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IN THE
SUPREME COURT
of the
STATE OF IDAHO

MARTIN FRANTZ,

Plaintiff-Appellant, Supreme Court No. 43576

v.

HAWLEY TROXELL ENNIS & HAWLEY LLP, an Idaho Limited Liability Partnership,

Defendant-Respondent,

APPELLANT'S BRIEF

Appealed from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai
The Honorable John T. Mitchell presiding.

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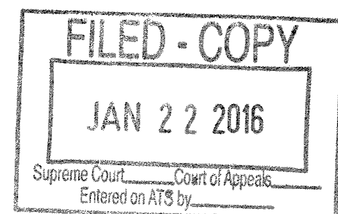

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Statement of the Case

NATURE OF THE CASE

This case arises from a legal malpractice/breach of fiduciary duties case between Mr. Martin Frantz and Hawley Troxell Ennis & Hawley, LLP ("**Hawley Troxell**"). In roughly 2009, a partner at Hawley Troxell, Mr. Merlyn Clark, agreed to act as an expert witness on Mr. Frantz's behalf. However, during the course of that relationship, Mr. Clark blurred his expert witness role with that of expert consultant and counseled with Mr. Frantz's attorneys on matters outside the scope of his expert testimony. Resultantly, Mr. Clark and Mr. Frantz fell into an attorney-client relationship.

However, late in the summer of 2010, Mr. Frantz got into a dispute with his bank, Idaho Independent Bank (the "**Bank**"). Subsequently, the Bank hired Hawley Troxell to represent it in a contract action against Mr. Frantz. Before that matter was resolved in court, Mr. Frantz filed for bankruptcy protection in 2011. Hawley Troxell then represented the Bank in the bankruptcy case, and then again in 2013 in an adversary proceeding against Mr. Frantz. Prior to trial in the adversary proceeding, Mr. Frantz opposed Hawley Troxell's representation, but the bankruptcy court denied any relief finding that there was no attorney-client relationship. However, before the adversary proceeding reached a resolution on the merits, the case was dismissed as moot.

Without a final resolution on the matter, Mr. Frantz filed an action against Hawley Troxell for malpractice and breach of fiduciary obligations in Idaho district court. At the heart of the issue at hand, is whether or not the mooted bankruptcy court's decision affects the state court litigation.

COURSE OF THE PROCEEDINGS

On February 20, 2015, Mr. Frantz filed his action against Hawley Troxell. On April 7, 2015, Mr. Jefferey Katz moved for pro hac vice admission to represent Mr. Frantz. Hawley Troxell then, through its attorney, who had not yet appeared in the matter, filed an objection to Mr. Katz pro hac vice admission on April 22, 2015. About two weeks later, Hawley Troxell's attorney filed his notice of appearance. Then, a couple days later, on May 7, 2015, Hawley Troxell filed its Motion to Dismiss or Abate ("**Motion to Dismiss**"). The two motions were to have separate hearings so that Mr. Katz, once admitted, would be able to argue the Motion to Dismiss.

On June 1, 2015, Mr. Frantz filed a reply to Hawley Troxell's objection. A mere two business days before the hearing thereon, Hawley Troxell, without court approval, submitted a sur-reply with additional supporting affidavits. As a result, on June 29, 2015, Mr. Frantz filed an objection to Hawley Troxell's sur-reply and its additional supporting affidavits. At the hearing on the motion for pro hac vice admission, the district court accepted Hawley Troxell's sur-reply and supporting documents, but continued the hearing and granted Mr. Frantz time to respond to Hawley Troxell's sur-reply. Mr. Frantz subsequently filed the court ordered supplemental briefing supporting Mr. Katz's motion for admission.

Mr. Frantz further filed an objection to the Motion to Dismiss on July 14, 2015, to which Hawley Troxell filed a reply. Finally, on July 28, 2015 the court heard oral argument on both matters. On July 29, 2015, in a written memorandum, the district court denied Mr. Katz's

motion for pro hac vice admission and granted the Motion to Dismiss partly for reasons raised by Hawley Troxell and partly for reasons the district court raised *sua sponte*.

Then, on August 7, 2015, Hawley Troxell moved for costs and attorney fees. The Frantzes objected, but at a hearing on the matter, the district court granted Hawley Troxell costs and attorney fees anyway. On August 21, 2015, Mr. Frantz filed his appeal of the district court's decisions to deny Mr. Katz's motion for admission, grant the Motion to Dismiss, and grant Hawley Troxell's request for attorney fees.

