5-28-2010

Soignier v. Fletcher Respondent's Brief Dckt. 37123

IN THE SUPREME COURT OF THE STATE OF IDAHO

MARY KILLINS SOIGNIER, Plaintiff/Appellant, vs W. KENT FLETCHER, Defendant/Respondent.	)	Docket No. 37123-2009

RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of

The State of Idaho, in and for the County of Cassia

Honorable Michael R. Crabtree

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I.

STATEMENT OF THE CASE

Zachary A. Cowan was a client of Respondent W. Kent Fletcher ("Fletcher") from approximately 2000 through 2006. (R. p. 90). Fletcher assisted Mr. Cowan with some estate planning, which included the drafting of his Last Will and Testament ("Will"). (R. pp. 90-91; R. pp. 95-97).

Mr. Cowan executed the Will Fletcher had drafted on May 24, 2005. (R. p. 91).

During his lifetime, Mr. Cowan was the beneficiary of a trust created by his mother, Leonarda A. Cowan, of Riverside, California, known as The Leonarda A. Cowan Trust (hereinafter "Leonarda Trust"). *Id.* It is unknown if Mr. Cowan had an interest in any other trust at any time prior to his death.

Clause 6 of the Will directed the residue and remainder of the Mr. Cowan's estate, other than beneficial interests in trusts, be given to the American Cancer Society, and that all beneficial interests that he had in *any* trusts be given to "Mary Killings," Appellant. *Id.* (emphasis added).

Prior to finalizing the Will, Fletcher asked Mr. Cowan about his interests in any trusts, including the Leonarda Trust, and Mr. Cowan informed Fletcher that he had received the disbursements from his mother's trust. (R. p. 91). Fletcher then asked Mr. Cowan if he wanted to keep the language in Clause 6 regarding the Plaintiff in the Will in light of the fact that he had received disbursements from the Leonarda Trust. *Id.* Mr. Cowan told Fletcher that he was uncertain as to whether or not all of that property had been disbursed, and that he wanted to leave the language in the Will. *Id.*

The Will was duly witnessed and attested to by the required number of witnesses. *Id.* The Will is a validly executed testamentary instrument, and Mr. Cowan was competent at the time he executed his Will. *Id.* No party has presented a challenge to the validity of the Will. *Id.*

Mr. Cowan died on the October 20, 2006. (R. p. 91).

Mr. Cowan's Will was admitted to informal probate on November 3, 2006 in the District Court (Magistrate Division) for the Fifth Judicial District, Cassia County, Case No. CV 2006 1234 ("Probate Action"). *Id.*

Pursuant to the terms of the Will, Stephen D. Westfall was nominated and duly appointed to be the Personal Representative of the Estate of Mr. Cowan. (R. p. 92).

The Personal Representative filed an Inventory of the estate on January 23, 2007. *Id.*

In his Will, Mr. Cowan directed that all of his personal property be distributed according to a written list of items and intended recipients, if such a list was in existence at the time of this death. (R. p. 92). A written list of items and intended beneficiaries could not be found and it was concluded that a written list did not exist. *Id.*

At the time of his death, Mr. Cowan did not hold or possess any interest in any trusts. (R. p. 92). The testator's Personal Representative determined that the residue of the testator's estate should be given to the American Cancer Society. *Id.*

Appellant contested the Personal Representative's interpretation of the Will in the Probate Action, claiming that she was entitled to certain monies derived from the Leonarda Trust, and that Clause 6 of Mr. Cowan's Will was ambiguous; Appellant claimed that the Magistrate Court should allow and/or consider parol evidence to aid it in determining the intent of the testator Mr. Cowan. (R. p. 92). Appellant submitted a number of affidavits in the Probate

Action which said, in effect, that Mr. Cowan had made representations that Appellant would receive a substantial portion of his estate upon his death. *Id.*

The Magistrate Court in the Probate Action found that there was no latent or patent ambiguity concerning Mr. Cowan's Will, that Mr. Cowan's intent was clear and unambiguous on the face of the Will, and that Appellant's challenge to the Will was without merit. (R. p. 92).

