3-21-2017

Davis v. Crafts Respondent's Brief Dckt. 44582

IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL M. DAVIS, Plaintiff/Appellant, v. CHARLES C. CRAFTS, and JOHN E. SUTTON, Defendants/Respondents.	)	SUPREME COURT NO. 44582 Fourth Dist, Ada Co. No. CV OC 2010-20715

RESPONDENTS' JOINT BRIEF

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

Honorable Richard D. Greenwood, District Judge, Presiding

DANIEL M. DAVIS
Appellant Pro Se
FCI Lompoc Low, FRN 10065-023
Lompoc, California, 93436-2705
Telephone:
Facsimile:
Email:

JOHN ERIC SUTTON
Attorney at Law
200 N. Third Street, Suites 2 & 3
Boise, Idaho 83702
Telephone: 208-336-4444
Facsimile: 208-336-4494
Email: john@jesutton.com

CHARLES C. CRAFTS
Attorney at Law
410 S. Orchard St., Ste. 184
Boise, Idaho 83705
Telephone: 208-278-8888
Facsimile: 208-267-8000
Email: charles@boiseattorney.com

APPELLANT PRO SE

RESPONDENTS PRO SE

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

COURT RULES

OTHER AUTHORITY

I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from a judgment entered in a civil action brought by the Appellant Daniel M. Davis ("Davis") in his status as a former client against his former attorneys, the Respondents, Charles C. Crafts ("Crafts") and John E. Sutton ("Sutton") alleging an action for malpractice and also for conversion of personal property that was used to pay a portion of those attorneys' accrued legal fees in their representation of Davis against charges brought against him upon charges for the possession of sexually explicit images of minors under 18 U.S. §§ 2252 and 2253. (*United States v. Davis*, Case No CR-07-255-S-EJL) (R., pp. 177-193).

The district court in the proceedings below dismissed all malpractice related claims as barred by the applicable two-year statute of limitations, and then after a two-day trial held that Davis had failed to prove that Crafts and Sutton taken any of the identified property "wrongfully," such that Davis had failed to prove an essential element of a conversion. The entire complaint was therefore dismissed with prejudice.

This Joint Respondents' Brief is submitted by the office of J.E. Sutton and Associates on behalf of both the named Respondents, Charles C. Crafts and John E. Sutton.

B. COURSE OF PROCEEDINGS BELOW

No transcript of the trial proceedings conducted in the district court on May 9, 2016 and on August 3, 2016 have been provided for review on this appeal. Excerpts from the testimony provided by Mr. Crafts (R. pp. 91-96) and provided by Mr. Sutton (R., pp. 97-107), on September 2, 2010 have been included as a part of the record on appeal concerning their representation of Mr. Davis in the federal criminal case in the proceeding in which Mr. Davis sought to withdraw his guilty plea as entered in the federal proceeding.[1]

The Appellant Daniel M. Davis ("Davis") filed a civil complaint against attorneys Charles C. Crafts ("Crafts") and John E. Sutton ("Sutton") in Fourth District Court, Ada County on December 6, 2010 alleging claims arising out of Crafts and Suttons' representation of Davis in an Idaho Federal Court action that alleged "neglect, fraud, misrepresentation, malfeasance, malpractice, unjust enrichment, unethical conduct, conversion, conspiracy, theft, and destruction of exculpatory and medical records." (R., pp. 11-20). By the terms of the allegation of that complaint, Davis was an inmate in the Ada County Jail at the time the complaint was filed. (R., pg. 12), and upon petition (R., pp. 113-125), he was permitted to proceed upon partial payment of court fees (R., pp. 126-27).

Crafts filed a verified answer to Davis's Complaint on June 17, 2011 in conjunction with

---

[1] As a result of his Rule 11 plea agreement (R., pp. 425-445), Davis was sentenced to 168 months of incarceration (14 years). The federal inmate locator (www.bop.gov/inmateloc/) indicates that Davis's current expected release date is October 26, 2019.

an abuse of process counterclaim. (R., pp. 139-143). Sutton filed a verified answer to Davis's Complaint on June 17, 2011 in conjunction with an abuse of process counterclaim. (R., pp. 147-152). Davis filed a single joint response on August 12, 2011 to the identical abuse of process counterclaims raised by both Crafts and Sutton. (R., pp. 221-229).

On June 27, 2011 Davis filed a notice indicating that he had been transferred to the Federal Correctional Institution at Lompoc, California, where he remains incarcerated at the present time. (R., pp. 153-154).

On July 22, 2011 Crafts filed a motion for the district court to take judicial notice of both Davis's federal Idaho U.S. District court case (No. 07-255-S-EJL), and the complaint that Davis had filed against Crafts with the Idaho State Bar (File No. 08-C276G) (R., pg. 171), which motion was granted during the hearing conducted by the District Court on October 26, 2011 (R., pg. 269).

On August 9, 2013, Respondent Crafts moved for summary judgment on the complaint (R., pp. 415-16) on the basis that nearly all of Davis's stated claims essentially stated a cause of action for legal malpractice, which cause of action was barred by the applicable two-year statute of limitations provided by I.C. § 5-219(4). (R., pp 417-21). Respondent Sutton joined in this motion for summary judgment on August 27, 2013, (R., pp. 523-24), with a supporting memorandum (R., pp. 525-28), as filed in conjunction with Sutton's own motion for summary judgment filed on that same date (R., pp. 491-92), as submitted on the Defendant Davis's claim

for conversion, which motion for summary judgment was supported by the Affidavit of Sutton, with attachments (R., pp. 493-513), and an accompanying supporting memorandum (R., pp. 514-522). The Appellant Davis filed a memorandum in opposition to Craft's motion for summary judgment on September 3, 2013 (R., pp. 562-567), with several attachments (R., pp. 568-576). Davis filed a separate memorandum in opposition to the Respondent Sutton's motion for summary judgment on September 13, 2013 (R., pp. 581-590), as supported by Davis's verified affidavit, with attached exhibits (R., pp. 591-598).

