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Stephen v. Sallaz & Gatewood, CHTD.
Supplemental Appellant's Reply Brief Dckt. 36322

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IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT NO. 36322-2009

PAMELA K. JOERGER STEPHEN,)
)
 Plaintiff-Respondent-Cross Appellant,)
)
 vs.)
)
 SALLAZ & GATEWOOD, CHTD.,)
 DENNIS SALLAZ and SCOTT GATEWOOD,)
)
 Defendants-Appellants-Cross Respondents.)
 _____)

**APPELLANTS/CROSS-RESPONDENTS' RESPONSE TO THE
RESPONDENT/CROSS-APPELLANT'S SUPPLEMENTAL BRIEF**

Appeal from the District Court of the Fourth Judicial District
in and for the County of Ada

HONORABLE MICHAEL R. MCLAUGHLIN, DISTRICT JUDGE, PRESIDING

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***APPELLANTS/CROSS-RESPONDENTS' RESPONSE TO THE
RESPONDENT/CROSS-APPELLANT'S SUPPLEMENTAL BRIEF – PAGE 1***

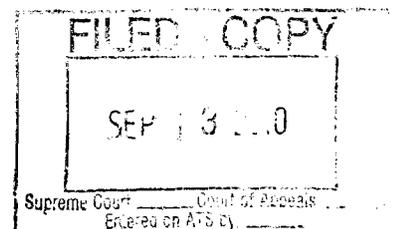


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I.

ARGUMENT IN RESPONSE TO CROSS-APPELLANT'S SUPPLEMENTAL BRIEF

If this Court should determine that the malpractice judgment that was entered against Scott Gatewood should be reversed, then it will be entirely unnecessary to address the issues that have been raised in the Cross-Appellant Pam Stephen's initial cross appeal, concerning the denial of attorney fees to her as the prevailing party below, or to address the issues that she has raised on this supplemental cross appeal, in respect to the reduction of the damages that were awarded to her, or on the question concerning the personal liability of Dennis Sallaz for those damages. Therefore the arguments that the cross-respondents have made in opposition to Pam Stephen's cross-appeals on these issues are made with the reservation that the district court erred in finding that any malpractice occurred upon which she could base any of these cross claims.

A. The Trial Court Did Not Err In Reducing The Malpractice Damage Award By The Excess Amount Of The Equalization Payment That Was Made By Gary Stephen In The Divorce Action

The Cross-Appellant Pam Stephen has argued that the district court erred in reducing the damages awarded to her on her malpractice claim against Scott Gatewood that were based upon the alleged inadequacy of the property equalization payment that she had received as a result of Gatewood's representation of her in her divorce proceeding. Trial Exhibit 103 consists of the divorce decree and the attached property schedule. Page 8 of that property schedule indicates a net distribution of \$80,965 in property to Gary Stephen, and a net distribution of \$13,095 in property to

Pam Stephen, resulting in a disparity of \$67,870. In order to exactly equalize this property distribution, Gary was required to pay \$33,935 to Pam ($\$67,870 \div 2 = \$33,935$).

Instead of making this exact equalization payment of \$33,935, paragraph 4 of the divorce decree ordered Gary to pay Pam \$48,000 at \$2,000 per month over a 24 month period, which was \$14,065 in excess of Gary's actual equalization obligation under the divorce decree. This equalization payment provision was consistent with the 24 month period that Pam was allowed to live in the Beach Street house that had been awarded to Gary as his separate property, as provided in paragraph 3 of the divorce decree. Under paragraph 3 of the divorce decree Pam's right to live in the Beach Street house was made contingent upon her payment to Gary of \$430 per month in rent, which was 1/2 of Gary's monthly mortgage obligation on that property. Paragraph 4 of the divorce decree also recognized that Pam's payment of her \$430 monthly rental obligation to Gary could be satisfied by allowing him to deduct that amount each month from the \$2,000 equalization payment that he had been ordered to pay to Pam, resulting in a net payment to her by Gary of \$1,570 per month. This \$430 reduction in Gary's \$2,000 monthly payment obligation to Pam would continue as long as she resided in the Beach Street house during this 24 month period.