Based on the Magistrate Court's decision, the residue of Mr. Cowan's estate was paid American Cancer Society. (R. p. 93). Plaintiff filed an appeal of the Magistrate Court decision in the Probate Action. *Id.*

On or about September 9, 2008, the parties of the Probate Action entered into a "Stipulation for Settlement of Claim of Mary Killins Soignier, Approval of Petition for Construction of the Will and Plan of Distribution and Dismissal of Appeal" (hereinafter "Stipulation for Settlement"). (R. p. 93; R. pp. 98-99). That Stipulation for Settlement was signed by Fletcher and Appellant, among others. *Id.*

In consideration for Appellant signing the Stipulation for Settlement, she dismissed her appeal and received payment from the American Cancer Society in the amount of $100,000. (R. p. 93).

On March 25, 2009, Appellant filed a complaint against Fletcher alleging that he committed malpractice by allegedly failing to ascertain that Mr. Cowan held no interest in trusts at the time he drafted the Will. Appellant asserts that Fletcher drafted a Will in which Mr. Cowan's bequest to Appellant would be frustrated because at the time the Will was drafted, Mr. Cowan allegedly had no interest in any trust; thus, no bequest to Appellant. (R. pp. 13-50).

Further, Appellant claims that Fletcher was negligent because he allegedly did not advise Mr. Cowan that upon his death, no trust interest would be conveyed to Appellant. *Id.*

On June 12, 2009, Fletcher filed a motion for summary judgment. In that motion, Fletcher sought dismissal of Appellant's complaint on three separate premises. (R. pp. 72-74). First, Fletcher argued that Appellant's claims were barred by the applicable statute of limitations. (R. pp. 75-89). Second, Fletcher argued that he did not breach any duty owed to Appellant and, therefore, Appellant had no claim against Fletcher. *Id.* Finally, Fletcher argued that Appellant's claims were barred by the doctrine of judicial estoppel. *Id.*

Because the District Court granted Fletcher's motion on the basis that there was no issue of fact that Fletcher did not breach any duty owed to Appellant, the details of Fletcher's motion regarding his statute of limitations and judicial estoppel arguments will not be addressed here.

On September 9, 2009, the District Court entered its Memorandum Decision Granting Defendant's Motion for Summary Judgment. Appellant correctly describes the District Court's ruling on Fletcher's motion in her Statement of the Case. (R. pp. 205-214).

Thereafter, Fletcher filed a motion for attorney fees and costs and the District Court, on December 29, 2009, granted Fletcher's motion. (R. pp. 218-252; R. pp. 285-291) Appellant correctly describes the District Court's ruling on Fletcher's motion in her Statement of the Case.

II.

ISSUES PRESENTED ON APPEAL

Whether, based on the express language contained in Mr. Cowan's Will, there is an issue of material fact that Fletcher breached his duty to Appellant in preparing Mr. Cowan's Will.

Whether the District Court erred in awarding attorney fees to Fletcher as the prevailing party in the underlying legal malpractice case.

Whether, in the event that Fletcher is the prevailing party on this appeal, he is entitled to attorney fees in defending this appeal.

III.

ATTORNEY FEES ON APPEAL

Fletcher is entitled to attorney fees under Idaho Code § 12-120(3) as there was a contractual and/or commercial relationship between Fletcher and the deceased, Mr. Cowan. Because Appellant was a third party beneficiary to the contract and/or commercial relationship (on which basis she asserts standing to sue Fletcher for malpractice), Idaho Code § 12-120(3) is applicable. If the District Court decision is affirmed on appeal, Fletcher should be awarded his attorney fees and costs incurred in defending this appeal.

IV.

ARGUMENT

A. The District Court Did Not Err In Granting Fletcher's Motion For Summary Judgment.

1. The District Court Properly Analyzed The Elements Of An Attorney Malpractice Action By A Named Beneficiary.

The District Court held, based upon this Court's decision in *Harrigfeld v. Hancock*, 140 Idaho 134, 139, 90 P.3d 884, 889 (2004), that in certain circumstances, a named beneficiary of a Will may assert a malpractice claim against the attorney who drafted the Will. (R., p. 210). *Harrigfeld* recognized that an attorney preparing testamentary instrument owes a duty to the

beneficiaries named, so as to effectuate the testator's intent as expressed in the testamentary instrument. *Id.*

The District Court accurately set forth the elements of an attorney malpractice claim, which are: "(a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been the proximate cause of the damage to the client." *Id.*, citing *Harrigfeld*, 140 Idaho at 136, 90 P.3d at 886.

