1-10-2017

Clark v. Jones Gledhill Fuhrman Gourley Appellant's Brief Dckt. 44477

IN THE SUPREME COURT FOR THE STATE OF IDAHO

Eric R. CLARK, and Clark & Associates, PLLC,

Plaintiffs-Appellants,

vs.

JONES GLEDHILL FUHRMAN GOURLEY, P.A., an Idaho Professional Association; William Fuhrman, individually, and as an agent of Jones Gledhill Fuhrman Gourley, P.A.; and Christopher Graham, individually, and as an agent of Jones Gledhill Fuhrman Gourley, P.A.,

Defendants-Respondents.

Supreme Court Docket No. 44477

APPELLANTS' 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 Samuel Hoagland, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes and Rules:

Statement of the Case

This case involves the scope and enforceability of Idaho's Attorney Lien statute as it applies to defendants' counsel when defendants' counsel had actual and constructive knowledge of the attorney's entitlement to a lien, as it applies to defendants' counsel who possesses settlement funds, and as it applies to defendants' counsel who concealed both the actual settlement and proceeds from that settlement from the attorney claiming the lien.

The course of the proceedings below and the disposition

Judge Hoagland granted Defendants' Motion to Dismiss according to I.R.C.P. 12(b), denied Plaintiffs' Motion to Reconsider, denied Plaintiffs' Motion to Amend Complaint and awarded Attorney Fees to Defendants according to I.C. §12-121. The Court also granted Intervenor's[1] Motion to Seal Records.

Facts

The Appellants, (Collectively "Clark"), were Plaintiffs' counsel and ultimately co-counsel with the Spence Law Firm in *Forbush, et al., vs. Sagecrest, et al.*, Ada County Case No. CV PI 1304325. ("*Forbush* case") (R. p. 9).

Two of the Defendants in the *Forbush* case were Anfinson Plumbing, LLC and its employee Daniel Bakken, both of whom were represented by the Respondents, (Collectively "Jones Gledhill"). (R. p. 9).

[1] "Intervenor's" are Clark's former Clients, who are also represented by Jones Gledhill's counsel. (R. p. 35). Clark believes that Jones Gledhill tendered the defense of this case to the Spence Law Firm as likely there is an indemnification and hold harmless clause in the Anfinson Plumbing settlement documents.

Clark hereby incorporates the "facts" as alleged in *Plaintiffs' Memorandum Filed In Opposition To Defendants' Motion To Dismiss* in this case. (R. pp. 252 –254, filed on appeal under seal by Court Order). Clark also hereby incorporates essentially the same factual allegations stated in *Plaintiffs' Memorandum Filed In Opposition To Defendants' Motion To Dismiss* filed in *Clark et. al v. Forbush et. al.*, Ada County Case No. CV-OC-1604217[2], (R. pp. 293 –296, filed on appeal under seal by Court Order), which however remains a public record in *Clark et. al v. Forbush et. al.*, Canyon County Case No. CV-2016-06347-c.[3] The Complaint Clark filed in *Clark et. al v. Forbush et. al.*, Ada County Case No. CV-OC-1604217 is also in the record on appeal. (R. pp. 329–342, which remains a public record in that case, but which is filed on appeal under seal by Court Order).

Clark and the Spence Firm had a fundamental disagreement concerning the Spence Firm's recommendation to the Clients in the *Forbush* case to pursue settlement with A.O. Smith after the Spence Firm failed to present relevant evidence in response to A.O. Smith's motion for Summary Judgment, which the Court ultimately granted.[4] The disagreement with Clark led the Spence Firm to present an ultimatum to Clients regarding who would continue to represent Clients in the *Forbush* case. (R. pp. 240–41). The Spence Firm informed Clark that should the Clients choose Clark, the Spence Firm would withdraw and assert its lien on any proceeds Clark obtained. (R. pp. 243–46).

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[2] Which is now titled, *Clark et. al v. Forbush et. al.*, Canyon County Case No. CV-2016-06347-c, after a change of venue.

[3] Please see Clark's Motion for Judicial Notice filed in this Appeal.