These summary judgment motions were set for hearing before the district court on October 30, 2013 (R., pg. 529-530). The minute entries from that October 30, 2013 summary judgment hearing indicated that the combined legal malpractice claims, as made by Davis in this complaint against Crafts and Sutton, were dismissed by the district court, (R., pg. 599). On December 4, 2013, the district court issued a memorandum decision denying Sutton's separate motion for summary judgment on the remaining conversion claim, (R., pp. 607-609), on the basis that the district court was "not entitled to pass on the credibility of witnesses on the context of summary judgment motions." (R., pg. 608).

On November 12, 2013 Davis filed a motion for reconsideration of the Court's decision dismissing his malpractice claims as barred by the two-year statute of limitations (R., pg. 600), as supported by an accompanying memorandum with attachment (R., pp. 601-606). The district court never ruled on this motion. The record does not reveal that Davis ever noticed this motion

for hearing, and only reveals a single subsequent reference to this motion for reconsideration as a pending motion in September 2014. (R., pg. 639). The minute entry for the district court hearing held on August 8, 2011 indicates that the district court did advise the Appellant Davis of the necessity of providing a notice of hearing on motions, and the procedure required to place a motion on the court's calendar, with a notation from the Plaintiff Davis, that he "Understands." (R., pg. 232).

On March 4, 2016, the district court issued an order governing proceedings and setting the matter for a one day trial on May 9, 2016. (R., pp. 668-672).

The Defendants Crafts and Sutton submitted Joint Proposed Findings of Fact and Conclusions of Law to the district court on April 13, 2016 (R., pp. 676-681). The Plaintiff Davis filed an objection to the Defendants' proposed findings on April 28, 2016 (R., pp. 691-696), and Davis submitted his own Trial Memorandum on April 18, 2016 (R., pp. 682–690).

The minute entries from the May 9, 2016 court trial appear within the appellate record at R., pp. 697-702), which at the conclusion of those proceedings indicate agreement to continue the trial, partly in order to cure an issue about the need for Crafts and Sutton to provide their trial exhibits to Davis, which matter was satisfactorily completed, (R., pp. 711-712), although Davis continued to complain, (R., pp. 713-717). Minute entries for the continued trial on August 3, 2016 appear within the appellate record at R., 718-722, and at the conclusion of these proceedings, the district court took the matter under advisement.

The district court issued its findings of fact and conclusions of law on September 23, 2016 (R., pp. 732-737). As material to the primary issue raised by the Appellant Davis on this appeal, the district court concluded:

> 5. Plaintiff's claim of conversion fails for lack of proof that the taking of the coin collection or the money, either the case or the charges against the credit card, were wrongful.
>
> . . .
>
> 8. Plaintiff's complaint will be dismissed with prejudice.

(R., pg. 736).

Judgment was entered on September 23, 2016. (R., pp. 738-739). Davis filed a timely notice of appeal on October 26, 2016. (R., pg. 740).

C. STATEMENT OF FACTS

On August 16, 2007, Appellant Daniel M. Davis ("Davis") was charged in U.S. District Court for Idaho with the possession of sexually explicit images of minors under 18 U.S. §§ 2252 and 2253. (*United States v. Davis*, Case No. CR-07-255-S-EJL) (R., pp. 177-193). At the time these charges were filed Davis remained on probation for a 2002 federal conviction related to receiving child pornography in interstate commerce. (R., pg. 195, Office of Bar Counsel, Idaho State Bar, Summary of Investigation; Case No CR 01-188-S-EJL, R., pg. 432).

On or about September 19, 2007 Davis retained Idaho attorney Charles Crafts to represent him in his defense against the above-filed federal charges. (R., pp 48-50). Within the

engagement letter that Crafts subsequently wrote he stated that Idaho attorney John Sutton would be acting as co-counsel in the matter. (R., pg. 48). Sutton submitted a notice of appearance in the federal action on November 30, 2007. (R., pg. 181). Crafts and Sutton remained counsel of record for Davis until they filed a motion to withdraw as counsel on September 4, 2008, and granted leave to withdraw by an order issued on September 15, 2008. (R., pg. 185, Minute Entry for Proceedings before Judge Edward J. Lodge, Motion to Withdraw as Attorney By Charles Crafts and John Sutton - Granted.).

Between November 2007 and June 2008 Davis remained in custody in various jails and federal detention centers, during which time Sutton and Crafts investigated his case, filed motions his behalf and negotiated a plea bargain agreement with the federal prosecutors. On June 19, 2008 Davis executed a Rule 11 plea agreement, (R., pp. 425-445), which agreement fully outlines the factual background of the underlying pending charges and the terms to which Davis agreed in that federal case in which he was represented by Crafts and Sutton.

The issues raised by Davis in this civil litigation, and which went to trial before the district court, relate to certain items of personal property that were taken and retained by Crafts and Sutton in payment of their legal fees in their representation of Davis in that federal action. Davis has alleged in respect to Crafts that the amounts taken exceeded the amount of their agreed fee (Appellant's Brief at pg. 15), and in respect to Sutton that there was never any attorney-client relationship under which Sutton was entitled to any fee (Appellant's Brief at pp. 14-15).

