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IN THE SUPREME COURT FOR THE STATE OF IDAHO

MICHAEL SCOTT MOLEN,

Plaintiff-Appellant,

vs.

RONALD D. CHRISTIAN,

Defendant-Respondent.

Supreme Court Docket No. 43755
Ada County No. CV-2015-3024

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RESPONDENT'S BRIEF

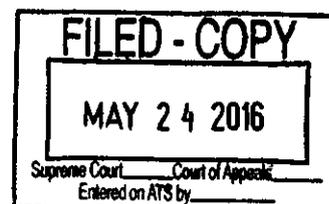
Appeal from the District Court of the Fourth Judicial District of the State of Idaho,
in and for the County of Ada,
The Honorable Lynn G. Norton, District Judge

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RESPONDENT'S BRIEF

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I.

STATEMENT OF THE CASE

This is a legal malpractice case in which the underlying case involved Ronald Christian's representation of the Appellant in a criminal case. Appellant alleges that Mr. Christian was negligent in his representation of him in the criminal case. Mr. Christian alleged negligence is not at issue in this appeal, and is disputed by Mr. Christian.¹ In this case, Appellant simply filed his malpractice action against Mr. Christian well past the applicable statute of limitations.

Idaho follows the "actual damage" rule as it pertains to when the statute of limitation accrues. Idaho requires that in a legal malpractice action arising from representation in a criminal proceeding, the person pursuing the claim must establish the additional element of actual innocence, as opposed to legal innocence.

There is no requirement in Idaho that a defendant obtain post-conviction relief in an underlying criminal case prior to filing a civil attorney malpractice case. Nor is the accrual of an attorney malpractice case impacted by a finding of "legal innocence" in Idaho. The District court applied the controlling law to the facts of the case and properly held that Appellant's claim is barred by the statute of limitation.

Appellant does not dispute that the District Court followed controlling Idaho law in ruling on Mr. Christian's motion for summary judgment. Thus, Appellant cannot be heard to argue that the District Court's ruling was erroneous. *See* Appellant-Plaintiff's Opening Brief,

¹ Mr. Christian squarely disputes the factual allegations set forth in the PC Order of Judge Owen, and the Orders entered by Judge Norton, as the respective orders were entered without any response from Mr. Christian, were simply based on allegations of Appellant (not actual evidence), which are not relevant to the appeal before this Court.

p. 17. Rather, Appellant wants this Court to reverse and change the law in Idaho and adopt what is referred to as “the exoneration rule” to change the point at which the statute of limitations accrues on a malpractice action where the underlying representation was in a criminal matter.

The only way Appellant can prevail on this appeal is if this Court ignores the statute that pertains to the accrual of the statute of limitations in professional malpractice claims, and reverses the vast body of case law which holds accrual commences when a claimant suffers “some” damage.

II.

RELEVANT FACTS

On June 29, 2007, Appellant was convicted by a Boise County jury on charges of lewd conduct with a minor. Mr. Christian represented Appellant in the trial of the case.

On June 27, 2007, Appellant filed a motion for new trial in which he asserted that he had ineffective assistance of counsel. R., 000105 - 107.²

In addition, on October 3, 2007, Appellant, through then counsel Jeffrey McKinnie, filed a “Notice of Lodging Ineffective Assistance of Counsel.” R., 000108 - 109.

On October 5, 2007, Appellant filed an Amended Motion for a New Trial. R., 000110 - 111.

Judge Carey denied Appellant's Motion for New Trial and specifically stated that ineffective assistance of counsel is not a ground for granting a new trial under ICR 34 and Idaho Code § 19-2604.

² Plaintiff also filed a complaint with the Idaho State Bar which contained similar allegations.

On May 23, 2011, Appellant filed a pro se Verified Petition for Post-Conviction Relief; *Molen v. State of Idaho*, Boise County Case No. CV-2011-124. R. 000118 - 144. In the Petition, Appellant asserted that both Mr. Christian as trial counsel, and his appellant counsel, were respectively ineffective. Specifically, Appellant asserted that “Mr. Christian did not move to continue or to dismiss based on the late disclosure of photographs taken during S.Z.’s physical exam by Nurse Ortega.” R. 000130. Appellant alleged “[t]he limited time Dr. Friedlander had to review the photographs impacted the value of his opinion ...” R. 000133.