[4] Judge Copsey ruled that A. O. Smith did not owe Plaintiffs any duty of care and granted summary judgment. Because Judge Copsey so ruled any remaining defendants have no authority to include A.O. Smith on the verdict form or allege A. O. Smith somehow had some comparative fault.

Ultimately, Clients chose the Spence Firm, (R. p. 242), and Clark withdrew from the *Forbush* case on August 26, 2015.

Upon withdrawing from the *Forbush* case, Clark sent a letter to counsel for the remaining defendants, including Jones Gledhill, in which Clark asserted a lien according to I.C. § 3-205, and requested that Respondents protect Clark's lien by including his name on any settlement check. (R. pp. 12 and 15). Neither addressee responded or denied Clark's entitlement to a lien under the circumstances.

Notwithstanding Clark's request, and Jones Gledhill's knowledge that Clark was attorney of record for Plaintiffs in the *Forbush* case for at least as long as Jones Gledhill's involvement in that case, Jones Gledhill concealed the settlement and failed to protect Clark's interest in the settlement funds. (R. p. 12). Jones Gledhill delivered the settlement funds to the Spence Law Firm and proceeded to dismiss the *Forbush v. Sagecrest* case.

Clark's co-counsel, the Spence Law Firm, who also had knowledge of Clark's lien, (R. p. 232), also concealed the settlement from Clark and thereafter refused to pay Clark any fees to which he was entitled for his three and half years of work in the *Forbush* case, and thereafter sought to extort a settlement from Clark by withholding Clark's attorney fees. (R. p. 234).

Clark has had to sue his former co-counsel to recover his entitled attorney fees because Jones Gledhill failed to protect Clark's lien and the Spence Firm has refused to pay Clark his entitled fees. *Clark et. al v. Forbush et. al.*, Ada County Case No. CV-OC-1604217. Clark filed that action on March 3, 2016, and before filing suit against Jones Gledhill on March 10, 2016.

Issues Presented on Appeal

1. Whether the District Court erred when it granted the Respondents' Motion to Dismiss?
2. Whether the District Court erred when it awarded attorney fees to Respondents?
3. Whether the District Court exercised appropriate discretion when it ordered documents sealed that were already of record in a separate case filed in Ada County?
4. Whether the Appellants are entitled to costs and attorney fees on appeal?

ARGUMENT

I. Legal Standards on Appeal

A. Statutory Interpretation

Recently the Idaho Supreme Court, in *Hoffer v. Shappard*, reiterated its duty to evaluate statutes giving utmost regard for legislative intent.

> 'The objective of statutory interpretation is to give effect to legislative intent.' *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). 'When interpreting a statute, the Court begins with the literal words of the statute . . . .' *Williams v. Blue Cross of Idaho*, 151 Idaho 515, 521, 260 P.3d 1186, 1192 (2011). 'If the statutory language is unambiguous, the clearly expressed intent of the legislative body *must* be given effect . . . .' *Idaho Youth Ranch, Inc. v. Ada Cnty. Bd. of Equalization*, 157 Idaho 180, 184-85, 335 P.3d 25, 29-30 (2014) (internal quotations omitted) (quoting *St. Luke's Reg'l Med. Ctr., Ltd. v. Bd. of Comm'rs of Ada Cnty.*, 146 Idaho 753, 755, 203 P.3d 683, 685 (2009)). This Court does not have the authority to modify an unambiguous legislative enactment. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 895, 265 P.3d 502, 508 (2011) (quoting *Berry v. Koehler*, 84 Idaho 170, 177, 369 P.2d 1010, 1013 (1962)).

Hoffer v. Shappard, 160 Idaho 870, 884, 380 P.3d 681, 695 (2016).

The Supreme Court had previously stated that when interpreting statutory language, the Court must interpret the words chosen by the legislature by their "plain, usual and ordinary

meaning." *Ada Cnty. Prosecuting Attorney v. 2007 Legendary Motorcycle*, 154 Idaho 351, 353, 298 P.3d 245, 247, (2013), citing *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011).

The Supreme Court has also defined statutory ambiguity and concluded that a statute is only ambiguous if the language could be construed so as to have two rational meanings. "A statute is ambiguous where the language is capable of more than one reasonable construction." *Ada Cnty. Prosecuting Attorney v. 2007 Legendary Motorcycle*, 154 Idaho at 353, quoting *Porter v. Bd. of Trustees, Preston School Dist. No. 201,* 141 Idaho 11, 14, 105 P.3d 671, 674 (2004).