The District Court correctly recognized that this Court's holding in *Harrigfeld* represented "a very narrow departure from the general rule that an attorney may have liability for his or her negligence only to his or her client and not to the person with whom the attorney does not have an attorney-client relationship." (R. p. 211), citing *Harrigfeld*, 140 Idaho at 136, 90 P.3d at 886.

There is no dispute, and the District Court held as a matter of law, that the first two elements of an attorney malpractice claim were satisfied; that is, there was an attorney client relationship, and Fletcher did have a duty to Appellant, as specifically and narrowly set forth in *Harrigfeld*, that arose from Fletcher's preparation of Mr. Cowan's Will in which Appellant was a beneficiary. *Id.*

The next element analyzed by the District Court was whether there was an issue of material fact as to whether Fletcher breached his duty to Appellant. In doing so the District Court meticulously described the "very narrowly defined scope" of the attorney's duty to the beneficiary, finding "[t]he duty is 'very limited' and 'the attorney ... has no duty to see that the testator distributes his or her property among the named beneficiaries in any particular manner.'"

Id. Moreover, the District Court went on to rely on this Court's clear holding in *Harrigfeld* that "this extension of an attorney's duty will not subject attorneys to lawsuits by person ... who simply did not receive in the testamentary instruments what they understood the testator had stated or indicated what they would receive." (R. pp. 211-212), citing *Harrigfeld*, 140 Idaho at 139, 90 P.3d at 889.

This Court in *Harrigfeld* made it very clear that an attorney's duty to a beneficiary of a testator's will is: "(1) to prepare the testamentary instrument; and (2) if requested by the testator, to have the instrument properly executed so as to effectuate the testator's intent **as expressed in the testamentary instrument**." (R. p. 212)(emphasis by District Court). Key to this Court's opinion in *Harrigfeld* is that this Court limited the means of ascertaining the testator's intent to a review of the validly executed testamentary instrument itself. *Id.* Moreover, as correctly pointed out by the District Court, this Court "determined that a person who has the mental capacity to make a valid will knows the names and identities of the persons who are the objects of his bounty, would also know whether or not such persons are included as beneficiaries under the testamentary instrument before executing them, and can understand how his or her property will be distributed under the testamentary documents." *Id.*

In evaluating whether Fletcher breached any duty to Appellant, the District Court correctly identified the relevant undisputed facts: that "Mr. Cowan was competent to make his Will, that he possessed testamentary capacity, that he signed and declared the Will in the form in which it had been prepared by his attorney, Mr. Fletcher, that the witnesses to his Will attested to his competency and his declaration, and that the Will was valid and had legal effect. As the Supreme Court as noted, it is therefore presumed that the Will was as he wanted it to be." *Id.*

Based on these findings, the District Court held there was no genuine dispute that the Will Fletcher prepared in any way frustrated Mr. Cowan's intent, as that intent was expressed in the Will, and that as a matter of law, Fletcher did not breach his very narrow and limited duty to Appellant. (R. pp. 212-213).

2. The Unambiguous Language Of The Will Is Controlling And The District Judge Properly Limited Its Analysis To The Testamentary Instrument.

Appellant asserts that even if no extrinsic evidence is considered, that it is nevertheless clear from the language of the Will that Mr. Cowan's intent was frustrated because Fletcher makes reference to things that allegedly do not exist.

As a preliminary matter, Appellant does not dispute that "Idaho law is unanimous that, where the language of a testamentary instrument is 'unambiguous, given its ordinary well-understood meaning', the courts will not look beyond the four corners of the document." Appellant's Brief, p. 9, citing *Hedrick v. West One Bank*, 123 Idaho 803, 806, 853 P.2d 548, 551 (1993).

