12-9-2011

Reynolds v. Trout Jones Gledhill Fuhrman Appellant's Reply 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.

DOCKET NO. 38933-2011

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District

of the State of Idaho, in and for the County of Ada

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Honorable Richard Greenwood, District Judge, Presiding

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I.

ARGUMENT

The principal vice in the Respondents' Brief is that it responds to so very little of what was contained in Appellants' Brief. Arguments made by the Appellants are simply ignored. What response is found from the Respondents has a thread of meaning but without much spine. Much of the compelling Idaho precedent provided by Appellants is similarly not addressed and conclusory opinions are repeatedly stated as facts. The following will address these errors and omissions.

II.

WAS AND IS THERE A QUESTION OF FACT PRECLUDING SUMMARY JUDGMENT?

In Appellants' Opening Brief the argument that "circumstances" as stated in such cases as *Bonz v. Sudweeks*, 119 Idaho 539, 543, 808 P.2d 876, 880 (1991), imply that the underlying facts will drive a decision as to what constitutes objective proof of actual damage for purposes of the accrual of a cause of action against an attorney. These are material facts of a genuine nature. The Appellants' question was posed "Do we automatically decide the issue of objective proof of damage which is so dependent on the underlying facts by means of summary judgment motions (or appellate decisions) or do we allow, when a jury has been requested, the decision to be made by the trier of fact?" This argument finds no response in Law firm's briefing.

In *Horkley v. Horkley*, 144 Idaho 879, 880 (Idaho 2007), this Court acknowledged that "The time when a cause of action accrues may be a question of law or a question of fact,

depending on whether any disputed issues of material fact exist . . . . where there is conflicting evidence as to when the cause of actions arose, the issue is one of fact for the trier of fact . . . ." *Citing Kimbrough v. Reed*, 130 Idaho 512, 516 (Idaho 1997).

Objective proof of actual damage requires an analysis of the underlying facts or, if you will, of the "circumstances" underlying each case. *When* did something occur? This is a question of fact. It is a material and genuine question of fact.[1] At what point in time did objective proof of actual damage exist? That is a time question. Where a jury has been requested it is thus a jury question. The "when" question must be answered by determining a date which is the date at which objective proof of actual damage exists and the clock starts ticking. That date is a material question of fact. "A material fact is one upon which the outcome of the case may be different." *Peterson v. Romaine*, 131 Idaho 537, 960 P.2d 1266 (Idaho 1998).

This argument has not been addressed by the Respondents. But the argument exists. It is submitted that it is worthy of this Court's consideration and adoption in the context of attorney malpractice cases.

III.

THE MISSING CASES

Although Respondents cite *Buxton* throughout their Memorandum, they have omitted to mention (much less distinguish) four cases which are the cornerstone of the *Buxton* decision. These are *Stephens v. Stearns,* 106 Idaho 249, 254, 678 P.2d 41, 46 (1984), *Chicoine v. Bignall*, 122 Idaho 482, 487, 835 P.2d 1293, 1298 (1992), *Fairway Development Co. v. Peterson, Moss,*

[1] Even Judge Williamson's decision below recognized that time is a question of fact. That is why she refused to grant summary judgment on the issue of what constituted a "reasonable time." *See, also, CIT Financial Services v. Hub's Indoor RV Center*, 108 Idaho 820, 822, 702 P.2d 858, 860 (Id. App. 1985), where a question of the actual date of default precluded summary judgment.

Olsen, Meacham & Carr, 124 Idaho 866, 865 P.2d 957 (1993), and *Mack Financial Corporation v. Smith*, 111 Idaho 8, 720 P.2d 191 (1986). It would be unnecessarily redundant to explain the holdings in each of these cases. That has already been done in Appellants' Opening Brief. The refusal of Respondents to deal with these cases is suspected to be more than a mere oversight, however. These cases, as incorporated within and approved by *Buxton*, happen to be the law in this jurisdiction regarding objective proof of actual damage in attorney malpractice cases. To leave them undiscussed, undistinguished, and untouched is rather telling. Instead, Respondents engage in a mantra-like conclusory assertion which appears over and over and over in their Brief that the damage occurred at the instant that Quasar defaulted.[2]

Some defendants become stubborn with opposition because their convictions are all that they have. This is such a case. Respondents are not accurately reflecting the state of Idaho law in their response to Appellants' Opening Brief and merely state and restate their convictions.

City of McCall v. Buxton, 146 Idaho 656, 201 P.3d 629 (2009) trumps any convictions the Respondents offer. "[T]here must be objective proof that would support the existence of some actual damage." At 661. A cause of action for negligence cannot accrue until there is objective proof of actual damage. *Id.* "Negligence that increases the risk that a client will be harmed does not trigger the running of the statute of limitations until harm actually occurs." *Id.* Here, objective proof did not occur until, at the earliest, there was a court decision adverse to the Reynolds, *i.e.,* March 11, 2008. Since this action was filed on March 9, 2010, the statute of limitations, I.C. § 5-219(4), does not act as a bar.