In *Skelton v. Spencer*, 102 Idaho 69, 76, 625 P.2d 1072, 1079, (1981), interpreting I.C. § 3-205, the Supreme Court determined that the attorney lien statute specified five elements for a valid lien:

> (1) (T)hat there is a fund in court or otherwise available for distribution on equitable principles,
>
> (2) that the services of the attorney operated substantially or primarily to secure the fund out of which he seeks to be paid,
>
> (3) that it was agreed that counsel look to the fund rather than the client for his compensation,
>
> (4) that the lien claimed is limited to costs, fees or other disbursements incurred in the litigation by which the fund was raised and
>
> (5) that there are equitable considerations which necessitate the recognition and application of the charging lien.

Then in *Frazee v. Frazee*, 104 Idaho 463, 660 P.2d 928 (1983), the Supreme Court distinguished the *Frazee* fact situation because there was no settlement "fund." "We note the

difference in the instant case from the situation in Skelton v. Spencer, supra. There a "fund" was in existen." *Frazee v. Frazee*, 104 Idaho at 466. (Typographical error in original) This case involves a *Skelton v. Spencer* situation.

B. Standard for Review on Appeal

1. Statutory Interpretation. The interpretation of a statute is a question of law over which this Court exercises free review. *Gonzalez v. Thacker*, 148 Idaho 879, 881, 231 P.3d 524, 526 (2009), citing *State v. Hart,* 135 Idaho 827, 829, 25 P.3d 850, 852 (2001).

2. Abuse of Discretion. "A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason." *Elliott v. Murdock,* 2016 Opinion No. 141, at *4 (December 2, 2016), quoting *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008).

II. IDAHO'S ATTORNEY LIEN STATUTE IS CLEAR AND UNAMBIGUOUS AND PROVIDES FOR AN ATTORNEY LIEN TO AUTOMATICALLY "ATTACH" TO ANY SETTLEMENT "FUND"

The Idaho legislature, when it enacted Idaho's attorney lien statute, clearly and unequivocally stated their intent that the attorney's lien *attaches* from the "commencement of the action."

> 3-205. ATTORNEYS' FEES -- LIEN. The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. **From the commencement of an action**, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, **which attaches** to a verdict, report, decision or judgment in his client's favor and **the proceeds** thereof **in whosoever hands they may come;** and can not be

affected by any settlement between the parties before or after judgment. (Emphasis added)

The Supreme Court has also ruled that lien statutes are by nature remedial. *Franklin Bldg. Supply Co. v. SUMPER*, 139 Idaho 846, 851, 87 P.3d 955, 960 (2004). As remedial legislation, Idaho's Attorney Lien Statute must be interpreted "broadly to effectuate the intent of the legislature." *Selkirk Seed Co. v. State Ins. Fund*, 135 Idaho 434, 438, 18 P.3d 956, 959 (2000). "Variously phrased, the intent of the law on this point is to allow the attorney an *interest* in the fruits of his skill and labors. The lien secures his right to compensation for obtaining the recovery or 'fund' for his client." *Skelton v. Spencer*, 102 Idaho 69, 77, 625 P.2d 1072, 1080 (1981).

In *Frazee,* the Supreme Court found that an attorney charging lien did not attach until the party claiming the lien took "some affirmative act ... in reducing it to a judgment or order of the court." *Frazee v. Frazee*, 104 Idaho at 466. However, as the Supreme Court noted in that case, *Frazee* did not apply to overrule *Skelton v. Spence*. "We note the difference in the instant case from the situation in Skelton v. Spencer, supra. There a "fund" was in existen." *Frazee v. Frazee*, 104 Idaho at 466. The "fund" vs. "no fund" situation is a key distinction when interpreting and applying the lien statute that the District Court disregarded below. If there is a fund, then the attorney lien statute applies. If there is no fund arising from the attorney's efforts, as in the *Frazee* situation, then no lien attaches until it is "perfected" through some judicial proceeding.