In the first cause of action in the Verified Petition for Post-Conviction Relief, filed May 23, 2011, Appellant alleged:

Mr. Christian performed deficiently within the meaning of *Strickland* by failing to ensure that Nurse Ortega was interviewed prior to trial. Had Nurse Ortega been interviewed, she would have admitted that she took photos during her exam as she did during trial. Those photos would have then been obtained prior to trial for a careful and thoughtful review by Dr. Edward Friedlander. Dr. Friedlander would have deferred to a Master Pediatric Gynecologist and Mr. Molen would have been able to consult with and hire such a gynolocologist who would have testified. Because the prior opportunity to review the photos was not afforded to Dr. Friedlander, the prosecutor was able to discredit Dr. Friedlander’s expertise and credibility. Had Mr. Christian performed effectively in this regard, the jury would not have returned a guilty verdict.

Mr. Christian performed deficiently within the meaning of *Strickland* by failing to move to dismiss or to continue for failure to timely disclose the photos taken during Nurse Ortega’s exam, which were material exculpatory evidence. Had such a motion been made, the case would have been dismissed or would have been continued and the additional investigation would have occurred as described in the preceding paragraph.

R., 000139 - 140.

On April 1, 2013, Appellant, through appointed counsel, filed a Second Amended Verified Petition for Post-Conviction relief, which alleged additional claims of ineffective assistance of counsel against Mr. Christian.

In Judge Owen's June 17, 2015 "Memorandum Decision and Order Denying Stipulation for Summary Judgment and Granting Post-Conviction Relief on Other Grounds" (hereinafter "PC Order"), he stated that Mr. Christian's actions constituted ineffective assistance of counsel in the criminal trial of Appellant. R., 000038 - 64. The crux Judge Owen's basis for making this holding was his opinion that Mr. Christian's alleged "failure" to seek a continuance or a mistrial based upon the State's failure to disclose the existence of photographs of the colposcopic examination of the Victim, which photographs were disclosed to the defense for the first time at trial or take other measures to address additional issues in the case.³

Judge Owen's opinion is entirely consistent with the allegations Appellant had been making against Mr. Christian since his conviction in 2007. That is, Judge Owen didn't tell Appellant anything – or give him notice of anything – that he hadn't himself been proclaiming since 2007; he would not have been convicted or damaged but for Mr. Christian's actions.

Appellant filed the malpractice action against Mr. Christian subject of this appeal on February 17, 2015, nearly eight years after the statute of limitations began to accrue on his claim against Mr. Christian.

³ Note that Appellant was not in favor of a continuance or mistrial, nor was Mr. Christian, for reasons not relevant to this appeal.

III.

ATTORNEY FEES ON APPEAL

Mr. Christian is entitled to attorney fees and costs incurred in defending this appeal pursuant to Idaho Code § 12-120(3).

IV.

STANDARD OF REVIEW

This Court applies the same standard as the district court when ruling on a motion for summary judgment. *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 890, 243 P.3d 1069, 1078 (2010). Summary judgment is proper if " the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The movant has the burden of showing that no genuine issues of material fact exist. *Stoddart v. Pocatello Sch. Dist. No. 25*, 149 Idaho 679, 683, 239 P.3d 784, 788 (2010). Disputed facts and reasonable inferences are construed in favor of the nonmoving party. *Castorena v. Gen. Elec.*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010). This Court freely reviews issues of law. *Lattin v. Adams Cnty.*, 149 Idaho 497, 500, 236 P.3d 1257, 1260 (2010).

Soignier v. Fletcher, 256 P.3d 730, 151 Idaho 322, 324 (2011).

V.

APPLICABLE LAW

The elements required to establish a claim for attorney malpractice arising out of a civil proceeding include: (1) the creation of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the breach of the duty or of the standard of care by the lawyer; and

(4) the failure to perform the duty must have been a proximate cause of the damages suffered by the client. *Marias v. Marano*, 120 Idaho 11, 13, 813 P.2d 350, 352 (1991).

In a legal malpractice action arising from representation of a defendant in a criminal proceeding, the person pursuing the claim must establish the additional element of actual innocence. *Lamb v. Manweiler*, 129 Idaho 269, 923 P.2d 976 (1996); *see also Lamb v. Manweiler*, Docket No 21266, Idaho Court of Appeals (1995)(...“where one convicted of a crime sues for legal malpractice, contending that he would not have been convicted but for his attorney’s negligent representation, the plaintiff must prove, in addition to the elements enunciated in *Marias*, the further element that plaintiff is in fact innocent of the crime”). R., 000147.