The district court in its findings of fact and conclusions of law (R., pp. 732-737) found that both Crafts and Sutton had been retained by Davis and that the amounts billed by each attorney for the legal work undertaken on Davis's behalf was reasonable. (Findings of Fact Nos. 1-6, R., pp. 733-734). Each attorney had received a substantial amount in payment less than was billed, the district court concluding that:

> 5. Plaintiff's claim of conversion fails for lack of proof that the taking of the coin collection or the money, either the cash or the charges against the credit card, were wrongful.

(R., pg. 736).

Prior to the trial on the conversion claim the district court had dismissed all other claims raised by Davis in his complaint as barred under the two-year statute of limitations for legal malpractice. (R., pg. 599). As only being an interlocutory order, that summary judgment order was necessarily included within the district court's entry of the "Judgment" dismissing the Plaintiff Davis's complaint with prejudice on September 23, 2016. (R., pg. 738).

The only substantive argument raised by the Appellant Davis on this appeal has been a challenge to the district court's decision denying his claim for conversion, as brought against Crafts and Sutton.

D. STANDARD OF REVIEW

The standard of review from the grant of a motion for summary judgment was recently summarized by the Idaho Supreme Court in, *Parks v. Safeco Insurance Co. of Illinois*, 160 Idaho

556, 376 P.3d 760 (2016):

> On appeal from the grant of a motion for summary judgment, we review that decision de novo but apply the same standard used by the district court in ruling on the motion. *McColm-Traska v. Valley View Inc.*, 138 Idaho 497, 65 P.3d 519 (2003); *Carnell v. Barker Management, Inc.*, 137 Idaho 322, 48 P.3d 651 (2002). As a general rule, this Court will affirm the judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Carnell*, 137 Idaho at 327, 48 P.3d at 656. When making its determination, the Court construes all facts in the light most favorable to the nonmoving party. *Id.*
>
> *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 662, 115 P.3d 751, 753 (2005).

160 Idaho at 560-61, 376 P.3d at 764-65.

On the appeal from a court trial, the appellate court limits its review to a determination of whether the evidence supports the trial court's findings of fact, and whether those findings of fact support the conclusions of law. In conducting that review the trial court's findings are to be liberally construed in favor of the judgment entered, as it is within the province of the trial court to weigh conflicting evidence, the testimony, and to judge the credibility of the witnesses. On appeal the appellate court will not disturb findings of fact that are supported by substantial and competent evidence, even if there was conflicting evidence presented at trial. The trial court's conclusions of law are freely reviewed on appeal with the appellate court drawing its own conclusions from the facts presented in the record on appeal. *Sims v. Daker*, 154 Idaho 975, 977, 303 P.3d 1231, 1233 (2013); and *Watkins Co., LLC v. Storms*, 152 Idaho 531, 535, 272 P.3d 503,

507 (2012).

As to alleged errors raised in respect to other pre-trial proceedings that took place in the case, once all the evidence has been presented at trial, any final judgment entered upon the evidence presented in a case should be tested upon the record that was made at trial, and not upon the less complete record that existed at the time those pre-trial proceedings occurred. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 26, 105 P.3d 676, 686 (2005); *Watson v. Idaho Falls Consolidated Hospitals, Inc.*, 111 Idaho 44, 46, 720 P.2d 632, 634 (1986); *Leavitt v. Swain*, 131 Idaho 765, 767, 963 P.2d 1202, 1204 (Ct.App.1998); *Herrick v. Leuzinger*, 127 Idaho 293, 305, 900 P.2d 201, 213 (Ct.App. 1995); *Keeler v. Keeler*, 124 Idaho 407, 410, 860 P.2d 23, 26 (Ct.App.1993); and *Evans v. Jensen*, 103 Idaho 937, 655 P.2d 454 (Ct.App.1982).

II.

RESPONDENTS' RESTATEMENT OF THE APPELLANT'S ISSUES RAISED ON APPEAL

A. On the Defendant/Respondents' motion for summary judgment did the district court err in dismissing on all claims that had been made on the face of the complaint as stated and declared against the Defendants/Respondents Crafts and Sutton by the Plaintiff/Appellant Davis as collectively constituting a claim for legal malpractice that was barred by the applicable two-year statute of limitations?

B. Did the district court err in dismissing the sole remaining claim for conversion on the basis that the Plaintiff/Appellant Davis failed to present adequate proof at trial

to establish that the Defendants/Respondents Crafts and Sutton had "wrongfully" taken possession of the coin collections, and the money in the form of both cash and as charges made against a credit card, in payment for their accrued legal fees?

C. Was the Appellant Davis denied his due process right to a fair trial as a result of the district court's failure to issue rulings on a number of pre-trial motions, including summary judgment, discovery, depositions, and judicial notice?

III.

ARGUMENT

A. Davis's Claim For Legal Malpractice Was Barred, As A Matter Of Law, By The Two-Year Statute Of Limitations That Applies To Legal Malpractice Claims Under I.C. § 5-219(4)

The district court in the, "Introduction," to its September 23, 2016 Findings of Fact and Conclusions of Law summarized the claims that had been raised and made by the Appellant Davis in his Complaint as follows:

> Plaintiff sought recovery against Charles Crafts and John Sutton for "neglect, fraud, misrepresentation, malfeasance, malpractice, unjust enrichment, unethical conduct, conversion, conspiracy, theft, and destruction of exculpatory and medical records."