In this case, like the *Skelton* case, there was a "fund" created by the Anfinson plumbing settlement, so *Frazee* is not applicable and the District Court's reliance on *Frazee* was error. The

District Court also cited to *In re Harris*, 258 B.R. 8 (Bankr.Idaho, 2000), but that case merely confirms that *Frazee* only applies where no "fund" exists. "The Idaho Supreme Court also seems to recognize the possibility of a charging lien in a 'non-fund' situation. *Frazee v. Frazee*, 104 Idaho 463, 660 P.2d 928 (1983)." *In re Harris*, 258 BR at 14.

Moreover, while the "potential economic coercion" that concerned the Supreme Court in *Frazee* is limited to the situation presented in *Frazee* where an attorney sought to attach property outside of the case or not associated with any "fund" created by the attorney's efforts. There is no similar threat or concern, however, when the claim of lien attaches to the fund created by the attorney's efforts and limited by his contractual agreement with clients, which is the situation here.

By the clear wording of the Attorney Lien Statute, the attorney lien attaches to the fund when created.

> **From the commencement of an action**,...a party has a lien upon his client's cause of action or counterclaim, **which attaches** to a verdict, report, decision or judgment in his client's favor and **the proceeds** thereof **in whosoever hands they may come;** and can not be affected by any settlement between the parties before or after judgment. (Emphasis added)

I.C. § 3-205.

If there is no "fund," a situation not addressed specifically in I.C. § 3-205, then an attorney must sue to perfect the lien, and no liability attaches before the lien is perfected. That is the limited ruling in *Frazee*. To rule otherwise and require an attorney to "perfect" their attorney lien before liability could attach in all cases undermines the intent of the lien statute and conflicts with the clear wording of I.C. § 3-205.

Accordingly, if a lien is created by statute, because an attorney's efforts resulted in a fund, and that attorney suffers damages when *someone* ignores or disregards the lien, then the scope and amount of any liability can then be determined in litigation if necessary. That "someone" certainly can be the client, co-counsel, or opposing counsel as each falls into the broad category of "...whosoever hands they may come...." Here, Jones Gledhill knew Clark had been Plaintiffs' counsel for several years, knew that Clark was claiming a lien, and knew there was a settlement. Thereafter, Jones Gledhill either possessed or controlled the settlement funds. Then, notwithstanding Jones Gledhill's knowledge Clark was entitled to a lien, Jones Gledhill ignored and disregarded Clark's lien and delivered the settlement funds to the Spence Firm. As Clark's lien arose by statute upon settlement, and the lien attached to those "proceeds" and in "whosoever hands they may come," it was error to dismiss Clark's case. Clark has a cause of action against Jones Gledhill for the amount of his lien or any damages associated and resulting from Jones Gledhill's failure to protect Clark's interest, including the litigation costs Clark is incurring to pursue his claim against the Spence Firm and his former clients.

III. THE DISTRICT COURT ERRED WHEN IT DISMISSED CLARK'S CASE

To the extent the District Court based its decision by interpreting I.C. § 3-205, that decision is subject to free review. As nothing in the statute requires an attorney to do anything to affirmatively perfect his lien, then the District Court's ruling that I.C. § 3-205 requires some "affirmative judicial action" to perfect an attorney lien is contrary to the clear and unambiguous language in I.C. § 3-205. There is no language in this statute that even remotely addresses any

procedural requirements. This Court should therefore exercise its authority to freely review the District Court's decision and reverse.

Conversely, to the extent that the District Court's decision is based on application of existing case law, then the abuse of discretion standard applies. This Court should also reverse as the District Court did not apply the correct legal standard and therefore abused its discretion when it dismissed Clark's case.

The District Court ruled below, relying on *Frazee* and *In re Harris*, that as Clark had not yet *perfected* his lien, no liability could attach to Jones Gledhill.