“An action to recover damages for professional malpractice must be commenced within two years after the cause of action accrued.” *Reynolds v. Trout Jones*, 154 Idaho 21, 293 P.3d 645 (2013), quoting *Stuard v. Jorgenson*, 150 Idaho 701, 704, 249 P.3d 1156, 1150 (2011).

Idaho Code § 5-219 provides that “the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer.” *Id.*, citing *City of McCall v. Buxton*, 146 Idaho 656, 659, 201 P.3d 629, 632 (2009). A cause of action cannot accrue until some damage has occurred. *Buxton, supra*.

The legislature, in drafting and passing Idaho Code § 5-219, made no distinction as to its application in specific cases. That is, it applies to all cases of professional negligence.

VI.

ARGUMENT

A. The District Court did not error in applying controlling Idaho Law in holding that that statute of limitation on Appellant's cause of action accrued in 2007.

Appellant argues that his cause of action did not accrue until his petition for post-conviction relief was granted, which, per Appellant, was the date the tort was “complete”; the date on which he could make a prima facie case for a malpractice claim. See Appellant-Plaintiff's Opening Brief, pgs. 17 - 18.

Idaho has no requirement that a claimant obtain direct or collateral relief from an underlying conviction to start the accrual of the statute of limitation; or obtain the “grant” of legal innocence.

As set forth above, Idaho law actually requires the proof of actual innocence in a malpractice claim in which the underlying claim is criminal, thus a ruling on legal innocence (i.e. obtaining post-conviction relief) is irrelevant. Following Appellant's “request” for this Court's adopting of the “exoneration rule”, a claimant would be barred from bringing a claim of attorney malpractice unless they filed a petition for post-conviction relief and relief was granted. Put another way, if a claimant's petition for post-conviction relief is denied, they are barred from bringing a negligence claim against their attorney.

This Court has previously reviewed a plea for adoption of the exoneration rule in *Lamb v. Manweiler, supra*, and rejected it. Quite contrary to Appellant's representation that *Lamb*

supported the adoption of the exoneration rule, it certainly did not. *See* Appellant-Plaintiff's Opening Brief, pg. 22.

1. Proof of actual innocence is required in an attorney malpractice case in Idaho, rendering the issue of legal guilt or innocence moot.

Again, Appellate is advocating that until a claimant his or her legal innocence, the statute of limitations on a malpractice claim against their attorney does not accrue. This argument is in direct conflict with existing law in Idaho which requires a claimant to establish their actual innocence, as established in *Lamb v. Manweiler, supra*.

As Mr. Christian provided in briefing for the District Court, a brief history of the *Lamb v. Manweiler* is informative.

The case was before Judge J. William Hart in Ada County.

A concise statement of the facts of Manweiler was provided by the Idaho Court of Appeals:

Sometime in 1989, Lamb was charged with a number of felonies related to his operations in the cattle industry. He employed attorney Howard Manweiler to defend him on these charges. As a result of plea negotiations, and upon Manweiler's advice, Lamb pleaded guilty to four felony charges, and the remaining counts were dismissed. After entry of the guilty plea but prior to sentencing, Manweiler discovered evidence that cast doubt on the underlying factual basis for two of the four charges to which Lamb had pleaded guilty. Thereafter, Manweiler filed on Lamb's behalf a motion to withdraw the guilty pleas on these two charges. The district court granted the motion.

With respect to the two remaining counts for grand theft, I.C. § 18-2403(1), §-2407(1), Manweiler was of the opinion that he could not ethically present a motion to withdraw these

guilty pleas. Lamb therefore retained another attorney to present the motion for withdrawal of the two remaining guilty pleas, but the district court denied the motion. Lamb was ultimately incarcerated at the Idaho State Correctional Institution for a period in excess of eighteen months on convictions for the two counts of grand theft. Lamb filed an application for post-conviction relief pursuant to I.C. § 19-4901 et seq., seeking to have the convictions set aside. That proceeding was dismissed, however, upon stipulation between Lamb and the State.

In September 1992, Lamb filed the present civil action against Manweiler alleging professional malpractice in Manweiler's representation of Lamb in criminal matters....

R., 000147 - 153.

