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IN THE SUPREME COURT OF THE STATE OF IDAHO

CHRISTINA J. GREENFIELD,

Appellant,

vs.

IAN D. SMITH,

Respondent.

Supreme Court No. 43831

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County

Honorable Cynthia K.C. Meyer, Presiding

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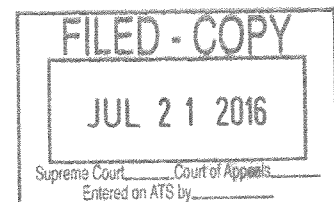


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I. STATEMENT OF THE CASE

On September 15, 2010, Appellant Christina Greenfield ("Greenfield") hired attorney Ian Smith ("Smith") on an hourly basis to represent her in a civil suit against her neighbors, Eric and Rosalynn Wurmlinger ("Wurmlinger"). R, Vol. I, p. 91.

On January 19, 2011, Greenfield retained Smith to represent her in a criminal case. The underlying criminal and civil cases have a common factual background. R, Vol. I, p. 88. Those facts are summarized in Greenfield v. Wurmlinger, 159 Idaho 591, 349 P.3d 1182 (2015) as follows:

In 1994, Eric and Rosalynn Wurmlinger (Defendants) built their home in the Park Wood Place subdivision in Post Falls, Idaho, on a lot next to the home of Judy Richardson. The Defendants operated a bed and breakfast from their home, and they planted a row of arborvitae near the property line between their lot and a lot owned by Ms. Richardson. In 2005, Christina Greenfield (Plaintiff) purchased the Richardson property. The following year, Plaintiff had an attorney write to the Defendants, stating that the operation of their bed and breakfast violated the subdivision's protective covenants, conditions, and restrictions (CC&Rs) and that the height of the arborvitae violated the height restrictions on fences contained in the CC&Rs and the height restrictions on hedges contained in a city ordinance. Therefore, the dispute between Plaintiff and Defendants centered on the operation of Defendants' bed and breakfast in their home and the height of their arborvitae near the boundary between the two properties.

On April 12, 2006, the City of Post Falls sent Mr. Wurmlinger a letter stating that the city had received a complaint regarding a hedge on his property and that the city code required fences and hedges within a side yard setback to be no higher than six feet. The letter quoted the relevant ordinance and asked that the hedge be brought into compliance within 30 days. Defendants trimmed their arborvitae to bring them into compliance, and in June 2006 the city amended its ordinance to remove the limitation on the height of hedges.

Thereafter, Defendants allowed their arborvitaes to grow taller than six feet.

By 2010, the arborvitaes had grown to a height of 10 to 12 feet. In April 2010, Defendants returned from a vacation and discovered that about 4 to 6 feet had been cut from 10 of their arborvitaes. It is undisputed that Plaintiff had her agent cut the trees. Plaintiff was charged criminally, but the charges were later dismissed.¹ Thereafter, Defendants began experiencing vandalism on their property. Over a period of about 18 months, there were 14 incidents of paint being splashed or poured on improvements to their property, with the last incident occurring about four months before the jury trial in this case.

On September 23, 2010, Plaintiff filed this action alleging four claims against Defendants. First, Plaintiff asked for a declaratory judgment that Defendants were violating the CC&Rs by operating the bed and breakfast, allowing their arborvitaes to grow higher than five feet, and obstructing a pedestrian easement across their property. She sought an injunction requiring Defendants to cease the alleged violations. Second, Plaintiff alleged that the plants and trees on defendants' property that blocked her view of the Spokane River constituted a nuisance. She sought damages and an order requiring defendants to remove the offending foliage. Third, Plaintiff alleged that Defendants had agreed to maintain their foliage along the common boundary line at a height of six feet; that Plaintiff had the foliage trimmed to the agreed height when Defendants breached that agreement; and the Defendants then contacted law enforcement which resulted in Plaintiff being charged with a misdemeanor. As a result, Plaintiff claimed that Defendants intentionally caused her emotional distress, for which she was entitled to recover damages. Fourth, Plaintiff alleged that Defendants breached their agreement with her and made false and defamatory statements about her to law enforcement, which negligently caused her emotional distress. She requested and awarded

