZ Preparation of appellate brief (3.10);	3.10	465.00
8/14/2009	BNZ Preparation of appellate brief (3.0);	3.00	450.00
8/17/2009	BNZ Preparation of appellate brief (5.30);	5.30	795.00
8/19/2009	PLT Letter to court clerk (.10); faxed a copy of motion for extension and affidavit to Kenneth Lyons (.10);	0.20	13.00
	BNZ Research motion for extension; preparation of motion for extension of time for filing appellant's brief; preparation of affidavit in support of motion for extension (1.30);	1.30	195.00
8/24/2009	BDS Receipt and review of order granting extension of time (.10);	0.10	18.50

		<u>Hours</u>	<u>Amount</u>
9/10/2009	BNZ Preparation of appellate brief (3.20);	3.20	480.00
	BDS Preparation of appellate brief (4.0);	4.00	740.00
9/11/2009	BNZ Research judicial code of conduct and case law; research rules of professional conduct; preparation of appellate brief (3.20);	3.20	480.00
9/15/2009	BNZ Preparation of appellate brief (.90);	0.90	135.00
9/21/2009	BDS Receipt and review of letter from court clerk (.10);	0.10	18.50
10/19/2009	BNZ Receipt and review appellate reply brief; research statutes cited in appellate reply brief (1.20);	1.20	180.00
10/21/2009	BDS Receipt and review of letter from court clerk (.10);	0.10	18.50
10/22/2009	BNZ Preparation appellate reply brief (3.60);	3.60	540.00
11/6/2009	BNZ Preparation of appellant's reply brief (2.80);	2.80	420.00
11/9/2009	BNZ Research procedural rules and case law regarding request for award of attorney's fees; preparation of appellant's reply brief (4.40);	4.40	660.00
11/10/2009	BNZ Preparation of appellant's reply brief (.40);	0.40	60.00
11/16/2009	BDS Receipt and review of letter from court clerk (.10);	0.10	18.50
11/25/2009	PLT Letter to court clerk (.10);	0.10	6.50
12/3/2009	BDS Receipt and review of notice of court assignment (.10);	0.10	18.50
12/17/2009	PLT Letter to court clerk (.10);	0.10	6.50
	BDS Receipt and review of Notice (Set for Hearing by Court of Appeals) (.10);	0.10	18.50
12/21/2009	BNZ Receipt and review of notice of hearing (.10);	0.10	15.00
2/15/2010	BNZ Research case law (1.80);	1.80	270.00
2/17/2010	BNZ Keycite case law contained in appellate briefs; preparation for hearing; travel to hearing (10.20);	10.20	1,530.00
2/18/2010	BNZ Preparation for hearing; attend hearing; travel from hearing (8.0);	8.00	1,200.00
3/25/2010	BNZ Receipt and review appellate court decision (.50);	0.50	75.00
4/2/2010	BNZ Preparation of memorandum of costs and fees to Supreme Court; preparation of memorandum of costs and fees to District Court (1.25)	1.25	187.50
For professional services rendered		91.25	\$13,835.50

Balance due

Amount

\$13,835.50

User Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Bryan D. Smith, Partner	6.90	185.00	\$1,276.50
Bryan N Zollinger	83.25	150.00	\$12,487.50
Paralegal	1.10	65.00	\$71.50

In the Court of Appeals of the State of Idaho

MEDICAL RECOVERY SERVICES, LLC,)
an Idaho limited liability company,)
)
Plaintiff-Appellant,) ORDER AWARDING ATTORNEY'S
) FEES AND COSTS
v.)
) Supreme Court Docket No. 36500-2009
BILLY M. CARNES,) Bannock County District Court No.
) 2007-306
Defendant-Respondent.)

A MEMORANDUM OF ATTORNEY'S FEES AND COSTS and AFFIDAVIT OF BRYAN D. SMITH IN SUPPORT OF AWARD OF ATTORNEY'S FEES AND COSTS with Exhibit "A" attached were filed by counsel for Appellant on April 7, 2010. This Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that ATTORNEY'S FEES AND COSTS shall be AWARDED to Appellant and against Respondent as follows:

Attorney's fees:	\$ 4,000.00
Costs:	<u>501.00</u>
TOTAL:	<u>\$ 4,501.00</u>

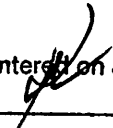
DATED this 6th day of May 2010.

By Order of the Court of Appeals



Stephen W. Kenyon, Clerk

cc: Counsel of Record

Entered on JSI
By: 

IDAHO SUPREME COURT



IDAHO COURT OF APPEALS

Clerk of the Courts
(208) 334-2210

P.O. Box 83720
Boise, Idaho 83720-0101

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For the Court:
Stephen W. Kenyon
Clerk of the Courts

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