Lamb alleged in his complaint in the malpractice case against Manweiler that "as a direct result of Defendant's negligence as aforesaid, the Plaintiff (Lamb) was incarcerated in the Idaho State Penitentiary." R., 000158.

The parties acknowledged in *Manweiler* that the issue of Lamb's guilt "would be dispositive of the malpractice action; if plaintiff was in fact guilty of the crimes, any alleged negligence on the part of Mr. Manweiler would be of no effect and therefore proximate cause would not be established." R., 000173.

On May 13, 1993, Manweiler filed a motion under I.R.C.P. 12(b)(6) or alternatively a motion for summary judgment under I.R.C.P. 56(c), asserting that Lamb's case was barred by the applicable statute of limitations.⁴ In that motion, Manweiler also asserted that Lamb's claims

⁴ Manweiler asserted that the applicable statute of limitation commenced upon the Court's acceptance of the Lamb's guilty plea (March 23, 1990); the date Lamb lost the presumption of innocence and his constitution right to a jury trial. The malpractice case wasn't filed September 4, 1992. Lamb argued that he didn't suffer "objectively

were barred because, based on admissions Lamb made in the underlying criminal case, he was estopped from asserting his actual innocence, which was a necessary element establishing malpractice where the underlying action was a criminal proceeding. R. 000164 - 167.⁵

Judge Hart did not enter ruling on Manweiler's statute of limitation argument. Instead, Judge Hart ruled that Lamb failed to come forward with any fact to rebut the record setting forth his admissions of guilt before the Judge in the criminal proceeding, therefore, he could not maintain a malpractice claim against Manweiler. R., 000172 - 176.⁶ Specifically, Judge Hart held "if Mr. Lamb is guilty then the prima facie element of proximate cause in Mr. Lamb's cause of action cannot be shown and his claim is without merit." R., 000175.

Lamb appealed Judge Hart's decision. Lamb asserted, in sum, that there were general issues of material fact regarding his guilt and/or innocence that precluded Judge Hart from granting Manweiler's motion for summary judgment. Lamb again acknowledged in his appeal briefing that if guilty, it is this guilt, not any attorney negligence, that was the proximate cause of his incarceration. Lamb didn't assert (and never asserted), in response to Manweiler's motion, that he was actually innocent.

In his Respondent's Brief, Manweiler argued that all Judge Hart was "confronted with is Mr. Lamb's unverified assertion that 'Defendant negligently advised Plaintiff that the guilty

ascertainable damage" until he was denied his motion to withdraw his guilty pleas, putting him inside of the 2 year statute of limitations in Idaho Code § 5-219(4).

⁵ Lamb asserted that his claims were not barred by collateral estoppel because he was not given the opportunity to fully litigate his guilt or innocence in the criminal case.

⁶ Judge Hart denied Manweiler's initial motion for summary judgment, finding further discovery needed to take place with respect to Lamb's guilt or innocence. On renewed motion for summary judgment, Manweiler submitted several affidavits germane to this issue on which Judge Hart granted Manweiler's renewed motion.

pleas should be entered and could be withdrawn at a later date.” R., 000191. In sum, Manweiler argued that Lamb didn’t establish a record from which Judge Hart could find an issue of material fact pertaining to his actual innocence.

In ruling on Lamb’s appeal, the Court of Appeals - on the issue of first impression in Idaho - that “actual innocence be proven as a prerequisite to recovery for negligent representation in a criminal case.” Augmented Record, Opinion, p. 6

Specifically, the Court of Appeals held “that where one convicted of a crime sues for malpractice, contending that he would not have been convicted but for his attorney’s negligent representation, the plaintiff must prove, in addition to the elements enunciated in *Marias*,⁷ their actual innocence. The Court of Appeals found that affidavits submitted in Lamb’s post-conviction proceeding controverted his guilt and created a genuine issue of material fact and that Judge Hart’s opinion was in error. The judgment was vacated and the case remanded.

On September 22, 1995, Manweiler filed a Petition for Review of the Court of Appeals decision based, in sum, on his arguments that the record in the underlying case “unequivocally established” that Lamb was not factually innocent of the underlying crimes. R., 000201 - 203.