¹ In the criminal matter against Greenfield, the day before the trial was to begin, on October 3, 2011, the deputy prosecuting attorney filed a motion to dismiss the charge without prejudice stating that "the state does not yet have an official survey of the property at issue identifying the location of the subject trees." R, Vol. I, pp. 89-90. On the morning of trial, October 4, 2011, Smith argued against the motion to dismiss without prejudice. *Id.* Significantly, the court denied the state's motion to dismiss without prejudice. *Id.* Smith prepared an order, which was signed by Judge Gibler on October 4, 2011. *Id.* The state was then required to go forward with its evidence. *Id.* However, the state failed to produce any evidence or testimony at trial. *Id.* As a result, Smith obtained a judgment of acquittal for Greenfield. *Id.*

damages on that claim. Defendants filed a counterclaim seeking damages for negligence or intentional infliction of emotional distress, common-law trespass, and timber trespass.²

Prior to trial, Plaintiff's claim of intentional infliction of emotional distress was dismissed upon defendants' motion for summary judgment.³ Plaintiff's claim for nuisance and negligent infliction of emotional distress and defendants' claim were tried to a jury. It returned a special verdict finding that Plaintiff had failed to prove her claims of nuisance and negligent infliction of emotional distress.⁴ The jury also found that the Defendants had proved their claim of negligent infliction of emotional distress, for which it awarded them \$52,000 in damages, and for their claim of timber trespass, for which it awarded them \$17,000 in damages. The jury also found that Defendants have proved that Plaintiff committed a common-law trespass, but Defendants did not prove any damages for that claim. Plaintiff's action for declaratory judgment that Defendants were in violation of the CC&Rs was tried to the District Court, and it later entered a decision finding that Plaintiff had failed to prove that claim.

The timber trespass damages were trebled to \$51,000 pursuant to Idaho Code § 6-202, and the court awarded Defendants' court costs and a reasonable attorney fees totaling \$65,755.37. It entered a judgment against Plaintiff in the amount of \$168,755.37, and she timely appealed.

R, Vol. I, pp. 327-329.

² On February 14, 2012, Smith filed a motion to withdraw from representation of Greenfield in her civil case. R, Vol. I, p. 225-227. The motion demonstrates that the attorney-client relationship had broken down to such an extent that it would be impossible for Smith to continue representing Greenfield. *Id.* The motion to withdraw was later granted on March 8, 2012 by the court and Greenfield began representing herself on her civil claims against the Wurmlingers. R, Vol. I, p. 91.

³ These claims were dismissed on May 24, 2012. R, Vol. I, p. 230-241.

⁴ On November 30, 2012, the civil jury returned a special verdict in favor of the Wurmlingers on each of Greenfield's claims, and found in favor of the Wurmlingers on their counterclaims. R, Vol. I, p. 92. As to Greenfield's claims, the jury found that the Wurmlingers' maintenance of the arborvitae and/or operation of the bed and breakfast did not constitute nuisances. Additionally the jury found that the Wurmlingers had not inflicted emotional distress upon Greenfield. R, Vol. II, p. 668; R, Vol. I, p. 329.

Following the verdict, on October 4, 2013, Greenfield filed a complaint against the City of Post Falls, its mayor and various administrators and employees (past and present), as well as members of the Post Falls Police Department, seeking damages for the Defendants' alleged failure to enforce its zoning laws to her detriment. That complaint was dismissed with prejudice on April 3, 2014, by Hon. Candy W. Dale, United States Magistrate Judge. R, Vol. I, pp. 293-325.

On May 21, 2015, the Idaho Supreme Court affirmed the civil court judgment and awarded attorney fees and costs against Greenfield in favor of the Wurmlingers. R, Vol. II, pp. 327-348.

Greenfield initiated the present civil suit by filing a complaint on December 1, 2014. R, Vol. I, p. 1. A Modified Complaint was filed on December 5, 2014. R, Vol. I, p. 30.

On April 13, 2013, 2015 Greenfield responded to Smith's first set of interrogatories and requests for production of documents. R, Vol. I, pp. 350, 353. Greenfield failed to designate any experts in response to Smith's discovery request to identify experts. Id.

