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Gailey v. Whiting Appellant's Brief Dckt. 41605

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Bill Gailey, Plaintiff-Appellant, vs. Kim Whiting, Defendant-Respondent	Docket No. 41605 APPELLANT'S BRIEF
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APPELLANT'S BRIEF – BILL GAILEY

**Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for Ada County.**

Honorable Mike Whetherell, District Judge, Presiding

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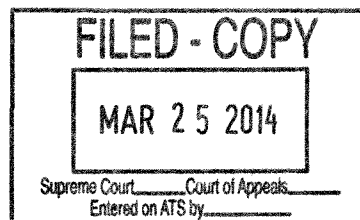


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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a professional negligence case brought by Appellant-Plaintiff Bill Gailey against Respondent-Defendant Kim Whiting, Mr. Gailey's life insurance agent, to recover damages caused by Mr. Whiting's bad advice. This appeal comes after the District Court dismissed the Complaint because it believed it lacked personal jurisdiction. It stated two grounds for its conclusion. The first is that it found the pertinent transactions in this matter the—Mr. Whiting's sale of the insurance policy in 1994 and his bad advice in 2011—were not part of the same business transaction. While the first occurred in Idaho, it found that the second occurred in Hawaii and that Idaho's Long Arm Statute did not authorize Idaho courts to exercise personal jurisdiction over this matter. Its second ground for dismissing this matter for want of personal jurisdiction is that it found Mr. Whiting's contacts with Idaho to be too attenuated. It determined that allowing him to be brought before an Idaho Court on this matter would violate due process.

B. Proceedings Below

In August of 2011, Mr. Whiting gave bad advice to Mr. Gailey which resulted in Mr. Gailey recognizing \$223,323.00 of taxable income upon the receipt of \$44,946.70. Because Mr. Whiting's advice did not disclose that such negative tax consequences would occur and because Mr. Whiting did not advise Mr. Gailey of options that would permit him to not recognize that income, Mr. Gailey brought a Complaint for Damages, filed on March 21, 2013, alleging professional misconduct.

On May 1, 2013, Mr. Whiting moved to dismiss this case for lack of personal jurisdiction. On June 11, 2013 Mr. Gailey responded. After hearing arguments on September 6, 2013, the Court entered an Order Granting Defendant's Motion to Dismiss for Lack of Personal Jurisdiction which granted the motion to dismiss. Final Judgment was entered October 7, 2013. This appeal followed.

C. Statement of Facts

Mr. Whiting, selling insurance for Western Reserve Life Insurance, entered into a long term business relationship with Mr. Gailey. (R, Vol. I, p 41 at 8 & 11.) On May 2, 1994, Mr. Gailey, a resident of Pendleton, Oregon, travelled to Mr. Whiting's office in Boise, Idaho to sign a contract for the purchase of an insurance policy. (R, Vol. I, pp. 40-41 at 2-6.) Following this sale of insurance, Mr. Whiting was listed as Western Reserve Life Insurance's agent on each statement Mr. Whiting received from the company. (R, Vol. I, p. 41 at 7-8 & p 111 at 3.) Because of this relationship, in 1999 when Mr. Gailey sought information on taking a loan against his life insurance policy, Mr. Gailey contacted Mr. Whiting for information and materials. (R, Vol. I, p 112 at 5-6).

Then, in August of 2011, Mr. Gailey sought further advice from Mr. Whiting concerning his insurance policy. (R, Vol. I, p 41 at 8 & 11.) Mr. Whiting's advice was to surrender the policy and request to cash out the remaining balance. (R, Vol. I, p 41 at 12.) Mr. Whiting did not describe the tax consequences of this transaction or recommend alternate strategies to avoid negative tax consequences. (R, Vol. I, p. 5 at 11-17.) Upon surrendering the life insurance policy, Mr. Gailey received \$44,946.70 from the insurance company but, because of his previous loan,

had to recognize \$223,323.00 of taxable income. (R, Vol. I, p. 5 at 11-17.) Because Mr. Whiting failed to disclose the tax consequences and failed to discuss other alternatives which would have allowed Mr. Gailey to avoid recognizing \$223,323.00 of income in 2011, he negligently provided information to Mr. Gailey which he knew or should have known would unnecessarily cause harm. (R, Vol. I, p. 5 at 11-17.)

