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Cole v. Posey Appellant's Reply Brief Dckt. 38646

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Kelly Cole

Docket No. 38646-2011

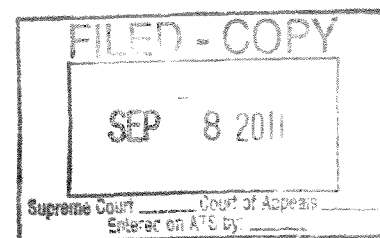
Plaintiff-

Appellant,

vs.

David Posey

Defendant, Respondent,



REPLY 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, Pro-Se

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 a civil case.
- ii. Course of Proceedings
 - 1. Complaint and demand for jury trial, filed 8/24/2010.
 - 2. Amended complaint and demand for jury trial filed 1/27/2-11.
 - 3. Response to motion to dismiss, filed 1/27/2011.
 - 4. Order dismissing case, filed 1/9/2011.
 - 5. Notice of appeal, filed 3/18/2011.

III. Statement of Facts:

1. That the plaintiff is a defendant in a criminal action in Adams County starting in July 2004, to current time. Case 2004-4421. (R2, Par.1).
2. The plaintiff was charged with Domestic Battery and resisting and obstructing an officer, (R2. Par.2).
3. The defendant in this case, David Posey, was assigned to plaintiff's criminal case on about May 12, 2006, as a Public Defender. (R3, L1).
4. The case went to trial on August 30, 2006. (R4, Par. 4).
5. The plaintiff was found guilty of obstructing an officer, with judgment of \$1,000.00 fine, 48 hours in jail, 24 months unsupervised probation and 180 days of suspended jail time. (R4 Par.10).
6. On Sept 27, 2006, defendant filed a Notice of Appeal to the District Court.
7. On July 10, 2007, the District Court entered its Memorandum Decision on Appeal from Magistrate Division.
8. On August 21, 2007, defendant filed a Notice of Appeal to the Idaho Court of Appeals.
9. On August 25, 2007, opinion form Court of Appeals.

ISSUES ON APPEAL

1. Did Judge Wiebe error on which date the Statute of Limitations starts? Id. Code, 5-219(4).

Points of Authority

1. The application statute of limitations for professional malpractice is two years. Idaho Code 5-219(4).
2. Appendix A, P. 225, August 30, 2006, Trial transcript – Stay pending appeal.

3. A case of action for professional malpractice cannot accrue until some damages has occurred. Buxon, 146 Idaho at 659, 201 P 3d at 632.
4. Damages accrue after the Supreme Court dismissal. Ford v. Lovan Docket # 36852, 2010 unpublished opinion. No. 423.

Argument

From Respondents Brief Page 7 –

(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 fro professional malpractice must be commenced within two years after the cause of action accurse. City of McCall v. Buxon, 146 Idaho 656, 659, 201 P.3d 629,632 (2009). A cause of action for professional malpractice accurse as of the time of the occurrence, act or omission of which a party complains. Lapham, 137 Idaho at 585-86, 51 P3d at 3990400. A cause of action of professional malpractice cannot accrue until some damage has occurred. Buxon, 146 Idaho at 659, 201 P3d 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.) Appellant agrees with this.

Judge Wiebe found that court damages did accrue (The damages I find accrued when the trial was commenced). Exhibit to the record Transcript of the February 9, 2011 hearing.P.5. Mr. Posey did not appeal finding of damages, so Judge Wiebie’s finding of damages stands.

REPLY BRIEF PAGE 5

The damages from the August 30, 2006 judgment were stayed on August 30, 2006 pending appeal. Appendix A P.225 of the trial transcript L2-6,

(Mr. Posey: Your Honor, at this time I move the court stay the execution of sentence for 42 days so I can consider an appeal.

The Court: I will stay the execution of everything except the two days in jail, Barrons Law Dictionary- Stay- a judicial order whereby some action is forbidden or held in abeyance until some event occurs or the court lifts its order.