On July 8, 2015, Greenfield served "Plaintiffs Second Response to Defendants Request for Production." R, Vol. II, pp. 364-365. Here, Greenfield had a second opportunity to identify experts and she did not. Id.

Greenfield's deadline for disclosing experts was July 21, 2015. R, Vol. II, p. 385. Smith was not served with any expert disclosure by Greenfield. R, Vol. I, p. 290.

On July 30, 2015, Smith moved for summary judgment. R, Vol. I, p. 66. The basis of the motion was that the Greenfield's claims were barred by the statute of limitations and that

Greenfield failed to establish a prima facie case of malpractice. In the motion, Smith argued that Greenfield failed to file an expert opinion regarding Smith's representation, and absent an expert opinion, Greenfield could not establish a cause of action for malpractice. Smith also offered expert testimony demonstrating that his representation of Greenfield in both the criminal and civil matters met or exceeded the applicable standard of care and that Smith did not cause Greenfield to lose her civil case. R, Vol. I, p. 79.

Greenfield filed a response arguing that her relationship with Smith should be considered a contract and therefore the statute of limitations should be five years per Idaho Code § 5 - 216, rather than the two years per Idaho Code § 5- 219 (4). Greenfield also claimed that Idaho Rule of Civil Procedure 6(a) determines that the statute does not begin to run until the day after the judgment is entered. Greenfield included a motion for summary judgment in her response. Greenfield offered no expert testimony in opposition to the motion for summary judgment.

Smith filed a written objection and motion to strike paragraphs 4, 8, 9, 16, 17 and 18 of Greenfield's Affidavit on August 24, 2015. R, Vol. II, p. 494.

The summary judgment hearing was held on September 1, 2015. Tr, p. 1. At the hearing, Judge Meyer first considered the objection and motion to strike, which she granted. Tr, pp. 9-10. Greenfield brought with her to the summary judgment hearing a "supplemental affidavit" which she offered to the court pursuant to IRCP 56(e). Tr, p. 7. The supplemental affidavit had not previously been served. The defense objected to the supplemental affidavit and Judge Meyer refused to consider the supplemental affidavit as it was untimely under IRCP 56. Tr, pp. 7 - 8.

Fourteen (14) days after oral argument on Smith’s motion for summary judgment Greenfield filed a “Motion in Further Opposition to Defendant’s Motion for Summary Judgment Pursuant to IRCP 56(f)” and an affidavit in support of the motion. These documents were untimely and not considered by the court. R, Vol. II, p. 669.

On October 6, 2015, Judge Meyer filed and served her memorandum decision and order granting defendant’s motion for summary judgment. R, Vol. II, pp. 667 - 681. Judgment was entered in favor of Smith on October 20, 2015. R, Vol. II, p. 684.

On October 29, 2015 Greenfield filed a motion to disqualify Judge Meyer, alleging Judge Meyer was biased against her because of her status as a pro se plaintiff and she was mistaken in her rulings pertaining to the case. R, Vol. II, pp. 688 - 691. Judge Meyer denied the motion to disqualify on November 12, 2015. R, Vol. II, pp. 692 - 693.

Greenfield filed a notice of appeal on December 2, 2015. R, Vol. II, p. 695.

II. ADDITIONAL ISSUES ON APPEAL

Is Smith entitled to attorney fees on appeal pursuant to Idaho Code § 12 – 121?

III. ARGUMENT

A. Introduction

Greenfield appeared pro se in the underlying civil case and ultimately lost with judgment entered against her on November 30, 2012. Just over one year ago, this Court heard Greenfield’s appeal of that judgment. Greenfield v. Wurmlinger, 159 Idaho 591, 349 P.3d 1182 (2015). This Court unanimously upheld the judgment and awarded attorney fees because the “issues on appeal were pursued frivolously, unreasonably or without foundation. . . .” Despite that ruling, plaintiff

steadfastly clings to the position that her lawsuit against the Wurmlingers was meritorious. In this case, she is claiming that but for the malpractice of her attorney, who withdrew eight months prior to the jury verdict against her, she would have prevailed at the jury trial against the Wurmlingers.

