11-18-2011

Reynolds v. Trout Jones Gledhill Fuhrman Respondent's Brief Dckt. 38933

IN THE SUPREME COURT OF THE STATE OF IDAHO

JUSTIN S. REYNOLDS and S. KRISTINE REYNOLDS; and SUNRISE DEVELOPMENT, LLC,

Plaintiffs-Appellants,

vs.

TROUT JONES GLEDHILL FUHRMAN, P.A.; and DAVID T. KRUECK, individually and in his capacity as a member of the Defendant Law Firm,

Defendants-Respondents.

Supreme Court No. 38933

District Court No. CV-OC-2010-04458

RESPONDENTS' BRIEF

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

Honorable Richard D. Greenwood, District Judge, Presiding

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I.

STATEMENT OF THE CASE

Respondents represented Justin and Kristine Reynolds and Sunrise Development, LLC (collectively "Appellants") in a transaction in which they wished to purchase certain real property located in Ada County, Idaho, commonly known as the Dunham Place Subdivision ("the Property") from Quasar Development, LLC ("Quasar"). (R. p. 70).

On July 21, 2006, Appellants and the principals of Quasar entered into a Real Estate Purchase Agreement ("the Agreement") whereby Appellants agreed to purchase the Property from Quasar under certain terms and conditions. *Id.*

Pursuant to the terms of the Agreement, Appellants deposited $60,000 as earnest money, to be applied toward the purchase price for the Property, in the event the parties closed the transaction under the terms of the Agreement. *Id.*

Section 7(a) of the Agreement provided that in the event Quasar failed to record the final plat for the Property by July 31, 2007, Appellants had the right to terminate the Agreement and seek a full refund of the earnest money. *Id.*

Quasar failed to record the plat for the Property by July 31, 2007. (R. pp 70-71). On that same date, Mr. Krueck on behalf of Appellants provided written notice to counsel for Quasar that Appellants terminated the Agreement due to Quasar's failure to record the plat pursuant to the terms of the Agreement, and also demanded a full refund of the $60,000 paid in earnest money. *Id.* Quasar did not refund the Appellants' earnest money in response to this demand.

Respondents, on behalf of Appellants, sent several letters to counsel for Quasar demanding refund of the earnest money pursuant to the terms of the Agreement. (R. p. 71).

On September 6, 2007, Respondents received a letter from counsel for Quasar, along with a proposed promissory note and release agreement, which proposed promissory note provided that Quasar would pay Appellants, or Sunrise Development, LLC, $60,000 no later than September 17, 2007. *Id.* The parties could not reach a resolution regarding the terms of the proposed promissory note and release agreement, and no payment was ever made by Quasar. *Id.*

On September 25, 2007, Respondents filed on behalf of Appellants, a Complaint and Demand for Jury Trial as Sunrise Development, LLC v. Quasar Development, LLC, Ada County Case No. CV OC 0717098 (the "Underlying Litigation"). (R. pp. 71-72).

In the Complaint, Appellants asserted that Quasar was obligated under the terms of the Agreement to fully refund the earnest money to Reynolds on July 31, 2007. (R. p. 54). Appellants also asserted that they "had been damaged in an amount to be proven at trial, including but not limited to, the amount of the Earnest Money deposit and other incidental and consequential damages ..." (R. p. 55) (emphasis added).

On December 4, 2007, Appellants filed a motion for summary judgment. On that same date, the Affidavit of Kristine Reynolds ("Appellant") in Support of Motion for Summary Judgment was filed. (R. pp. 63-65). In that affidavit, Ms. Reynolds confirmed that "Sunrise has made numerous written demands to Quasar seeking a refund of the Earnest Money pursuant to the express terms of the Agreement." (R. p. 64)

Judge Darla Williamson entered an Order on Appellants' Motion for Summary Judgment on March 11, 2008. *See* Order Granting in Part Plaintiff's Motion for Summary Judgment ("Order"), Appendix A of the Affidavit of Plaintiff Justin S. Reynolds in Opposition to Motion

for Summary Judgment, *see* Order Granting Stipulated Motion to Augment Record, entered October 19, 2011.