At all times during the ongoing business relationship between Mr. Gailey's and Mr. Whiting, Mr. Gailey believed that Mr. Whiting was a resident of Idaho. (R, Vol. I, p 45-46 at 9-15.) During this period, Mr. Whiting maintained a business in Boise, Idaho at all times—including the entirety of 2011. (R, Vol. I, p 45-46 at 9-15.) Additionally, when Mr. Gailey called or received calls from Mr. Gailey, the calls were always from a phone number with a two-zero-eight area code. (R, Vol. I, p 45-46 at 9-15.) Mr. Gailey also continued receiving statements from Western Reserve Life Insurance listing Mr. Whiting as its representative and giving Mr. Gailey an Idaho address. (R, Vol. I, p 45 at 7-8.)

Unbeknownst to Mr. Gailey, Mr. Whiting—after twice being sanctioned by the Idaho Department of Finance—moved from Idaho to Hawaii. (R, Vol. I, p 46 15 and R, Vol. I, p. 67 at 2). In May of 2011, Mr. Whiting permanently moved to Hawaii, and in June of 2011, Mr. Whiting relinquished his Idaho Insurance license. (R, Vol. I, p 67 at 3-6.) Despite these events occurring, when Mr. Gailey spoke with Mr. Whiting, Mr. Whiting never disclosed he had left the state or that he had relinquished his license. It was while Mr. Whiting was in Hawaii that he provided Mr. Gailey with the bad advice that is the subject of this litigation.

II. ISSUES PRESENTED ON APPEAL

1. Did the trial court err in ruling that the business relationship between Mr. Gailey and Mr. Whiting was comprised of separate discrete events?
2. Did the trial court err in ruling that Idaho's Long Arm Statute did not authorize Idaho's courts to exercise its jurisdiction over Mr. Whiting?
3. Did the trial court err in ruling that subjecting Mr. Whiting to the jurisdiction of the Idaho Courts would violate principles of due process?

III. STANDARD OF REVIEW

The question of the existence of personal jurisdiction over a non-resident defendant is one of law which we review freely. *Beco Corp. v. Roberts & Sons Const. Co.*, 114 Idaho 704, 706-08 (1988). In reviewing a motion to dismiss for lack of personal jurisdiction in which the evidence is presented through affidavits to the court, if there is a dispute over the facts, the court should apply an evidentiary presumption in favor of the non-moving party. *Intermountain Business Forms, Inc v. Shepherd Business Forms Co.*, 96 Idaho 538, 531 (1975). It is the same standard that this Court applies when reviewing evidence in a motion for summary judgment: review the facts in the light most favorable to the non-moving party. *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 75 (1990).

IV. Argument

- A. By Selling Insurance in Idaho and Maintaining a Long Term Business Relationship with Mr. Gailey, Mr. Whiting has Availed Himself of Idaho's Long Arm Statute.**

Idaho's Long Arm Statute—the statute that authorizes Idaho Courts to exercise its jurisdiction over non-resident defendants—states that anyone transacting business within the state of Idaho is subject to its jurisdiction. I.C. 5-514 (a) (2010). The statute reads:

The transaction of any business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation;

Id. An Idaho Court's power to exercise this jurisdiction is not restricted by when the business is transacted, or between which parties. The statute is express: any defendant who engages in business in the state of Idaho is subject to its long arm statute.

Here, Mr. Whiting's ongoing business relationship with Mr. Gailey—almost all of it being conducted in Idaho—is sufficient for Idaho's Court's to exercise its long arm jurisdiction. In 1994, Mr. Whiting, with the goal of recognizing pecuniary gain in the state of Idaho, sold an insurance contract to Mr. Gailey. Between the execution of the insurance contract in Mr. Whiting's Boise, Idaho office until the time he left the state in May 2011, Mr. Whiting earned money as an insurance agent for Western Reserve Life Insurance by being its representative in Boise. Part of the responsibilities of this position was to be available for customer questions and concerns and to be listed as the company's representative on materials sent to clients. Mr. Gailey, a recipient of these materials, sought Mr. Whiting's help with decisions regarding his insurance policy in 1999 and 2011. Almost all of the professional service Mr. Gailey received from Mr. Whiting occurred while Mr. Whiting was in Boise, and all of the work Mr. Whiting performed for Mr. Gailey was for the purpose of realizing some pecuniary benefit.