The judgment that Pam Stephen obtained against Scott Gatewood in the malpractice action was based upon an alleged undervaluation of property in the divorce action, including \$55,000 in respect to the Crescent Rim residence, and a \$28,000 judgment debt obligation that had been attributed to Gary Stephen which, it turned out, had been previously paid. The district court

determined that the fair market value of the Crescent Rim property was \$440,000 at the time of the August 2004 divorce, rather than the \$385,000 value that the parties had agreed to in a mediation conducted by Boise attorney, Steve Beer ($\$440,000 - \$385,000 = \$55,000$).¹ Thus the total amount of damages in the malpractice action, as arising from the alleged undervaluation of the net community property estate in the divorce action, was determined to be \$83,000 ($\$55,000 + \$28,000 = \$83,000$), one half of which, or \$41,500, was to be awarded to Pam Stephen.

But the district court in the malpractice action recognized that the \$48,000 that Gary had already paid to Pam as part of the equalization payment in the underlying divorce action had included \$14,065 in excess of the required \$33,935 equalization payment that had been recognized in the divorce decree. Therefore, the final judgment entered by the district court in the malpractice action was for \$27,435 ($\$41,500 - \$14,065 = \$27,435$).

On this supplemental cross appeal Pam Stephen has argued that the district court erred in recognizing any credit for the \$14,065 that Gary Stephen had paid in excess of the required \$33,935 equalization payment under the divorce decree. She argues that by allowing this credit the district court effectively rescinded an executed contract that had been made in the divorce action. *See*, Cross-Appellant's Supplemental Brief at pp. 24-25. Pam Stephen has also argued that even if such a credit was otherwise appropriate, the district court should not have included within that credit the

¹ The on-line records of the Ada County Assessor indicate that the property at issue, 3309 W. Crescent Rim Drive, had a fair market value of \$314,000 in 2004, the year the divorce decree was entered.

\$430 per month rental benefit that she received which totaled \$10,320 over the 24 month period that she continued to reside in the Beach Street house. On this basis she argues that any credit allowed for the overpayment of the divorce equalization amount should have been reduced to \$3,745 ($\$14,065 - \$10,320 = \$3,745$). *See*, Cross-Appellant's Supplemental Brief at pp. 25-26.

Nothing in the executed judgment under the divorce decree was changed as a result of the \$14,065 offset that the district court applied to the amount of the malpractice judgment. What the district court in the malpractice action recognized was that the executed divorce judgment had resulted in an overpayment to Pam Stephen by Gary Stephen, and that when Pam Stephen challenged the equity of the overall division of property in the divorce settlement, she necessarily put all elements of that settlement at issue. A challenge that is only made to particular assets, rather than to the entire settlement of the case, violates the rule that a party in a divorce cannot pick and choose as between those items of property in which it is deemed that the property settlement is inequitable and others in which it is not. *McGrew v. McGrew*, 139 Idaho 551, 559, 82 P.3d 833, 841 (2003). Correspondingly, in a legal malpractice action the measure of damages is the difference between the actual recovery that was obtained for the client, and the recovery that should have been obtained for that client, but for the attorney's alleged malpractice. *Sohn v. Foley*, 125 Idaho 168, 172-73, 868 P.2d 496, 500-01 (Ct.App.1994).

Both the determination of the \$33,935 equalization payment in the divorce proceeding, and the determination of the additional \$27,435 equalization payment in the malpractice proceeding were

based entirely upon the valuations declared in the eight page property schedule attached to the divorce decree and submitted as Trial Exhibit 103 in the malpractice action. In challenging the property distribution that was made under the divorce decree, Pam Stephen in her malpractice action could not seek to both insulate from further review the beneficial payment made to her by Gary Stephen of \$48,000 in satisfaction of the \$33,935 equalization obligation, and then at the same time seek the full benefit of an additional equalization payment arising from the alleged undervaluation of the Crescent Rim property, and also from the satisfied \$28,000 judgment debt obligation. *McGrew, supra.*

