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IN THE SUPREME COURT OF THE STATE OF IDAHO

Reed J. Taylor, an individual; Plaintiff/Appellant, v. MICHAEL E. McNICHOLS, et al., Defendants/Respondents.	Consolidated Docket No. 36130
REED J. TAYLOR, an individual; Plaintiff/Appellant, v. GARY D. BABBITT, et al., Defendants/Respondents.	Supreme Court Docket No. 36131

RESPONDENTS' BRIEF OF HAWLEY TROXELL ENNIS & HAWLEY, et al.

Appeal from the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce Honorable Jeff Brudie, Presiding

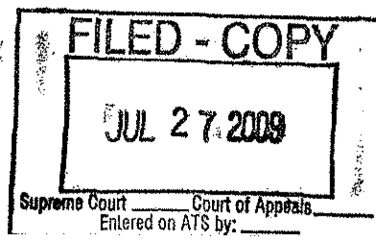
---

Roderick C. Bond
Michael S. Bissell
CAMPBELL BISSELL & KIRBY, PLLC
7 South Howard Street, Suite 416
Spokane, WA 99201

Attorneys for Plaintiff/Appellant

Jeffrey A. Thomson ISB #3380
ELAM & BURKE, P.A.
251 E. Front Street, Suite 300
P.O. Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844

Attorneys for Defendants/Respondents
Hawley Troxell, et al.



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I. INTRODUCTION

A. **Nature of the Case.**

Plaintiff seeks to appeal well settled law that one party cannot sue another's attorneys during the course of litigation. Although spun by Plaintiff as "novel" theories and "creative" pleading, well settled Idaho law does not recognize, nor would a reasonable extension of Idaho law recognize, Plaintiff's tactical invasion of the attorney/client relationship.

The district court properly dismissed all of Plaintiff's claims against the Defendant attorneys ("HTEH") under Rule 12(b)(6). It did so based on the proper record and by determining that Plaintiff did not have standing to pursue claims against his opponents' lawyers and that no legal duty was owed to him by those. In addition, as to each of the individual causes of action pled, a 12(b)(6) motion to dismiss was proper because of insufficient, conclusory pleading or because each failed as a matter of law.

B. **Course of Proceedings.**

HTEH generally agrees with Plaintiff's course of proceedings but would add the following:

On March 8, 2007 the district court, in the Underlying Action, enjoined Plaintiff from attempting to interfere with the operation or management of AIA Services or AIA Insurance. (R. Vol. 3, p. 470.) The district court entered a Preliminary Injunction prohibiting Plaintiff from acting, or attempting to act, as manager and/or a board member of AIA Insurance, Inc., and/or from harassing and/or interfering with the management of AIA Insurance, Inc., and AIA Services Corporation. (*Id.*) That Order remains in effect.

On December 8, 2008, shortly before filing the present action, Plaintiff moved to disqualify

HTEH in Taylor v. AIA, et al. ("Underlying Action"). (R., Additional Clerk's Record, p. 521.)

On June 17, 2009 the district court, in the Underlying Action, filed its Opinion and Order on summary judgment. (*See* Motion to Augment Record.) The district court ruled that the written agreements upon which Plaintiff based all of his claims in the Underlying Action were illegal and unenforceable. (*Id.*) The result of this ruling, as a matter of law, is that the parties are left as the court found them, meaning that Plaintiff does not have a secured interest, is and cannot be a shareholder or director, is not a stock pledgee, and is not a creditor of an insolvent corporation.

C. <u>Statement of Facts</u>.

HTEH does not agree with the characterization of the various unproven and conclusory allegations as "facts" and takes issue with the omission of relevant facts in Plaintiff's statement of facts and wishes to submit and/or add the following:

In the Underlying Action Plaintiff sued AIA Services upon a contract to redeem his stock. He also named as Defendants AIA Insurance and CropUSA Insurance and various officers and directors of the three corporations. HTEH represented AIA Services and AIA Insurance and appeared as local counsel for CropUSA in the Underlying Action.

II. ISSUES ON APPEAL

HTEH feels the issues on appeal can be more clearly and completely stated as follows:

1. Did the district court properly dismiss Plaintiff's complaint under Idaho Rule of Civil Procedure, Rule 12(b)(6)?
    a. Does the invited error doctrine apply to the Rule 12(b)(6) dismissal?
    b. Did the district court properly take judicial notice of its own rulings and the records in the related but separate case of *Taylor v. AIA Services, et al.*?
    c. If the district court erred in going beyond the allegations in the complaint, was any such error harmless?

2. Does Plaintiff have standing to bring any direct or derivative claims against the attorneys representing an opposing party?
3. Does HTEH owe a duty to Plaintiff as the opposing party in litigation or as a non-client in transactional work?
4. Does the litigation privilege apply giving HTEH immunity against all claims or causes of action alleged by Plaintiff arising out of its representation of its clients?
5. Did the district court properly dismiss each cause of action and deny the motion to amend to add new causes of action based on insufficient pleading or as a matter of law?
6. Did the district court abuse its discretion in awarding attorney fees to HTEH?
7. Is HTEH entitled to attorney fees and costs on appeal pursuant to Idaho Appellate Rule 41 and Idaho Code § 12-121, Idaho Code § 48-608 and Idaho Code § 30-1-746?

III. ARGUMENT

A. Standards of Review on Appeal.

1. Standard of Review of a Rule 12(b)(6) Dismissal.

"The well-pleaded facts must be reviewed in the light most favorable to the plaintiff. A plaintiff, however, must allege specific facts, not conclusory allegations. Conclusory allegations and unwarranted deductions are not admitted as true." *Scott v. Steinhagen Oil Co., Inc.,* 224 F.Supp.2d 1084, 1085 (E.D.Texas 2002). Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Myers v. Guardian Life Ins. Co. of America*, 5 F.Supp.2d 423, 427 (1998). The pleadings are not sufficient where the plaintiff relies on "subjective characterizations or unsubstantiated conclusions" or on "bald assertions, unsupportable conclusions and opprobrious epithets." *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 23 (1st Cir. 1990). The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief. *Klusty v. Taco Bell Corp.*, 909 F.Supp. 516, 519 (S.D.Ohio 1995).

2. **Standard of Review of Denial of Motion to Amend.**

Whether to permit an amended pleading is committed to the sound discretion of the district court. *McCann v. McCann,* 138 Idaho 228, 61 P.3d 585 (2002). In determining whether an amended complaint should be allowed, the court may consider whether the new claims proposed to be inserted into the action by the amended complaint state a valid claim or whether the opposing party has an available defense to the newly added claim. *Spur Products Corporation v. Stoel Rives LLP*, 142 Idaho 41, 44,122 P.3d 300, 303 (2005). The trial court should decline to grant leave to amend where the amendment would be a futile act. *Wells v. United States Life Ins. Co.* 119 Idaho 160, 804 P.2d 333 (Ct.App. 1991). An "amendment is futile if the [pleadings], as amended, would not survive a motion to dismiss for failure to state a claim upon which relief can be granted." *U. S. v. Union Corp.*, 194 F.R.D. 223, 237 (E.D.Pa. 2000).

3. **Standard of Review for Award of Attorney Fees.**

An award of attorney fees is reviewed for an abuse of discretion. *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 165 P.3d 261 (2007). To prove an abuse of discretion this Court looks to three factors: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistent with legal standards applicable to specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. (*Id.*)

B. Analysis.

1. The District Court Properly Dismissed Plaintiff's Complaint Under Rule 12(b)(6).

Plaintiff claims that the district court erred in the following manner: (1) it failed to apply the correct Rule 12(b)(6) standard; (2) it considered matters outside of the appropriate record; and (3) it failed to convert the Rule 12(b)(6) motion to a motion for summary judgment.

a. A District Court is Allowed to Go Beyond the Allegations in the Complaint on a Rule 12(b)(6) Motion in Limited Circumstances Applicable to this Case.

(i) Plaintiff Invited the District Court to Go Beyond the Complaint Allegations.

There is no question that the district court referred to matters beyond the specific allegations in either the complaint or proposed amended complaint. As the district court correctly set forth in its Opinion and Order on Defendant's Motion to Dismiss and Plaintiff's Motion to Amend ("Opinion and Order"), the Malpractice Action "is rooted in the underlying case of *Taylor v. AIA, et al.*; Nez Perce County Case No. CV07-00208." (R. Vol. III, p. 469.) ("Underlying Action").[1] The Court reviewed pertinent procedural matters and rulings from the Underlying Action. (*Id.* at pp. 469-471.) The Court recognized that "Reed Taylor's claims against the defendants are all based on conduct and actions engaged in by the defendants within the scope of the underlying litigation." (*Id.* at 12.) However, the only record the district court looked to outside of the allegations in the complaint and proposed amended complaint was that found in the court files of the Underlying Action.

---

[1]The district court judge in the Malpractice Action is the Honorable Jeff M. Brudie. Judge Brudie is also the district court judge in the Underlying Action.