STATEMENT OF FACTS

Pre-Litigation

Mr. Frantz, throughout his career has hired scores of attorneys throughout the western U.S. and Alaska for transactional work. (R. 204). Nearly all of those attorneys are known to Mr. Frantz by their name, not by their firm's name. *Id.*

In or around 2000, Mr. Frantz, or an entity that he controlled, purchased property in Lewiston, Idaho for the purpose of developing a Guardian Angel Homes assisted living facility. (R. 194-96)[1]. Unbeknownst to Mr. Frantz, Mr. Frantz's real estate agent and the land seller colluded to inflate the price of the land so that the seller would receive more for the property and the agent would receive a larger commission. *Id.* Several years later, when the fraud was discovered, Mr. Frantz hired a Coeur d'Alene attorney to represent him against the seller and the real estate agent. *Id.* However, that attorney failed to file against the real estate agent within the

---

[1] The facts regarding Hawley Troxell's prior representation were previously set forth in the Motion to Disqualify Hawley Troxell Ennis & Hawley, LLP, which comprises pages 194-96 of the record herein.

statute of limitations. *Id.* As such, the case against the agent was dismissed summarily based on the statute. *Id.*

Resultantly, Mr. Frantz filed a malpractice case against his Coeur d'Alene attorney. *Id.* In that litigation, in 2009, Mr. Frantz hired Merlyn Clark, a partner at Hawley Troxell, to act as an expert witness on the matter of malpractice liability against Mr. Frantz's former attorney. (R. 15). While Mr. Clark was initially retained as an expert witness, Mr. Clark ended up reviewing and/or discussing confidential information relating to the value of the Guardian Angel Homes facility. (R. 15). Further, Mr. Clark consulted on areas of the case outside of Mr. Clark's expert testimony. (R. 198-99). As a result, Mr. Clark's role morphed from that of a testifying expert to that of consulting expert thereby forming an attorney-client relationship with Mr. Frantz. *Id.*, *see also* R. 197-200. Mr. Frantz personally paid Hawley Troxell more than $10,000 for Mr. Clark's services. (R. 196).

In 2010, Mr. Frantz got into a dispute with his Bank over a real estate loan. (R. 16). The Bank hired Hawley Troxell to represent them in that dispute; Mr. Clark did not participate in that case. *Id.* As such, Mr. Frantz did not at that time realize he had hired Hawley Troxell before. (R. 204). Shortly thereafter, Mr. Frantz filed for bankruptcy. (R. 16). Early on in the bankruptcy case, Mr. Frantz disputed Hawley Troxell's representation based on a potential conflict of interest relating to a different matter. *Id.* However, after reviewing that matter, Mr. Frantz stipulated that under those circumstances there was no conflict. *Id.* Yet, despite Mr. Frantz raising the conflict issue, Hawley Troxell ignored Mr. Clark and Mr. Frantz's affiliation and never once mentioned Mr. Clark's connection to Mr. Frantz. (R. 205-06). Notwithstanding

the glaring fact that Mr. Frantz did not *knowingly* make any waiver of any conflict of interest, Hawley Troxell has repeatedly proclaimed the stipulation as a waiver of any conflict of interest. *Id.*

Roughly two years later, the Bank filed an adversary proceeding against Mr. Frantz alleging that Mr. Frantz had fraudulently represented the value of his assets, including his Guardian Angel Homes assets (which lawsuit will be referred to as the "**Adversary Proceeding**"). (R. 201). In that litigation, the Bank once again hired Hawley Troxell for representation. (R. 16). Until that time there was no nexus between the confidential information regarding the valuation of the Guardian Angel Homes assets, which Hawley Troxell possessed, and the lawsuits to which Mr. Frantz and the Bank were embroiled. (R. 201-03). As a result, Mr. Frantz did not sustain damages until Hawley Troxell represented the Bank in the Adversary Proceeding, well *after* the chapter 7 bankruptcy case was underway. *Id.*

It was near the end of the Adversary Proceeding when Mr. Frantz discovered that Hawley Troxell was in possession of confidential information. (R. 203-04). Upon discovering such, Mr. Frantz 1) hired a malpractice attorney, Mr. Jefferey Katz, to represent him in any future litigation thereon, and 2) moved to disqualify Hawley Troxell in the Adversary Proceeding. (R. 193-212)[2]. Pursuant to that representation, Mr. Katz sent a demand letter to Hawley Troxell. Roughly a month later, the motion to disqualify Hawley Troxell was heard in the Adversary Proceeding. (R. 72). While the judge there denied the motion, the entire Adversary Proceeding was later dismissed as moot; it never went to trial and there was no final judgment on the merits. (R. 352,

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[2]The Motion to Disqualify Hawley Troxell filed in the Adversary Proceeding.

418[3]). As such, Mr. Frantz was deprived of his opportunity to seek an appeal of the interlocutory order denying Mr. Frantz's motion to disqualify Hawley Troxell. *See* Tr, p. 15, ln. 21-23.

In the hearing to disqualify Hawley Troxell in the Adversary Proceeding, Mr. Frantz sought to introduce the expert opinion of Mr. Jeffrey Katz. (R. 317-24, the expert disclosure for Mr. Katz). While Mr. Katz, had already agreed to represent Mr. Frantz in litigation against Hawley Troxell "Mr. Frantz only had a couple of weeks in which to prepare for the evidentiary hearing" on disqualification, no other expert was available on such short notice. (R. 341). Regardless, the bankruptcy court did not allow the parties to present any expert testimony. (R. 350, ¶11). As such, Mr. Katz never acted as an expert witness in the case. *Id* at ¶12.