Notwithstanding Appellant's acknowledgment, she asserts that in the context of an attorney malpractice case, "the mere clarity of a testamentary instrument should not serve to insulate the will drafter from liability." *Id.*

Once again, Appellant is asking this Court essentially overrule *Harrigfeld*, as well as the long line of Idaho cases that hold that where a Will is clear in its terms, the Court will not look to extrinsic evidence to interpret the terms of a Will or to draw inferences as to the intent of the testator. That is, the Appellant is requesting this Court hold that courts *should* look to extrinsic evidence to determine if the intent of the testator is reflected in and/or carried out by the terms of

the Will, and if said intent was not reflected, there is an *additional basis* to claim that an attorney breached a duty to the beneficiary.

Put another way, Appellant claims that a malpractice plaintiff who is a named beneficiary should not be prevented from utilizing extrinsic evidence to demonstrate how a testator's intent was "frustrated" in establishing that an attorney breached his or her duty in drafting a Will. Appellant's Brief, p. 10.

In fact, that is exactly what this Court in *Harrigfeld, supra*, precludes. *Harrigfeld* was a case that came before this Court on a certified question from the Ninth Circuit Court of Appeals.[1] The underlying facts of the case involved a claim by beneficiaries, that the attorney, who had prepared the testator's Will and three separate codicils, that the attorney owed a duty to the beneficiaries, and breached that duty. *Id.* at 135, 90 P.3d 885. Specifically the beneficiaries argued that the attorney breached his duty to them when he drafted codicils, which codicils expressly revoked all of the testator's codicils. The beneficiaries argued the codicils should have been cumulative in nature and that the codicils, as drafted and executed, deprived them of property that the testator had intended they receive under earlier codicils. *Id.*

As set forth above, this Court in *Harrigfeld* specifically held that "an attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them property executed, so as to

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[1] The question certified was: "Is a direct attorney-client relationship required to exist between the plaintiff and the attorney-defendant in a legal malpractice action when the plaintiff alleges to be an intended beneficiary of testamentary instruments drafted by the attorney-defendant by a third-party testator?"

effectuate the testator's intent **as expressed in the testamentary instruments**." *Id.* at 888, 90 P.3d at 138 (emphasis added). Even if the beneficiary believes that the testator meant to give them something that was no reflected in the Will, they are nevertheless "stuck" with the express language of the Will unless there is some finding the testator's intent, as expressed in the instrument, is frustrated by some act of the attorney.

Appellant alleges that in a "fair reading" of the Will, it is clear that Mr. Cowan wished Appellant to receive certain assets, and that by "mis-describing" the assets as "beneficial interests in trusts" in the Will, Fletcher "thwarted" Mr. Cowan's intent as to Appellant's receipt of those assets. There is no indication based on the language of the Will that any asset is "mis-described" or that Fletcher "thwarted" the intent of Mr. Cowan in drafting the Will.

The language of the Will, as an expression of Mr. Cowan's intent, is clear. Based on this Court's holding in *Harrigfeld*, the District Court correctly held that Fletcher breached no duty to Appellant.

a) The Language Of The Will Does Not Reflect That Mr. Cowan's Intent Was Frustrated.

Appellant argues that even if extrinsic evidence is not referenced to ascertain Mr. Cowan's intent to bequest to her certain assets, that the actual language of Mr. Cowan's Will evidences that Fletcher committed malpractice in drafting the Will.

Specifically, Appellant asserts that the Will references a "non-existent" power of appointment, and second, that the Will references a trust that did not in fact exist. Because she did not received any interest in any trust, and because she did not receive any power of

appointment, Appellant rationalizes that Fletcher somehow erred in following Mr. Cowan's instruction in this regard. Appellant's argument is without merit.

Simply because an item listed in a Will does not exist at the time the testator executes the Will, or at the time of the testator's death, does not create an issue of fact regarding the attorney's conduct.

There is no legal precedent to support Appellant's argument that if a client informs his attorney what terms are to be contained in his Will, and the attorney drafts the Will to contain those items requested by his or her client, that the attorney has some further affirmative duty to assure that all items expressed or specified by his or her client actually exist, or, that certain assets will in fact, be bequeathed to the beneficiaries identified in a Will.