Pam Stephen has argued that the primary reason Gary Stephen was allowed to pay her \$48,000 over 24 months, rather than \$33,935 in a lump sum at the time of the August 2004 divorce, was that Gary did not have sufficient financial resources available at the time the divorce decree was entered to make that lump sum payment. Although this allegation is true, it was not the sole reason that the equalization payment under the divorce decree was spread over 24 months. At least three other reasons supported the parties' decision to spread the equalization payments over a period of 24 months. These reasons included: (1) Pam Stephen's single-minded pursuit of maintenance in the divorce action, (2) the concern expressed by legal counsel for both parties in the divorce action that a lump sum payment would be immediately dissipated by Pam and her boyfriend, Jody Kimmel, and (3) the benefit that was provided to Pam by allowing her the use of the Beach Street house as transitional housing that she could occupy over that same 24 month period.

On cross-examination, Gary Stephen's attorney in the divorce action, Ann Shepard, testified to these reasons for using the monthly equalization payments, rather than a lump sum payment.

Q. (BY MR. CLARK) And that's based on if there was a lump-sum payment made that day?

A. Correct.

Q. But Ms. Stephen didn't receive a lump-sum payment; did she?

A. She did not.

Q. What was the determining factor as to why there wasn't a lump-sum payment?

A. Well, a couple reasons. Mr. Stephen was very money-strapped - - very cash-strapped. He didn't have a lot of - - a lot of, uh, money to be able to make a lump-sum payment. And his credit had been stretched pretty thin. And because of all the problems with the credit cards and some of the other things, he was barely making it monthly. He was pretty broke.

And the other thing was, there was a part of it that we - - I think my client, certainly, and I agreed that a lump-sum payment, we were afraid it would promptly be spent by Jody Kimmel, and we felt that it was best that - - even for Pam, that it be monthly payments. At least she would have a monthly income for a period of time. That was also part of the thinking on why she would have to live in Beach Street.

Q. So you were also concerned about Mr. Kimmel's influence on Ms. Stephen?

A. Yes.

Q. And recognize that that was a possibility - - or probability?

A. That he would spend the money? That they would spend the money? Yes.

Q. Right.

A. Yes.

Q. That he would benefit from it?

A. Yes.

Tr. pg., 516, L. 11 to pg. 517, L. 19. Mr. Gatewood's own testimony confirmed these reasons for extending Gary's equalization payments to Pam over the 24 month period. (Tr., pg. 223, L. 23 to pg. 225, L. 13).

Ann Shepard's just-quoted testimony that, "At least she [Pam] would have a monthly income for a period of time," (bracketed reference added) reflects what was Pam Stephen's central objective during the entire divorce case – to obtain maintenance. (Tr., pg. 186, LL. 5-9; pg. 187, LL.14-18 (Gatewood); pg. 520, LL. 1-10 (Shepard)). Therefore, providing for the 24 monthly payments, as opposed to a single lump sum payment, helped to achieve what had been Pam Stephen's paramount goal in that proceeding.

In the same fashion, until just about a month before the malpractice trial Pam Stephen had been pursuing a nearly \$400,000 claim for damages that was based upon the allegation that Scott Gatewood had committed malpractice by his alleged failure to obtain an award of maintenance for her in the divorce action. Mr. Gatewood had disclosed StanWelsh as an expert witness in the malpractice action. Shortly after Mr. Welsh offered his opinion at his deposition that under the facts of the case it was highly unlikely that Pam Stephen could have obtained a maintenance award in the

divorce action, the malpractice claim based upon Mr. Gatewood's alleged failure to obtain a maintenance award for Pam Stephen was entirely dropped from the malpractice action. (Tr., pg. 48, LL. 13-16; pg. 640, L. 2 to pg. 641, L. 3; pg. 650, L. 22 to 651, L. 14; pg. 59, LL. 1-5; pg. 61, LL. 11-13; pg. 83, L. 23 to pg. 84, L. 3). Therefore, what had appeared to be nearly a half million dollar case became, just a few days before trial, a matter that ended in a judgment for \$27,435.