> ...Without affirmative adjudicative actions to perfect his lien by "reducing it to a judgment or order of the court," no authority exists to pay Clark any amount of money on behalf of his former clients. See *Frazee v. Frazee,* 104 Idaho 463, 466, 660 P.2d 928, 931 (1983); *In re* Harris, 258 B.R. 8, 14 (Bkrtcy. D. Idaho 2000). The law requires these affirmative adjudicative actions to strike a proper balance between potential economic coercion and equity. (R. p. 68).
>
> Had Clark taken some affirmative adjudicatory action to perfect his lien, the amount owed would have been reduced to an amount certain, taken the form of a court order or judgment, which would have then been applicable to the parties and their counsel. Violation of that order could have been enforced by contempt and/or by a damage action against the parties and attorneys. (R. p. 68).
>
> But Clark took no such affirmative adjudicative actions to perfect his claimed lien. Neither was there a contract between Clark and Jones Gledhill. Consequently there was no order or contract that these Defendants violated. They owed no contractual or other legal duty to Clark to protect his interests. It was Clark's duty to protect his own interests, which he failed to do. (R. p. 69).

Undeniably, the District Court's ruling is limited to its interpretation of *Frazee*. Again, however, unlike the *Frazee* case, there was a settlement fund to which Clark's lien attached by statute, the very situation in *Skelton*, and distinguished in *Frazee*. If the lien attached to the

settlement funds when the settlement was achieved, then so did Jones Gledhill's liability for ignoring the lien. The resulting damages related to Jones Gledhill's conduct could and should have been addressed in the proceeding below. Based on the facts presented here, Frazee was inapplicable, so the District Court's reliance solely on that case was error. Accordingly, the District Court abused its discretion by applying the wrong legal standard and should be reversed.

Moreover, even for the sake of argument that *Frazee* did apply, the District Court's ruling ignores the fact that Jones Gledhill directly interfered with Clark's ability to "perfect" his lien. If Jones Gledhill would have been liable had Clark perfected his lien, as the District Court ruled, (R. p. 68), why then would Jones Gledhill escape liability when they interfered with Clark's ability to obtain a perfected lien in the first place? Clark believed he had adequately pled that Jones Gledhill had interfered with Clark's ability to timely perfect his lien in his Complaint. (R. pp. 8–23). However, although Clark sought leave to amend his complaint to very specifically plead that Jones Gledhill had interfered with Clark's ability to perfect his lien, (R. pp. 305–317), Judge Hoagland summarily denied that motion and disregarded the additional facts as pled. (R. pp. 74–76). The District Court also erred when it denied Clark's Motion to Amend.

The Supreme Court ruled in *Frazee*, that a "charging lien of an attorney is equitable in nature...." *Frazee v. Frazee*, 104 Idaho at 466. Thus, all equitable defenses apply, including unclean hands and estoppel. If Clark failed to timely obtain a perfected attorney lien because Jones Gledhill, who knew Clark was asserting a lien, and who then purposefully and intentionally withheld information from Clark, then equity should intervene to prevent Jones

Gledhill from raising the lack of a perfected lien as a defense. Here, however, Judge Hoagland appeared to approve of and condone Jones Gledhill's "hide the ball" conduct.

> Perhaps Clark seeks to perfect the claimed lien in the other case against the former clients and Spence, but the settlement check and proceeds have already gone through the hands of these Defendants, never to return. Thus, Plaintiff can prove no set of facts in support of a claim that would entitle him to relief against these Defendants.

To properly exercise its discretion, the District Court must apply the correct legal standard. "A motion to dismiss for failure to state a claim should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.' *Gardner v. Hollifield,* 96 Idaho 609, 611, 533 P.2d 730, 732 (1975). When reviewing a district court's dismissal of a case under I.R.C.P. 12(b)(6), this Court draws all reasonable inferences in favor of the non-moving party. *Young v. City of Ketchum,* 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). After drawing all inferences in favor of the non-moving party, the Court then examines whether a claim for relief has been stated. *Id.*" *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005).

Here, the District Court should have considered Jones Gledhill's conduct in interfering with and preventing Clark from taking "affirmative adjudicative actions," either as pled or pursuant to Clark's timely Motion to Amend. Had Jones Gledhill informed Clark there was a settlement when the settlement occurred and that Jones Gledhill did not intend to honor Clark's lien or his request to put his name on the settlement check, then Clark certainly could have taken the "affirmative adjudicative actions" the District Court deemed necessary. Instead, Jones Gledhill concealed the settlement and delivered the settlement funds to the Spence Firm before