In the Memorandum in Support of Petition for Review, Manweiler asserted that “[d]espite Lamb’s conviction and his failure to obtain post conviction relief, [the Court of Appeals] held that evidence of statements made by Lamb during his post conviction relief action could be considered in creating a factual issue for purposes of denying summary judgment.” R.,

⁷ *Marias v. Marano*, 120 Idaho 11, 13, 813 P.2d 350, 352 (1991), the further element that the plaintiff is in fact innocent of the crime, their actual innocence.

000208. “This Court so held despite the fact, as the Court points out, that Lamb did not assert such statements in opposition to summary judgment before the district court or the appeals court.” *Id.*

In this same Memorandum, Manweiler also states:

[t]he Court’s admission of Lamb’s statements during the post-conviction proceedings and its reversal of summary judgment in view of Lamb’s failure to obtain post conviction relief is against authority which holds that a criminal defendant who pleads guilty to the underlying criminal charges must successfully obtain post-conviction relief before he can even file a legal malpractice action against his defense attorney. *Carmel v. Lanney*, 70 N.Y.2d 169, 511 N.E.2d 1126, 1128 (1987); *Shaw v. State*, 816 P.2d 1358 (Alaska 1991); *Bailey v. Tucker*, 533 Pa. 237, 621 A.2d 108 (1993); *Weiner v. Mitchell, Silvergerg & Knupp*, 114 Cal. App. 3d 39, 170 Cal. Rptr. 533 (1980).

R., 000209.⁸

Lamb, in his Brief In Response to Petitioner’s Brief, addressed Manweiler’s argument that the “Court of Appeals’ decision is against the law because plaintiff, prior to initiating this malpractice suit, must “successfully obtain post-conviction relief...” R., 000217. Lamb goes on to state: “[t]hat is, defendant seeks a rule that post-conviction relief is a condition precedent to filing a malpractice claim arising from criminal advocacy.” *Id.* Lamb acknowledged that “[p]ost-conviction relief does not resolve the guilt or innocence of the defendant; rather if relief

⁸ In discussing *Shaw v. State, supra*, 816 P.2d at 1360, Manweiler states: “the Alaska Supreme Court held that a convicted criminal defendant must obtain post-conviction relief before pursuing an action for legal malpractice against his defense attorney.” R., 000210.

is granted, the matter is reset for trial. Therefore, the granting of such relief is without resolution of the defendant's innocence..." R., 000219.

Lamb went on to argue that "the Idaho Legislature cannot impose a heavier burden of proof upon one class of civil litigants (felons) than upon another class (non-felons); nor can the Legislature require on class of litigants to complete two separate pieces of litigation without imposing the same requirement upon the rest of its citizens. There is no justification for treating civil claimants differently from criminal claimants." R., 000225.

In reply, Manweiler continued to make the argument that post-conviction relief was a prerequisite for a convicted criminal defendant to pursue a malpractice claim, citing, *Stevens v. Bispham*, 851 P.2d 556, 562 (Or. 1993)(statute of limitations began to accrue when post-conviction relief obtained). R., 000230 - 243. Manweiler urged the Court to adopt the "exoneration" rule, arguing "[s]everal reasons support the adoption of the foregoing rule ... it would be inappropriate to allow malpractice actions unless it was shown that the attorney failed to meet the established standards in a way that would make post-conviction relief appropriate." R., 000235, citing *Stevens*, 851 P.2d 362. Manweiler rallied for the adoption of the exoneration rule stating "[t]he *Stevens* Court reasoning is equally applicable to Idaho's criminal justice system and this Court should adopt it." *Id.*

The Idaho Supreme Court was not persuaded by Manweiler's arguments with respect to adoption of the exoneration rule, but nevertheless affirmed the district court's decision granting Manweiler's motion for summary judgment, finding "Lamb does not dispute the proposition that in a legal malpractice action arising from representation of a defendant in a criminal proceeding,

the person pursuing the claim must establish the additional element of actual innocence of the underlying criminal charges.” *Lamb v. Manweiler*, 129 Idaho 269, 272, 923 P.2d 976, 979 (1996). This additional element of actual innocence of course was established in the earlier Idaho Court of Appeals decision in the case, which was affirmed by the Idaho Supreme Court.