The most significant issue for Pam Stephen in both her divorce action, and in the subsequent malpractice action – spousal maintenance – was ultimately determined to be entirely without merit by both her legal counsel in the divorce action, Scott Gatewood, and also by her legal counsel in the malpractice action, Eric Clark.

Against this background, Pam Stephen has now argued on her supplemental cross appeal that the \$14,095 in excess of the \$33,935 divorce equalization payment should not have been offset against the malpractice judgment on the basis that she “would be entitled to a reasonable interest rate to compensate her for not actually receiving this money when the decree was entered.” *See*, Cross-Appellant's Supplemental Brief at pg. 26. There would be some merit to this argument if in fact Gary Stephen's financial inability to make the \$33,935 lump sum payment in August 2004 had been the only reason for deferring that payment over 24 months. But the record, as cited above, demonstrates at least three other reasons that supported the monthly payment option.

In any event, it seems fair to assume that if Pam Stephen had been entitled to any interest payment under the then-existing circumstances, that interest payment would not have amounted to

more than \$2,500 over the period of time that it would have taken to pay out the entire \$33,935 equalization payment in \$2,000 monthly installments.² Consequently, if any consideration in the nature of interest was required to make Pam Stephen whole, then, at most, she would be entitled to no more than \$2,500, and not the entire \$14,095 that she has claimed on her supplemental cross appeal.

But as already argued above, the inability of Gary Stephen to make a \$33,935 lump sum payment was not the only reason that the equalization payment was made in monthly installments, rather than in a lump sum. The benefit conferred upon Pam, and the detriment imposed against Gary, as a result of those other reasons for ordering monthly installments more than offset any alleged \$2,500 interest benefit that might be owed to Pam.

Pam Stephen was required by the divorce decree to pay Gary \$430 a month for use of the Beach Street property. Presumably, Gary could have rented the Beach Street property for an amount at least equal to the full monthly mortgage obligation (\$860), plus the cost of upkeep, and the addition of a fair return on investment.³ Over the 24 month payment period that Pam was allowed

² The statutory interest rate on judgments in 2004 was 7.125%, and was 8.375% in 2005. Assuming a melded rate of 8%, and using a basic mortgage calculator on a spreadsheet program, counsel for the cross-respondents has estimated that the entire \$33,935 obligation at 8% could be paid off in roughly 18 monthly payments of \$2,000 each, including a total interest payment of about \$2,200.

³ Testimony concerning the “rental value” of the Beach Street property is found at, Tr., pg. 603, LL. 13-25.

by the divorce decree to continue living at the Beach Street property, Gary Stephen had to forgo at least \$10,320 in rental income from the Beach Street property ($\$430 \times 24 = \$10,320$), as based upon the assumption that he could have rented that property for no less than the amount of the monthly mortgage obligation of \$860, rather than only the \$430 per month that he received from Pam. Therefore, Gary Stephen has already paid \$10,320 in additional “consideration” in exchange for being allowed to make his equalization payments to Pam in \$2,000 per month installments, rather than as a lump sum payment in August 2004.

In addition to the fact that Gary had to forgo the full rental value of the Beach Street property, the other intangible factors that figured into the monthly payment determination also hold some value, even though that value is not easily susceptible to a precise determination. These intangible benefits included the provision of transition housing to Pam; the provision of a monthly income to her, which included a rental benefit; and the prevention of any immediate dissipation of the entire amount of that equalization payment if it had been given to Pam as a lump sum.

In sum, there is neither factual nor legal support for the argument that Gary Stephen was not entitled to a credit for the entire \$14,095 overpayment that he had made as a part of the property equalization determination in the divorce proceeding. Even if it could be argued that Pam should have been entitled to as much as \$2,500 in interest based upon the monthly payment scheme, as compared to the lump sum payment, the balance of the equities still weighs against her, when that \$2,500 claim is compared to the \$10,320 that Gary had to forgo in rent from the Beach Street

property, and when it is also weighed against the other intangible benefits to Pam that arose from this monthly payment approach. Therefore, when all the relevant factors in the record are considered and evaluated, this Court should deny Pam Stephen's request to set aside the \$14,095 offset that the district court applied against the malpractice judgment.