In sum, Appellant is arguing that it is the duty of an attorney, upon being instructed by his or her client as to what items to list in a Will, that the attorney thereafter has a duty to inquire into the "universe" of potential "mis-described" assets to verify and/or assure there is no error in the description given to the attorney by the client regarding that item.

Appellant's argument is off the mark. The test according to the clear instruction of *Harrigfeld* is "if, as a proximate result of the attorney's professional negligence, the testator's intent **as expressed in the testamentary instrument** is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized, the attorney would be liable to the beneficiary harmed." *Id.* at 138, 90 P.3d at 888.

There is no case law in Idaho to support Appellant's proposition that not only does an attorney have a duty to prepare a testamentary instrument pursuant to the client's instruction and

request, but that the attorney has an additional duty to essentially audit and verify what the client has requested to be bequeathed.

In this case, Mr. Cowan bequeathed to Appellant "[a]ll beneficial interests that I have in any trust I give, bequeath, and devise to Mary Killings. I exercise any power of appointment that I might hold and appoint Mary Killings." (R. p. 49). There is no affirmation contained in the Will that Mr. Cowan has any interest in a specific trust, or any trust, or that any power of appointment actually exists. The Will simply and unambiguously states that if any interest in any trust exists, Appellant gets those interests.

Moreover, Appellant misstates the terms of the Will. While it is true that Mr. Cowan had at one time a beneficial interest in the Leonarda Trust, Appellant's assertion that Clause 6 of the Will actually references the Leonarda Trust is not correct. As set forth above, Clause 6 states that Appellant receive "all beneficial interest that [Mr. Cowan has] in any trust." The Will does not reference the Leonarda Trust. Because the Will does not reference the Leonarda Trust, Appellant's allegations related to the power of appointment (contained in the Leonarda Trust) or that the Leonarda Trust terminated when Mr. Cowan reached the age of 50, are irrelevant. Mr. Cowan's Will is broad in terms of his bequeathment to Appellant, his interest in <u>any</u> trust, non-specific to any one trust, including the Leonarda Trust.

There was no evidence presented to the District Court that created an issue of material fact that Mr. Cowan did not know what he was bequeathing to Appellant when he instructed Fletcher to draft the Will, when he reviewed the Will or when he executed the Will.

There was no evidence presented to the District Court that created an issue of material fact that Fletcher made a mistake or frustrated the intent of Mr. Cowan in drafting the Will.

The District Court properly found that, as a matter of law, Fletcher did not breach his duty to Appellant.

3. Evidence Of Alleged "Negligence" In This Case Did Not Create An Issue Of Fact To Preclude The District Court From Granting Fletcher's Motion For Summary Judgment.

Appellant asserts that Fletcher's actions in drafting the Will of Mr. Cowan fell below the applicable standard of care and, therefore, breached a duty of Plaintiff. Whether an attorney breached the applicable standard of care and whether an attorney breached his duty to a third party (non-client) beneficiary to a testamentary instrument the attorney drafted - are mutually exclusive inquiries.

Simply because Appellant's purported "expert" is of the opinion that Fletcher's actions allegedly fell below the applicable standard of care, such an opinion does not (and did not for the District Court) create an issue of fact with regard to Fletcher's motion for summary judgment as it pertained to the discrete determination of whether Fletcher breached his duty to Appellant.

Specifically, in support of her opposition to Fletcher's motion for summary judgment, Appellant submitted the affidavit of attorney John Magnuson to opine that Fletcher's conduct, in preparation of Mr. Cowan's 2005 Will, purportedly fell below the applicable standard of care because (1) Fletcher refers to a power of attorney held by the testator, which power of attorney is not granted by the Trust (referring to the Leonarda Trust) which purportedly "indicates" to Mr. Magnuson that Fletcher did not review the Trust; (2) had Fletcher reviewed the Trust, he would have learned that after Mr. Cowan reached the age of 50, his mother's trust property would revert to Mr. Cowan; (3) Fletcher had a duty to inquire of Mr. Cowan whether he had reached the age of 50 and to modify the language in Mr. Cowan's Will to reflect that he owned

property previously held in trust; (4) Mr. Cowan's Will references "all beneficial interests that I have in any trusts" indicates to Mr. Magnuson that Fletcher failed to inquire of Mr. Cowan how he wanted the property, previously held in trust, devised; and (5) the portion of Mr. Cowan's Will that refers to "all beneficial interests that I have in any trusts" is of no force and effect given the absence of such trust or trusts. (R. pp. 126-130).