In the Order, Judge Williamson granted Appellants' motion regarding the amount due to be refunded (the $60,000), but denied the motion regarding the timing of the payment of the refund, finding that the refund must be made in a reasonable time and that there was an issue of fact whether or not a reasonable time had past for the refund to be made. *Id.*

Appellants incurred substantial attorney fees associated with Quasar's failure to refund the earnest money upon their termination of the Agreement on July 31, 2007; until the litigation was filed, and thereafter, in eventually reaching another settlement with Quasar. Appellants filed a complaint for malpractice against Respondents on March 9, 2010.

II.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Whether the District Court erred in holding that the Complaint was barred by applicable statute of limitations.

Whether, in the event that Respondents are the prevailing party on this appeal, they are entitled to attorney fees in defending this appeal.

III.

ATTORNEY FEES ON APPEAL

Respondents are entitled to attorney fees under Idaho Code § 12-120(3) as there existed a contractual and/or commercial relationship between Respondents and Appellants. If the District Court decision is affirmed on appeal, Respondents should be awarded their attorney fees and costs incurred in defending this appeal.

IV.

STANDARD OF REVIEW

The Idaho Supreme Court applies the same standard as that applied by the trial court when it reviews an order for summary judgment. *Lattin v. Adams Cnty.*, 149 Idaho 497, 500, 236 P.3d 1257, 1260 (2010). Summary judgment is appropriate where "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 judgment as a matter of law." *Idaho Dairymen's Ass'n v. Gooding Cnty.*, 148 Idaho 653, 656, 227 P.3d 907, 910 (2010) (quoting I.R.C.P. 56(c)).

The burden is on the movant to show that no genuine issues of fact exist. *Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 101, 218 P.3d 1150, 1162 (2009). "Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Castorena v. Gen. Elec.*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010).

If there is no genuine issue of material fact, only a question of law remains for review by the Court. *Indian Springs LLC v. Indian Springs Land Inv.*, 147 Idaho 737, 746, 215 P.3d 457, 466 (2009)). The Idaho Supreme Court freely reviews questions of law. *Vavold v. State*, 148 Idaho 44, 45, 218 P.3d 388, 389 (2009).

V.

ARGUMENT

Appellants argue that the District Court misconstrued this Court's decision in *City of McCall V. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009 in finding that Appellants' claims against Respondents were barred under the applicable statute of limitation. The underlying premise of this appeal is Appellants' claim that because "objective proof" of Respondents' "actionable negligence" did not exist until at the earliest, the issuance of the Order on March 11, 2008 the Statute of Limitation could not begin to run before that date. *See* Appellants' Brief, p. 7. Put another way, Appellants assert that they could not have filed a lawsuit against Respondents prior to the entry of the Order. Therefore, the statute of limitation could not have commenced before March 11, 2008. [1]

In setting forth their argument that "they didn't have a claim" until Judge Williamson's Order, Appellants purportedly rely on the case of *Buxton*, *supra* - the case they claim the District Court misapplied to the facts of this case. To fit within the confines of *Buxton* Appellants assert that they had to have their claim "adjudicated" in the Underlying Litigation to trigger the commencement of the statute of limitations.

The first flaw in Appellants' argument is that Judge Williamson's opinion did not serve as an "adjudication" within the meaning assigned to that term in applicable cases decided by this Court.

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[1] In the Order, Judge Williamson held there was an issue of fact regarding the timing in which the earnest money had to be refunded to Appellants by Quasar: a question of fact as to what was a "reasonable time" was for the refund. *See* the Order, p. 6.

The second flaw in Appellants' argument is their claim that *Buxton* supports the unqualified position that a party must have their claim adjudicated in the underlying case in order to trigger the statute of limitation for a claim of attorney malpractice.