Mr. Katz's Motion for Pro Hac Vice Admission

Several months later, Mr. Frantz filed this suit against Hawley Troxell in state court. (R. 8). In the meantime, on March 9, 2015, Mr. Katz contacted the Bank about this malpractice litigation. (R. 332). After receiving no response, this litigation proceeded when Mr. Katz applied for pro hac vice admission. (R. 22-23). Mr. Frantz served the motion on Hawley Troxell directly as no attorney had yet appeared on Hawley Troxell's behalf. *Id.*

Then, in June 2015, Mr. Frantz contacted the Bank directly with a proposal to end the litigation between the parties. (R. 333-335). Mr. Frantz's proposal was based on his belief that the Bank *could* be a co-plaintiff in this very same litigation against Hawley Troxell. (R. 334) ("...it would be an advantage to Hawley-Troxell if [*the Bank] were to join in the case...*")

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[3] The entire docket for the Adversary Proceeding was filed. R. 418, docket entry 116 states, "Hearing Held . . . Report of Proceedings . . . this Adversary Proceeding is rendered MOOT. The trial . . . is hereby VACATED."

(emphasis added). In essence, Mr. Frantz proposed to 1) have the Bank join as a plaintiff, 2) allow the Bank sole discretion to accept or reject settlement proposals, if any, to itself *and* Mr. Frantz, and 3) pay the Bank the first $4,000,000 of settlement proceeds, if any. (R. 333-335). This would all be in exchange for extinguishing any alleged indebtedness between Mr. Frantz and the Bank. *Id.*

It's true, in the emailed offer Mr. Frantz engaged in puffery and exaggerations, but such statements are typical of settlement offers. *Id.* For example, Mr. Frantz made the claim that the disqualification motion was a "probe" to evaluate this malpractice litigation. (R. 334). However, that statement is nothing more than posturing as 1) Mr. Katz had already agreed to represent Mr. Frantz in this litigation, and 2) the motion was lost. (R. 346, ¶7). Further, the disqualification hearing was not a sham but an attempt to prevent Hawley Troxell from claiming that Mr. Frantz failed to mitigate his damages. (R. 347, ¶ 14, R. 350, ¶ 9). Regardless, the Bank never accepted the offer to join this litigation as a co-plaintiff.

With this lawsuit underway, Hawley Troxell objected to Mr. Katz's pro hac vice admission. (R. 24). In its objection Hawley Troxell cited two reasons for preventing Mr. Katz's admission: 1) Hawley Troxell claimed that the motion was not served on its counsel- despite no counsel having yet appeared at that time[4]- and 2) it questioned whether Mr. Katz was aware of Idaho's Rules of Professional Conduct and whether or not he would comply with them. (R. 24-

[4] Hawley Troxell submitted false, inadmissible hearsay evidence indicating that Hawley Troxell's counsel had appeared in the matter via a phone conversation with Mr. Frantz's counsel. *See* (R. 27-28) Affidavit of John C. Riseborough, (R. 313) hearsay objection to said affidavit, (R. 309-10) Declaration of Jonathon Frantz outlining the actual contents of the phone conversation.

25). As evidence that Mr. Katz had violated Idaho's Rules of Professional Conduct, Hawley Troxell fabricated ethical violations and concocted a scheme to require Mr. Katz as a witness. (R. 361-67). To that end, Hawley Troxell made wild claims that Mr. Katz had been communicating with a represented party, the Bank, even though Hawley Troxell was well aware that, 1) Mr. Katz had only communicated with the Bank about this lawsuit, and 2) the Bank was not represented in this matter. (R. 306-308). Then, when Hawley Troxell's fabricated ethical violation was dispelled, Hawley Troxell claimed that Mr. Katz would be a witness and therefore could not be act as an attorney pursuant to I.R.P.C. 3.7(a). (R. 363-65). Without consideration for any attorney-client privilege rules, Hawley Troxell claimed that it wanted to use Mr. Katz's testimony to show Mr. Frantz's motive in filing this malpractice litigation. *Id.*

Mr. Frantz responded by not only pointing out that Mr. Katz had no independent knowledge of the case, but also that even were he to be a witness, I.R.P.C. 3.7 only bars an attorney who is a witness from being the attorney *during the trial*. (R. 428-30). On July 28, 2015, the district court held a hearing on the matter. (R. 439). After the hearing, the court entered a ruling denying Mr. Katz motion for admission because,

> The Court finds Katz will likely have to testify in this case. The Court finds none of the three exceptions to IRPC 3.7(a) apply to Katz as a witness. Thus, this Court finds that it would be improper to allow admission *pro hac vice* of an out of state attorney who would, if appointed, violate the Idaho Rules of Professional Responsibility . . ., [by violating the] prohibition of likely being a witness in a matter.

(R. 454). The court believed that Mr. Katz would be a witness because on March 9, 2015, Mr. Katz sent the Bank's CEO an email stating, "I represent Marty Frantz in a newly filed action

against his former attorneys at Howley (sic) Troxell firm. I would like to discuss this matter with you and discuss how it may be financially beneficial to you." *Id.*

The Motion to Dismiss

On May 7, 2015, Hawley Troxell also filed a Motion to Dismiss or Abate pursuant to I.R.C.P. 12(b)(8). (R. 273). The bases for its motion consisted of 1) collateral estoppel and/or res judicata, and 2) that the parties are litigating the same issue in different lawsuits. (R. 275-86). The facts supporting Hawley Troxell's first contention revolve entirely around the denial of the motion to disqualify which Mr. Frantz raised in the Adversary Proceeding. *Id.* The second contention is based on the fact that, while the Adversary Proceeding had already been deemed moot, there was still pending requests for fees and costs. *Id.*

The Frantzes responded by showing that the Adversary Proceeding had been rendered moot by the judge in that case and that there would never be any judgment on the merits in the Adversary Proceeding, and therefore neither issue nor claim preclusion would ever apply. (R. 352-56). Further, with the Adversary Proceeding rendered moot, there was no longer a second pending action; as such, abatement was improper.