(R., pg. 732). The district court then went on to declare that, "Before trial all of Plaintiff's claims were dismissed on summary judgment except the claim for conversion." *Id.*

Idaho is a notice pleading state. *Gillespie v. Mountain Park Estates, LLC*, 138 Idaho 27, 30, 56 P.3d 1277, 1280 (2002). All of the claims alleged by Davis's complaint were categorized by the district court below as arising within one of two recognized causes of action under Idaho

law: (1) legal malpractice, and (2) conversion. The Idaho Supreme Court is the final arbiter of rules of decisional common law in Idaho. *State v. Guzman*, 122 Idaho 981, 987, 842 P.2d 660, 666 (1992) ("To this Court falls the obligation to be and remain the ultimate authority in fashioning, declaring, amending, and discarding rules, principles, and doctrines of precedential law by application of which the lower courts will fashion their decisions. This Court has been and remains the final arbiter of Idaho rules of law, both those promulgated and those evolving decisionally."). Within the scope of the recognized causes of action under Idaho law, it remains a question of law for the court that has been presented with a complaint to then decide which causes of action have been adequately stated by the facts that have been alleged by that complaint. *Ernst v. Hemenway and Moser, Co., Inc.*, 120 Idaho 941, 945, 821 P.2d 996, 1000 (1991); *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct.App.1992); and *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 314, 870 P.2d 663, 667 (Ct.App. 1994).

Other than the barest mention in the concluding paragraphs of his opening brief on this appeal, where he essentially admits the bar of the statute of limitations ("Appellant believed the only claim barred by the statute of limitations was the malpractice claim, ..." Appellant's Brief at pg. 25), the Appellant Davis has mounted almost no challenge to the dismissal of his malpractice claims on this appeal. Those claims were dismissed due to the bar of the two-year statute of limitations of I.C. § 5-219(4). (R., pg. 599). The record on appeal establishes that Crafts and Sutton were finally discharged by Davis when they were allowed to withdraw from

their representation of him by Order of the U.S. District Court entered on September15, 2008. (R., pg. 185, Minute Entry for Proceedings before Judge Edward J. Lodge, Motion to Withdraw as Attorney By Charles Crafts and John Sutton - Granted.). For purposes of legal malpractice, the statute of limitations commences at the time some damage arises. *City of McCall v. Buxton*, 146 Idaho 656, 659, 201 P.3d 629, 632 (2009). The damage claims as generally alleged by Davis in this complaint, could have accrued no later than the time when Crafts and Sutton last provided legal services to him, and the last conceivable date of those alleged damages therefore would be no later than the date of their withdrawal on September 15, 2008.

The complaint in this action was filed on December 6, 2010 (R., pg. 11), more than two years after the date that last legal services were provided by Crafts and Sutton to Davis on September 15, 2008, and therefore those alleged claims were necessarily barred by that two-year statute of limitations and were appropriately dismissed on Crafts and Suttons' motion for summary judgment. *Reynolds v. Trout Jones Gledhill Fuhrman, P.A.*, 154 Idaho 21, 293 P.3d 645 (2013); and *Lapham v. Stewart*, 137 Idaho 582, 51 P.3d 396 (2002).

The Appellant Davis has, by only the barest means, made only a passing reference on the last page of his opening brief to the district court's alleged failure to consider equitable tolling in overcoming the statute of limitations, and by citation to the Idaho Supreme Court's recent decision in *Molen v. Christian*, 161 Idaho 577, 388 P.3d 591 (2017). *See*, Appellant's Brief at pg. 24. The defense of equitable estoppel is a bar to the assertion of a statute of limitations

defense, which can only be asserted when the record supports the conclusion that the opposing party has acted to conceal the truth, and then, only until such time as the truth has been discovered. *See*, *City of McCall v. Buxton*, 146 Idaho 656, 663-64, 201 P.3d 629, 636-37 (2009). The record on this appeal does not support the existence of an equitable estoppel defense.

The recent *Molen* decision held that the statute of limitations for legal malpractice, **as based upon the facts alleged in that case**, did not begin to run until the plaintiff had been exonerated of the underlying criminal conviction. 161 Idaho at 581, 388 P.3d at 595 ("We hold that Molen's malpractice cause of action did not accrue until he was exonerated, ..."). A potential exoneration of Davis in respect to the underlying charges was never a possibility in his federal prosecution. In his response to the Idaho State Bar, John Sutton succinctly summarized the situation with which he and Crafts were confronted concerning the pending charges against Davis and the potential defenses against those charges:

> My defense strategy was to use the thumb drives, portable hard drive and cd parts to demonstrate cooperative which could give Mr. Davis a 2-point downward departure for cooperation. Mr. Davis's mother disclosed that she observed Dan Davis being in possession of and viewing child pornography. The U.S. Marshall's confiscated enough evidence through a valid search warrant to unquestionable [sic] demonstrate Mr. Davis possession of child pornography (his second offense). If Mr. Davis had ever followed advise [sic] of this counsel his potential sentence could have been reduced by a downward departure for cooperation and enable [sic] him to avoid the mandatory minimum 10 years fixed sentence for this crime.
>
> However, Mr. Davis did not cooperate. His non-cooperation compelled the U.S. Attorney to further review all of Mr. Davis's Ada County Jail Telephone Calls.