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[2] See Respondents' Brief, pps. 6, 7 (two times), 10, 11, 12 (two times), 13 (two times), 14 (two times), and 15.

IV.

DID JUDGE WILLIAMSON'S ORDER TRIGGER THE STATUTE OF LIMITATIONS?

Respondents argue strongly (and incorrectly) that it is Appellants' position that Judge Williamson's Order triggered the running of the statute of limitations. This reflects a careless or incomplete reading of Appellants' argument. At p. 15 of Appellants' Opening Brief, Appellants commented that "it is perhaps arguable that there was objective proof of damage at that time" (at the time of Judge Williamson's Order). Appellants continued, however, stating "but since Judge Williamson did not decide that issue, one way or the other, it appears that there was no damage until and unless there was a judgment against Reynolds on the time term or unless Reynolds was not made whole upon the resolution of the case.

This is a distinction that is not very subtle at all. This is the *Chicoine* or *Masingill* model. No damage had occurred at the time of Judge Williamson's Order and it is Appellants' position that that decision was not a triggering event. Even if it was, though, this action was filed within two years of the Order by Judge Williamson which only partially decided the breach of contract action against Quasar.

V.

THE "GOTCHA" MOMENT

Respondents argue that when they filed a lawsuit against Quasar on behalf of Appellants the Complaint " . . . asserted that they (Appellants) '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 . . .'" (Respondents' Brief, p. 2; R., p. 55.) This language,

itself authored by the Respondents, is then leveraged into a conclusion that the Reynolds then knew they had been damaged and, therefore, objective proof of actual damage had already occurred.

Nothing is unless a court or a jury says that it is. This is a shorthand way of saying that allegations in a complaint or arguments of learned counsel are not "true" until and unless the trier of fact agrees with those allegations and their supporting arguments by virtue of a verdict or findings of fact and conclusions of law.[3]

The argument made by Law Firm at p. 2 of its Brief that Appellants' allegation in the Complaint drafted and filed on their behalf by Law Firm that they "had been damaged" is dispositive of the question of when there was objective proof of damage. If that allegation in the Reynolds' Complaint against Quasar is to be construed as "objective proof of actual damage" (*Buxton*, at 61; *Chicoine v. Bignall*, at 482), then every time a plaintiff complains of some injury the case would not have to go to trial on that issue since there is already – as stated in the referenced Complaint against Quasar – "objective proof." The defense bar can rest easy though. Such is not the law. The mere allegation of damage in a Complaint filed in a contract action does not provide the "objective proof of actual damage" required by the multiple decisions of this Supreme Court.

[3] The sole exceptions being where there is an admission by the opposing party or no dispute on the relevant facts.

VI.

DOES THE PAYMENT OF ATTORNEYS' FEES TRIGGER THE STATUTE OF LIMITATIONS?

The argument of Law Firm that since Appellants "began to incur substantial attorneys' fees and costs" in connection with Quasar's refusal to refund the earnest money upon demand completely fails in light of *Buxton*. Law Firm has turned a blind eye on *Chicoine's* teaching as reaffirmed by *Buxton* at 660:

> Even though he had incurred attorney fees in defending the action after his attorney's negligent act in failing to timely request a new trial, this Court held that "there was no objective proof of some actual damage to Chicoine until this Court reversed the order granting a new trial in *O'Neil II*." 122 Idaho at 487, 835 P.2d at 1298.

VII.

SHOULD A DRAFTING ATTORNEY BECOME A DEFENDANT WHENEVER THERE IS A DISPUTE OVER THE TERMS OF A DISPUTED CONTRACT?

The Respondents are angling for a ruling from this Court which can be succinctly stated:

> Where an attorney drafts a contract which is arguably breached by the other party and the drafting attorney then sues the non-client party, the attorney must advise the client to sue him (or her) within two years of the first notice of breach in order to preserve the client's rights.

The attorney-client relationship is built upon trust and loyalty. The attorney owes the client absolute loyalty, competence and diligence and that is why the client has come to the attorney. This is fundamental.[4] In this case, the same attorney who drafted the Agreement for the Reynolds – the terms of which were disputed by Quasar – then represented the Reynolds in

[4] *See* Idaho Rules of Professional Conduct, §§ 1.1 and 1.3; Rule 1.7, Commentary [1].

the subsequent lawsuit against Quasar. In undertaking the role of Plaintiffs' attorney against Quasar, Mr. Krueck signed a Complaint he drafted designed to make his client whole, *i.e.*, the Reynolds should suffer zero loss, zero damage.