Pam Stephen also has made a separate argument on her supplemental cross appeal that the district court should have only credited Gary Stephen with the actual \$1,570 monthly cash outlay that he made to her, rather than the full \$2,000, which included the "in-kind" \$430 monthly rental credit while Pam Stephen remained living in Gary Stephen's Beach Street property. The malpractice judgment should not operate as an instrument by which the actual terms of the divorce judgment are changed. The divorce decree declared in paragraph 3 that Pam would have a right to live in the Beach Street property for 24 months, for which she would be obligated to pay Gary Stephen the equivalent of 1/2 of the monthly mortgage payment, or \$430.

If Pam had been compelled to move to another property, then it is highly unlikely that she would have been able to find an equivalent rental for only \$430 per month. In turn, even though Gary had his actual monthly cash payment obligation to Pam reduced to \$1,570, he was denied the full \$860 per month rental value of the Beach Street property. If this was the status quo that the parties had agreed to under the divorce decree for a period of 24 months, then the effect of denying Gary the full benefit of the \$14,095 offset to the malpractice judgment, as determined by use of the \$2,000 per month payment, would – in effect – have allowed Pam to live rent-free at the Beach

Street property for 24 months, and also would have denied Gary the receipt of any benefit for the rental value of the Beach Street property during that same 24 month period.

There is a long-standing precedent in this state which supports the proposition that when after entry of a divorce decree an ex-spouse continues to occupy a residence that is now owned as separate property by the other ex-spouse, then the owning ex-spouse is thereafter entitled to a credit for the amount of the rental value of that residence, so long as the other ex-spouse continues to occupy that residence. *Radermacher v. Radermacher*, 61 Idaho 261, 274, 100 P.2d 955, 962 (1940) (“If he continues to provide his family with the home in which they now live, he should be given credit for its rental value on what he would otherwise be required to pay in cash.”).

The rental value of the Beach Street property was just as much a benefit to Pam Stephen as if she had received cash and then had been required to pay rent. The divorce decree provided that she was to be allowed to both occupy the Beach Street property owned by Gary Stephen for a period of 24 months, and that she also was required to pay Gary rent in the amount of 1/2 of the monthly mortgage obligation on that property. Therefore, the district court properly included the \$430 monthly rental value of the Beach Street property to Pam Stephen in making its determination that the appropriate amount of the offset against the malpractice judgment was the difference between the entire \$48,000 payment obligation that Gary Stephen had undertaken in satisfaction of \$33,935 equalization determination that had been made in the divorce action, for an allowable offset of \$14,065.

B. Dennis Sallaz Has No Personal Malpractice Liability For the Claims That Have Been Made by Pam Stephen Arising Out Of Scott Gatewood's Representation Of Her In Her Divorce Proceeding

The district court held that attorney Dennis Sallaz had no personal liability for the malpractice claims made by the Cross-Appellant Pam Stephen arising from Scott Gatewood's representation of her in the underlying divorce proceeding. Findings of Fact at pg. 3, and R., pg. 62.

Pam Stephen, at pp. 26-28 of her supplemental cross appeal brief, has made the following four arguments in support of her supplemental cross appeal that the district court erred in its determination that Dennis Sallaz had no personal liability to her on her malpractice claims:

- (1) Stephen entered into a fee agreement with the firm, Sallaz & Gatewood.⁴
- (2) Dennis Sallaz's name appeared in the pleading caption on the documents that were filed with the court in the Stephen divorce proceeding.
- (3) Dennis Sallaz had a duty to supervise Scott Gatewood.
- (4) Under I.C. § 53-3-306 both Sallaz and Gatewood remained personally liable to Stephen for the negligence committed by either partner in the firm.