Furthermore, there is neither statute nor case law that states that just because the initial contract was signed seventeen years prior that this age somehow limits the Court's exercise of its long-arm jurisdiction. If this were the case, the application of Idaho Code section 5-514 would upend the rights of many Idaho citizens who seek relief after having their interests damaged while conducting business under a long term contract. Such a policy would operate as a common-law and ill-defined statute of limitation.

Additionally, not only did Mr. Whiting directly transact business with Mr. Gailey between 1994 and May of 2011, Mr. Whiting carried on his business after moving to Hawaii as if he were still in Idaho. By continuing to operate a business in Idaho from Hawaii and by continuing to service his clients from his Idaho practice, Mr. Whiting continued to transact business in Idaho. Mr. Whiting was publicly listed as operating from his Boise office and Western Reserve Life Insurance still listed his Boise office as his location. Mr. Whiting received and placed phone calls on a two-zero-eight phone number. To any of Mr. Whiting's customers, including Mr. Gailey, he appeared to be working from Idaho.

In August of 2011, even though Mr. Whiting physically conducted his business while he was in Hawaii, his business was still centered in Idaho. When Mr. Gailey called to seek advice from Mr. Whiting, Mr. Gailey fully believed that he was speaking with and working with an Idaho based insurance representative.

Mr. Whiting's actions of selling and servicing an insurance policy with the goal of recognizing pecuniary gain in the state of Idaho, is sufficient for this Court to exercise jurisdiction under Idaho Code section 5-514.

B. The Effects of Mr. Whiting's Negligent Advice Were Felt in Idaho and this State's Courts can extend Long Arm Jurisdiction over him.

Idaho's Long Arm Statute further permits Idaho's Courts to exercise jurisdiction over defendants who have committed a tort within the state. The statute expressly extends the State Court's jurisdiction by listing "[t]he commission of a tortious act within this state" as grounds for extending the State's jurisdiction. I.C. 5-514(b) (2010).

In addition to availing himself of Idaho's jurisdiction by the business he has conducted, Mr. Whiting has availed himself of Idaho's jurisdiction by committing a tortious act here. Even though Mr. Whiting committed his tortious act while he was physically present in Hawaii, the effects of the tortious act can be felt in Idaho and should be characterized as occurring in this state. *See generally, Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728 (2007) (holding that, for the purpose of a personal jurisdiction analysis, an out-of-state defendant was held to have committed the tortious act without ever stepping foot within the borders of Idaho). While this case applies specifically to analyzing whether asserting jurisdiction would violate the defendant's due process, this case and its holding broadly indicate that Idaho Courts do not just consider the physical location of the involved parties when determining whether a tort is committed in Idaho. *Id.* For personal jurisdiction purposes, it is possible for the tort of an alleged tortfeasor to be "located" in Idaho without the tortfeasor every stepping foot within the state. *Id.*

Mr. Whiting's tortious act should be characterized as occurring here because of the long-term nature of the services he provided to Mr. Gailey and because he held himself out as an Idaho businessman even after leaving for Hawaii. Between 1994 and 2011, Mr. Whiting serviced

Mr. Gailey's insurance policy. When Mr. Gailey left to move to Hawaii in May of 2011, Mr. Whiting's business interests were still centered around Boise, Idaho. Mr. Whiting continued to conduct business from Hawaii as if he were in Boise, Idaho. Mr. Whiting still appeared as the representative on Western Reserve Life's insurance policy, listing his address as being in Boise. Furthermore, Mr. Whiting continued to operate a business in Boise from his new home in Hawaii.

When Mr. Whiting engaged in professional malpractice by giving Mr. Gailey bad advice, Mr. Whiting's business was still in Idaho. While he may have physically moved, his business and his business persona were still in Boise, Idaho. When Mr. Gailey called for advice in August of 2011, he believed that he was conducting business with an Idaho based insurer.