Plaintiff, in both the complaint and proposed amended complaint, invited the district court to consider the Underlying Action. Indeed, nearly every factual allegation in the complaint and proposed amended complaint refers to actions and conduct in the Underlying Action and forms the bases for the Malpractice Action. (R. Vol. 2, pp. 239-264; pp. 406-453.) The complaints, specifically and in detail, allege the existence of the Underlying Action, describe the causes of action sought in that action and base the allegations in this Malpractice Action on the Underlying Action. (R. Vol. 2, pp. 243-245, ¶¶ 15-19; R. Vol. 2, pp. 411-419, ¶¶ 16-39.)

More importantly, Plaintiff expressly requested the district court to take judicial notice of all matters that took place in the Underlying Action.

> Mr. Bissell: . . . Also, your Honor, I would – I would ask the court because we obviously – we have talked about a lot of information in the past in this case and in other cases and, you know, a lot of the information in the other cases kind of has an impact on this case. So I would ask the court to take judicial notice of everything that's been followed, argued in those previous cases – or any other matter, the underlying matter we might call it, the Reed v. AIA matter which is 07-00208.
>
> The Court: Well, that was actually my intention, Mr. Bissell, that's part of what I came to conclude is I really can't discuss this and rule on the pending motion to dismiss without the consideration of the underlying case so that was actually my intention.
>
> Mr. Bissell: Okay, thank you, your Honor.

(Tr. Vol. 1, p. 70, ll. 9-23.) (Emphasis added.)

A party cannot consciously invite district court actions, and then successfully claim these actions are erroneous on appeal. *Sidote v. State*, 587 P.2d 1317 (Nev. 1978). Nor may a defendant successfully allege error in a ruling of the court, when the defendant himself requested the ruling. *Stilley v. People*, 417 P.2d 494 (Colo. 1966). It has long been the law in Idaho that one may not

successfully complain of errors one has acquiesced in or invited. *Walling v. Walling*, 36 Idaho 710, 214 P. 218 (1923). Errors consented to, acquiesced in, or invited are not reversible*Frank v. Frank*, 47 Idaho 217, 273 P. 943 (1929). The doctrine of "invited error" applies to estop a party from asserting an error when his own conduct induces the commission of the error. *Thomson v. Olsen*, 147 Idaho 99, 205 P.3d 1235 (2009).

Under the doctrine of invited error, the district court did not err in looking outside of the allegations in the complaints because Plaintiff invited the court to make its Rule 12(b)(6) decision based on an examination and consideration of all matters in the Underlying Action.

(ii) The District Court Can Properly Take Judicial Notice of its Own Rulings and the Records in the Underlying Action.

When ruling on Rule 12(b)(6) motions to dismiss, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when making such rulings, in particular, documents incorporated into the complaint by reference, <u>and matters of which a court may take judicial notice.</u> *Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 2509 (2007) (*citing* 5B Wright & Miller § 1357 (3d Ed. 2004 and Supplement 2007)); *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct.App. 1990). Pursuant to Idaho Rule of Evidence 201, the district court may take judicial notice of records, exhibits, or transcripts from the court file in the same <u>or a separate case</u>. (I.R.E. 201(c).)

In ruling on the 12(b)(6) motion to dismiss, the district court in the present Malpractice Action considered matters in the court records of the related but separate Underlying Action over which the district court also presided. Regardless of the invitation to do so, the district court was

permitted to take judicial notice of the court files in that separate case when it ruled on the 12(b)(6) motion to dismiss.

(iii) Any Error by the District Court in Going Beyond the Allegations of the Complaint and Proposed Amended Complaint was Harmless.

Even if the district court committed error in its Rule 12(b)(6) dismissal by accepting Plaintiff's invitation to take judicial notice of matters beyond the allegations in the complaint and proposed amended complaint, any error was harmless because, as described more fully *infra*, this Court can uphold the dismissal on other grounds. *Banning v. Minidoka Irrigation District*, 89 Idaho 506, 510, 406 P.2d 802, 803 (1965). Based solely on a review of the allegations in the complaint and proposed amended complaint and without regard to the record in the Underlying Action, each of the causes of action can properly be dismissed as insufficiently pled, or as a matter of law for lack of standing, or lack of a *prima facie* element such as duty.

2. Plaintiff Has No Standing to Bring Any Direct or Derivative Causes of Action or Claims Against HTEH as Counsel for the Opposing Party.

Whether Plaintiff has standing to sue his adversaries' litigation counsel is a question of law which was appropriately determined by the district court pursuant to Rule 12(b)(6). *See Thompson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002); *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002); *Osmunson v. State*, 135 Idaho 292, 17 P.3d 236 (2000).

a. Plaintiff Has No Standing to Sue HTEH Directly as a Stock Pledgee.

Plaintiff primarily alleges that he has standing to sue HTEH directly because stock in a subsidiary corporation (AIA Insurance) is pledged as security for the payment of the redemption price by the insolvent parent corporation (AIA Services). He asserts he may bring direct claims

against HTEH to preserve his interest in the stock of AIA Insurance. However, this theory disregards the obvious point that HTEH does not have possession of, or claim any interest in, such stock. Nor does the complaint or proposed amended complaint allege any such connection. The complaints allege only that HTEH, acting as defense counsel, asserted positions contrary to those espoused by Plaintiff.[2] HTEH is entitled to represent its clients' legal positions in court and cannot be held liable to Plaintiff for doing so, regardless of Plaintiff's allegations that he is a stock pledgee.

The cases cited by Plaintiff are inapposite. For example, in *Empire Life Ins. Co. of America v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972), the court was careful to point out that, "It is, however, an established rule that if a plaintiff sues in a stockholder capacity for corporate mismanagement, he must bring the suit derivatively in the name of the corporation." (*Id.* at 335.) While some courts have recognized an exception to the rule that does not apply here, Plaintiff has no direct cause of action. As will be discussed in greater detail, HTEH owes no duty to Plaintiff as a stock pledgee. To the contrary, HTEH's duty is solely to advocate the legal position of its clients, who dispute Plaintiff's claims that he possesses an enforceable right to receive preferential payment for his stock in AIA Services.[3]

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[2]For example, ¶ 14 of Plaintiff's complaint alleges that HTEH "engaged in inappropriate conduct in assisting parties (including R. John Taylor) in obtaining and/or . . . maintaining a restraining order and preliminary injunction against Plaintiff, when Defendants knew there was no legitimate legal basis to do so, that doing so was an intentional violation and tortious interference with Plaintiff's contractual rights, and that the assets and funds of AIA Insurance were being misappropriated and/or not safeguarded." This allegation was made despite the intervening act of the district court in granting this relief.

[3]HTEH's client's position was recently vindicated when the district court found the agreement upon which Plaintiff's alleged status as a stock pledgee to be illegal.

In *Gustafson v. Gustafson*, 734 P.2d 949 (Wa. App. 1987), relied upon by Plaintiff, the ex-spouse of a shareholder and the pledgee of the shareholder's stock as security for amounts owing pursuant to a divorce decree was held to possess both a derivative and a direct cause of action against the shareholder for fraudulent dissipation of corporate assets by corporate insiders. *Gustafson* did not hold that the ex-spouse possessed a direct cause of action against either her former husband's lawyers or the corporation's lawyers. None of the cases relied on by Plaintiff so hold. In the present case, Plaintiff does not allege that he has any direct contractual or other relationship with HTEH, as was the case between Mr. and Mrs. Gustafson. Plaintiff has no standing as a stock pledgee to bring suit against counsel for opposing parties in pending litigation.

b. Plaintiff Has No Standing to Sue HTEH as the Alleged Sole Shareholder or Director.

Plaintiff also argues that he has standing to sue HTEH directly because he is the only shareholder and director of AIA Insurance. This argument is predicated on the assumption that Plaintiff is entitled to repossess the stock of AIA Insurance and to become its sole shareholder or director. Plaintiff places the cart before the horse. At the time of the 12(b)(6) dismissal, the district court in the Underlying Action had not ruled that Plaintiff was entitled to exercise that remedy, and certainly had not ruled that he is entitled to regain ownership and resume operation of AIA Insurance.[4]

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[4]In fact, the district court has recently ruled that the contracts upon which Plaintiff's status as an alleged shareholder or director are illegal, the result of which is that Plaintiff cannot become the sole shareholder or a director. It is also contrary to the district court's Preliminary Injunction that Plaintiff cannot be the sole shareholder or a director until that status is legally adjudicated.

Plaintiff fails to explain how, as a matter of law, an insider who is attempting to redeem his stock in an insolvent corporation purportedly has standing to sue litigation counsel for the corporation. HTEH has advocated (successfully) in open court positions which are contrary to Plaintiff's proposed course of action; but it is fully entitled, and indeed ethically obligated, to do so.

c. Plaintiff Has No Standing to Sue HTEH as a Secured Creditor or Creditor of Insolvent Corporation.

Plaintiff argues he is entitled to bring a direct suit against HTEH because he is a secured creditor of AIA Services and alleges that the corporation made an unauthorized disposition of its collateral. His complaint does not allege that HTEH made an unauthorized disposition of such collateral or is in possession of the collateral, other than with respect to receipt of attorney's fees (which will be addressed *infra*). It does not follow that Plaintiff has standing to sue HTEH simply because of the existence of a justiciable dispute between himself and the corporations. Whether or not Plaintiff as an alleged creditor possesses a direct cause of action against the corporation is meaningless insofar as he now seeks to sue HTEH directly.

d. Plaintiff Has No Standing to Sue HTEH as a Third-Party Beneficiary.