An essential element of any legal malpractice action is the existence of an attorney-client relationship. *Harrigfeld v. Hancock*, 140 Idaho 134, 136, 90 P.3d 884, 886 (2004). Whether an attorney-client relationship exists, upon which a malpractice action can be based, presents a question

⁴ The fee agreement in question – as signed by Pam Stephen and Scott Gatewood – has been submitted as an exhibit to the record on appeal in the Appellant/Cross-Respondents' Motion to Augment the Record on Appeal filed with the Court on December 21, 2009, and also in the Appellant/Cross-Respondents' Second Motion to Augment the Record on Appeal filed with the Court on June 28, 2010 which requested that all trial exhibits be made part of the record on appeal.

of fact, rather than a question of law. *Warner v. Stewart*, 129 Idaho 588, 593, 930 P.2d 1030, 1035 (1997), citing to, *Stuart v. State*, 118 Idaho 932, 934, 801 P.2d 1283, 1285 (1990). In the absence of an attorney-client relationship there can be no liability for legal malpractice.⁵

The Court in *Warner v. Stewart, supra*, observed that, prior to that time, it had not addressed the question of what is the appropriate test that should be used to determine whether an attorney-client relationship exists. The Court in that case did not adopt any single test, but instead discussed both, “express contract,” and “subjective belief,” as grounds for recognizing the existence of an attorney-client relationship. 129 Idaho at 593, 930 P.2d at 1035. The Court in *Warner v. Stewart* also declared that “clear and convincing evidence” is required to establish the existence of an attorney-client relationship. 129 Idaho at 594, 930 P.2d at 1036.

The district court in this case held that no facts had been submitted into evidence at trial that established the existence of an attorney-client relationship between Pam Stephen and Dennis Sallaz. Nor did the district court find that facts had been submitted into evidence at trial which established

⁵ In *Harrigfeld v. Hancock*, 140 Idaho 134, 90 P.3d 884 (2004) the Court recognized the right of an intended beneficiary of a will to bring a malpractice action against the attorney who had drafted that will, even though that beneficiary did not have a direct attorney-client relationship with that attorney. 140 Idaho at 138, 90 P.3d at 888. Nonetheless, the alleged malpractice in that case did arise out of that attorney’s provision of legal services within the scope of an attorney-client relationship with the person who made the will. This third-party exception to the attorney-client relationship requirement, as an otherwise necessary predicate to malpractice liability, has been limited to the facts of the *Harrigfeld* case, as declared in subsequent decisions. *See, Taylor v. Maile*, 142 Idaho 253, 258-59, 127 P.3d 156, 161-62 (2005), and, *Estate of Becker v. Callahan*, 140 Idaho 522, 526-27, 96 P.3d 623, 627-28 (2004).

that Sallaz had exercised any supervisory responsibility over Gatewood in his provision of legal services to Stephen.

There was no evidence presented to the Court that Dennis Sallaz provided any legal services directly or indirectly to the Plaintiff nor did he act in a supervisory capacity over Gatewood.

(See, October 3, 2008 Findings of Fact, at pg. 3, as attached to Appellant's 12/21/09 Motion to Augment the Record on Appeal). This same statement was repeated almost verbatim by the district court in its February 9, 2009 decision on the post-judgment motions. (R., pg. 62).

Pam Stephen testified at the malpractice trial, in further confirmation of these findings of fact, that she never had any dealings with Dennis Sallaz in her divorce action, and that in fact she had "never met the man before." (Tr., pg. 431, L. 10 to pg. 432, L. 1). Other than a single unsigned letter that was sent to the Idaho Department of Motor Vehicles under Sallaz's name, there was no evidence presented at trial that Sallaz had any involvement whatsoever in Stephen's divorce action. (See, "Lien Letter," as attached to Appellant's 12/21/09 Motion to Augment the Record on Appeal).