Still, at the July 28, 2015 hearing on this matter, the district court raised *sua sponte*, its own issue regarding standing or judicial estoppel. (Tr, p. 9, ln. 17-24). While Mr. Frantz did address the impromptu issue at the hearing, the following day the district court entered an order dismissing and abating this case for the following reasons: 1) judicial estoppel (R. 441), and 2) because there is "another action pending between the same parties for the same cause." (R. 452).

The district court, in finding judicial estoppel, relied on the premise that,

> Judicial estoppel will be applied "when the debtor has knowledge of enough facts to know that a potential cause of action exists *during the pendency of the bankruptcy*, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset."

(R. 441)(emphasis in original). The district court went on to find that "It is clear that the cause of action in this present case arose during the pendency of Frantz' bankruptcy proceedings" and for that reason applied the doctrine of judicial estoppel and dismissed this matter. (R. 442).

In finding that there is another action pending between the same parties for the same cause, the district relied on the fact that "The same parties in the present case are (and have) litigating (and have litigated) the same issues <u>in the bankruptcy case</u>." (R. 452) (emphasis added).

<u>The Motion for Attorney's Fees</u>

After the order dismissing the case was entered, on August 7, 2015, Hawley Troxell moved for its attorney fees citing I.C.§12-120, claiming this matter is the result of a commercial transaction, and I.C.§ 12-121, asserting that this matter was brought frivolously. (R. 486). Mr. Frantz objected to the motion because the malpractice matter at issue in this case is not at its heart a commercial transaction nor was it brought frivolously. (R. 491-495). At oral arguments on the matter, the district court found that the gravamen of this suit was commercial in nature. (Tr, pp. 50-52). But it also found that this suit was brought frivolously:

> The misguided nature leads also to my alternate finding. . . The relief sought by Frantz and the legal theory underpinning that requested relief demonstrate the absurdity of this litigation, and I've already found it to be absurd. It is not at all a stretch to find it frivolous, and I agree completely with the defendant's argument that – **the underpinning on this state lawsuit that I'm deciding is that Merlyn Clark was hired as Frantz's attorney, and that was**

> **never the case, and it can't be the case. He was hired as an expert witness by his attorneys on Frantz's behalf. The bankruptcy court was clear that there wasn't a** – that what Frantz tried to do claiming a conflict wouldn't fly, and then this lawsuit is filed, and I think having such a clear opinion from the bankruptcy judge is—results in this case in the state court being frivolous, **so its frivolous at two junctures: One to say that Merlyn Clark was Frantz's attorney and, second, to file this claim in state court after a bankruptcy judge had said no, there's no conflict because he wasn't his attorney.**

(Tr, pp. 50-52) (emphasis added). As such, attorney fees were awarded. *Id.* at p. 54-55. Shortly thereafter, Mr. Frantz filed an appeal. (R. 501).

Issues Presented on Appeal

1. Did the district court err in finding that Mr. Frantz is judicially estopped/lacks standing to bring a suit which accrued *after* his chapter 7 bankruptcy commenced?

2. Did the district court err in dismissing this action pursuant to IRCP 12(b)(8) finding that another action was pending between the same parties for the same cause when the other action had already been dismissed as moot?

3. Did the district court err in denying Mr. Katz pro hac vice admission?

4. Did the district court err in awarding attorney fees pursuant to 12-120(3)?

5. Did the district court err in awarding attorney fees pursuant to 12-121?

Argument

MR. FRANTZ IS NOT JUDICIALLY ESTOPPED FROM BRINGING THIS LAWSUIT

The district court misapplied the judicial estoppel/standing issues because the court believed the proper inquiry was whether or not Mr. Frantz became aware of this litigation during the pendency of his bankruptcy. However, a proper inquiry looks at when this cause of action accrued. Because this malpractice action did not accrue until *after* Mr. Frantz's chapter 7 bankruptcy case began, judicial estoppel cannot apply.

11 USC §541(a) clarifies that at the commencement of a bankruptcy case, an estate is created. Further, that bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property **as of the commencement of the case.**" 11 USC §541(a)(1) (emphasis added). As a general rule, all interest obtained *after* the commencement of a chapter 7 case remains property of the debtor. *Id.*

Even causes of action can be included in the bankruptcy's expansive definition of property. *See Schertz-Cibolo-Universal City v. Wright (In re Educators Grp. Health Tr.),* 25 F.3d 1281, 1283 (5th Cir. 1994). The determination of whether "a particular state cause of action belongs to the estate depends on **whether under applicable state law the debtor could have raised the claim as of the commencement of the case**." *Id.* (emphasis added). For example, in *Wade v. Bailey*, the parties there did not dispute "that a cause of action belonging to a debtor as of the [bankruptcy] petition's filing becomes property of the estate." 287 B.R. 874, 881 (S.D. Miss. June 26, 2001). Nor was there a question in *Wade* "that the causes of action in the instant case did not belong to the [debtors] until after the petition was filed." *Id.* Because "the appellee's claims [in that case] had not accrued as of the commencement of the appellee's bankruptcy proceeding" the court in *Wade* found that "the lawsuit in question belongs to the [debtors], and not the estate, and that the [debtors] have standing to pursue the lawsuit." *Id.* at 882.