B. The District Court Properly Granted Smith’s Motion For Summary Judgment.

When the Supreme Court reviews a trial court’s decision on summary judgment, it employs the same standard as that properly employed by the trial court when originally ruling on the motion. Kolln v. Saint Luke’s Regl. Med. Ctr., 130 Idaho 323, 327, 940 P.2d 1142, 1146 (1997).

Summary judgment is appropriate “if the pleadings, depositions, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” IRCP 56(c). “Once the movant has established a prima facie case that, on the basis of uncontroverted facts, the movement is entitled to judgment, the opposing party must set forth specific facts showing there is a genuine issue for trial and cannot merely rest on the pleadings.” McVicker v. City of Lewiston, 134 Idaho 34, 37, 995 P.2d 804, 807 (2000) (citing IRCP 56(e)). In order to survive a motion for summary judgment, the non-moving party must make a sufficient showing to establish the existence of an element essential to that party’s case on which that party will bear the burden of proof at trial. Jones v. Starnes, 150 Idaho 257, 259-60, 245 P.3d 1009, 1011-12 (2011).

In this matter, Judge Meyer granted Smith's motion for summary judgment finding that Greenfield's claim for malpractice was time-barred by the statute of limitations, that Greenfield failed to establish the elements necessary for a malpractice claim, that her fraud claim was not pled with particularity and that her remaining tort claims were barred by the applicable statute of limitations. R, Vol. II, p. 667. Smith respectfully requests this Court to affirm Judge Meyer's decision in all respects.

1. Greenfield's Claims For Malpractice Were Properly Dismissed Because They Were Time-Barred By The Statute Of Limitations Under Idaho Code § 5-219.

An action seeking to recover damages for professional malpractice must be commenced within two years after the cause of action accrues. Idaho Code §§ 5-210 and 5-219; Lapham v. Stewart, 137 Idaho 582, 585, 51 P.3d 396, 399 (2002). Where there are no disputed facts with regard to the accrual of a cause of action, it is a question of law as to when the cause of action accrued. Reis. v. Cox, 104 Idaho 434, 660 P.2d 46 (1983).

a. Greenfield's Breach of Contract Claim Is Actually A Claim For Professional Malpractice for the Purpose of Calculating the Statute of Limitations.

Idaho Code § 5-219(4) defines "professional malpractice" as "wrongful acts or omissions in the performance of professional services by a person, firm, association, entity or corporation licensed to perform such services under the law of the state of Idaho." The focus of a professional malpractice claim under Idaho Code § 5-219(4) is "whether the alleged wrongful act or omission occurred in the course of performing professional services." Lapham v. Stewart, 137 Idaho 582, 589, 51 P.3d 396, 403 (2002). Put differently, the "appropriate statute of limitations

is determined by the substance, not the form, of the action." Trimming v. Howard, 52 Idaho 412, 16 P.2d 661, 662 (1932).

Greenfield's causes of action for negligence, breach of contract, breach of covenant of good faith and fair dealings and breach of fiduciary duty are properly characterized as professional malpractice claims under Idaho Code § 5-219(4). Because these claims arose out of the provision of professional services as an attorney, Idaho Code § 5-219(4) provides the applicable statute of limitations. See Lapham, 137 Idaho at 589.

b. Greenfield's Malpractice Claim Accrued When She Incurred Damage In The Form Of The Adverse Jury Verdict.

In addition to providing a two year statute of limitations for professional malpractice causes of action, Idaho Code § 5-219(4) also provides that the cause of action accrues at the time of the occurrence, act, or omission complained of. Tingley v. Harrison, 125 Idaho 86, 867 P.2d 960 (1994). Idaho case law extends the time of the accrual to the date when the plaintiff incurs some damage. Griggs v. Nash, 116 Idaho 228, 232, 775 P.2d 120, 124-25 (1989).

In Tingley, plaintiff/appellant sued his attorney after his personal injury action was dismissed. The Supreme Court of Idaho showed us how to calculate the accrual of a legal malpractice claim.