On this supplemental cross appeal Pam Stephen has not challenged the district court's findings – as based upon that court's determination of these questions of fact – that she did not have an attorney-client relationship with Dennis Sallaz. Instead, she now argues that Dennis Sallaz's mere status as a member of his law firm establishes his malpractice liability to her, apparently as a matter of law, rather than upon a determination of a question of fact. Stephen has cited no legal authority in support of her new arguments that an attorney-client relationship arises as a matter of law based

only upon the existence of a contract with one attorney, which also identifies that attorney's law firm, and as a result of an attorney's name appearing in the case caption on court filings.

Although the attorney-client relationship is founded upon contract, malpractice liability is based exclusively upon tort. *Trimming v. Howard*, 52 Idaho 412, 416, 16 P.2d 661, 662 (1932) (“The gist of a malpractice action is negligence, not a breach of the contract of employment.”). Therefore, potential malpractice liability does not arise at the time a contract is entered into, but instead can only arise at the time some damage occurs that would support tort liability for professional negligence. *City of McCall v. Buxton*, 146 Idaho 656, 659, 201 P.3d 629, 632 (2009). The outcome of litigation can provide objective proof of the occurrence of “some damage” sufficient for a potential malpractice action to arise. 146 Idaho at 661-63, 201 P.3d at 634-36. The district court in this case declared that “some damage” occurred at that time when the proposed divorce judgment containing the errors in the valuation of the parties' property was presented to the magistrate judge, which was on August 5, 2004. (Tr., pg. 632, L. 24 to pg. 633, L. 2).

The district court rejected Stephen's post-judgment motion to amend the pleadings to allege the existence of a general partnership at the time she entered into an attorney-client relationship with Gatewood because that partnership no longer existed at the time the alleged malpractice liability arose:

Well, the business organization structure at the time of the accrual of the cause of action is the organization that should suffer whatever consequences, whatever liabilities that accrued at that time. And at that time, it was a limited

professional corporation. The court has cited earlier to the fact that though there was evidence that Mr. Sallaz was certainly on the pleadings - - and I'll get into a little more detail on that on another motion here, that he did not act in a supervisory capacity as called for under the statute and, therefore, his individual assets cannot be made subject to this judgment.

And so, for those reasons, there is no basis in law, no purpose in allowing an amendment to the pleadings. Whether they were a general partnership or a limited liability partnership back in 2004 is of no significance in terms of this negligence claim.

Tr., pg. 633, LL. 10-25. Consequently, there was simply no malpractice liability alleged at any time when the firm was a general partnership, to which the existence or conduct of that partnership has any relevance to the issues raised on this appeal, regardless of the application of I.C. § 53-3-306.

Therefore, in respect to Pam Stephen's first and fourth arguments made on this supplemental cross appeal that Dennis Sallaz should bear personal liability on her malpractice claims, neither the mere existence of a contract with a law firm, under which one or more attorneys may establish an actual attorney-client relationship with a particular client, nor the structure of the law firm as a partnership at the time that contract is executed, is in any way determinative of the potential malpractice liability of any member of the firm based upon the facts of this appeal. Therefore, those two arguments made by Pam Stephen for imposing personal liability against Dennis Sallaz should be rejected by this Court.

In respect to Pam Stephen's third argument, the district court has already held – and Stephen has not challenged on this appeal – that Sallaz did not undertake any duty to supervise Gatewood.

Nor has Pam Stephen on her supplemental cross appeal cited to any legal authority in support of the proposition that Idaho law recognizes a free-standing and independent duty of an allegedly senior, or more experienced, attorney in a firm to supervise the provision of legal services by a junior, or less experienced attorney, to a client. *See e.g., Featherston v. Allstate Ins. Co.*, 125 Idaho 840, 843, 875 P.2d 937, 940 (1994) (The general, and long-established rule of liability in Idaho, is that even when an affirmative duty generally is not present, a legal duty may arise if “one voluntarily undertakes to perform an act, having no prior duty to do so.”). Therefore, in the absence of any argument or authority presented by Stephen in support of this theory, her claim that malpractice liability should be imposed against Dennis Sallaz on the basis of a “duty to supervise,” also must be rejected.