Idaho law, requiring proof of the addition element of actual innocence, is similar to the law in Washington. In *Ang v. Martin*, 76 P.3d 787 (Wash. App. Div. 2, 2003), plaintiffs sued their attorneys who had represented them in their defense of criminal charges (prior to hiring new attorneys prior to trial) who were ultimately acquitted at trial. The plaintiffs in that case asserted that their acquittal proved their innocence in the malpractice action. The Court held that to “succeed on a claim of legal malpractice allegedly occurring in a criminal trial, a plaintiff must prove ‘at a civil trial that he or she is innocent of the charged crime’ and must do so by a preponderance of the evidence.” *Id.* at 790, citing *Falkner v. Foshaug*, 29 P.3d 771 (2001).

The Court’s discussion in *Falkner* is helpful:

A brief overview of other jurisdictions’ treatment of criminal malpractice claims is instructive. First, many jurisdictions require that a defendant obtain post-conviction relief [b]efore initiating a malpractice claim, reasoning that it is inappropriate to treat victims of alleged negligence by defense counsel as having been harmed, for the purpose of maintaining a legal malpractice action ... unless they show that their counsel failed to meet the established standards in a way that would make post-conviction relief appropriate ... Many jurisdictions require proof that the criminal defendant/malpractice plaintiff is innocent of the underlying criminal charges as an additional element of the civil malpractice claim. Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient

to warrant a civil action, however inadequate, to redress the loss.

[internal citations omitted]; see *Wiley v. County of San Diego*, 19 Cal.4th 532, 966 P.2d 983, 985-986 n. 2 (1998), *Stevens v. Bispham*, 316 Or. 221, 851 P.2d 556 (1993), *Morgano v. Smith*, 110 Nev. 1025, 879 P.2d 735 (1994), *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995), *Kramer v. Kirkensen*, 296 Ill.App.3d 819, 695 N.E.2d 1288 (1998), *Glenn v. Aiken*, 409 Mass. 699, 569 N.E.2d 783(1991), *Carmel v. Lunney*, 70 N.Y.2d 169, 511 N.E.2d 1126, 518 N.Y.S.2d 605(1987).

The distinction is, states such as Idaho require actual innocence as an element of proof in an attorney malpractice case, and states that follow the exoneration rule require a showing of “legal” innocence prior to allowing a plaintiff to proceed with a malpractice action; thus, exoneration is an element of proof in an attorney malpractice case in those states. Idaho has no such requirement.

Despite extensive briefing by the parties in *Manweiler*,⁹ the Idaho Supreme Court considered but did not adopt the exoneration rule. Instead, the Court affirmed that in a legal malpractice action arising from representation of a defendant in a criminal proceeding must establish actual innocence as an additional element. See Appellant’s Brief, pgs. 17 – 19.

Notwithstanding whether the element of actual innocence is addressed by this Court, following Idaho law, Appellant’s claim is barred by the statute of limitations.

⁹ This briefing included the cases relied upon by Molen in Plaintiff’s Response to Defendant’s Motion to Dismiss.

2. The statute of limitations commences upon a plaintiff incurring some damage.

Appellant assert that his claim did not accrue until he received post-conviction relief, based on the notion that this Court should follow the exoneration rule pertaining to malpractice claims in which the underlying representation was in a criminal case.

Tellingly, none of the statutes of limitation being interpreted by the “exoneration rule” states contain language similar to the Idaho statute. As set forth below, the language in the Idaho statute is very specific that the statute of limitations begins to accrue at the time the alleged actions are committed. Also unlike Idaho, states that follow the exoneration rule rely on a discovery rule or otherwise “hold” when a statute of limitation accrues, without more.

This Court has specifically rejected the discovery rule in legal malpractice cases. *See Martin v. Clements*, 98 Idaho 906, 575 P.2d 885 (1978).¹⁰

In Idaho, the statute of limitations accrues on a professional malpractice action when “some damage” has occurred. *See e.g., Minnick v. Hawley Troxell, et al*, 341 P.3d 580 (2015).

Appellant’s argument that there was no objective proof of actual damage until Mr. Molen obtained post-conviction relief cannot be accepted by this Court and is simply unbelievable.