As discussed below, the attorney/client relationship runs only to the client and not to third-party beneficiaries, except in the limited circumstance of intended beneficiaries of testamentary instruments. *Harrigfeld v. Hancock*, 140 Idaho 134, 138, 90 P.3d 887, 888 (2004). Plaintiff has not alleged any other relationship or contract for which he is a third-party beneficiary. Nor has he alleged that any contract was entered into between HTEH and its clients primarily for his intended benefit. All of the causes of action require an attorney/client relationship with the Plaintiff as a

prerequisite for holding the attorney liable for tort causes of action. *Taylor v. Maile*, 142 Idaho 253, 259, 127 P.3d 156 (2005). Plaintiff has not alleged that he was an intended beneficiary of a testamentary instrument or that he had an attorney/client relationship with HTEH. Therefore, Plaintiff does not have standing to sue as a third-party beneficiary.

3. HTEH Owes No Duty to Plaintiff; All Tort Claims Brought by Plaintiff Were Properly Dismissed as a Matter of Law.

As a preliminary matter, it should be noted that many of Plaintiff's arguments depend upon the implicit assumption, although the complaints do not so allege, that he has already prevailed in the Underlying Action and has been awarded the relief requested in that litigation.[5] This pleading deficiency alone supports dismissal of Plaintiff's complaints.

"The existence of a duty is a question of law over which [an appellate] Court exercises free review." *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999). "No liability arises from the law of torts unless the defendant owes a duty to the plaintiff." *Udy v. Custer County*, 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001). This Court has held that "[a]s a general rule, an attorney will be held liable for negligence only to his or her client and not to someone with whom the attorney does not have an attorney-client relationship." *Harrigfeld v. Hancock*, 140 Idaho 134, 137, 90 P.3d 884, 887 (2004). *Harrigfeld* extended the attorney's duty to intended beneficiaries of testamentary instruments prepared by the attorney. (*Id.* at 138, 90 P.3d at 888.) That is the only circumstance recognized by Idaho law where an attorney owes a duty of care to parties with whom the attorney

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[5]In fact, the recent Opinion and Order in the Underlying Action came to the exact opposite conclusion. (*See* Motion to Augment Record.)

is not in privity or does not have an attorney/client relationship. "An attorney owes no duty to a third party in an adversarial relationship." *Bowman v. Two*, 704 P.2d 140 (Wash. 1985). "Existence of a duty to an adversary party beyond the courtesy and respect owed all participants in the legal process. . . would interfere with the undivided loyalty an attorney owes a client and would diminish an attorney's ability to achieve the most advantageous position for a client." *Id.* at 189. The issue of whether or not to extend that duty to the circumstances of the present case is an issue of law to be decided by the court, not an issue of fact for the jury. The district court correctly determined as a matter of law that a lawyer's duty of care should not be extended to the facts alleged in his complaints.

4. <u>HTEH Has Immunity From Liability for Any Claim, Cause of Action or Act Arising Out of Its Representation of Its Clients.</u>

a. <u>Plaintiff's Tort Claims are Barred by the Litigation Privilege.</u>

It would be particularly destructive of the attorney-client relationship if attorneys in a litigated matter were held to have a duty of care or loyalty to the adverse party – in effect, that they become co-counsel for the opponent. HTEH cannot possibly act as zealous advocates of its clients (as is required by the Idaho Rules of Professional Conduct) if it is also deemed to owe duties of care and loyalty to Plaintiff.

The existence of a privilege or immunity is a question of law . *Rincover v. State, Dept. of Finance, Securities Bureau*, 128 Idaho 653, 917 P.2d 1293 (1996). Section 890of the *Restatement (Second) of Torts (1979)* provides: "One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege of his own or of a privilege of another that

was properly delegated to him." (*Id.*) The statements and conduct of an attorney who participates in the judicial process are protected by the litigation privilege. The privilege is not absolute; for instance, it does not permit a lawyer to steal documents, *IBP, Inc., v. Klumpe*, 101 S.W.3d, 461 (Tex.App. 2001), to physically assault another party, *Miller v. Stonehenge/FASA - Texas*, 993 F.Supp. 461 (N.D. Tex. 1998), or to commit acts which constitute abuse of process or malicious prosecution. Otherwise, the privilege is broad. "[T]he litigation privilege protects lawyers not only against defamation actions but against a host of other tort-related claims." *Loigman v. Middletown*, 889 A.2d 426, 436 (N.J. 2006).

It was held in *Loigman* that an attorney who excluded a spectator and self-styled community watchdog from a hearing on the allegedly specious ground that the person was a potential witness was held to be immune from a 42 U.S.C. §1983 suit brought by the disgruntled watchdog. The court observed that "[t]he common policy thread that runs through judicial, prosecutorial and witness immunity is the need to ensure that participants in the judicial process act without fear of the threat of ruinous civil litigation when performing their respective functions." *Id.*, 889 A.2d at 436. The privilege applies even where the theories advanced against opposing counsel are new or innovative:

> Typically, the litigation privilege has been invoked by attorneys to safeguard them from defamation suits arising from comments made in the course of judicial proceedings. However, to address creative pleading, courts have extended the litigation privilege to cover unconventional and sometimes novel causes of action against attorneys acting within the judicial process. As one scholar put it, as new tort theories have emerged, courts have not hesitated to expand the privilege to cover theories, actions, and circumstances never contemplated by those who formulated the rule in medieval England. (Citations and internal quotations deleted)

Id. 889 A.2d at 435-436.

Numerous reported cases support the proposition that the privilege attaches where attorneys represent clients in litigation or other contested or adversarial matters. *See Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1137, 791 P.2d 587, 598 (1990). In fact, the privilege applies to any action except one for malicious prosecution. In some jurisdictions the privilege is absolute (*e.g., Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP, supra*, 440 F.Supp.2d at 1195), and in others it is qualified or conditional. In the latter jurisdictions the plaintiff must prove "a desire to harm, which is independent of and unrelated to the attorney's desire to protect his client." *Schott v. Glover*, 109 Ill.App.3d 230, 440 N.E.2d 376, 379-80 (1982). Restatement of the Law Governing Lawyers § 57(3) ("A lawyer who advises or assists a client to make or break a contract, to enter or dissolve a legal relationship, or to enter or not enter a contractual relation, is not liable to a nonclient for interference with contract or with prospective contractual relations or with a legal relationship, if the lawyer acts to advance the client's objectives without using wrongful means.") The case of *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 151 P.3d 732 (2007), contains an extensive review of the authorities and the policy reasons for barring a litigant's claim for civil damages against an opposing attorney for statements made or actions taken in the course of the attorney's representation of an opposing party related to the civil litigation. The policy reasons include:

> (1) promoting the candid, objective, and undistorted disclosure of evidence; (2) placing the burden of testing evidence upon the litigants during trial; (3) avoiding the chilling effect resulting from the threat of subsequent litigation; (4) reinforcing the finality of judgments; (5) limiting collateral attacks upon judgments; (6) promoting zealous advocacy; (7) discouraging abusive litigation practices; and (8) encouraging settlement.

Id., 151 P.3d at 750.

The allegations and causes of action in the present case relate to theories advanced, positions taken, comments made and defenses raised by HTEH in litigation or adversarial matters relating to disputed control of closely held corporations. Those corporations are entitled to zealous representation by attorneys of their own choosing, who should not be required to labor under constant threats of vindictive and retaliatory litigation by the adverse party. The litigation privilege applies to all tort causes of action, including professional malpractice, aiding and abetting and civil conspiracy, which were properly dismissed on the ground that the actions of HTEH as litigation counsel are privileged.

b. <u>Public Policy Prohibits Litigation Tactics Used to Disrupt Ongoing Litigation</u>.

Public policy against allowing litigation conduct to disrupt the judicial process has been clearly established by Idaho courts, including recognizing judicial immunity for certain judicial conduct.

> With certain exceptions, unimportant here, defamatory matter published in the due course of a judicial proceeding, having some reasonable relation to the cause, is absolutely privileged and will not support a civil action for defamation although made maliciously and with knowledge of its falsity.
>
> ***
>
> The reason for the rule is one of public policy in which the law recognizes certain communications as privileged and cannot be used as the basis of actionable libel.
>
> If litigants and attorneys were not privileged in their allegations in judicial proceedings, or if they were to be subjected to prosecution for libel under such circumstances as are here presented, justice would often be defeated.
>
> ***
>
> The privilege stated in this Section is based upon a public policy of securing to attorneys and officers of the court the utmost freedom in their efforts to secure justice

for their clients.

Malmin v. Engler, 124 Idaho 733, 864 P.2d 179 (Ct.App. 1993). Suing opposing counsel during the course of litigation is exactly the type of conduct that violates the public policy.