Mr. Magnuson opined that "under these circumstances, drafting a will, a portion of which has no force and effect and which fails to effectuate the intention of the testator, constitutes a deviation from the standard of care and falls below the standard of care of attorneys practicing in Idaho in 2005." (R. p. 128).

As previously set forth, the error in Appellant's and Mr. Magnuson's supposition is that the reference contained in Mr. Cowan's Will that Appellant receive "all beneficial interests that [Mr. Cowan has] in any trusts," is actually referencing the Leonarda Trust. The Will does not reference the Leonarda Trust. Notwithstanding that fact, Fletcher's Affidavit confirms that he discussed the status of the Leonarda Trust with Mr. Cowan and that Mr. Cowan indicated that certain properties had been distributed to him from the Leonarda Trust, but he wanted to keep the language in the Will pertaining to Appellant, in the event there were additional interests. (R. p. 91). Thus, at the time of his death, if there were additional interests in any trust, Appellant would receive said interests, and if there were not any interests in any trusts, Appellant would receive nothing. The fact that Mr. Cowan did not have any interest in any trust at the time of the Will, or at the time of his death, <u>is not relevant</u> to the adequacy of Fletcher's drafting, according to Mr. Cowan's intent as reflected in the unambiguous language of the Will, nor was it relevant

to the District Court in determining whether Mr. Cowan's intent, as expressed in his Will, was effectuated.

This Court Idaho has carved out a narrow exception where, "[a]n attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments ... so as to effectuate the testator's intent as expressed in the testamentary instrument." *Harrigfeld, supra,* 140 Idaho at 139, 90 P.3d at 889. The test in determining a breach of duty in cases brought by beneficiaries of a Will is whether, based on the language of the Will, the testator's intent was effectuated; the intent "as expressed in the testamentary instrument." *Id.* at 138, 90 P.3d at 888.[2] The test is not whether, after reviewing and evaluating extrinsic evidence, a purported expert can opine that some act or omission of the attorney allegedly fell below the standard to care.

The language this Court used in *Harrigfeld* is clear on the issue of duty:

> Our extension of the attorney's duty is **very limited** ... The attorney has **no duty to insure** that persons who would normally be objects of the testator's affection are included as beneficiaries in the testamentary instruments. Someone who has the mental capacity to make a valid will also knows the names and identities of the persons who are the objects of his or her bounty and would know whether or not such persons are included as beneficiaries under the testamentary instruments before executing them. The attorney likewise has **no duty to see that the testator distributes his or her property among the named beneficiaries in any particular manner**. Again, **a testator who has sufficient mental capacity to make a valid will can also understand how his or**

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2 There is no dispute that terms of the Will in this case are unambiguous. If the language of a Will is clear and unambiguous, the intent of the testator is derived from the Will as it reads on its face. *Allen v. Shea*, 105 Idaho 31, 34 (1983).

> **her property will be distributed under the testamentary documents.** The attorney's duty to his or her client must remain paramount ... **This extension of an attorney's duty will not subject attorneys to lawsuits by persons** who simply did not receive what they believed was their fair share of the testator's estate, or **who simply did not receive in the testamentary instruments what they understood the testator had stated or indicated they would receive**.

Id. (emphasis added).

Appellant has no claim against Fletcher based on what Mr. Cowen may have told her she would receive, whether it was from the Leonarda Trust or otherwise. All Mr. Cowan chose to express in his Will was that any beneficial interest Mr. Cowan had in any trust at the time of his death would go to Appellant, and if he didn't have any such interest, nothing would go to Appellant.