Conversely, in *In re Forbes*, the court there found that a debtor's cause of action for wrongful discharge was appropriately property of the estate. 58 B.R. 706, 707 (Bankr. S.D. Fla. 1986). The court reached this conclusion by reviewing the following facts:

> [The] defendant believed from the moment he was removed from office (**two months before bankruptcy**) that he had been illegally terminated by the city. The cause of action for tortuously interfering with a contract accrues when the damage is suffered.

Id. (emphasis added) (citation removed). Because the cause of action accrued *before* the debtor in *Forbes* filed his bankruptcy petition, it was property of the estate. *Id.* Therefore, what the courts look at to determine whether or not a cause of action belongs to the debtor is whether or not the cause of action accrued *before* or *after* the debtor files bankruptcy.

It is important to distinguish between when a cause of action accrued and when the action was filed. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. Ct. App. 2001). It does not matter when the cause of action was filed; it only matters when it accrued. *Id.* at 784-85. In *Hamilton*, a debtor had knowledge that "a cause of action against State Farm existed at the time he filed for bankruptcy." *Id.* at 785. However, he failed to disclose that claim in his bankruptcy and waited until one year after his bankruptcy before filing the claim. *Id.* at 784. Still, it did not matter when the case was filed, only that it existed and he knew about it at the time he filed for bankruptcy; therefore, the claim belonged to the bankruptcy estate. *Id.*

In the case at bar, Mr. Frantz was not damaged until *after* his chapter 7 bankruptcy case had commenced.[5] Hawley Troxell did not file the Bank's Adversary Proceeding until well *after* the chapter 7 case was underway; Hawley Troxell did not use Mr. Frantz's confidential information until *after* the chapter 7 bankruptcy had already commenced. Like *Wade*, neither Hawley Troxell nor the district court contend "that the causes of action in the instant case did not

[5] This fact is not in contention by either Hawley Troxell or the district court.

belong to the [debtors] until after the petition was filed[6]." Instead, the district court here merely concludes that Mr. Frantz knew about the cause of action during the pendency of the bankruptcy. As a result, like in *Wade*, where the claim was found to belong to the debtor, this instant lawsuit by Mr. Frantz against Hawley Troxell appropriately belongs to Mr. Frantz.

Unlike *Forbes*, where the cause of action accrued two months before bankruptcy, Mr. Frantz's cause of action against Hawley Troxell did not arise until *after* the bankruptcy case was filed. Therefore, while the estate in *Forbes* owned the cause of action, here the estate does not own Mr. Frantz's cause of action.

The district court's primary error comes from its uncomplete reading of *McCallister v. Dixon*. 154 Idaho 891 (2013). The district court's opinion relies heavily on *McCallister*. *See* R. 440-444, Memorandum Decision and Order. However, the district court errantly cites *McCallister*, and the opinions on which it relies, for the proposition that,

> Judicial estoppel will be applied 'when the debtor has knowledge of enough facts to know that a potential cause of action exists *during the pendency of the bankruptcy*, but fails to amend his schedules or disclosure statements to identify the cause of action a as a contingent asset.'

(R. 441) (emphasis in the Order). The district court specifically emphasized the phrase, "during the pendency of the bankruptcy" because it mistakenly believed that all lawsuits that arise during

[6] It should be noted that Hawley Troxell actually did not make any claims as the court raised this matter sua sponte. However, the court, like in *Wade*, admits that Mr. Frantz's claim against Hawley Troxell arose "during the pending bankruptcy proceeding." (R. 440). A claim that arises <u>during</u> a pending bankruptcy proceeding necessarily have arisen <u>after</u> the bankruptcy was filed.

the pendency of the bankruptcy are property of the estate. This error is evident through the rest of the district court's opinion. The district court continued,

> The bankruptcy case was ongoing at the time the Complaint was filed. The focus of this Court's inquiry is when Frantz became aware of the potential malpractice. Based on the foregoing it is clear that Frantz had knowledge of any potential legal malpractice claims against Hawley Troxell during the bankruptcy proceeding. . .

(R. 444) (emphasis added). The foregoing ruling is demonstrative of the district court's error. The district court concluded that, since Mr. Frantz became aware of the case during his bankruptcy, pursuant to *McCallister* the claim against Hawley Troxell belongs to the estate, not Mr. Frantz.

However, the district court should not have "focused" on when Mr. Frantz became aware of the potential malpractice, but on when the malpractice case accrued in relation to when the bankruptcy case was filed. Mr. Frantz's claim against Hawley Troxell did not accrue until after the bankruptcy case was well underway. As discussed above, neither the district court nor Hawley Troxell contend otherwise. As such, the district court plainly erred when it dismissed Mr. Frantz's case based on the doctrine of judicial estoppel or standing.