For example, strategies to disqualify opposing counsel are disfavored by the courts. *Tisby v. Buffalo General Hospital*, 157 F.R.D. 157, 163 (W.D.N.Y. 1994) ("Motions to disqualify opposing counsel must be viewed in the context of favoring a party's right to be represented by counsel of its own choice, as opposed to disqualifying as a strategic weapon."); *Spence v. Flynt*, 816 P.2d 771 (Wyo. 1991) ("Disqualification motions are often simply common tools of litigation process used for strictly strategic purposes."). Plaintiff moved to disqualify HTEH in the Underlying Action.[6] Suing opposing counsel during the course of litigation is a tactical tool similar to (if not worse than) a motion for disqualification, and such tactics are disfavored in Idaho and violate public policy.

5. Each Cause of Action Pled in the Complaint and Proposed Amended Complaint Was Properly Dismissed Due to Insufficient, Conclusory Pleading or as a Matter of Law.

A party may not rely on pleadings which assert only legal conclusions, but must allege facts which, if true, state a claim for relief. *Resolution Trust Corp., v. Farmer*, 823 F.Supp. 302, 309

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[6]Plaintiff's motion to disqualify opposing counsel was denied. (R. Additional Clerk's Record, p. 521.) In fact, the district court expressly determined that the motion was unjust. "Finally, the Court notes that Plaintiff's motion to disqualify counsel came only after the attorneys have been acting as counsel for their respective clients for well over a year, during which multiple motions have been filed, numerous hearings have been held, and extensive discovery has been completed. To disqualify the attorneys and law firms at this juncture would not only serve an injustice to the Defendant clients of the attorneys, but would serve an injustice to the Plaintiff." (*See* Respondent's Second Motion to Augment.)

(E.D.Pa. 1993). While well-pled facts alleged in the complaint are viewed in the light most favorable to the plaintiff, conclusory allegations are not accepted as true without specific factual allegations to support them. *Rales v. Blasband,* 634 A.2d 927, 931 (Del. 1993); *Production Resources Group, L.L.C. v. NCT,* 863 A.2d 772, 781 (Del. 2004). In the present case, Plaintiff merely stated conclusory allegations but failed to plead any facts to support cause of action.

a. The Complaints Fail to State a Cause of Action for Aiding and Abetting.

The Idaho courts have recognized that a party may in certain circumstances be held liable for aiding and abetting the tortious acts of another. *See Smith v. Thompson*, 103 Idaho 909, 655 P.2d 116 (Ct.App. 1982); *Price v. Aztec*, 108 Idaho 674, 701 P.2d 294 (Ct.App. 1985). No Idaho case has been found dealing with the issue whether an attorney can be found liable for aiding and abetting the commission of an allegedly tortious act committed by his or her client, whether in connection with litigation or otherwise. Other jurisdictions that have grappled with the issue have predominantly (that is, with limited exceptions not applicable here) held that the attorney-client relationship precludes aider-abettor liability.

A number of cases have held that a lawyer acting on behalf of his or her client and within the scope of the attorney-client relationship is not liable for assisting the client in allegedly wrongful conduct. *See, e.g., Durham v. Guest*, 171 P.3d 756 (N.M. 2007), reversed on other grounds by 204 P.3d 19 (N.M. 2009), (holding that an attorney who represented an insurer in a claim arbitration could not be held liable for aiding and abetting the insurer's allegedly wrongful denial of the claim); *Morin v. Trupin*, 711 F.Supp. 97 (S.D.N.Y. 1989) (holding that attorneys who represented their client in negotiations regarding the collection of allegedly fraudulent promissory notes were not

liable to an adverse party for aiding and abetting their client in seeking to enforce the notes); *Camp v. Dema*, 948 F.2d 455 (8th Cir. 1991) (holding that a corporate attorney could not be held liable for securities fraud solely on the basis of advice given to his client).

A case where the plaintiffs asserted claims strikingly similar to those in the present case is *Mann v. GTCR Golder Rauner, L.L.C.*, 351 B.R. 685 (D.Ariz. 2006), where suit was brought by shareholders of a corporation against the law firm of Kirkland & Ellis ("Law Firm") for allegedly aiding and abetting its clients, the parties in control of a corporation, to breach their fiduciary duties. The shareholders also alleged that Law Firm committed professional malpractice and tortiously interfered with the plaintiffs' contractual relations and prospective economic advantage. Law Firm moved for and was granted summary judgment with respect to the aiding and abetting claim on the ground Law Firm did no more than provide legal advice to its own clients.[7] The court found that Law Firm's act of giving advice to its clients, even if such advice were faulty, did not constitute aiding and abetting the alleged torts.[8]

A third party's claim against a lawyer puts the lawyer at odds with his or her client in a manner which compromises the attorney-client relationship. Protecting that relationship protects more than just an individual or entity in any particular case or transaction; it is fundamental to the integrity of the judicial process itself. As pointed out in *Durham v. Guest*, 171 P.3d 756, 761 (N.M.

[7]The court also dismissed the malpractice claim because Law Firm had no attorney-client relationship with the plaintiffs and dismissed the tortious interference claims because "the mere act of giving legal advice to a client cannot constitute tortious interference." *Id.* at 701.

[8]Law Firm advised bringing in a "crisis manager". This turned out to be disastrous, as the crisis manager dissipated the corporation's assets and led to its demise. *Id.* at 691-692.

2007), to permit aiding and abetting claims against attorneys by adversary parties in civil litigation would have a chilling effect on representation because:

> [A]nytime a plaintiff alleged that a defendant had breached a fiduciary duty to the plaintiff, an additional claim against the defendant's counsel for aiding and abetting would withstand a Rule [12(b)(6)] motion, even though the defendant's counsel had simply been representing the client's position in an adversarial proceeding. Before agreeing to represent a client, an attorney faced with this dilemma would have to evaluate the merits of his client's position and the attendant risks, then would have to monitor the case during the representation in order to evaluate the risk of liability. This would have a detrimental effect on the representation. . . .

Id. at 761.

Plaintiff's claims against HTEH for purportedly aiding and abetting its clients' actions was properly dismissed for failure to state a cause of action.

b. The Complaints Fail to State a Cause of Action for Civil Conspiracy.

"A civil conspiracy that gives rise to legal remedies exists only if there is an agreement between two or more to accomplish an unlawful objective or to accomplish a lawful objective in an unlawful manner." *McPheters v. Maile*, 138 Idaho 391, 395, 64 P.3d 317, 321 (2003). "An agreement between two or more persons, to do or accomplish something which is in itself lawful and does not contemplate or employ any unlawful means for its consummation, and which does not injure or damage the prospective victim (so called), is not actionable." *Kloppenburg v. Mays*, 60 Idaho 19, 88 P.2d 513 (1939). Thus, "[c]ivil conspiracy is not, *by itself*, a claim for relief." *McPheters*, 138 Idaho at 395, 64 P.3d at 321 (emphasis added). Rather, "civil conspiracy is a derivative tort that relies on an underlying actionable wrong." *Cunningham v. Jensen*, 2005 WL 2220022, at *8 (Idaho 2005).

The complaint and proposed amended complaint in the present case is legally insufficient because it fails to allege either that HTEH committed an unlawful act with its clients or it engaged in lawful conduct with its clients in order to achieve an unlawful objective. Not only is it not unlawful for attorneys to represent their clients zealously in litigation, they are under a duty to do so.

(i) Agents Cannot Conspire with their Principal.

"[I]t is fundamental that an agent cannot conspire with his principal." *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 457 (9th Cir. 1978). The explanation for this rule is that, "[s]ince a corporate entity cannot conspire with itself[,] a civil conspiracy is <u>not legally possible</u> where a corporation and its alleged coconspirators are not separate entities, but, rather, stand in either a principal-agent or employer-employee relationship with the corporation." 16 Am.Jur.2d *Conspiracy* § 56 (1998) (emphasis added).

Idaho follows this "fundamental" principle of conspiracy law. *See Afton Energy, Inc. v. Idaho Power Co.*, 122 Idaho 333, 340, 834 P.2d 850, 857 (1992) ("A corporation cannot conspire with its officers or agents to violate the antitrust laws."). "[A]lthough a corporation's agents may render the corporation liable for torts committed in the scope of their employment, an agent or multiple agents may not render the corporation liable for a civil conspiracy involving only corporate agents." *McClain v. Pactiv Corp.*, 602 S.E.2d 87, 90 (S.C. Ct. App. 2004) (citations omitted).

In other words, HTEH is legally incapable of "conspiring" with its clients to harm Plaintiff. Plaintiff's attempt to avoid this reality by alternative pleading is ineffectual. While he attempts to plead, in the alternative, the existence of an agency relationship, to deny the existence of such a relationship or to claim that HTEH acted outside the scope of its agency relationship, these

alternative allegations are wholly conclusory and do not survive the 12(b)(6) dismissal.

(ii) The Complaints Fail to Plead Conspiracy with Particularity.

Even if Plaintiff's civil conspiracy claim was legally tenable, it is inadequately pleaded. Where the "object of the alleged conspiracy is fraudulent," civil conspiracy must be pleaded with particularity. *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 990-92 (9th Cir. 2006). Rule 9(b)'s pleading standards apply. In addition to pleading the circumstances of fraud with particularity, the plaintiff is required to "plead at least the basic elements of the conspiracy, especially the existence of an agreement." *Wasco*, 435 F.3d at 990. In other words, "[t]o successfully plead [a civil conspiracy] cause of action, Plaintiff must more clearly allege specific action on the part of each defendant that corresponds to the elements of a conspiracy cause of action." *Accuimage Diagnostics Corp v. Terarecon, Inc.*, 260 F. Supp.2d 941, 948 (N.D. Cal. 2003).

