

8-17-2011

## Cole v. Posey Respondent's Brief Dckt. 38646

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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| <p><b>Kelly Cole,</b><br/>Plaintiff-Appellant,</p> <p>vs.</p> <p><b>David Posey,</b><br/>Defendant-Respondent.</p> | <p>Supreme Court</p> <p>Docket No. 38646</p> |
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**RESPONDENT'S BRIEF**

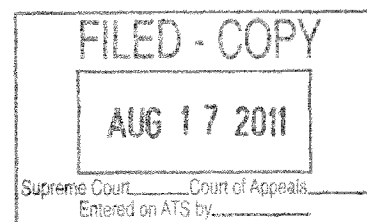
Appeal from the District Court of the Third Judicial

District of Idaho, in and for Payette County

Honorable Susan E. Wiebe, District Judge, presiding.

Kelly Cole  
Residing at Council, Idaho  
for Appellant

David Lee Posey  
Residing at Payette, Idaho  
for Respondent



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## STATEMENT OF THE CASE

i. **Nature of Case.** This case is an action for professional malpractice.

ii. **Course of Proceedings.**

1. On August 24, 2010, Plaintiff filed a Complaint.
2. On January 11, 2011, Plaintiff filed an Amended Complaint.
3. Defendant filed a Motion to Dismiss.
4. On January 27 2011, Plaintiff filed a Response to Motion to Dismiss.
5. On February 4, 2011, a hearing was held on Defendant's Motion to Dismiss.
6. On February 8, 2011, the court entered an Order Dismissing Case.
7. On March 18, 2011, Plaintiff filed a Notice of Appeal.
8. On April 6, 2011, Plaintiff filed an Amended Notice of Appeal.

iii. **Statement of Facts:**

1. In July 2004, Plaintiff in this case was charged with Domestic Battery and Obstructing an Officer in Adams County, Idaho. (R 6 Para 1 & 2)
2. On about May 12, 2006, Defendant in this case was appointed by the court to represent the Plaintiff. (R 6 Para 3)
3. Plaintiff alleges in the Amended Complaint several acts of negligence in the conduct of the trial on August 30, 2006. (R 7 Para 4 – 8)
4. Plaintiff alleges damages for the alleged negligence. (R 7 & 8 Para 9 & 11)
5. Plaintiff was sentenced on August 30, 2006. (R 8 Para 1 of prayer)
6. Plaintiff alleges in his Response to Motion to Dismiss that Defendant failed to appeal the decision of the Idaho Court of Appeals and that the deadline for filing that appeal was October 6, 2008. (R 10)

## **ISSUES PRESENTED ON APPEAL**

1. Did the Court err in dismissing the case?

## POINTS AND AUTHORITIES

1. A cause of action for professional malpractice may arise if the alleged act or omission occurred in the course of performing professional services. *Lapham v Stewart*, 137 Idaho 582, 588, 51 P.3d 396, 402 (2002).
2. The applicable statute of limitations for professional malpractice is two years. Idaho Code § 5-219(4).
3. An action to recover damages for professional malpractice must be commenced within two years after the cause of action accrues. *City of McCall v Buxon*, 146 Idaho 656, 659, 201 P.3d 629, 632 (2009).
4. A cause of action for professional malpractice accrues as of the time of the occurrence, act or omission of which a party complains. *Lapham*, 137 Idaho at 585-86, 51 P.3d at 399-400.
5. A cause of action for professional malpractice cannot accrue until some damage has occurred. *Buxon*, 146 Idaho at 659, 201 P.3d at 632.
6. There must be objective proof that would support the existence of some actual damages, *Id* at 661-633 201 P.3d at 634-636.

## **ARGUMENT**

### **A. Issue 1**

Did the Court err in dismissing the case?

On May 12, 2006, Defendant, Posey, was appointed by the court to represent Plaintiff, Cole, who was charge with domestic battery and resisting and obstructing an officer in Adams County, Idaho. The trial was held on August 30, 2006 and a jury entered a finding of guilty to the charge of obstructing an officer and not guilty to the charge of domestic battery. Cole was sentenced on August 30, 2006.

On August 24, 2010, Cole filed a Complaint against Posey alleging professional malpractice in the conduct of the trial on August 30, 2006 and alleging damages because of the sentencing which also occurred on August 30, 2006. On January 11, 2011, Cole filed an Amended Complaint making similar allegations. Posey filed a motion to dismiss on the grounds Cole's claims had not been filed within the applicable statute of limitations. Cole filed a Response to Motion to Dismiss making the new allegation that Posey failed to file an appeal from the Idaho Court of Appeals decision which was due on October 6, 2008. After a hearing on Posey's motion to dismiss the district court granted the motion.



A cause of action for professional malpractice may arise if the alleged act or omission occurred in the course of performing professional services. *Lapham v Stewart*, 137 Idaho 582, 588, 51 P.3d 396, 402 (2002). The applicable statute of limitations for professional malpractice is two years. Idaho Code § 5-219(4). An action to recover damages for professional malpractice must be commenced within two years after the cause of action accrues. *City of McCall v Buxon*, 146 Idaho 656, 659, 201 P.3d 629, 632 (2009). A cause of action for professional malpractice accrues as of the time of the occurrence, act or omission of which a party complains. *Lapham*, 137 Idaho at 585-86, 51 P.3d at 399-400. A cause of action for professional malpractice cannot accrue until some damage has occurred. *Buxon*, 146 Idaho at 659, 201 P.3d at 632. There must be objective proof that would support the existence of some actual damages, *Id* at 661-633 201 P.3d at 634-636. Cole did not file his claims against Posey within two years of the adverse trial determination on August 30, 2006.

Cole filed a response to Posey's motion to dismiss seeking to extend the cause of action to October 6, 2008 because he alleges that Posey did not appeal the Idaho Court of Appeals decision to the Idaho Supreme Court but Cole did not articulate any damages resulting from that failure. The damages alleged occurred when Cole was sentence on August 30, 2006. Cole filed his complaint in this case on August 24, 2010 which is over two years from that date.

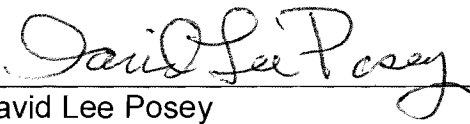
## CONCLUSION

Therefore, the statute of limitations had run and the decision of the district court to dismiss the action should be affirmed.

## CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Respondent's Brief were mailed to Kelly Cole at 2583 Council Cuprum Rd, Council ID 83612 on August 17, 2011.

Respectfully submitted on August 17, 2011.

  
David Lee Posey