THERE WAS NO OTHER ACTION PENDING BETWEEN THE PARTIES

The district court next misapplied 12(b)(8) abatement by concluding that there was another action pending between the same parties over the same matter even though the elements for disqualification are vastly different from the elements of malpractice. In Idaho, there is little guidance on what is deemed to be the "same matter." However, other states offer valuable insight.

In Indiana, whether two matters are the "same action" depends on whether "the parties, the subject matter, and remedies are precisely or even substantially the same in both suits." *David v. Perron*, 716 NE 2d 29, 35 (Ind. Ct. App. 1999); *see also Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 323 (S.C. Ct. App. 2010) ("*the claim must be precisely or substantially the same in both proceedings* in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8).").

Moreover, Illinois has already reviewed the question of whether or not a motion to disqualify is the same matter as a related, subsequent malpractice case. *See e.g. Eckert v. Freeborn & Peters LLP*, 2015 U.S. Dist. LEXIS 23477, at 12-14 (N.D. Ill. Feb. 26, 2015). In *Eckert*, the district court there reviewed whether or not a denial of a motion to disqualify could bar the pursuit of a legal malpractice claim after an unsuccessful motion to disqualify in a different proceeding. *Id.* 12-14. The court there determined that it could not because the "alleged legal malpractice is not 'identical' to the question presented by [the plaintiff's] motion to disqualify." *Id.* at 13. The court reasoned that

> in order to prevail on a claim of attorney malpractice, a plaintiff must succeed in proving four elements: (1) an attorney-client relationship giving rise to a duty on the attorney's part; (2) a negligent act or omission by the attorney amounting to a breach of that duty; (3) proximate cause establishing that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) actual damages. By contrast, '[d]isqualification motions require a two-step analysis. The court must consider (1) whether an ethical violation has actually occurred, and (2) if disqualification is the appropriate remedy.'

Id. at 13-14 (citations removed). This same consideration applies in Idaho. *See Foster v. Traul*, 145 Idaho 24, 32-33 (2007) (setting forth the elements for disqualification as: 1) whether the

motion is brought for the purposes of harassment, 2) whether the party bringing the motion will be damaged in some way if the motion is not granted, 3) whether there are any alternative solutions, and 4) whether the possibility of public suspicion will outweigh the benefits that might accrue to continued representation). The Idaho elements of legal malpractice are all but identical to those espoused in *Eckert*. *See e.g. Jordan v. Beeks*, 135 Idaho 586, 590 (2001). As such, just like the lack of overlapping elements between disqualification and malpractice in *Eckert*, Idaho's disqualification and malpractice elements do not overlap. Thus, a motion to disqualify should not bar the prosecution of a malpractice claim pursuant to I.R.C.P. 12(b)(8).

Additionally, the same result occurs if Indiana's approach is adopted. While the parties and subject matter in disqualification motions and malpractice suits may be substantially similar, the remedies sought could not be any more different. A disqualification motion is a defensive technique preventing harm while a malpractice suit seeks redress for harm already caused; one is a sword while the other is a shield. In a disqualification, at worst an attorney is prevented from representing a party; in a malpractice suit, at worst the breaching attorney will owe the plaintiff money. As such, the two different proceedings cannot be deemed as the "same" for the purposes of I.R.C.P. 12(b)(8) because their remedies are drastically different.

Furthermore, there are other policy considerations that warrant keeping motions to disqualify separate from malpractice claims under I.R.C.P. 12(b)(8). A party to a malpractice claim has the right to have such a claim to be considered by a jury while a disqualification motion is considered solely by a judge. To intertwine the two matters would be to potentially rob the parties of a jury trial.

For example, Mr. Frantz, under the counsel of his attorneys, filed the disqualification motion in order to foreclose the defense of failure to mitigate. After all, if Mr. Frantz had foregone the disqualification motion and then filed this malpractice litigation Hawley Troxell would rightfully have good cause to wonder why Mr. Frantz did nothing to try and prevent the breach. However, because Mr. Frantz did act to try and prevent the breach (by filing a motion to disqualify) if that hearing bars his future litigation, Mr. Frantz will be deprived a jury determination of his malpractice claim because a judge alone determined the disqualification motion, which would then be used to bar Mr. Frantz's right to malpractice litigation. Such a quasi-deprivation of the right to a jury trial would also have a chilling effect on plaintiff's willingness to mitigate damages and potential plaintiffs would be forced to choose between a jury and loss mitigation.

Additionally, the burdens of proof are different. The burden of disqualification consists of an intricate weighing of prejudice versus the legal system's integrity, while malpractice requires simply a preponderance of the evidence. As such, the fact that Mr. Frantz failed in his attempt to disqualify Hawley Troxell should not now bar him from bringing this litigation under 12(b)(8) because the two matters are not the "same."