Here, however, Plaintiff's civil conspiracy claim is devoid of any specific allegations supporting even the basic elements of a conspiracy, let alone the elements of fraud. Rather than plead any facts detailing the supposed conspiracy, including any conspiratorial agreement and the role each individual played in the conspiracy, Plaintiff merely makes conclusory assertions that a conspiracy existed and the claim was properly dismissed.

c. The Complaints Fail to State a Claim for Conversion.

Plaintiff alleges conversion of an indeterminate sum of money. Conversion has been defined as "a distinct act of dominion wrongfully asserted over another's personal property in denial [of] or inconsistent with [the] rights therein. " *Torix v. Allred*, 100 Idaho 905, 919, 606 P.2d, 334, 339 (1980). "Conversion in the legal sense applies only to personal property." *Rowe v. Burrup*, 95 Idaho

747, 750, 518 P.2d 1386 (1974).

Plaintiff cannot state a valid claim for conversion against HTEH, however, for three reasons: (1) Plaintiff does not own or have a possessory interest in the money claimed; (2) HTEH has not wrongfully asserted dominion over the money claimed; and (3) the money claimed by Plaintiff is not identifiable as a specific chattel. Plaintiff's conversion claim therefore fails as a matter of law and was properly dismissed.

(i) Plaintiff Does Not Own the Sum of Money Claimed.

In order to state a valid claim for conversion, a plaintiff must demonstrate that he or she has title to the property claimed, or a right of possession. *Portland Seed Co. v. Clark*, 35 Idaho 44, 46-47, 204 P. 146, 146-47 (1922). "Generally, a plaintiff must establish legal ownership or right to possession in the particular thing, the specifically identifiable moneys, that the defendant is alleged to have converted." *Macomber v. Travelers Property and Casualty Corp.*, 804 A.2d 180, 199 (Conn. 2002). No action for conversion of money may be brought if the plaintiff did not have ownership, possession or control of the subject money. *Flute, Inc. v. Rubel*, 682 F.Supp. 184 (S.D.N.Y. 1988).

The allegations of Plaintiff's complaints do not identify what specific sum of money plaintiff purportedly owns or is entitled to possess or control. Plaintiff alleges that he is a creditor of AIA Services (*See* Complaint, ¶¶ 51-55) whose right to payment of the debt has not been established and was at issue in the Underlying Action. (*See* Complaint, ¶¶ 15-16.)[9] At best, Plaintiff had a *claim* to a sum of money. At the time of the dismissal Plaintiff had no right to any liquidated sum.

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[9]Recently, Plaintiff's alleged rights in this respect were determined adversely to him.

Plaintiff therefore failed to establish a necessary element of his cause of action for conversion.

(ii) HTEH Has Not Wrongfully Asserted Dominion Over the Property.

A claim for conversion fails if the plaintiff cannot establish that the defendant wrongfully exerted dominion over the subject personal property. *See Torix v. Allred*, 100 Idaho 905, 910, 606 P.2d 1334, 1339 (1980). "No conversion action can exist against a defendant who did not exercise any form of dominion or control over the property that was allegedly converted." *U.S. Claims, Inc. v. Flomenhaft*, 519 F.Supp.2d 532, 536 (E.D. Pa. 2007).

In this case, HTEH is not alleged to have taken any property directly from plaintiff. Instead, Plaintiff's complaints allege HTEH was compensated for attorney fees and costs incurred in defending its clients in the Underlying Action filed by Plaintiff. (Complaint, ¶ 54.) Idaho law clearly permits corporations to hire attorneys to represent the corporations' interests and to compensate those attorneys for their services. *See* I.C. § 30-1-302(1) (general corporate power to defend in its name); I.C. § 30-1-302(7) (general corporate power to make contracts and to incur liabilities); I.C. § 30-1-302(15) (general corporate power to make payments that further the business and affairs of the corporation). AIA Services, AIA Insurance and CropUSA were legally authorized to hire HTEH and to pay the attorney fees and costs incurred relating to the defense of the claims asserted against the corporations in the Underlying Action.[10] Therefore, any exertion of dominion or control over the attorney fees and costs paid to HTEH, whether by AIA Services, AIA Insurance,

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[10]This was confirmed by the district court when it granted a Preliminary Injunction allowing the corporation to continue to operate per usual during the pendency of the Underlying Action. (R. Additional Clerk's record, p. 521.)

or CropUSA cannot be *wrongful* such that a claim for conversion arises in favor of Plaintiff against HTEH.

(iii) Plaintiff's Claimed Sum of Money Is Not a Specific Chattel.

Plaintiff's conversion claim against HTEH alleges only the conversion of an indeterminate amount of money. "Normally conversion for misappropriation of money does not lie *unless it can be described or identified as a specific chattel.*" *Warm Springs Properties, Inc. v. Andora Villa, Inc.*, 96 Idaho 270, 272, 526 P.2d 1106 (1974) (emphasis added). "More particularly, if the alleged converted money is incapable of being described or identified in the same manner as a specific chattel, it is not the proper subject of a conversion action." *High View Fund, L.P. v. Hall*, 27 F.Supp.2d 420, 428 (S.D.N.Y. 1998) (citation and internal quotations omitted).

> An action for conversion of money is insufficient as a matter of law unless it is alleged that the money converted was in specific tangible funds of which claimant was the owner and entitled to immediate possession. An action for conversion does not lie to enforce a mere obligation to pay money.

Ehrlich v. Howe, 848 F.Supp. 482, 492 (S.D.N.Y. 1994). "In other words, an action alleging conversion of money lies only where there is an obligation to deliver the specific pieces of the money in question or money that has been specifically sequestered, rather than a mere obligation to deliver a certain sum." *SouthTrust Bank v. Donley*, 925 So.2d 934, 940 (Ala. 2005).[11] Even if Plaintiff were a pledgee, shareholder, director or creditor of AIA Services or AIA Insurance, he would have no

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[11]Idaho Code § 28-9-332 provides in relevant part: (a) A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party; and (b) A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

personal right to possess or exert dominion over the assets of either corporation, including those funds paid as attorney fees.

The complaint fails to allege that HTEH exerted control over or possession of any identifiable personal property belonging to Plaintiff or in which he possessed a perfected security interest. It is alleged only that HTEH accepted payment of attorney's fees and costs.[12]

There is nothing improper about AIA Services and AIA Insurance retaining counsel to defend them in the Underlying Action or paying the fees of their defense counsel. The existence of a claim by an alleged secured creditor does not preclude a debtor from paying its legal bills or other obligations as they fall due. If Plaintiff's conversion theory were correct, then neither of the AIA entities could pay the wages of its employees, rent, taxes, operating expenses or amounts owing to trade creditors. All payments to anyone other than the alleged secured creditor, Plaintiff, would be improper.

d. The Complaints Fail to State a Cause of Action for Violation of the Idaho Consumer Protection Act.

Plaintiff alleges violations of the Idaho Consumer Protection Act (hereinafter the "Act"). Plaintiff, however, has not asserted – and indeed cannot assert – a valid claim under the Act against HTEH because plaintiff had no contract with HTEH from which an alleged claim could possibly

[12]Paragraph 55 of the complaint alleges that defendants "assisted in the inappropriate titling and pledging of a $1.2 Million Mortgage owned by AIA Services Corporation. . . ." However, the complaint does not allege that HTEH became the owner of the mortgage or that HTEH at any time possessed or controlled the note and mortgage. Even if it could be inferred that Plaintiff claims a perfected security interest in the mortgage, which is far from clear, his security interest would continue despite any transfer or assignment of the mortgage. Idaho Code § 28-9-201(a).

arise. Accordingly, Plaintiff's cause of action was properly dismissed as a matter of law.

Idaho Code §§ 48-603 and 48-603A set forth certain practices which are prohibited under the Act. Idaho Code § 48-608(1) allows individuals to pursue a cause of action for an alleged violation of the Act and provides, in relevant part, as follows:

> Any person who *purchases or leases goods or services and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by this chapter*, may treat any agreement incident thereto as voidable or, in the alternative, may bring an action to recover damages or one thousand dollars ($1,000), which ever is greater....

I.C. § 48-608(1) (emphasis added).

Idaho case law limits claims under the Act to circumstances involving a clear and distinct contractual relationship between the parties. *See Haskin v. Glass*, 102 Idaho 785, 640 P.2d 1186 (Ct.App. 1982). In *Haskin*, the parties entered into negotiations for the sale of real property. The proposed sale never occurred and the buyers, who were renting the subject property at the time, ultimately pursued damage claims against the sellers. The buyers later filed a motion to amend their pleading to assert a claim against the sellers under the Act, claiming the sellers engaged in deceptive acts or practices. The district court denied the buyers' motion to amend, finding that no valid claim could be asserted under the Act because no contract existed between the parties. On appeal, the Idaho Court of Appeals upheld the district court's denial of the sellers' motion to amend, and specifically held that a claim under the Act *must* be based upon a contract:

> . . . We do not construe this language to require that a purchase or lease be "completed" in order for an action to be brought. However, we have reviewed the regulations promulgated by the Idaho Attorney General pursuant to I.C. § 48-604(2), the decisions of the Idaho Supreme Court interpreting the ICPA to date, and cases

> reported under 15 U.S.C. § 45(a)(1), which are deemed guides to construction of the ICPA under I.C. § 48-604(1). We find no authority for applying the ICPA to a merely contemplated transaction, where there was no contract. *We hold, as we believe the trial court intended, that a claim under the ICPA must be based upon a contract.*

Haskin, 102 Idaho at 788 (emphasis added).