Fletcher breached no duty to Appellant and her claim for attorney malpractice was properly dismissed by the District Court.

B. The District Court Did Not Err In Awarding Attorney Fees To Fletcher As The Prevailing Party.

Appellant asserts that the District Court erred in awarding fees to Fletcher as the prevailing party pursuant to Idaho Code § 12-120(3) because there was no direct contractual relationship between Fletcher and Appellant. Appellant further attempts to take the underlying malpractice case outside the purview of Idaho Code § 12-120(3) by couching it as a probate action. Appellant misconstrues Fletcher's argument.

Idaho Code § 12-120(3) provides a basis for an attorney fee award. That statutory provision mandates a fee award in cases based on a "commercial transaction." Notwithstanding Appellant's assertion otherwise, there is no dispute that the underlying action at issue involves a

commercial relationship as between Mr. Cowan and Fletcher; Fletcher provided professional services to Mr. Cowan for a price, Appellant was a third party beneficiary of that commercial relationship and it is that commercial relationship on which Appellant rests her claim against Fletcher.

Before the Idaho Supreme Court's recent decision in *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 152 P.3d 592 (2007), section 12-120(3) had been interpreted not to apply in "commercial transaction" cases in which the theory of recovery was a tort theory. In *Blimka*, this Court overruled all prior decisions prohibiting fee awards in such cases. *Id.* One decision plainly overruled by *Blimka*, is *Fuller v. Wolters*, 119 Idaho 415, 425, 807 P.2d 633, 643 (1991). There, the court refused to award fees under section 12-120(3) in a legal malpractice case simply because such a case is a tort case, "even though the underlying transaction which resulted in the malpractice was a 'commercial transaction.'" *Id. Wolters* was overruled by *Blimka.*

In briefing on his motion for attorney fees, Fletcher also pointed the District Court to two recent District Court decisions that supported Fletcher's argument, the first from Judge Michael McLaughlin and the second from Judge Cheri Copsey.

The decision of Judge McLaughlin held that given the Idaho Supreme Court's holding in *Blimka, supra*, an attorney fee award was appropriate under Idaho Code § 12-120(3). (R. pp. 225-231). Judge Michael McLaughlin specifically held that a contract for attorney services was a commercial transaction, and, "the fact that the contract was for attorney services, not any other service, does not change the nature of the transaction into one for either personal services or household services." (R. p. 229).

Judge Copsey also held that attorney fees are awardable under Idaho Code § 12 120(3) to a prevailing party in an attorney malpractice case because the underlying action is based on an attorney client relationship, a contract to perform professional services. (R. pp. 232-239).

The underlying transaction at issue in this case involved Mr. Cowan retaining the professional services of Fletcher. It is the commercial transaction at issue in the underlying action that dictates whether attorney fees should be awarded under Idaho Code § 12-120(3) in a malpractice action; thus, it is irrelevant to this motion whether Appellant also had a contract with Fletcher. Appellant cannot remove her malpractice claim outside the context of the underlying commercial transaction based on her reasoning that Fletcher only had a duty to her as a beneficiary, or that she was not a part of the commercial transaction as between Fletcher and Mr. Cowan. Appellant's malpractice claim is based on the commercial transaction as between Fletcher and Mr. Cowan. Appellant is suing Fletcher for his performance of professional services for Mr. Cowan. The gravamen of the underlying case on which Appellant complains was a commercial transaction.

Given the applicability of Idaho Code § 12-120(3) to the facts of this case, and because Fletcher was the prevailing party in the underlying case, attorney fees were properly awarded to Fletcher incurred in defending Appellant's malpractice action.

Attorney fees should analogously be awarded to Fletcher incurred in defending this appeal.

V.

CONCLUSION

The District Court properly held that Fletcher did not breach any duty he owed to Appellant. The District Court property awarded attorney fees to Fletcher pursuant to Idaho Code § 12-120(3) as the prevailing party where the gravamen of the underlying action was a commercial transaction. The District Court's respective decisions should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of May, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Michelle R. Points
Attorneys for Respondent W. Kent Fletcher

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2010, I caused to be served a true copy of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to each of the following:

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