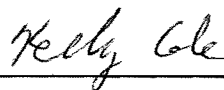
Damages do not accrue until the court of appeals decision on August 25, 2008.

This is consistent with Judge Weibe 's cited authority, Ford v. Lovan docket No. 36852, 2010 unpublished opinion, 423 P.4.

(Ford did not file his claims against Lovan and Duggan within two years of the adverse trial determination in March, 2002, or the Supreme Court's dismissal of his appeal in November 2004.)

CONCLUSION

Judge Wiebe's time of accrual is in error this case was filed with in the 2year statute of limitations of I.C. 5-219(4) and the order should be reversed.



Kelly Cole 9/6/2011

CERTIFICATE OF SERVICE

I hereby certify that I have furnished the Supreme Court Clerk with an addressed, postage paid envelop to mail two copies of the Appellants Reply Brief to David Lee Posey on this September 6, 2011.

Respectfully submitted on September 6. 2011.

Kelly Cole

Kelly Cole

Pro-Se

APENDIX A

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(1) I'm going to leave it to the two of you to work with
 (2) the counselor as to, you know, individual sessions,
 (3) joint sessions whatever. Obviously you both have a
 (4) great deal invested in your marriage and your
 (5) marriage is of importance to you, given the fact that
 (6) you are still together. So rather than do the anger
 (7) management counseling –
 (8) Now, ma'am, you're not a party to this,
 (9) so I can't order you to participate in a counseling.
 (10) I strongly encourage you to do so.
 (11) So here is what I'm going to do. Sir,
 (12) I'm going to sentence you to a fine of \$500;
 (13) I'm going to require that you reimburse
 (14) Adams County for the court-appointed legal expenses
 (15) in the amount of \$500;
 (16) I'm sentencing you to 180 days in jail.
 (17) I'm spending 168 days. That leaves 12 days
 (18) remaining, and I'm going to tell you in a moment what
 (19) I'm going to do with the remaining 12 days;
 (20) I'm putting you on unsupervised probation
 (21) for a period of 24 months.
 (22) The conditions of your probation are that
 (23) you not commit any further offenses, that you
 (24) complete a minimum of 24 hours of marital counseling,
 (25) that you submit written proof of completion within

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(1) six months.
 (2) I'm going to have the court clerk
 (3) schedule a review hearing for six months –
 (4) approximately six – at least six months from the
 (5) date of this judgment. I don't have the date today.
 (6) At the review hearing, if the court has
 (7) received proof of completion of the counseling, ten
 (8) days in jail will be suspended at that time.
 (9) As to the remaining two days in jail,
 (10) sir, you are going to submit yourself to the arrest
 (11) that you should have submitted yourself to on that
 (12) day. I am remanding you to the custody of the
 (13) sheriff. You will serve 48 hours now.
 (14) DEFENDANT COLE: (Inaudible) do it that way,
 (15) Your Honor, the marriage counseling won't do any
 (16) good, because there is no marriage. She's down the
 (17) road.
 (18) THE COURT: That's your choice, sir.
 (19) DEFENDANT COLE: Okay. Okay. I can do it
 (20) without her.
 (21) THE COURT: That's your choice. Okay.
 (22) DEFENDANT COLE: (Inaudible.)
 (23) THE COURT: If you prefer, I can remove the 24
 (24) hours of marital counseling and go back to the 12
 (25) days in jail I was going to originally sentence you

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(1) to.
 (2) MR. POSEY: Your Honor, at this time I move
 (3) the court stay the execution of sentence for 42 days
 (4) so I can consider an appeal.
 (5) THE COURT: I will stay the execution of
 (6) everything except the two days in jail. He will
 (7) remand himself to the custody of the sheriff's office
 (8) immediately.
 (9) Okay. We're in recess.
 (10) MR. GABBERT: Thank you, judge.
 (11) (Proceeding concluded.)
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 (16)
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