Even if the two matters were the same, in this case abatement should not have been granted because the Adversary Proceeding was mooted denying Mr. Frantz a judgment on the merits. The roots of abatement come from considerations of judicial economy. *Scott v. Agric. Prods. Corp.*, 102 Idaho 147, 150 (1981). Abatement is closely related to the considerations of

claim and issue preclusion. *See e.g. Klaue v. Hern*, 133 Idaho 437, 440 (1999); *Johnson v. Johnson*, 147 Idaho 912, 917 (2009). In Idaho

> [t]wo tests govern the determination of whether a lawsuit should proceed where a similar lawsuit is pending in another court. First, the court should consider whether the other case has gone to judgment, in which event the doctrine of claim preclusion and issue preclusion may bar the litigation. The second test is . . . whether the court in which the matter already is pending is *in a position to determine the whole controversy and to settle all the rights of the parties*.

Klaue, supra. at 440. (citations removed) (emphasis in original). The second test, abatement, only comes into play when no final judgment on the merits has been entered **yet**. In essence, abatement is the "wait-and-see" approach; let us wait and see what happens in the other, similar case before we proceed with this one.

In the case at bar, that approach does not make any sense because there will never, ever be a final judgment on the merits because the Adversary Proceeding was dismissed as moot. There can never be any appeal from the denial of the motion to disqualify because the entire Adversary Proceeding was mooted. It is true, there were judgments entered in the Adversary Proceeding (i.e. for fees and costs). But there was no judgment on the merits of the case, no ruling on any matter contained within the complaint. And there never will be. As such, even if there was a "same matter" at some point in time, there certainly was none at the time the district court issued its opinion. It was mooted.

It is important to note that Hawley Troxell and the district court both got lost in the fact that the bankruptcy case (not the Adversary Proceeding) is still pending. However, that fact is nothing more than a red herring as the bankruptcy case does not and cannot operate to provide

Mr. Frantz with a final resolution on the merits regarding the Adversary Proceeding. The fact that the bankruptcy case continues will not reverse the effects of the mooting of the Adversary Proceeding. Mr. Frantz is not endowed with authority to appeal the denial of his motion to disqualify merely because the bankruptcy case marches on. Instead, when the Adversary Proceeding was mooted, so too were Mr. Frantz's chances for appeal; likewise, the chance for a final resolution on the merits were mooted. As such, it does not matter that the bankruptcy case ensues.

Lastly, even if this matter is to be dismissed, it should not be dismissed with prejudice as was done in the instant case because then the dismissal with prejudice would affect the proceeding in the other case. *See Scott v. Agricultural Prods. Corp.*, 102 Idaho 147, 150-51 (1981).

MR. KATZ SHOULD BE ADMITED PRO HAC VICE

Idaho has no case law interpreting when pro hac vice admission should be granted. However, other jurisdictions have met this question head on. The fifth and eleventh Circuits have held,

> The District Court may [only] refuse to admit a lawyer, otherwise qualified, on a showing that in any legal matter . . . he has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court.

Sanders v. Russell, 401 F.2d 241, 247 (5th Cir. 1968); *see also Schlumberger Techs. V. Wiley*, 113 F.3d 1553,1561 (11th Cir. 1997) (the eleventh circuit continued to apply the same standard

after it split from the fifth circuit). Because Mr. Katz has not violated any rules of professional conduct, let alone have cause to be disbarred, he must be granted admission.

While the district court recklessly claims that Mr. Katz "would, if appointed, violate the Idaho Rules of Professional Responsibility, possibly for unauthorized contact" that allegation was not supported by any facts or consideration and ultimately the district court did "not decide that issue now." (R. 454). But even had it decided that issue, there is but one possible outcome: that Mr. Katz abided by Idaho's ethical rules; Mr. Katz never made unauthorized conduct because the Bank has never been represented by an attorney in this litigation.

Hawley Troxell has claimed that it represents the Bank. While it is true, Hawley Troxell represents the Bank in the bankruptcy case and in the Adversary Proceeding, it has made no notice of appearance, nor letter, nor email, nor phone call informing Mr. Katz, Attorney Frantz, or Mr. Frantz that the Bank is represented in *this* matter. Mr. Katz has only ever contacted the Bank in regards to this present litigation. (R. 347, ¶20). There is simply no evidence to the contrary. The record is completely bereft of any evidence, direct, causal, circumstantial, or otherwise that would allow even an inference the Mr. Katz contacted the Bank in regards to any other case. As such, it is patently impossible for a court to find that Mr. Katz made unauthorized contact. Furthermore, to makes such a flippant, yet serious accusation while "not decid[ing] that issue now" is simply "misguided."

The district court did, however, decide that "Mr. Katz will likely have to testify." As a result, it barred Mr. Katz based on I.R.P.C. 3.7(a), lawyer as witness. I.R.P.C. 3.7(a) states, "A lawyer shall not act as advocate **at a trial** in which the lawyer is likely to be a necessary

witness." (emphasis added). This rule is applicable only at a trial. The vast majority of this case will likely take place outside of trial: for example in discovery, depositions, expert disclosures, pre-trial motions, etc. As such, even if Mr. Katz is a necessary witness he should still be admitted and allowed to represent Mr. Frantz in this matter up until trial. Besides, this case never made it pass the pleadings stage (after all, this case was dismissed on a 12(b) motion). With zero discovery conducted it seems a little early to be deciding who is a necessary witness at a trial which was never even scheduled.