Finally, if the Court correctly accepts that the statute of limitation began to run on the date Quasar refused to refund the earnest money to Appellants, or July31, 2007, and the Order gave them "notice" on March 11, 2008, that they had an actionable claim against respondents, Appellants still had 16 months to file their Complaint against Respondents. Appellants' inference that they could not have filed a claim against Respondents because they didn't know they had one, is somewhat disingenuous. From the date they admit they knew they had a claim against Respondents, they had 16 months to file and they failed to do so. Therefore, their claim is barred.

A. Appellants Incorrectly Apply Controlling Case Law As To When The Statute Of Limitations Begins To Accrue In A Claim For Attorney Malpractice.

Respondents do not dispute, that in certain cases a determination of when "some damages" accrue will depend upon outcome of certain litigation, but those cases, as recognized by this Court, are fact specific. Where the existence of "some damage" does not depend on the outcome of a lawsuit (such as the facts in this case), the statute of limitations begins to accrue. *See Buxton* at 662, 201 P.3d at 635. There are instances where some damage accrues without litigation.

A clear reading of *Buxton* does not support Appellants' interpretation and/or application of that case's holdings. There were two distinct rulings in *Buxton*, wherein the City of McCall sued its attorneys based on allegations of negligent advice. Two counts of the City's complaint

were based on allegations of negligent advice by the City's attorney pertaining to termination of a contract and the withholding of certain payments to contractors. This Court held that until there was an outcome of the litigation related to this "advice" on the breach of contract claims, there could not be a determination of damage; that is, the City could have prevailed in the litigation (i.e. no breach of the contract) and arguably suffered no damage. *Id.*, 146 Idaho at 663, 201 P.3d at 636.

The remaining claim of negligence in *Buxton* had to do with the City attorney advising the City to release a lien against J-U-B Engineering. This Court held that the date on which the City of McCall released its lien was the date on which the damage occurred because that was the date on which the City of McCall lost its opportunity to recover against J-U-B Engineering. *Id.* at 663, 201 P.3d at 636.

This is not a case like *Buxton*, where attorneys advise the client to take a certain course of action and a resulting trial renders the client liable to a third party and awards damages against the client and in favor of the third party. This is a case where Appellants claim that Respondents negligently drafted a document and as a result of that negligence, they suffered damages. In this case, the Order was not determinative of any alleged negligence on the part of Respondents or any party nor did it award damages to any party. Judge Williamson did not find that "but for" the draftsmanship of the Agreement Quasar did not have to pay within a reasonable time. Judge Williamson found that Quasar had to pay within a reasonable time, but there was only a question of fact what "reasonable time" meant in terms of specific training.

This District Court's ruling in this case is entirely consistent with *Buxton*. The District Court found that Appellants suffered some damage when Quasar refused to refund the earnest

money upon demand. The Order entered by Judge Williamson had no effect on the damage that Appellants had already suffered. The damage was done.

The facts of this case are more closely in line with *Elliot v. Parsons*, 128 Idaho 723, 918 P.2d 592 (1996) and *Parsons Packing, Inc. v. Masingill*, 140 Idaho 480, 95 P.3d 631 (2004).

In *Elliot v. Parsons*, the attorney drafted documents for the Elliots associated with the sale of their business to purportedly obtain favorable installment sales tax treatment. Later, the Internal Revenue Service ("I.R.S") audited the Elliots, concluded that the transactions did not qualify for installment tax treatment and provided notice to the Elliots that a substantial amount of taxes was still owed. *Id.* at 724, 918 P.2d at 593. Thereafter, the Elliots hired an attorney to appeal the I.R.S decision. In ascertaining when the Elliots incurred some damage, this Court held it was when the Elliots were assessed unpaid taxes, and when they had to pay an attorney pursue the appeal – not when their appeal was finally denied by the I.R.S. *Id.* Similar to this case, only when Quasar refused to immediately refund the earnest money did Appellants suffer some damage, and thereafter when Appellants had to expend substantial attorney fees and costs to collect their earnest money.