Because Mr. Whiting's business interests were still centered around Boise, Idaho and because he held himself out as a businessman in Idaho, his tortious actions should be considered as occurring in this state.

C. Mr. Whiting has Sufficient Contacts with the State of Idaho to Permit the State to Exercise Jurisdiction over Mr. Whiting without Violating Principles of Due Process.

Due process requires that a defendant 1) have certain minimum contacts with the forum and 2) that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (U.S. 1945). Essentially the analysis defined by the United States Supreme Court is to ascertain whether the defendant can expect to be brought before a state's court.

Sufficient minimum contact exists where a defendant purposefully directs his activities at residents of the forum state and the litigation relates to those activities. *Houghland Farms v. Johnson*, 119 Idaho 72, 76 (Idaho 1990). The question of whether assertion of personal jurisdiction comports with fair play and substantial justice involves many factors, but, as this Court recognized in *Houghland*, the essential inquiry is whether “the defendant purposefully avails itself of the privilege of conducting activities in the forum State, thus invoking the benefits and protections of its laws.” *Id.* at 72, 803 P.2d at 986 (quoting *Hanson v. Denckla*, 347 U.S. 235, 253 (1958)). Moreover, “where a defendant who purposefully directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unjustifiable.” *Id.* at 76, 803 P.2d at 982 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

International Shoe and its federal and state progeny focus on the extent that non-present entities may reach into a forum state before being subject to personal jurisdiction. They do not stand for the proposition that a post-present defendant may escape liability by running for the border.

Similarly, it is in keeping with—not in excess of—the traditional notions of fair play and substantial justice to expect a businessman to be accountable for his business in the forum where that business resided. Mr. Whiting availed himself of the privileges of the state specifically by maintaining the center of his business practices in Idaho after leaving for Hawaii and by engaging with Mr. Gailey as if he still resided in Idaho.

In 2011, Mr. Whiting operated a business in the state of Idaho remotely from Hawaii. Mr. Whiting had several Idaho business addresses associated with him in Idaho even after he left. Furthermore, Mr. Whiting and his Boise office space continued to be listed on correspondence that Mr. Gailey received from Western Reserve Life Insurance. When Mr. Gailey sought Mr. Whiting's advice, Mr. Gailey called a two-zero-eight number and fully believed that he was speaking with an insurance agent residing in Idaho. Mr. Whiting neither provided Mr. Gailey with information on his move nor information on the termination of his insurance license. Because Mr. Whiting continued to operate his business in Idaho and because Mr. Whiting held himself out as an Idaho business man during this period of time, it comports with fair play and substantial justice to allow Idaho Court's to have jurisdiction over him.

Furthermore, it is against wise public policy to permit an Idaho businessman to avoid Idaho's personal jurisdiction by skipping town. While Mr. Gailey does not allege that Mr. Whiting left town specifically to avoid this law suit, if the lower court's ruling is affirmed, the result of such a ruling is that an Idaho businessman in an ongoing business relationship with a client may avoid the jurisdiction of this Court simply by moving to another state. To borrow a phrase, such a result would substantially interfere with fair play and substantial justice.

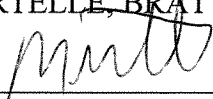
As it was reasonable for Mr. Whiting to sue and be sued during his lengthy personal residence in Idaho, it is reasonable for him to expect the same when potential liability arises from his ongoing business transactions in the state.

V. CONCLUSION

For the foregoing reasons, the Defendant's Motion to Dismiss should not have been granted. The District Court's decision must be reversed. Finally, this action should be remanded with instruction to continue this action for trial.

Respectfully submitted this 25 day of March, 2014

MARTELLE, BRATTON AND ASSOCIATES, P.A.



Martin J. Martelle

Attorney for the Plaintiff/Appellant

CERTIFICATE OF SERVICES

I HEREBY CERTIFY that on the 25 day of March, 2013, I caused two (2) true and correct copies of the foregoing to be served via U.S. Mail, first class postage pre-paid to the following:

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