In this case, as a matter of law, the latest possible date that Tingley's malpractice cause of action accrued under I.C. 5-219(4) is November 16, 1983, the date the underlying personal injury action was dismissed. It was only on that day, following either a far removed antecedent negligence act or the continuing negligence of the respondents, that Tingley was damaged. (Citation omitted) The I.C. 5-219(4) limitation period applicable to this malpractice action expired November 16,

1985, and, consequently, bars Tingley's complaint, which he did not file until March 1987.

Tingley v. Harrison, 125 Idaho 86, 90, 867 P.2d 960, 963-64 (1994).

Here, Smith withdrew from representing Greenfield in the civil case on March 8, 2012. R, Vol. I, p. 285. Thus, any acts of negligence would have had to occur before that time. Following the withdrawal, Greenfield proceeded to prosecute her civil lawsuit pro se. She filed, argued and lost a motion for summary judgment and proceeded to argue her case to a jury. She was allowed to call witnesses and utilize expert witnesses during trial, and when a jury was presented with the evidence proffered by Greenfield, they returned a verdict against her on November 30, 2012, thus it was on that date, at the very latest, that Greenfield was damaged. R, Vol. I, p. 246; see Tingley, 125 Idaho at 89-90; see also City of McCall v. Buxton, 146 Idaho 656, 661, 210 P.3d 629, 634 (2009) (objective proof of damage did not occur until there was a court decision adverse to the client caused by the attorney's negligence). Thus, the Idaho Code § 5-219(4) limitation period applicable to Greenfield's present malpractice action expired on November 30, 2014. Consequently, this case, which was commenced by filing on December 1, 2014, is time-barred.

Additionally, Smith obtained an acquittal in the criminal matter of October 4, 2011. R, Vol. I, p. 172. Thus, even though Greenfield cannot prove she was innocent of the charges that she cut down her neighbor's trees, any claim for legal malpractice arising out of that representation would have needed to be filed by October 4, 2013, at the latest. See Tingley, 125 Idaho at 89-90.

2. Greenfield Failed To Establish The Elements Necessary For A Claim Of Legal Malpractice.

In a claim for attorney malpractice/professional negligence, the plaintiff must show: (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 the standard of care by the lawyer; and (4) that the failure to perform the duty was a proximate cause of the damages suffered by the client. McColm-Traska v. Baker, 139 Idaho 948, 88 P.3d 767, 770 (2004)(citing Jordan v. Beeks, 135 Idaho 586, 590, 21 P.3d 908, 912 (2001)).

In other words, to establish a claim for attorney malpractice arising out of a civil action, the plaintiff must show that the attorney's negligence proximately caused the plaintiff to lose the right to recover in the underlying case. Samuel v. Hepworth, Nungester & Lezamiz, Inc., 134 Idaho 84, 996 P.2d 303 (2000). The plaintiff must normally produce expert evidence of negligence and causation of damages to establish a prima facie case of legal malpractice. Jarman v. Hale, 112 Idaho 270, 273, 731 P.2d 813, 816 (Ct. App. 1986)(Jarman I).

Where a defendant attorney moves for summary judgment in a malpractice case, the plaintiff must ordinarily provide affidavits of expert witnesses to resist the motion. Jarman v. Hale, 122 Idaho 952, 961, 842 P.2d 288, 297 (Ct.App. 1992) (Jarman II). The reasons for these requirements, as in malpractice actions against other professionals, are that "the factors involved ordinarily are not within the knowledge or experience of laymen composing the jury." Corey v. Wilson, 93 Idaho 54, 58, 454 P.2d 951, 955 (1969).

In support of his motion, Smith submitted to the court the expert report and affidavit of Mr. Pete Erbland. R, Vol. I, p. 79. Mr. Erbland set out his qualifications and familiarized himself with the applicable standard of care. R, Vol. I, p. 83-88. Mr. Erbland then reviewed the court files, court decisions and the files and records relating to both the criminal and civil cases at the center of Greenfield's present lawsuit. Id. After considering all of the facts and applying the applicable standard of care, Mr. Erbland opined that Greenfield's allegation of professional negligence are without merit and that Smith's representation of Greenfield met and exceeded the applicable standard of care. R, Vol. I, p. 88-93.