In *Parsons Packing, Inc. v. Masingill*, the attorney failed to file a U.C.C financing statement in connection with a lease and purchase agreement he had drafted for his client. The purchaser under the agreement made payments for several years, but then filed for bankruptcy and the client was not secured with the U.C.C. filing. This Court, in applying the "some damage" rule, held that the seller did not suffer some damage until the purchaser defaulted on payments under the agreement. Similar to this case, Appellants did not suffer some damage when the act of negligence allegedly occurred - when the Agreement was negligently drafted.

Appellants suffered some damage when Quasar refused to refund their earnest money upon their demand. And again, also suffered some damage when they incurred attorney fees having to pursue collection of the earnest money from Quasar through settlement efforts and then litigation.

Buxton does not support Appellants' argument that because "objective proof" of Respondents' "actionable negligence" did not occur until entry of the Order, that the statute of limitations did not commence. As analyzed in more detail below, the statute of limitations does not commence only when a party realizes they might have a claim against their attorney. Rather, it commences when they suffer some damage as a result of the attorney's alleged negligence. These are mutually exclusive inquiries, and one is not necessarily relevant to the other.

The statute of limitations applicable to attorney malpractice claims does not have a discovery exception: it is not material when a plaintiff discovers he might sue his or her attorney, but rather when "some damage" occurs as a result of the alleged negligence. *See Lapman v. Stewart*, 137 Idaho 582, 51 P.3d 396 (2002). In this case, it was when Quasar did not refund the earnest money upon demand and when Appellants expended substantial attorney fees and costs attempting to collect the earnest money.

B. The Order Did Not Constitute Damage To Trigger The Statute Of Limitations.

Judge Williamson's ruling did not cause Appellants any damage. Appellants' claim that until the Order was issued they didn't know they had a claim against Respondents' does not get them where they need to go.[2]

This Court has made it very clear that "[t]he standard of 'objectively ascertainable' damage does not mean that the fact of damage must have been known to the injured party, or that it must have been ascertainable from facts known by the injured party." *Stewart*, 137 Idaho at 586, 51 P.3d at 400. In *Stewart, supra*, Stewart represented Lapham in a loan closing. Lapham instructed Stewart to disperse the loan proceeds incrementally and upon his approval. Stewart's secretary instead paid all proceeds to the borrower upon closing. Sometime later, borrowers defaulted. This Court held that some damage occurred when the funds were dispersed without Lapham's consent Lapham could have sued Stewart to recover the finds when he wrongfully dispersed them. "The fact that the borrower may have repaid the funds in the future would not toll or delay the running of the statute of limitations. *Id.* "The mere hope that the loss may be recovered from another party in the future does not toll the statute of limitation for malpractice in the future." *Id.*[3]

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[3] Appellants' assertion that they "didn't know" Quasar's refusal to pay might be due to the language contained in the Agreement is a red herring. That Appellants were not aware of the "reasoning" behind the non-payment does not negate the fact that they were damaged by Quasar's non-payment.

Appellants state that "[w]hile Reynolds had some risk before the judge's ruling, they **continued to have risk after the ruling**, albeit somewhat diminished." Appellants' Brief, pg. 12 (emphasis added). Appellants' arguments pertaining to the stages and quantity of risk are irrelevant to the issue before the Court on this appeal, they do not create an issue of material fact that Appellants suffered actual damage well prior to the entry of the Order.

Appellants claim that the facts of this case fall squarely into the *Masingill,* which held that risk alone is not sufficient to trigger the statute of limitation. *Id.* Appellants assert that before the Order was issued, there was only "the risk" of no refund and after the ruling there was in increased risk. But Appellants do not properly apply the holding in *Masingill* and miss the mark on when damages were incurred in this case.