Finally, as to the second issue raised by Pam Stephen, she has cited to I.R.C.P. 10(a)(1) concerning the placement of the name of the counsel of record in the pleading caption, but has cited no legal authority in support of her argument for the *per se* imposition of malpractice liability based only upon the mere listing of an attorney’s name in the case caption. Her argument is summarized by the assertion that, “It would seem to contradict every duty that an attorney owes to a client to appear in a case, do absolutely nothing for the client, and then avoid responsibility by claiming the other attorney who also had appeared was responsible.” Cross-Appellant’s Supplemental Brief at pg. 27.

It is undisputed that the name, “Dennis Sallaz,” in addition to that of “Scott Gatewood,” appeared in the case caption on the filings made with the court in the divorce action. But it is also undisputed that Dennis Sallaz never signed a contract with Pam Stephen, and it is also undisputed that Pam Stephen had no subjective expectation that Dennis Sallaz was representing her in the divorce action. (“I have never met the man before.” Tr., pg. 432, L. 1). Therefore, neither of the applicable tests for determining the existence of an attorney-client relationship – express contract or subjective expectation – as identified in *Warner v. Stewart*, 129 Idaho 588, 593, 930 P.2d 1030, 1035 (1997), were established upon the facts of this case.

In addressing this issue the district court noted the possible complications that could arise if potential malpractice liability was triggered by nothing more than the law firm listing that is included as a part of the case caption. (Tr., pg. 662, L. 11 to pg. 667, L. 6). The cross-respondents have already raised and argued the issue of whether malpractice liability can be imposed upon a law firm under I.C. § 5-219.4 in the argument made at pp. 46-48 of Appellant’s Supplemental Brief. To the extent that argument is also applicable in response to the issue raised here by Pam Stephen on her cross appeal, it is incorporated by reference.

If Dennis Sallaz had entered into a contractual attorney-client relationship with Pam Stephen, or if he had signed any document to which Rule 11 liability could attach, or if he had actually undertaken any representation on her behalf, either in court or out, then there might be some substance to Pam Stephen’s argument. But the fact remains that her entire representation in the

divorce case was undertaken and performed by Scott Gatewood, not Dennis Sallaz.

In sum, neither the facts of the case, nor the applicable law, supports Pam Stephen's arguments on her supplemental cross appeal that personal malpractice liability should be imposed upon Dennis Sallaz, and therefore that argument should be rejected by this Court.

C. Attorney Fees

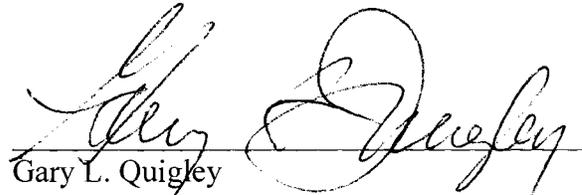
The cross-respondents, as the original appellants on this appeal, have previously argued in the first brief that they filed on this appeal for an award of costs and attorney fees under I.C. § 12-120(3) should they be determined to be the prevailing parties on this appeal. I.A.R. 40 & 41, and *City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009). They renew that request as cross-respondents here, should they prevail on the issues raised on their own appeal, and upon this supplemental cross appeal, and the issues raised in the original cross appeal. Correspondingly, they also argue that the Cross-Appellant Pam Stephen has no right to an award of costs or attorney fees on her cross appeal in the absence of a determination that she is the prevailing party on this appeal.

II.

CONCLUSION

In the event that this Court does not reverse the malpractice judgment against Scott Gatewood, then it should uphold the district court's determination of damages on that award, and also uphold the district court's determination that there was no basis upon which to place personal malpractice liability upon Dennis Sallaz.

Respectfully Submitted this 13th day of September 2010.


Gary L. Quigley
Attorney for the Appellants, and Cross
Respondents, Dennis J. Sallaz, G. Scott
Gatewood, and Sallaz & Gatewood, Chtd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 13th day of September, 2010, two true and correct copies of the foregoing **APPELLANTS/CROSS-RESPONDENTS' RESPONSE TO THE RESPONDENT/CROSS-APPELLANT'S SUPPLEMENTAL BRIEF** were served upon the following:

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