The party moving for summary judgment initially carries the burden to establish there is no "genuine issue of material fact" and that he or she is entitled to judgment as a matter of law. Eliopoulos v. Knox, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct.App.1992). When the party moving for summary judgment will not carry the burden of production or proof at trial, the "genuine issue of material fact" burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to establish, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under I.R.C.P. 56(f).

The United States Supreme Court, in interpreting Federal Rule of Civil Procedure 56(c), which is identical in all relevant aspects to I.R.C.P. 56(c), stated:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is “entitled to a judgment as a matter of law” because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. “[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)...”

Celotex Corp. v. Catrett, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)

(citations omitted).

The language and reasoning of Celotex has been adopted by the appellate courts of Idaho. See, e.g., G & M Farms, supra; Barab v. Plumleigh, 123 Idaho 890, 892, 853 P.2d 635, 637 (Ct.App.1993); Podolan v. Idaho Legal Aid Services, Inc., 123 Idaho 937, 941, 854 P.2d 280, 284 (Ct.App.1993).

In the present case, Greenfield’s affidavit recites a series of events involving alleged actions and alleged inactions of Smith during the course of his representation of Greenfield. She failed to submit any expert testimony concerning how any of these alleged incidents were negligent and whether any of the incidents caused damage. Then, in her responses, she simply concludes, without any evidentiary support, that the alleged incidents represented negligent acts which caused her to lose her civil case. R, Vol. II, p. 457 (last paragraph). Conclusory allegations of negligence are insufficient to defeat a motion for summary judgment. See Gerdon v. Rydalch, 153 Idaho 237, 280 P.3d 740 (2012) (Summary judgment rule, requiring that

supporting and opposing affidavits be made on personal knowledge, is not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge.).

In this case, it is outside the experience of a lay person to determine whether any of the specific instances of conduct complained of by Greenfield actually fell short of the applicable standard of care for an attorney. Further, it is not within the common experience of the average person to know whether a far removed antecedent negligence act caused an otherwise meritorious claim to be defeated in a jury trial. See Samuel, 134 Idaho at 89, 996 P.2d at 308 (holding that whether a law firm breached the standard of care and whether any such breach caused damages are issues outside the ordinary knowledge and experience of lay persons).

Without sufficient evidence on how the actions or inactions of Smith robbed Greenfield of the right to recover against the Wurmlingers, no reasonable jury could infer causation under the facts as presented in this case. Likewise, with no evidence as to how any specific instance of negligence resulted in the unfavorable verdict, a jury would be left to speculate as what might have caused the verdict.

There is no evidence that Smith's alleged negligence caused Greenfield to lose her civil case. There is no evidence that Smith's withdrawal or handling of the case up to that point had any adverse impact on her claims or defenses. There is no evidence submitted that suggests the outcome at Greenfield's trial would have been any different if Greenfield had hired another attorney or if Smith had continued his representation through trial. It is more probable that Greenfield's case was simply unsuccessful, a proposition that is demonstrated by the Idaho

Supreme Court decision rejecting Greenfield's appeal. R., Vol. I, p. 93. See Greenfield v. Wurlinger.

Greenfield's inability to present expert testimony establishing negligence and causation required the entry of summary judgment in favor of defendant Smith.

3. Greenfield's Fraud Claim Was Properly Dismissed Because It Was Not Pled with Particularity.

Fraud claims need to be pled with particularity as required by I.R.C.P. 9(b). The alleging party must specify what factual circumstances constituted the fraud. I.R.C.P. 9(b); Glaze v. Deffenbaugh, 144 Idaho 829, 833, 172 P.3d 1104, 1108 (2007). Greenfield's fraud claim hinges on the theory that Mr. Smith "committed fraud when he knowingly failed to disclose the fabricated FBI NCIC Report" and "committed fraud when he deceptively failed to disclose his professional relationship with Pamela Wallace." R, Vol. I, p. 49. Simply, Plaintiff has not pled any false representations by Smith, rendering the fraud claim fatally defective. See Glaze, 144 Idaho at 833.