Clearly, there were two different and opposing points of view put forward by Quasar and Reynolds.[5] The Answer filed by Quasar (R. 58) documents that a contest had arisen. Was the Agreement clear? Did the Agreement say what Law Firm said that it did? Law Firm was apparently representing the Reynolds in good faith and was attempting to vindicate its unfortunately imprecise draftsmanship and prove that Quasar was in breach of contract.

Law Firm now argues that Reynolds should have found yet another attorney and sued it and the drafting attorney for professional negligence even while they were asserting on behalf of the Reynolds that there was clarity in the terms of the Agreement it had prepared and that the breach was unlawful. There is nothing in the record before this Court indicating that Law Firm ever advised Reynolds that it had been or might have been negligent in the drafting of the Agreement. On the contrary, Law Firm has denied any negligence (R. 9). Yet, Law Firm is now asserting that Reynolds should not have trusted their attorneys in the suit against Quasar and that Reynolds were obligated to sue Law Firm even before the trier of fact determined the efficacy of the Agreement.

Following Law Firm's argument through its intermediate and final conclusions, it is easily seen that there are many practical and even ethical considerations afoot here.

First, the tension created by such a lawsuit by one's own clients is problematic. Both the Defendant attorney and the client have to be thinking "are we on the same team or not?" Can

[5] Although the late-filed and therefore useless Reply Brief filed by Mr. Krueck does seem to be compelling in validating the allegations found in the Complaint against Quasar.

they communicate freely? If the Defendant attorney hires the services of, say, Hawley Troxell, et al. to defend him, can client's new attorney in case number two (the malpractice action) even talk with the drafting attorney who is now in a dual role of Plaintiffs' counsel and Defendant in two separate lawsuits?

Second, an allegation of professional negligence – a tort – must have the four elements of every tort in order to be successful: Duty, Breach of Duty, Proximate Causation and Damages. As *Reynolds v. Quasar* was still being adjudicated, how are any damages measured? Indeed, have any damages yet occurred? Is not proximate causation itself a fact issue? The answer is that damages cannot be determined to exist until the damage actually occurs. Nothing is until a court or a jury says that it is. If the trier of fact agrees with the attorney who is trying to vindicate his work product by reaching a result where the client is awarded what the Agreement calls for – together with pre-judgment interest, costs and attorney's fees – the lawsuit alleging professional negligence will be seen to have been wrongfully filed. The clients may then be liable to their drafting attorney for his or her fees, costs and expenses in defending against a malpractice suit that has no merit.

As a practical matter, there may be reasons for the drafting attorney *not* to advise his clients to sue him. The attorney may honestly believe that there is zero negligence so why report anything otherwise to the client? Or why report anything to the malpractice carrier if there is no negligence? Or is this an irreconcilable conflict of interest which will cause the attorney to withdraw from the representation of his clients per the Idaho Rules of Professional Conduct, § 1.7? The clients are then stuck with hiring a third attorney who will come in both fresh and ignorant of all that has gone before. More delay. Higher fees.

A prematurely-filed lawsuit against an attorney who has only possibly written a defective agreement may also cause the clients to cooperate less vigorously (or even not at all) with the drafting attorney on the surmise that if lawsuit number one by the attorney does not pan out, then they will have a lock on lawsuit number two against the same attorney for negligence.

The court system, if Respondents have their way, is going to be burdened unnecessarily with many "what if" lawsuits. Presumably, this is why the Supreme Court decided in *Streib v. Veigel*, 109 Idaho 174, 706 P.2d 63 (1985) that there is no necessity to file a suit against the possibly negligent attorney until the point of some final resolution. (This is echoed in *Mack Financial Corporation v. Smith*, 111 Idaho 8, 11, 720 P.2d 191, 194 (1986).) *Buxton, supra*, is explicit on this very point. ". . . the existence or effect of any alleged negligence . . . depended upon the outcome of the litigation . . . . There would not be objective proof of actual damage until that occurred. . . . To hold otherwise in this case 'would foment future litigation initiated on sheer surmise of potential damages in order to avoid the likely consequence of seeing actions barred by limitations.'" At 663. *Citing Mack Financial Corp. v. Smith*, 111 Idaho 8, 12, 720 P.2d 191, 195 (1986).

VIII.

ATTORNEY'S FEES

Appellants' arguments in support of an award of attorney's fees are contained in their Opening Brief in this appeal. Those arguments are incorporated herein by reference.

IX.

CONCLUSION

Consistent with the arguments and reflections as stated above, the Appellants request that the Court rule the Complaint in this action was timely filed, that the Second Amended Judgment and all prior Judgments be vacated and the case be remanded to the District Court for further proceedings, in addition to an award of attorneys' fees and costs to the Reynolds on this appeal.

RESPECTFULLY SUBMITTED this 9th day of December, 2011.

LOJEK LAW OFFICES, CHTD.

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2011, I caused to be served two true and correct copies of the foregoing by the method indicated below, and addressed to the following:

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