Similar to the facts at issue in *Haskin*, there is no contract in the present case between Plaintiff and HTEH upon which Plaintiff's claim under the Act can be based. The facts of this case are even further removed from those at issue in *Haskin* because in this case plaintiff has not alleged that any transaction was even "contemplated" between himself and HTEH.

Further, the Washington Court of Appeals recently held that allowing a plaintiff to sue his or her adversary's attorney under a consumer protection act theory infringes on the attorney-client relationship. *Jeckle v. Crotty*, 85 P.3d 931 (Wash.App., 2004). In support of that finding, the court relied on Connecticut case law, holding as follows:

> Providing a private cause of action under [the Connecticut Unfair Trade Practices Act] to a supposedly aggrieved party for the actions of his or her opponent's attorney would stand the attorney-client relationship on its head and would compromise an attorney's duty of undivided loyalty to his or her client and thwart the exercise of the attorney's independent professional judgment on his or her client's behalf. *Suffield Dev. Assoc. Ltd. P'ship v. Nat'l Loan Investors, L.P.*, 260 Conn. 766, 783-84, 802 A.2d 44.

Id., 85 P.3d at 384-85.

Not only is there a complete absence of any contract or consumer relationship between Plaintiff and HTEH which would form the basis for a claim, but Plaintiff should not be permitted to sue his adversaries' attorneys under the Act.

e. The Complaints Fail to State a Claim for Legal Malpractice or Breach of Fiduciary Duty.

Plaintiff alleged causes of action for legal malpractice and for breach of the fiduciary duty. Ordinarily, one not in privity of contract with an attorney cannot bring suit for legal malpractice against the attorney. Stated otherwise, the care and skill an attorney owes his or her client ordinarily does not extend to third parties. *National Sav. Bank v. Ward*, 100 U.S. 195, 205-206, 25 L.Ed. 621 (1879); *Buscher v. Boning*, 159 P.3d 814 (HI 2007).

The reasons for the privity rule are manifold: "The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained." *Johnson v. Jones*, 103 Idaho 702, 703, 652 P.2d 650, 652 (1982); absent the privity rule, "clients would lose control over the attorney-client relationship, and attorneys would be subject to almost unlimited liability." *Barcelo v. Elliott*, 923 S.W. 2d 575, 580 (Tex. 1996); allowing a broad cause of action in favor of third parties would create a conflict of interest between an attorney's client and such third parties, thereby limiting the attorney's ability to zealously represent his or her client. *Id.* at 578; "Attorneys owe fundamental duties to their clients. Among the most important of these duties are the duties of zealous representation and loyalty." *Heinze v. Bauer*, 145 Idaho 232, 178 P.3d 597, 603 (2008). Those duties would be irrevocably compromised if attorneys were required to temper their representation by taking into account the economic or other interests of third parties. Imposing duties to non-clients would give rise to increased malpractice suits and cause attorneys to practice in a manner calculated to protect themselves personally rather than advance the interests of their clients.

Plaintiff's malpractice claim fails to allege the existence of an attorney-client relationship – the so-called privity rule.

> To establish a claim for attorney malpractice/professional negligence, the plaintiff must show: (1) the creation of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the breach of the duty of the standard of care by the lawyer; and (4) that the failure to perform the duty was a proximate cause of the damages suffered by the client.

Becker v. Callahan, 140 Idaho 522, 526, 96 P.3d 623, 627 (2004), *citing McColm-Traska v. Baker*, 139 Idaho 948, 951, 88 P.3d 767, 770 (2004).

The Idaho Supreme Court in *Harrigfeld v. Hancock*, 140 Idaho 134, 90 P.3d 884 (2004), confronted the issue of whether a legal malpractice action must arise out of an attorney-client relationship. In that case disappointed heirs sought to bring a legal malpractice action against the attorney who drafted a decedent's will and three codicils. Each of the two later codicils revoked prior codicils. The heirs contended the codicils were intended to be cumulative. The Court acknowledged: "[a]s a general rule, an attorney will be held liable for negligence only to his or her client and not to someone with whom the attorney does not have an attorney-client relationship." *Id.* at 137, 90 P.3d at 887. However, the Court held this is not an invariable rule and held that an attorney preparing testamentary instruments owes a duty to the beneficiaries named in the instruments to effectuate the testator's intent. This is the *only* instance in which the requirement of privity in a legal malpractice action has been abrogated under Idaho law. The *Harrigfeld* Court cautioned:

> A direct attorney-client relationship is required to exist between the plaintiff and the attorney-defendant in a legal malpractice action except in this very narrow circumstance.

Id. at 139, 90 P.3d 884.

The reason for such cautionary limitation was aptly expressed by the *Harrigfeld* Court, quoting *Pellam v. Griesheimer,* 440 N.E.2d 96, 99-100 (Ill. 1982):

> While privity of contract has been abolished in many areas of tort law, the concern is still that liability for negligence not extend to an unlimited and unknown number of potential plaintiffs. In the area of legal malpractice the attorney's obligations to his client must remain paramount. In such cases the best approach is that the plaintiffs must allege and prove facts demonstrating that they are in the nature of third-party intended beneficiaries of the relationship between the client and the attorney in order to recover in tort. By this we mean that to establish a duty owed by the defendant attorney to the nonclient the nonclient must allege and prove that the intent of the client to benefit the nonclient third party was the primary or direct purpose of the transaction or relationship.

Id. at 137, 90 P.3d at 887.

The Idaho Supreme Court, in a case decided after *Harrigfeld,* declined to create an additional exception to the privity requirement. In *Taylor*[13] *v. Maile*, 142 Idaho 253, 127 P.3d 156 (2005), the remainder beneficiaries of a trust, attempted to sue the trustee's attorney for legal malpractice. After a thorough discussion of *Harrigfeld* the Court affirmed dismissal under Rule 12(b)(6) of the claim of malpractice against the attorney:

> The third count of the complaint asserts a professional malpractice claim against Mr. Maile and this count is precluded by the general rule espoused in *Harrigfeld* that an attorney-client relationship with the plaintiff is a prerequisite for holding the attorney liable for negligence in the performance of legal services.

Id. at 259, 127 P.3d 156.

The Court in *Taylor* also upheld dismissal of the claim of breach of fiduciary duty against

[13]This is the same Taylor who is the Plaintiff in the present case.

the attorney because he had assumed no fiduciary duty to them; he was acting as counsel for the fiduciary rather than as a fiduciary himself – an important distinction.

Plaintiff's complaints are deficient because they fail to allege facts to establish an attorney-client relationship between HTEH and himself, the existence of any duty on the part of HTEH to him, or the breach of any duty owing by HTEH to him, and fails entirely to allege how any act or omission of HTEH was the proximate cause of any damages allegedly suffered by him.

f. The Complaints Fail to State a Cause of Action for Intentional Interference With Contract.

The analysis of interference with contractual relations is similar to that of civil conspiracy above. A party cannot tortiously interfere with its own contract. *Ostrander v. Farm Bureau Mut'l Ins. Co. of Idaho, Inc.*, 123 Idaho 650, 654, 851 P.2d 946, 950 (1993). A principal and agent are treated as one for purposes of analyzing whether tortious interference with contract has occurred. It is a legal absurdity to allege that an agent interfered with its principal's contract. *See BECO Const. Co., Inc. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 184 P.3d 844 (2008).

> Although J-U-B was not a party to the Construction Contract in the traditional sense, it acted as the city's agent by the very terms of the contract between BECO and the city. This case falls within the purview of *Ostrander* where an intentional interference claim was found not to lie against an agent of a party who was acting within the scope of his authority.

BECO Const. Inc. J-U-B Engineers, Inc., 145 Idaho 719, 725, 184 P.3d 844, 850 (2008). The relationship between an attorney and his or her client is that principal and agent. *See Crockett & Meyers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 440 F.Supp.2d 1184, 1194-95 (D.Nev. 2006) (because a party to a contract cannot tortiously interfere with that contract, party's law firm cannot

be liable for the tort as a matter of law); *American Family Mutual Ins. Co. v. Zavale*, 302 F.Supp.2d 1108, 1117-18 (D.Ariz. 2003) (lawyers act as their client's agents, their alter egos, and therefore generally are not capable of interfering with their contractual relations). An attorney cannot be held liable for interference with contract by giving advice to the client within the scope of the attorney's representation of the client. Plaintiff's complaints failed to sufficiently plead a cause of action for intentional interference with contract.

g. The Complaints Fail to State a Cause of Action for Fraud or Constructive Fraud.