(R., pg. 80). Therefore, the exoneration rule of *Molen* has no applicable whatsoever to the facts of this appeal.

The Appellant Davis has provided no other argument, and no other authority in his opening brief that the district court erred in granting summary judgment to the Defendants Crafts and Sutton in dismissing his malpractice claims. *See H.F.L.P., LLC v. City of Twin Falls*, 157 Idaho 672, 686, 339 P.3d 557, 571 (2014) ('issues on appeal are not considered unless they are properly supported **by both authority and argument**.') (emphasis added). Error is not presumed on appeal, and error must be shown by the party asserting error. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 745, 9 P.3d 1204, 1211 (2000). It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. *State v. Murinko*, 108 Idaho 872, 873, 702 P.2d 910, 911 (Ct.App.1985). In the absence of an adequate record on appeal to support the appellant's claims, the appellate court will not presume error. *State v. Beason*, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct.App.1991). Rather, missing portions of the record must be presumed to support the action of the trial court. *Retamoza v. State*, 125 Idaho 792, 795, 874 P.2d 603, 606 (Ct.App.1994). The appellant has the responsibility to include exhibits and transcripts of hearings in the record before the appellate court. *Id.* "When the record on appeal does not contain the evidence taken into account by the district court, this Court must necessarily presume that the evidence justifies the decision and that the findings are supported by substantial evidence." *Id.* Pro se litigants are held to the same

standards and rules on appeal as those litigants represented by an attorney. *E.g., Trotter v. Bank of N.Y. Mellon*, 152 Idaho 842, 846, 275 P.3d 857, 861 (2012).

Therefore, in the absence of any other argument or authority, this Court on appeal should affirm the decision of the district court granting summary judgment and dismissing with prejudice the entirety of malpractice claims that were stated on the face of the Appellant's complaint.

B. The District Court Did Not Error Dismissing The Conversion Claim On The Basis That Davis Did Not Prove That Crafts And Sutton Wrongfully Took The Cash And Coins In Payment Of Their Fees

The only claim arising out of the Appellant Davis's complaint that was tried by the district court was that which was stated for conversion. A claim for conversion has three elements as recently declared in *Sallaz v. Rice*, 161 Idaho 223, 384 P.3d 987 (2016):

> A claim of conversion requires proof of three elements: "(1) that the charged party wrongfully gained dominion of property; (2) that property is owned or possessed by plaintiff at the time of possession; and (3) the property in question is personal property." *Taylor v. McNichols*, 149 Idaho 826, 846, 243 P.3d 642, 662 (2010).

161 Idaho at 226, 384 P.3d at 990. These elements are stated in the conjunctive, meaning that all three must be proven to prevail on a claim for conversion, and in the absence of any single element, the claim necessarily fails. *Medical Recovery Services, LLC v. Bonneville Billing and Collections, Inc.*, 157 Idaho 395, 401 n. 3, 336 P.3d 802, 808 n. 3 (2014) ("We note that the

conversion elements set out by this Court in *Taylor* are conjunctive. *See* 149 Idaho at 846, 243 P.3d at 662. We have chosen to address the third element in this case because it was clearly not satisfied. However, this opinion should not be read as implicitly finding elements one and two satisfied. Rather, they have simply not been addressed.").

The district court in its conclusions of law determined that Davis's claim for conversion failed due to the absence of required proof of the "wrongful" taking element:

> 5. Plaintiff's claim of conversion fails for lack of proof that the taking of the coin collection or the money, either the cash or the charges against the credit card, were wrongful.

(R., pg. 736).

The Appellant Davis appears to predicate his argument that Crafts and Sutton had no right to take this property in partial satisfaction of their fees as based upon his erroneous belief that there was no attorney-client relationship between himself and those parties that entitled Crafts and Sutton to fees, either to that extent (Crafts), or to any fees at all (Sutton).

This question, concerning the status of Crafts and Sutton as performing as Davis's legal counsel during the time period of August 2007 through September 2008 has been subsequently fully litigated in the Federal Court, and therefore that factual determination would have full collateral estoppel effect in any subsequent state or federal court proceedings on this question. *See, Davis v. United States*, 2016 WL 6471012 at * 9 (D. Idaho, 11/01/2016) ("The Affidavits of

Sutton and Craft include attachments of letters reflecting Petitioner's understanding and agreement that both counsel would be representing him, the amount of the retainer, and estimated cost range for their services. (CV Dkt. 31, Ex. 4, Att. A) (CV Dkt. 31, Ex 7, Att. A.)" [footnote 7 accompany this text declared in part, "These letters also disclaim Petitioner's argument that he 'never hired" Attorney Sutton."]).[2]

---

[2] The several unpublished opinions of both the U.S. District Court of Idaho and the Ninth Circuit Court of Appeals involving Davis's criminal prosecution are collateral to the questions placed at issue in this proceeding, and therefore can be cited within the spirt of Ninth Circuit Local Rule 36-3. The Idaho U.S. District Court Local Rules do not address unpublished opinions. Ninth Circuit Local Rule 36.3 declares:

> **Rule 36-3. Citation of Unpublished Dispositions or Orders**
>
> (a) **Not Precedent**. Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.
>
> (b) **Citation of Unpublished Dispositions and Orders Issued on or After January 1, 2007.** Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1.
>
> (c) **Citation of Unpublished Dispositions and Orders Issued Before January 1, 2007**. Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit, except in the following circumstances.
>
> (i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.
>
> (ii) They may be cited to this Court or by any other courts in this