4. Greenfield's Remaining Tort Claims Were Properly Dismissed Because They Were Barred By The Statute Of Limitations.

When the tortious conduct ends, the limitation period begins. Glaze, 144 Idaho at 833. Here, Mr. Smith withdrew from representing plaintiff in March of 2012. Any tortious conduct would have had to have happened prior to that time, thus her claims in this regard are also time barred. This would apply to the remaining tort claims of tortuous interference with prospective economic advantage and Greenfield's claims of intentional and negligent emotional distress.

C. Judge Meyer Applied Idaho Law And The Idaho Rules Of Civil Procedure Fairly And Without Consideration Of Greenfield's Pro Se Status.

The record is devoid of any allegations of bias or prejudice by Greenfield against Judge Meyer prior to the summary judgment ruling. Clearly, Greenfield did not like the result and incredibly, yet predictably, Greenfield attempted to foist blame for the dismissal of her case on the jurist signing the order. See Greenfield v. Wurmlinger, 158 Idaho 591, 349 P.3d 1182 (2015)

Judicial rulings, standing alone, do not constitute a valid claim of bias or partiality. Greenfield v. Wurmlinger, 158 Idaho at 1196 (quoting State v. Hairston, 133 Idaho 496, 988 P.2d 1170 (1999)). When considering evidence presented in support of or in opposition to a motion for summary judgment, a court can only consider material which would be admissible at trial. Petricevich v. Salmon River Canal, Co., 92 Idaho 865, 869, 452 P.2d 362, 366 (1969); IRCP 56(e). Thus, the admissibility of evidence presented in support of a motion for summary judgment is raised by an objection by one of the parties, the court must first make a threshold determination as to the admissibility of evidence “before proceeding to the ultimate issue, whether summary judgment is appropriate.” Bromley v. Garey, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999). A trial court’s evidentiary rulings are reviewed under the abuse of discretion standard. Reed v. Reed, 137 Idaho, 53, 57, 404 P.3d 1108, 1112 (2002). The appellate court should consider whether the trial court correctly perceive the issue as discretionary, whether it acted within the boundaries of its discretion, whether it acted consistent with the applicable legal standards, and whether it reached its decision by an exercise of reason to determine whether a trial court has abused its discretion. Id.

Greenfield contends that Judge Meyer “abused her discretion and refused to consider plaintiff’s material facts or dispositive legal arguments which were presented by the plaintiff to the court before such order for dismissal.” Greenfield’s brief, p. 46. Although Greenfield does not specifically point to what evidence she is referring, Judge Meyer made three evidentiary rulings relating to Greenfield’s opposition to Smith’s motion for summary judgment. First, Judge Meyer granted Smith’s motion to strike just before commencing with the hearing for summary judgment. Tr, p. 6-10; R, Vol. II, pp. 494-495. Second, on the day of the summary judgment hearing, Greenfield offered a “supplemental affidavit.” Tr, p. 7-9. Smith objected to the affidavit as untimely. Tr, p. 6-10. Judge Meyer refused to consider the “supplemental affidavit” because it was untimely under IRCP 56. Tr, Vol, II, p. 6-10. Third, 14 days after oral argument on Smith’s motion for summary judgment, Greenfield filed a motion in further opposition to Smith’s motion for summary judgment and an affidavit in support of Greenfield’s motion. R, Vol. II, pp. 631-640. Judge Meyer refused to consider those documents because they were untimely. R, Vol. II, p. 669.

Although Greenfield has not specifically appealed Judge Meyer’s rulings relating to the evidence to be considered when deciding Smith’s motion for summary judgment, she generally alleges that Judge Meyer abused her discretion when she refused to consider Greenfield’s “material facts.” All three of Judge Meyer’s evidentiary rulings were proper under Idaho law and were within her discretion.