A party must establish nine elements to prove actual fraud. *Glaze v. Defenbaugh*, 144 Idaho 829, 833, 172 P.3d 1104, 1108 (2007). Moreover, fraud must be pled with particularity pursuant to I.R.C.P. 9(b). Plaintiff appears to concede in his Appellant's Brief that there were insufficient, particular facts pled in favor of actual fraud by choosing instead to focus upon constructive fraud. Regardless, the complaints do not allege sufficient, particular facts and actual fraud was properly dismissed on Rule 12(b)(6).[14]

"An action in constructive fraud exists when there has been a breach of a duty arising from a relationship of trust and confidence, as in a fiduciary duty." *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). "Examples of relationships from which the law will impose fiduciary obligations on the parties include when the parties are: members of the same family, partners,

[14]Neither complaint pleads the nine elements nor any facts in support of the nine elements. Plaintiff does not identify what averments in the complaints would meet the pleading requirement; nor does he address the Rule 9 particularity requirement. In fact, Plaintiff does not even expressly state what the actual fraud or constructive fraud is.

attorney and client, executor and beneficiary of an estate, principal and agent, insurer and insured, or close friends." *Mitchell v. Barendregt*, 120 Idaho 837, 844, 820 P.2d 707, 714 (Ct.App. 1991). Neither complaint alleges any of these relationships between Plaintiff and HTEH. Moreover, as discussed above, there is no duty to breach since none is owed by opposing counsel's attorneys in ongoing litigation. Plaintiff's relationship with opposing counsel did not rise to that of trust or confidence and certainly did not rise to the level of a fiduciary relationship. "The jist of a constructive fraud finding is to avoid the need to prove intent (i.e.: knowledge of falsity or intent to induce reliance) [under the elements required to prove actual fraud], since it is inferred directly from the relationship and the breach." *Country Cove Dev., Inc. v. May*, 143 Idaho 595, 601, 150 P.3d 288, 294 (2006). In *Garcia v. Rodey, Dickason, Sloan, Akin & Robb*, 106 N.M. 757, 750 P.2d 118 (1988), the court rejected plaintiff's attempt to allege causes of action for constructive fraud and other torts based on counsel's statements upon which a litigation adversary allegedly relied to his detriment. The court found that imposition of the requisite legal or equitable duty to the plaintiff "would be contrary to an attorney's duty to represent his client and pursue his client's interests with undivided loyalty." *Id.*, 750 P.2d at 124. However, the party is still required to prove the remaining seven elements of actual fraud. *Gray v. Tri-Way Const. Services, Inc.*, ___ Idaho ___, 210 P.3d 63 (09.9 ISCR 465) (2009).

Regardless of HTEH's alleged knowledge of falsity or intent that Plaintiff rely on statements or representations of fact, Plaintiff's claim for constructive fraud still fails. Plaintiff has not alleged with sufficient particularity facts to support the remaining seven elements of actual fraud. Plaintiff cannot establish that HTEH owed him a duty, let alone breached any such duty. Moreover, Plaintiff

cannot establish a relationship of trust and confidence between himself and HTEH, his adversaries' attorneys. Finally, there are no facts (nor could there be) that support Plaintiff's justifiable reliance upon any statements or actions taken by HTEH given the adversarial nature of the Underlying Action from which the Malpractice Action springs.

6. **The District Court Did Not Abuse Its Discretion in Denying the Motion to Amend the Complaint Since Any Such Amendment Would be Futile.**

a. Amending the Complaint Would be Futile Where the Plaintiff Cannot State a Cause of Action.

With respect to Plaintiff's so-called direct claims, leave to amend should be denied because, as a matter of law, he has not and, indeed, cannot state a cause of action against counsel for opposing parties. While the district court cannot consider the sufficiency of the evidence in deciding whether to allow the proposed amendment, *Spur Products Corporation v. Stoel Rives LLP*, 142 Idaho 41, 44,122 P.3d 300 303 (2005), sufficiency of the evidence is not an issue here because the attempt to sue attorneys not in privity with the plaintiff is barred as a matter of law.

(i) As a Matter of Law, the Defendants Owed No Duty to Plaintiff.

Except in the narrow circumstance of an attorney drafting testamentary instruments, an attorney owes no duty under Idaho law to third parties who are not his clients. *Harrigfeld v. Hancock*, 140 Idaho 134, 139, 90 P.3d 884, 889 (2004). The proposed amended complaint does not allege any facts that would come within the *Harrigfeld* exception. Therefore, the district court properly denied the motion to amend, because as a matter of law HTEH cannot be liable to Plaintiff under any cause of action requiring a duty.

(ii) As a Matter of Law, Plaintiff Lacks Standing to Sue Opposing Parties' Counsel.

Plaintiff lacks standing to sue lawyers who do not represent him. It would be a futile act to grant leave to amend the complaint where it fails to allege a viable cause of action whether denominated legal malpractice or breach of fiduciary duty or any other tort. In the present case, the amended complaint alleged no facts which would give Plaintiff standing to sue HTEH. It would be a futile act to grant leave to amend the complaint merely to assert nonviable claims.

(iii) As a Matter of Law, Plaintiff Lacks Privity with HTEH.

In the absence of privity, the Plaintiff has no cause of action against HTEH for torts, *Harrigfeld v. Hancock*, 140 Idaho 134, 139, 90 P.3d 884, 889 (2004), includes breach of fiduciary duty, *Taylor v. Maile*, 142 Idaho 253, 127 P.3d 156 (2005). Since the proposed amended complaint fails to allege any facts which would establish privity, leave to amend was properly denied.

(iv) As a Matter of Law, Plaintiff Has No Cause of Action under the I.C.P.A.

In the proposed amended complaint, Plaintiff attempts to allege a direct cause of action for breach of the Idaho Consumer Protection Act, Idaho Code §§ 48-601 through 48-619. However, a private cause of action may be asserted under that Act only by a "person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property. . . ." Idaho Code § 48-608. The proposed amended complaint does not contain allegations that Plaintiff purchased goods or services from HTEH. Granting leave to amend to bring a fatally flawed claim under the Act would be futile.

(v) As a Matter of Law, Plaintiff's Purported Claims for Conspiracy and Tortious Interference Are Deficient.

Plaintiff sought to "clarify" causes of action in his proposed amended complaint for tortious interference with contract and civil conspiracy. However, the proposed amended complaint still fails to allege that HTEH acted in any capacity other than as counsel for their corporate clients. The relationship of attorney-client is one of principal and agent. *Jarman v. Hale*, 112 Idaho 270, 731 P.2d 813 (1986). As a matter of law, an agent cannot conspire with his principal. *Afton Energy, Inc. v. Idaho Power Co.*, 122 Idaho 333, 340, 834 P.2d 850, 857 (1992. An attorney does not "conspire" with his own client merely by giving advice. "To hold otherwise would be akin to saying that 'a defendant could conspire with his right arm, which held, aimed, and fired the fatal weapon.'" *Fischer v. Estate of Flax*, 816 A.2d 1, 5, n.4 (D.C. 2003). Nor can the agent be held to have interfered with his principal's contract. *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 184 P.3d 844 (2008).

Accordingly, the proposed amended complaint does not allege actionable claims against HTEH for civil conspiracy or tortious interference. Leave to amend was properly denied with respect to these claims.

(vi) As a Matter of Law, HTEH is Shielded by the Litigation Privilege.

As attorneys for parties adverse to Plaintiff, HTEH is not subject to suit by him for its actions taken in connection with litigation. Insofar as the proposed amended complaint attempts to state claims based on defendants' litigation strategy, positions taken in open court, cooperation with co-counsel in defending against Plaintiff's claims, or other matters collaterally related to pending

litigation such as payment of litigation expenses, resisting the opposing party's attempts to possess property, or negotiating, or declining to negotiate, with opposing counsel, HTEH's actions are privileged as a matter of law. The proposed amended complaint is an exercise in futility because it merely seeks to advance claims which cannot survive assertion of the defense of litigation privilege.

(vii) As a Matter of Law, Plaintiff's Claim for Conversion Does Not State a Claim upon which Relief Can Be Granted.

Plaintiff attempts in his proposed amended complaint to plead his claim for conversion in slightly different terms, which are nonetheless insufficient to state a claim. Plaintiff's theory seems to be that HTEH can be held liable for conversion if it can be shown that its fees were paid with the proceeds of assets in which the plaintiff alleges he possesses a perfected security interest. If plaintiff's conversion theory were to be accepted, every person who accepts payment from a client or customer for services rendered would be subject to suit for conversion by the secured creditor of such client or customer. The Uniform Commercial Code rejects this approach. In *Lake Ontario Production Credit Association of Rochester v. Grove Hogan*, 138 A.D.2d 930 (N.Y. 1988), a debtor sold cows in which the plaintiff possessed a perfected security interest. At least part of the proceeds from the sale of the cows was used to pay the debtor's attorneys. The court held that the secured creditor could trace the proceeds from the sale of the collateral only insofar as such proceeds remained in the hands of the debtor. The law firm which received payment from the sale of collateral took free of any claim by the secured creditor. While the UCC has been amended and renumbered since the date of the *Grove Hogan* case, the concept continues under the current version of the Code. *See* Idaho Code § 28-9-332 (persons who in good faith receive payment of money from

a debtor for services rendered take free and clear of any security interest in such money). Because plaintiff's conversion allegations do not raise any justiciable issue, it would be futile to grant leave to amend.

b. Plaintiff's Attempt to Frame His Amended Complaint as a Derivative Action is Inaccurate and Unavailing.