In addition, Idaho clearly follows the rule that collateral estoppel prohibits the raising of issues within subsequent civil proceedings that have been raised and decided in a prior criminal proceeding. *See e.g., Anderson v. City of Pocatello*, 112 Idaho 176, 184, 731 P.2d 171, 179 (1986) ("[W]e are constrained to hold that under the conditions described above, collateral estoppel bars the relitigation of an issue determined in a criminal proceeding in which the party sought to be estopped had a full and fair opportunity to litigate that issue."). The attorney-client relationship at issue here is no different as adjudicated within the criminal proceeding, and as determined in this subsequent civil proceeding. *See e.g., Schwan's Sales Enterprises, Inc. v. Idaho Transportation Dept.*, 142 Idaho 826, 832, 136 P.3d 297, 303 (2006). *See generally*, Wright & Miller et al, 18B Fed. Prac. & Proc. Juris. § 4468 *Res Judicata Between Federal and State Courts* (2d ed., Jan. 2017 Update); and § 4469 *Res Judicata Between State and Federal Courts—In General* (2d ed., Jan. 2017 Update).

Davis has predicated his argument – although not supported by any cited legal authority – upon his apparent erroneous presumption that he had only entered into an enforceable oral attorney-client relationship with Crafts (Appellant's Brief, pg. 5), and that he had never entered

---

> circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.
>
> (iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence

any attorney-client relationship, by means of a contract that he had signed, which authorized Sutton to represent him (Appellant's Brief, pg. 13). Davis has misapprehended the controlling Idaho law which applies to the determination of a formation of an enforceable attorney-client relationship. The determination of the amount of the fee is left to the agreement of the parties, I.C. § 3-205, ("The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law."), subject the applicable provisions of the Idaho Rules of Professional Conduct. *See e.g.*, I.R.P.C 1.5 "Fees," Vol. II 2016 Idaho Court Rules (Michie) at pp. 584-85.

The Idaho Supreme Court in, *H-D Transport v. Pogue*, 160 Idaho 428, 374 P.3d 591 (2016), summarized the rules that apply in determining the formation of an attorney-client relationship:

> In *Berry v. McFarland*, we explained the rules concerning the formation of an attorney-client relationship, the scope of the attorney-client relationship, and the duration of the attorney-client relationship:
>
> > As a general rule, no attorney-client relationship exists absent assent by both the putative client and attorney. An attorney-client relationship can be established when the attorney is sought for assistance in matters pertinent to his or her profession. *If the attorney agrees to provide assistance, or engages in conduct that could reasonably be construed as so agreeing, then there is an attorney-client relationship.* The scope of the representation depends upon what the attorney has agreed to do. If the client consults with the attorney, the relationship terminates upon the completion of the consultation unless the attorney agrees to continue the relationship or to undertake a specific matter for the

---

of a conflict among opinions, dispositions, or orders.

client. If the attorney agrees to undertake a specific matter, the relationship terminates when that matter has been resolved. If the attorney agrees to handle any matters the client may have, the relationship continues until the attorney or client terminates the relationship.

There are also circumstances in which the existence of an attorney-client relationship can exist based upon the attorney's failure to clarify whom the attorney is representing where, under the circumstances, one of the parties could reasonably believe that the attorney is representing that person's interests. Thus, the attorney-client relationship also exists if the attorney has represented the client in a variety of matters over a period of time and the attorney is asked to perform services in connection with a matter in which the client is involved, unless the attorney clearly informs the client that the attorney is not representing the client with respect to that matter. Likewise, where an attorney has represented a closely held business entity and then provides legal services for a transaction involving that entity and its owners where their interests are adverse, the attorney must clearly inform all involved who is the attorney's client and inform the others to seek independent legal advice.

153 Idaho at 9-10, 278 P.3d at 411-12 (emphasis added) (internal quotations and citations omitted). Our holding in *Berry* followed a discussion of the decision in *Warner v. Stewart*, 129 Idaho 588, 930 P.2d 1030 (1997):

> In *Warner*, we noted two lines of authority from other jurisdictions as to the appropriate test for determining whether an attorney-client relationship exists. Some courts have held that the controlling factor is the client's *subjective belief which is reasonable under the circumstances.* Other courts have construed the attorney-client relationship in more strict contractual terms, finding that no attorney-client relationship exists absent clear assent by both the putative client and attorney. In *Warner* we did not resolve the issue, finding that there was no attorney-client relationship under either test.

Berry, 153 Idaho at 9, 278 P.3d at 411 (emphasis added) (internal citations and quotations omitted).

In its decision, the district court explained that this Court settled on an appropriate test in *Berry*:

> The Court in *Berry v. McFarland*, *supra*, recognized that, "[i]f the attorney agrees to provide assistance, or engages in conduct that could reasonably be construed as so agreeing, then there is an attorney-client relationship." Under this circumstance could Hughes reasonably believe that Pogue represented his interests as concerns himself or the Partnership? In assessing the reasonableness of one's belief a totality of the circumstances analysis is appropriate with both a subjective and objective component.