Therefore, since Mr. Katz has not violated any ethical rules and because I.R.P.C. 3.7(a) only limits a likely witness from being an attorney *at trial*, Mr. Katz admission pro hac vice should be granted. In the event that Mr. Katz does wind up likely being a necessary witness at trial, he would then properly be barred from representing Mr. Frantz at that time, but not until then.

ATTORNEY FEES SHOULD BE DENIED PURSUANT TO I.C.§12-120(3)

The next error by the district court is finding that the gravamen of this matter is a commercial transaction. It is true that Idaho allows attorney fees in malpractice lawsuits, however, it does not allow them when "[t]he gravamen of [the] case was an effort to enforce a statutory scheme. . ." *Kelly v. Silverwood Estates*, 127 Idaho 624, 631 (1995). Instead, the commercial transaction must be integral to the claim and constitute the basis upon which the party seeks to recover. *Spence v. Howell*, 126 Idaho 763 (1995).

In *Kelly*, the lawsuit sought dissolution of the partnership which was formed for commercial purposes (real estate development). 127 Idaho at 626. The dissolution sought,

however, was to be governed exclusively by state statute. *Id.* at 627. There, the Court denied attorney fees to the prevailing party under I.C.§ 12-120(3) because the suit was to enforce a statutory scheme, not a commercial transaction. *Id.* at 631.

Said another way, the commercial transaction entered into in *Kelly* was to form a for-profit partnership. From that commercial transaction, other duties (namely the duty to perform dissolution) sprang forth from the statutory scheme which was triggered when the partners formed their partnership.

In the present case, the commercial transaction occurred when Mr. Clark became an expert consultant for Mr. Frantz (like the forming of the partnership in *Kelly*). Mr. Frantz hired Mr. Clark to provide competent testimony and advice. Mr. Clark was <u>not</u> hired to provide Mr. Frantz with loyalty; Mr. Clark was not hired to keep Mr. Frantz's confidential information confidential. Instead, Mr. Clark's duty of loyalty, his duty to keep Mr. Frantz's confidential information confidential sprang up from a statutory scheme[7], not the commercial transaction (the same way the duty to perform dissolution sprang up from the statutory scheme of partnership law, not the act of forming a partnership).

Mr. Clark's (and Hawley Troxell's) duties are derived from the Idaho Rules of Professional Conduct. As such, the only reason the commercial transaction is even mentioned is because it triggered the statutory framework of Hawley Troxell's professional responsibilities. The duties Hawley Troxell violated spring from that statutory scheme the same way the duties to perform dissolution in *Kelly* sprang from Idaho partnership statutes.

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[7] The Idaho Rules of Professional Conduct.

Said another way, the commercial transaction of hiring Mr. Clark is merely incidental to this matter. The crux of this claim is a violation of the Idaho Rules of Professional Conduct. As such, since the commercial transaction here in not integral to this claim, but instead it is ancillary. Therefore attorney fees are not appropriate under I.C. § 12-120(3).

ATTORNEY FEES SHOULD BE DENIED PURSUANT TO I.C.§12-121

The last assignment of error by the district court is in finding that this matter was frivolous and thereby awarding attorney fees under §12-121. The district court found that this case was frivolous because,

> The underpinning of this state lawsuit that I'm deciding is that Merlyn Clark was hired as Frantz's attorney, and that never was the case, and it can't be the case. He was hired as an expert witness by his attorneys on Frantz's behalf. The bankruptcy court was clear that there wasn't a -- . . . a bankruptcy judge had said no, there's no conflict because [Mr. Clark] wasn't [Mr. Frantz's] attorney.

(Tr, p. 52, ll. 1-9, 14-16). The district court clarified that this matter was frivolous "at two junctures: one to say that Merlyn Clark was Frantz's attorney and, second, to file this claim in state court after a bankruptcy judge had said no, there's no conflict because he wasn't his attorney." *Id.* at ll. 12-16.

In short, the district court found this matter frivolous because this matter had already been decided in the bankruptcy court. That is claim or issue preclusion. The district court concludes that Mr. Clark was never Mr. Frantz's attorney because the bankruptcy court already determined that he was not. But, the district court concluded in its opinion on dismissal that claim preclusion and issue preclusion do not apply because there was not and will not be a final

judgment on the merits. If the res judicata principles do not operate to bar this claim, they simply cannot operate to make it frivolous. It simply does not make sense.

For the reasons laid out above, the bankruptcy court's opinion about whether or not an attorney-client relationship was formed simply is immaterial, moot. It may be indicative, but it certainly is not probative. Both Mr. Frantz and the district court agree that res judicata cannot bar this claim because there is not and will not be a final judgment on the merits. How then, can that be the basis for finding frivolity when it is not even a basis for dismissal?

Because the district court impermissibly finds frivolousness in an action that the court itself deemed to comply with the law (by not dismissing the case for that reason) the finding of frivolity and the subsequent granting of attorney's fees pursuant to I.C.§121 cannot stand.

Conclusion

Therefore, for the foregoing reasons, this Court should reverse the orders of the district court and deny Hawley Troxell's motion to dismiss or abate, grant Mr. Katz's motion for pro hac vice admission, and deny Hawley Troxell's motions for fees and costs.

Respectfully submitted on this 19th day of January, 2016.

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