As set forth above, in *Masingill*, this Court found that the failure to file a security instrument did not constitute some damage, that it was not until the debtor failed to pay and the plaintiff had not security that "some damages" were incurred for the purpose of triggering the statute of limitation. That is, the debtor may have paid off the debt and plaintiff suffered no injury. In this case, Respondents allegedly failed to specify the time in the Agreement in which refund of the earnest money was to be made. Then, Quasar **refused to refund** Appellants' their earnest money. The facts of this case fall squarely within the facts of *Masingill* but not in the way Appellants attempt to make them fit. This is not a case about Appellants' risk. Quasar actually refused to pay. The issue of risk was moot upon Quasar's refusal to pay and continued refusal to pay, prior to entry of the Order.

Appellants go on to assert that "[i]f the Trial Court had decided both issues as requested by Law Firm (principal, interest, pre-judgment interest and attorney's fees), Reynolds would

have been made whole ... no possible damage. But they were left with potential damage." Appellants' Brief, p. 13. This statement ignores the undisputed fact that prior to the issuance of the Order, Appellants' had already been damaged. Moreover, in addition to Quasar's refusal to refund the earnest money upon demand on July 31, 2007, Appellants began to incur substantial attorney fees and costs on or about that date due to Quasar's refusal, as Respondents commenced with continuous communications with counsel for Quasar regarding the Appellants' continued demands for the refund including drafting settlement documents. Appellants then filed the lawsuit to collect the earnest money payment on September 25, 2007, after the failed settlement efforts - all of which resulted in Appellants' incurring substantial attorney fees.

Appellants next attempt to analogize this case to *Streib v. Veigel,* 109 Idaho 174, 706 P.2d 63 (1985). In *Veigel*, accountants negligently prepared plaintiffs' tax returns and listed certain items as deductible that were not in fact deductible from 1976 through 1980. The plaintiffs in *Veigel* were not aware of the defects in the returns until July 1982, at which time they fired Veigel. The trial court held that the damage occurred when the tax returns were filed. *Id.* at 175, 706 P.2d at 64. This Court held that the "tortious negligence is continuing in nature until the plaintiffs suffer damage." *Id.* at 179, 706 P.2d at 68. No damage was suffered until the tax return was challenged by the Internal Revenue Service and an assessment made. Appellant reasons that "had the tax returns never been audited no loss would have been suffered and plaintiffs-appellants would have had nothing to gain from filing suit." Appellants' Brief, p. 13, citing *Veigel* at 178, 706 P.2d at 67. The facts of this case are in no way similar to the facts of *Veigel*. The assessment in *Veigel* is equivalent to Quasar's refusal to refund the earnest money.

This Court's ruling in *Veigel* only supports the correctness of the District Court's ruling in this case.

Appellants' theory still misses the mark. If Quasar would have paid upon demand it would have been a "no harm no foul" scenario. Even if Judge Williamson had ruled that Quasar had to pay the whole amount **and should have paid it on demand** - it does not negate the fact that Quasar **didn't refund the earnest money** when originally demanded to do so, and continued to refuse to refund the earnest money, requiring Appellants to file litigation to collect the earnest money. Appellants' had been damaged prior to filing the litigation and prior to the issuance of the Order.[4] Quasar's stated basis for not refunding immediately was that they were not required to under the terms of the Agreement. *See* Order p. 6 ("Defendant counters that 7(a) does not state a specific time for paying the refund, and therefore performance must merely occur in a reasonable time").[5]

Appellants do not dispute that they were damaged by Quasar's failure and/or refusal to refund the earnest money. Quasar's failure to pay when the payment was demanded is ascertainable damage, notwithstanding Appellants' attempts to persuade the Court otherwise.

Appellants' arguments convolute the issues before the Court. The Order did not damage Appellants or trigger the running of the statute of limitations. Appellants focus on when they purportedly "realized" they might have a cause of action against Respondents, claiming only

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[4] Appellants cannot substantiate any claim that they were actually "damaged" by the Order.

[5] Appellants admit that there was a dispute pertaining when the earnest money had to be refunded prior to Judge Williamson's decision. Appellants' Brief, p. 12.

then could the statute of limitations begin to accrue. This is not the inquiry before the Court, nor should it be the finding of this Court.