160 Idaho at 432-33, 374 P.3d at 595-96 (italicized emphasis in original).

Based upon the above-stated legal standard for the formation of an attorney-client relationship under Idaho law, the district court made the following findings of fact in this case:

> 1. Plaintiff Daniel Davis hired Defendant Charles Crafts to represent him in a criminal case pending before United States District Court for the District of Idaho. Charles Crafts was at all times material to this lawsuit an attorney licensed to practice law in the state of Idaho and before the United States District Court for the District of Idaho. Charles Crafts was hired pursuant to an engagement letter dated September 19, 2007.
>
> 2. Plaintiff authorized Crafts to associate with Defendant John Sutton for the joint representation of Plaintiff with Defendant Crafts to be lead counsel. John Sutton was at all times material to this lawsuit an attorney licensed to practice law in the state of Idaho and before the United States District Court for the District of Idaho
>
> 3. Plaintiff agreed to pay reasonable attorney fees to the Defendants for their services based on an hourly rate of $150 per hour for Defendant Crafts and $250 per hour for Defendant Sutton.
>
> 4. Defendants represented Plaintiff through the course of his federal case, including negotiation of a plea agreement and sentencing.
>
> 5. Defendant Crafts billed $26,490 and received payment totaling $11,950, leaving a balance due from Plaintiff of $14,540. Given the nature and complexity of the charges against Plaintiff Davis in federal court and the work

performed, the fees charged by Defendant Crafts were reasonable.

6. Defendant Sutton billed $40,162.50 for his professional services. In addition, Defendant Sutton advanced $450 for a competency examination performed by a Dr. Sandford. Defendant Sutton received payment totaling $15,100, leaving a balance due of $25,512.50. Given the nature and complexity of the charges against Plaintiff Davis in federal court and the work performed, the fees charged by Defendant Sutton were reasonable.

7. Plaintiff did not have available cash on hand or on deposit sufficient to pay the legal fees incurred. Plaintiff authorized Defendant Sutton to make charges against Plaintiff's credit card. The $15,100 in payments received by Defendant Sutton were authorized charges against Plaintiff's credit card.

8. Plaintiff authorized Defendants Crafts and Sutton to keep certain electronic equipment, cash, coin collection, and three tubs of clothing and shoes for him. The electronic equipment was later seized by federal law enforcement. Disposition of the three tubs of clothing and shoes is not clear from the record, but there is no evidence that they had more than nominal value. Nor is there evidence of any demand by Plaintiff for return of the clothing.

9. The coin collection was eventually sold by Defendant Crafts, with the proceeds applied against sums owed by Plaintiff. Sale of the coins for payment of legal fees was specifically authorized by Plaintiff Davis.

10. Other than the electronic equipment, cash, coin collection, and three tubs of clothing, Plaintiff presented no credible evidence that Defendants took personal property from Plaintiff as alleged in the complaint. The Court finds that no such property was taken by Defendants.

(R., pp 733-34).

Based upon the argument made in Davis's Appellant's Brief submitted on this appeal, he has submitted no legal authority that rebuts the controlling legal standard upon which both Crafts and Sutton established attorney-client relationships with him under which they were entitled to

the reasonable fees accrued for the legal services provided to him between August 2007 and September 2008 in the federal action. Nor has Davis provided any evidence that at any time after those legal services were first provided to him by Crafts and Sutton that he made any timely effort to terminate the provision of those legal services before September 2008. Instead, the evidence that has been presented on the record on this appeal supports the district court's determination that both Crafts and Sutton provided legal services to Davis, that the fees for those legal services were reasonable, and that there has been no proof submitted by Davis that any of the property taken by Crafts and Sutton in satisfaction of those legal fees was taken "wrongfully" for purposes of supporting any alleged claim of conversion by Davis. Therefore, the district court's dismissal of that claim with prejudice should be affirmed.

C. Davis Has Submitted No Legal Authority That Supports His Argument That He Was Deprived Of Due Process On The Questions That Were Adjudicated By The District Court In The Proceedings Below

Davis has also raised a list of pre-trial motions at page 22 of his Appellant's Brief upon which he has alleged that he was denied his due process right to a fair trial because the trial court neglected to issue rulings on those motions. Under the Idaho civil rules, both before and after the 2016 amendments, if a moving party does not request oral argument on a motion the court is free to deny the motion without further notice if the motion is deemed to be without merit. *See*, I.R.C.P. 7(b)(3)(E) – [7(b)(3)(D) prior to July 1, 2016]. On October 6, 2011, the district court

issued an, "Order Governing Proceedings and setting Trial," (R., pp. 255-59), and an "Order Re: Motion Practice," (R., pp. 260-65). The Order Governing Proceedings specifically provided that, "All summary judgment motions shall be filed, and **HEARD** at least 60 days prior to trial." (R., pg. 257). The motion practice order declared that, "The schedule for serving brief and affidavits shall be as set forth Idaho Rule of Civil Procedure 56(c). COUNSEL ARE EXPECTED TO STRICTLY COMPLY WITH TIME REQUIREMENT." (R., pg. 263). As the actual May 9, 2016 date of trial approached, on March 4, 2016 the district court issued an, "Order Governing Proceedings and Setting Trial," (R., pp. 668-671), which again declared that, "All summary judgment motions shall be filed at least 90 days before trial and **HEARD** at least 60 days prior to trial." (R., pg. 670). (The March 4, 2016 date of this order was 65 days before the scheduled May 9, 2016 trial date, and therefore already the date of that order was past the, "90-days-before-trial," date deadline for filing summary judgment motions.).