For the first time, Plaintiff alleged in the proposed amended complaint that he is entitled to bring not only direct claims on his own behalf, but also a shareholder's derivative action. This is the primary and perhaps only substantive change in the proposed amended complaint.[15]

The shareholder's derivative action was developed as an extraordinary equitable device to enable shareholders to enforce a corporate right that the corporation failed to assert on its own behalf. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984).

> The corporation is the real party in interest and the shareholder is only a nominal plaintiff. The substantive claim belongs to the corporation. . . .

13 W. Fletcher et al., Cyclopedia of the Law of Private Corporations § 5941.10 (1995 Rev.)

"Because a corporation exists as a separate legal entity, the shareholders have no direct cause of action or right of recovery against those who have harmed it. A shareholder may not maintain an action on his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock because such an action would lead to multitudinous litigation. *Sutter*

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[15]It is doubtful whether the purported derivative claims are properly classified as such. Paragraph 13 of the proposed amended complaint alleges that Plaintiff is entitled to bring derivative claims but then asserts that he is personally entitled to "recover and possess all funds, damages and/or property recovered from all direct and derivative causes of action." It is a fundamental principle that derivative claims belong to the corporation, not the shareholder(s) who bring the derivative action on the corporation's behalf.

v. General Petroleum Corp., 28 Cal 2d 525, 530, 170 P.2d 898 (1946). "When a derivative action is successful, the corporation is the only party that benefits from at any recovery; the shareholders derive no benefit 'except the indirect benefit resulting from a realization upon the corporation's assets.'" *Grossett v. Wenaas,* 175 P.3d at 1190.

(i) Plaintiff Is Not a Shareholder.

Idaho Code § 30-1-741 provides that a person cannot commence or maintain a derivative proceeding unless he "[w]as a shareholder at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one (1) who was a shareholder at that time." The proposed amended complaint does not allege that Plaintiff was a shareholder at the time of the acts complained of. His status is that of former shareholder whose stock was redeemed and who now seeks to recover the balance owing notwithstanding the insolvency of the corporation. This does not qualify him as a "shareholder." He ceased to be a shareholder when his stock was redeemed. Whether or not he will ever again become a shareholder by operation of law or otherwise remains unlikely. Nor does his security interest in the stock of AIA Insurance, make him a shareholder. Whether or not his security interest is enforceable and, if so, whether he possesses any right other than to sell the collateral in a commercially reasonable manner had not been adjudicated when the district court dismissed his complaint.

(ii) Plaintiff Does Not Fairly Represent the Interests of the Corporations.

The shareholder bringing the derivative action must "fairly and adequately represents the interests of the corporation in enforcing the right of the corporation." Idaho Code § 30-1-741. It is impossible to conceive of any way that Plaintiff can be said to represent the interest of AIA Services

or AIA Insurance, or the larger community of shareholders. In every respect, his personal interest is adverse to the corporations and hostile to the interests of other shareholders. Payment of even a substantial portion of the balance due for the redemption of his stock will bankrupt the corporations and leave nothing for other shareholders.[16] The district court properly determined that Plaintiff's proposed amendment to add derivative claims was futile.

7. **The District Court Did Not Abuse Its Discretion in Awarding HTEH Attorney Fees.**

a. Idaho Code § 12-121.

It is appropriate to award fees pursuant to § 12-121 where the district court is not asked to establish any new legal standards, nor to modify or clarify any existing legal standards but the focus of the action is the application of settled law to the facts. *Scott v. Castle*, 104 Idaho 719, 662 P.2d 1163 (Ct.App. 1983). The present case, while unusual, is not a case of first impression nor is it novel for purposes of avoiding an award of attorney fees. In *Taylor v. Maile*, 142 Idaho 253, 259, 127 P.3d 156, 162 (2002), this Court held that Plaintiffs lack standing to sue an attorney where they have no attorney/client relationship. Plaintiff in the present action is aware of the controlling principles of law enunciated in that case, since he was one of the Plaintiffs in *Maile*. Nevertheless, in the present case, he asserted similar claims against attorneys with whom he had no attorney/client relationship. Moreover, he did so during the course of litigation and after a previous, failed attempt to disqualify

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[16]*See*, for example, ¶ 17 of the proposed amended complaint, which alleges that the debt allegedly owing by AIA Services to Plaintiff exceeds its assets by $3 million, and ¶ 29 of the proposed amended complaint which alleges that AIA Services is insolvent and unable to pay the amount allegedly owing to Plaintiff.

those same attorneys in the Underlying Action. Where a party wilfully asserts claims that are contrary to establish law, imposition of fees under § 12-121 is appropriate.[17]

b. Idaho Code § 30-1-746(2), (3).

Upon termination of a shareholder's derivative action, a district court may require the Plaintiff to pay Defendant's reasonable expenses and attorney fees if it finds the proceedings were commenced or maintained without reasonable cause or for an improper purpose or were not well grounded. *See* Idaho Code § 30-1-746(2) and (3). The Official Comment to § 30-1-746 states that among the purposes of the statute are to deter strike suits and prevent proceedings which may be brought to harass the corporation or its officers. Here, Plaintiff attempted to bring derivative actions against his adversaries' attorneys during the course of litigation. He did so after a failed attempt to disqualify these same attorneys. He did so despite the fact that he was not a shareholder at the time of the alleged acts and omissions complained of and despite clear law that derivative actions can only be brought by a shareholder. Moreover, the complaints clearly show that Plaintiff was not seeking to protect or benefit the corporation but rather himself. Based on the above, it was not an abuse of discretion to award HTEH its attorney fees under this statute.

c. Idaho Code § 48-608(5).

Under the Idaho Consumer Protection Act costs, including reasonable attorney fees, shall be

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[17]The district court clearly perceived the award of attorney fees as one of discretion, specifically cited to the rules and statutes upon which he based his award, analyzed his decision against the legal standards and based his decision on his observations of Plaintiff's legal wranglings in both the Underlying Action and this case. As such, there was no abuse of discretion in awarding HTEH its attorney fees.

allowed to the prevailing party unless the district court otherwise directs. *See* Idaho Code § 48-608(5). The district court must, however, find that Plaintiff's action is spurious or brought for harassment purposes only. *Id.* HTEH was clearly the prevailing party on all claims, including the Act. Based on the tactics described in the paragraphs above, coupled with the undeniable fact that Plaintiff did not purchase or lease any goods or services from HTEH, a threshold requirement under the Act, there was no abuse of discretion in awarding attorney fees under this statute.

8. **HTEH is Entitled to Attorney Fees and Costs on Appeal.**

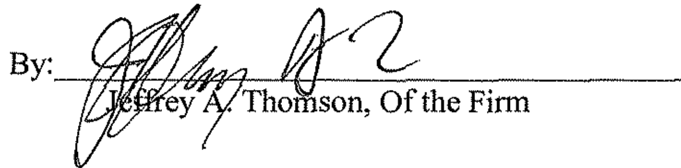
HTEH requests that it be awarded attorney fees and costs incurred in defending this appeal pursuant to Idaho Appellate Rule 41, Idaho Code §§ 12-121, 30-1-746 and 48-608(5). An award of attorney fees is appropriate "if law is well settled and the Appellants have made no substantial showing that the District Court misapplied the law." *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 377, 973 P.2d 142, 148 (1999). Here, the law regarding suits against attorneys under *Taylor v. Maile*, 143 Idaho 253, 258, 127 P.3d 156 (2005), is well settled, and Plaintiff has made no substantial showing that the district court misapplied the law. There is objective evidence that the Malpractice Action was brought to disrupt the Underlying Action and the attorney/client relationship between HTEH and its clients. This appeal was brought without foundation, is spurious, and was brought for harassment purposes making costs and fees on appeal appropriate.

IV. CONCLUSION

The district court's dismissal of the complaint, denial of the request to file an amended complaint and grant of attorney fees should be affirmed. In addition, HTEH should be awarded its fees and costs on appeal.

DATED this 27 day of July, 2009.

ELAM & BURKE, P.A.



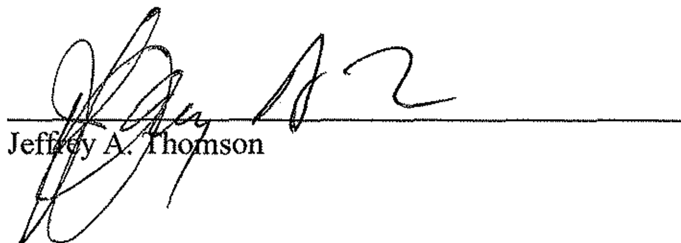
By: Jeffrey A. Thomson, Of the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of July, 2009, I caused a true and correct copy of the foregoing document to be served, via U.S. Mail, to the following:

Roderick C. Bond
Michael S. Bissell
CAMPBELL BISSELL & KIRBY, PLLC
7 South Howard Street, Suite 416
Spokane, WA 99201

John J. Janis
Hepworth, Janis & Brody
P.O. Box 2582
Boise, ID 83701



Jeffrey A. Thomson