Greenfield also complains that Judge Meyer made a directive barring pro se litigants from self-representation thus violating her due process rights under the 14th Amendment of the

United States Constitution. Greenfield also makes a number of conclusory statements that Judge Meyer was biased against her because of her pro se status. Pro se civil litigants are not accorded special latitude merely because they choose to proceed through litigation without the assistance of an attorney. Michalk v. Michalk, 148 Idaho 224, 220 P.3d 580 (2009). “Pro se litigants are not accorded any special consideration simply because they are representing themselves and are not excused from adhering to procedural rules.” Nelson v. Nelson, 144 Idaho 710, 718, 170 P.3d 375, 383 (2007).

Here, Judge Meyer fairly applied the time restrictions related to the submission of briefs and affidavits contained in IRCP 56(e) when she refused to consider the affidavit offered on the day of the hearing and when she refused to consider the affidavit offered 14 days after the hearing. The record is devoid of any evidence that could give rise to an inference that Judge Meyer was somehow biased or prejudiced against Greenfield due to her pro se status. Indeed, Judge Meyer clearly viewed the evidentiary matters as matters within her discretion and she properly exercised the same.

D. Greenfield Alleges Multiple Theories That Were Not Argued Below.

Issues not raised below may not be considered for the first time on appeal. Sanchez v. Arave, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). For instance, Greenfield argues the District Court prematurely dismissed Greenfield’s case prior to the close of discovery, yet she did not bring a motion for a continuance per IRCP 56(f). Similarly, Greenfield argues for the first time on appeal that that the defense expert was untimely disclosed, that the affidavits filed in support of the summary judgment motion were improper, that Judge Meyer should have

appointed an expert on behalf of Greenfield pursuant to ER 706, that Judge Meyer violated ER 201 and that Judge Meyer violated Greenfield's 14th Amendment rights. None of these arguments were made below and none of them should be entertained on appeal.

IV. ATTORNEY FEES ON APPEAL

Greenfield unreasonably clings to the position that the lawsuit she lost against her neighbors after cutting down their trees was a valid claim. Idaho Code § 12 - 121 provides for the award of attorney fees to the prevailing party in any civil action, but in normal circumstances the Supreme Court will only award attorney fees on appeal under that statute "when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." Greenfield v. Wurmlinger, 159 Idaho 591, 349 P.3d 1182 (2015) (citing Minich v. Gem State Developers, Inc., 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979)).

At the heart of this appeal is Greenfield's unreasonable position that her lawsuit against the Wurmlingers was meritorious. A jury, this honorable Court and Judge Meyer have all told her otherwise. Yet here she is asking this Court to make a ruling inconsistent with Greenfield v. Wurmlinger. Despite the numerous and clear determinations, Greenfield filed the present suit, which requires her to prove, as an essential element of her claim, that her Wurmlinger claim was meritorious. This position is not reasonable and it is without foundation. After losing this precise issue at trial and then losing again before this honorable Court, she frivolously pursued the present suit against her former attorney alleging the same set of facts and urging the opposite outcome. Greenfield has argued, without a shred of evidence, that she is the victim of prejudice

and bias, not only perpetrated against her by Judge Meyer but also by Judge Haynes in the underlying case against the Wurmlingers. Greenfield is not a victim of the judicial system; the judicial system is a victim of Greenfield. Smith is a victim of Greenfield's unreasonable and frivolous pursuit of this matter and this Court should award him all of his costs and fees incurred responding to this appeal.

V. CONCLUSION

Greenfield has failed to establish the elements necessary for a claim of legal malpractice and her lawsuit was filed after the expiration of the applicable statute of limitations. Consequently, the granting of summary judgment to Smith by Judge Meyer should be affirmed on all grounds. Greenfield's unreasonable and frivolous prosecution of this lawsuit in light of this Court's findings in Greenfield v. Wurmlinger require an award of attorney fees under Idaho Code § 12 – 121.

DATED this _____ day of July, 2016.

RANDALL | DANSKIN, P.S.

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the _____ day of July, 2016, addressed to the following:

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Plaintiff Pro Se:
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Troy Y. Nelson

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DATED this 19 day of July, 2016.

RANDALL | DANSKIN, P.S.

By: 

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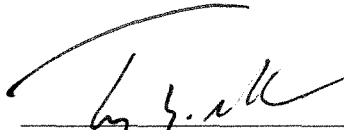
I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 19 day of July, 2016, addressed to the following:

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