On pg. 22 of the Appellant Davis's opening brief he has indicated that the summary judgment motion he had placed at issue was filed on June 7, 2016. At that point in the proceedings the parties' court trial had already commenced on May 9, 2016 and had been continued to August 3, 2016. A motion for summary judgment made at this point in the proceedings was clearly untimely. Rule 16, Idaho Rules of Civil Procedure, encompasses the matters that are addressed by a pre-trial order governing scheduling and case management. These matters are determined under the court's inherent authority to regulate its calendar and to

manage cases that are pending before it. *See e.g., Department of Labor and Industrial Services v. East Idaho Mills, Inc.*, 111 Idaho 137, 139, 721 P.2d 736, 738 (Ct.App.1986). Certainly, when a claimant has in fact put forth evidence establishing a valid basis upon which he should be afforded an opportunity to test his claims on the merits then mere delay, standing alone, is not sufficient reason for denying relief, in the absence of bad faith or undue prejudice to the opposing party. *First Federal Sav. Bank of Twin Falls v. Riedesel Engineering, Inc.*, 154 Idaho 626, 630-31, 301 P.3d 632, 636-37 (2012).

In this case in his pre-trial submissions to the district court Davis repeatedly requested a trial setting and argued that "Further discovery would be futile." (R., pg. 634 (June 9, 2004); pg. 645 (June 29, 2015); pg. 655 (September 24, 2015). He has argued that he was denied due process by denial of the presentation of witnesses by deposition (Appellant's Brief pp. 22-23), but as he attempted to explain in the memorandum he submitted to the district court (R., pp. 704-05), all that proposed evidence would have provided to the district court, as declared by Davis, is testimony concerning the identity of the property that was taken. Since the record before this Court establishes that Crafts and Sutton had a right to the property, as a matter of law, this evidence would have been unavailing to Davis's claims. As based upon the district court's ultimate finding that Crafts and Sutton had a legal right to the property in payment of their just legal fees, there simply has been no evidence proffered by Davis upon which he could prevail on his conversion claim, none of his arguments implicate the denial of any substantive right at trial.

I.R.C.P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

The only substantive claim that the parties litigated at trial was the question of whether the Defendant/Respondents, Crafts and Sutton, committed the tort of conversion. The district court concluded that the property at issue was properly taken in satisfaction of the Defendants' just legal fees as owed to them by the Plaintiff/Appellant Davis. (R., pp. 732-736). The key finding was that neither the actions of Crafts, nor Sutton, were "wrongful":

> 5. Plaintiff's claim of conversion fails for lack of proof that the taking of the coin collection or the money, either the case or the charges against the credit card, were wrongful.

(R., pg. 736).

As declared in, *Williams v. Idaho State Bd. of Real Estate Appraisers*, 157 Idaho 496, 337 P.3d 655 (2014):

> Under both the Idaho and United States Constitutions, the right to procedural due process requires "a fair trial in a fair tribunal . . . ." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Eacret*, 139 Idaho at 784, 86 P.3d at 498 ("The Due Process Clause entitles a person to an impartial and disinterested tribunal . . . .").
>
> "[D]ue process is not a concept rigidly applied to every adversarial confrontation, but instead is a flexible concept calling for such procedural protections as are warranted by the particular situation." *Matter of Wilson*, 128 Idaho 161, 167, 911 P.2d 754, 760 (1996). . . . .

157 Idaho at 505, 337 P.3d at 664. *See also*, *Nguyen v Bui*, 146 Idaho 187, 191, 191 P.3d 1107, 1111 (Ct.App.2008) (Fundamental issues of due process are raised by the lack of sufficient

notice as to the claim itself, and as to the time that is necessary to prepare witnesses and evidence for trial, in addition to meeting the legal questions presented.).

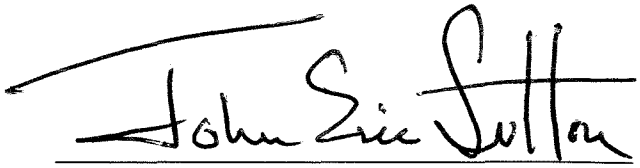
No issue, claim, or fact raised or argued by the Appellant Davis on this appeal has implicated these standards. Davis is barred by the rules of appellate procedure from raising any new issues in any "reply brief," that he may choose to file on this appeal. *Shepherd v. Shepherd*, 161 Idaho 14, 20, 383 P.3d 693, 699 (2016) ("We will not consider arguments raised for the first time in an appellant's reply brief. 'A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the Respondent has an opportunity to respond in the Respondent's brief.' *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005). 'Consequently, this Court will not consider arguments raised for the first time in the appellant's reply brief.' *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004).").

IV.

CONCLUSION

For all the reasons set out above, the Judgment entered by the district court below dismissing the Plaintiff Davis's complaint with prejudice should be affirmed.

Dated this 21st day of March, 2017.

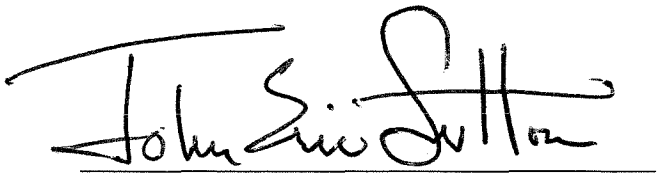


John Eric Sutton, ISB No. 1891
Respondent Pro Se and as joined in this response by
Charles C. Crafts
Respondent Pro Se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 21st day of March, 2017, two true and correct copies of the foregoing **RESPONDENTS' JOINT BRIEF** were served upon the following in the manner described below:

Daniel M. Davis	X	U.S. Mail
Appellant Pro Se	___	Facsimile
FCI Lompoc Low, FRN 10065-023	___	Overnight Mail
Lompoc, California, 93436-2705	___	Hand Delivery
	___	_____



John Eric Sutton