C. The District Court Correctly Found That The Appellants' Complaint Was Not Filed Within the Applicable Statute of Limitations.

The basis of Appellants' malpractice claim is that Respondents negligently drafted the Agreement. Specifically, Appellants assert that the language in the Agreement did not provide a date certain that the $60,000 of earnest money had to be refunded to them by Quasar in the event the Agreement was terminated.

When Quasar refused to refund Appellants their $60,000 earnest money payment upon Appellants terminating the Agreement on July 31, 2007, Appellants suffered some damage – they expected and did not receive the funds, and the statute of limitation on their claim against Respondents began to accrue on that date.

In addition, Appellants began to incur substantial attorney fees and costs on or about that date due to Quasar's refusal to refund the earnest money, as Respondents commenced with continuous communications with counsel for Quasar regarding the Plaintiffs' continued demands for the refund which culminated in Appellants filing litigation against Quasar on September 25, 2007 (the "Underlying Litigation").[6] Appellants incurred damages in addition to the "refusal to refund" by Quasar – beginning July 31, 2007.

Appellants filed that malpractice action against Respondents on March 9, 2010, well beyond the expiration of the two year statute of limitation.

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[6] Litigation was only commenced against Quasar after a settlement agreement was reached and not executed by Quasar.

Appellants' statement that they "could not have sued their attorney on that date [referring to July 31, 2007] because no one had established that any defect in the Agreement causing Quasar not to return the earnest money" is not relevant to this motion.[7] Again, Appellants' knowledge of Quasar's "reasoning" for not refunding the earnest money is not relevant to the issue of whether Appellants' suffered ascertainable damage to commence the applicable statute of limitations. When Appellants' allegedly became "aware" of the issue pertaining to the Agreement regarding timing, Appellants could have filed litigation against Respondents within the applicable statute of limitations, but they failed to do so. Specifically, the District Court held:

> ...assuming the lawyer was negligent in drafting the contract and failing to provide within that contract a method for immediate enforcement or to require a specified time for the payment of the earnest money... then the damage starts accruing when the absence of the language in the contract causes the Plaintiff loss. And that loss started when they had to start enforcing the contract...

T.,p. 30, LL 12-22. (February 28, 2011 Transcript).

Appellants suffered some damage when Quasar failed or refused to refund their earnest money upon demand and the District Court correctly such made a finding as a matter of law.

VI.

CONCLUSION

The material facts of this case are not in dispute. The District Court correctly determined as a matter of law that Appellants' claim against Respondents as a matter of law. Respondents

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[7] Judge Williamson did not find there was a "defect" in the Agreement, she only found there was an issue of fact regarding the reasonable time for Quasar to refund the earnest money.

respectfully request that decision of the District Court to be affirmed and that Respondents be awarded their attorney fees and costs incurred in defending this appeal pursuant to L.C. § 12-120(3) and other applicable law.

RESPECTFULLY SUBMITTED this 18th day of November, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Michelle R. Points
Attorneys for Defendants-Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of November, 2011, I caused to be served a true copy of the foregoing RESPONDENTS' BRIEF by the method indicated below, and addressed to each of the following:

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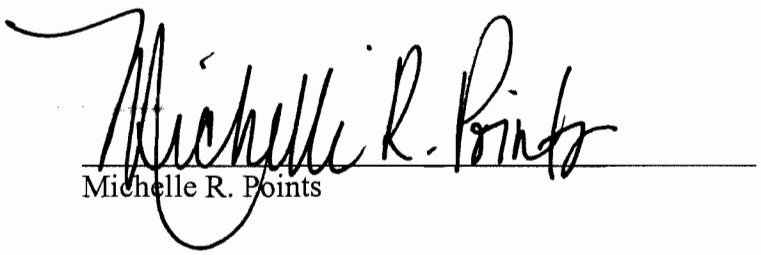

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