¹⁰ In 1971 the Idaho legislature amended Idaho Code § 5-219(4) to create two discovery exceptions, one for the leaving of a foreign object in a body, and the other for fraudulent concealment of a wrongful or negligent act of professional malpractice. Prior to 1971 this Court had created discovery exceptions in at least two cases. *See Adams v. Armstrong World Industries, Inc.*, 596 F. Supp. 1407 (D. Idaho 1984). The first case was *Billings v. Sisters of Mercy of Idaho*, 86 Idaho 485, 389 P.2d 224 (1964). In that case, this Court adopted the discovery rule pertaining to foreign objects being left in a patient’s body. The other was *Renner v. Edwards*, 93 Idaho 836, 475 P.2d 530 (1969). In *Renner*, this Court extended the discovery rule to cover medical misdiagnosis. The Idaho legislature adopted the *Billings* discovery rule exception, but not *Renner*.

Appellant was convicted in 2007 and thereafter incarcerated. There can be no dispute that Appellant had objective proof of damage at that time.

Judge Owen's order granting post-conviction relief has no bearing on whether Molen had "objective proof" that he had been damaged, nor did that order establish his actual innocence. It only established his legal innocence. Put another way, in Idaho, a finding of legal innocence triggers nothing; it is a finding that the effectiveness of the defendant's legal representation is sufficiently in question to grant a new trial. It has nothing to do with when a criminal defendant suffered some damage, and certainly does not trigger the accrual of the statute of limitation on a professional negligence claim, or toll that accrual. Judge Owen's order spoke to the issue of causation, not damages.

In sum, Judge Owen's ruling has no bearing on this instant professional practice case whatsoever.

There is no dispute that Plaintiff suffered ascertainable damage upon his conviction in June of 2007 and following. As set forth above, Molen had been asserting that Mr. Christian's actions – those actions on which Judge Owen's post-conviction relief was granted – caused him damage, since the time he was convicted in 2007 and began filing post-trial motions. That is, Molen has asserted since he was convicted that he was damaged by Mr. Christian not moving for a new trial when evidence not disclosed by the state, was disclosed for the first time at trial.

It is impossible that Molen could not have know he was damaged until after reading Judge Owen's PC Order, and Molen is clearly estopped from making such an assertion given his past causes of actions and filings as they relate to Mr. Christian.

Nothing in Idaho law bars a plaintiff from attempting to prove actual innocence in a malpractice proceeding, even if they are pursuing or have received post conviction relief; notwithstanding whether they have been found “legally innocent.”

Idaho law does not bar a plaintiff from filing a malpractice action within the applicable statute of limitation and moving for a stay of the proceedings pending the outcome of post conviction proceedings if they choose to pursue such proceedings.

However, Idaho law does not allow a potential plaintiff to “toll” the statute of limitation until some prerequisite “event” occurs, or deem a cause of action “ripe” only upon the granting of post-conviction relief.

Akin to medical malpractice, the statute of limitations for filing a professional medical malpractice claim is two years from the date the plaintiff has objectively ascertainable damage – not the date the Idaho Board of Medicine finds a physician breach the applicable standard of care.

Obtaining post-conviction relief is simply not an element of a malpractice claim in Idaho, and does not serve to accrue the statute of limitations for such a claim.

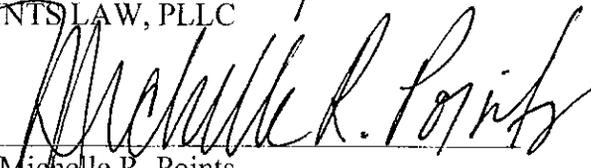
VII.

CONCLUSION

The only issue before the District Court was when the statute of limitation for the instant attorney malpractice case accrued, and it accrued, as a matter of law, when Molen was convicted on June 29, 2007. The District Court’s decision should be affirmed and Mr. Christian should be awarded his attorney fees and costs incurred in defending this appeal.

RESPECTFULLY SUBMITTED this 24th day of May, 2016.

POINTS LAW, PLLC

By 

Michelle R. Points

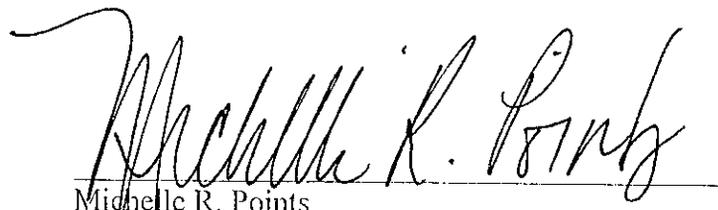
Attorneys for Defendant-Respondent Ronald D.
Christian

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2016, I caused to be served a true and correct copy of the foregoing document by the method indicated below, addressed to each of the following:

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MASSOTH & BURROWS
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