Clark had knowledge of the settlement or any opportunity to protect his lien. If the stated purpose of the attorney lien statute is to protect the fruits of an attorney's hard work, and it must be construed "broadly to effectuate the intent of the legislature," then Judge Hoagland's decision is contrary to the stated purpose and requisite interpretation of this statute. Moreover, Clark pled facts that should have entitled him to some relief, so Judge Hoagland's dismissal was contrary to the applicable standard when considering a Rule 12(b) Motion to Dismiss. Accordingly, even if *Frazee* was applicable, the District Court failed to apply the correct legal standard and abused its discretion when it disregarded Jones Gledhill's conduct that prevented Clark from timely perfecting his lien.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT AWARDED ATTORNEY FEES BELOW TO JONES GLEDHILL

The District Court also granted Jones Gledhill's motion for attorney fees pursuant to I.C. § 12-121, but denied the request according to I.C. 12-120 and 12-123. (R. pp. 205–215). Clark now incorporates his argument above that the District Court erred when it dismissed his case. If this Court reverses the District Court and reinstates the case, then Clark requests the Court summarily reverse the award of attorney fees. In the alternative, Clark argues the District Court abused its discretion when it awarded Jones Gledhill's attorney according to I.C. § 12-121 even if this Court affirms the District Court's decision granting the Rule 12(b) motion.

An awarding Court must have an "*abiding belief*" the case was filed frivolously and without foundation in order to award attorney fees. "A district court should only award fees 'when it is left with the abiding belief that the action was pursued, defended, or brought

frivolously, unreasonably, or without foundation.' *C & G, Inc. v. Rule*, 135 Idaho 763, 769, 25 P.3d 76, 82 (2001) (internal quotation marks omitted). However, 'when a party pursues an action which contains fairly debatable issues, the action is not considered to be frivolous and without foundation.' *Id.* A claim is not necessarily frivolous simply because the district court concludes it fails as a matter of law. *Gulf Chem. Employees Fed. Credit Union v. Williams*, 107 Idaho 890, 894, 693 P.2d 1092, 1096 (Ct.App.1984). Furthermore, '[a] misperception of the law, or of one's interest under the law is not, by itself, unreasonable. Rather, the question is whether the position adopted was not only incorrect, but so plainly fallacious that it could be deemed frivolous, unreasonable, or without foundation.' *Snipes v. Schalo*, 130 Idaho 890, 893, 950 P.2d 262, 265 (Ct.App.1997) (internal citation omitted) (internal quotation marks omitted)." *Garner v. Povey*, 151 Idaho 462, 468, 259 P.3d 608, 614 (2011). Moreover, "[w]here a case involves a novel legal question, attorney fees should not be granted under I.C. § 12-121." *Campbell v. Kildew*, 141 Idaho 640, 652, 115 P.3d 731, 742 (2005), citing *Graham v. State Farm Mut. Auto. Ins. Co.,* 138 Idaho 611, 614, 67 P.3d 90, 93 (2003).

The District Court granted some[5] of the requested attorney fees according to I.C. § 12-121, because the Court found that Clark had ignored *Frazee*.

> ...But Plaintiffs disregarded established case law finding that the failure to take affirmative adjudicative steps to perfect an attorney's lien renders the claimed lien unenforceable. *Frazee v. Frazee*, 104 Idaho 463, 466, 660 P.2d 928, 931 (1983) ("The equitable source of the claimed charging lien necessitates that an attorney take affirmative steps in an adjudicative process to perfect and reduce his lien to a judgment or order of the court"). If Plaintiff had perfected the lien through an

[5] Jones Gledhill's Attorneys billed 77 hours for allegedly performed pursuing the motion to dismiss, and an additional **54 hours** (6.76 eight-hour days) just for drafting the motion to costs and attorney fees alone. (R. p. 294). Judge Hoagland ruled these claims were "unreasonable and excessive."

> affirmative adjudicatory process in the underlying action, then Defendants would have had to protect Plaintiffs' interest, as required by Idaho Code § 3-205. Plaintiffs did not argue a new or novel interpretation of Idaho Code § 3-205, nor argue that the law should be extended or modified. Plaintiff's "novel legal question" merely argued that the Court should ignore established precedent, which it has declined to do. (R. p. 212).

Actually, Clark argued in opposition to the Motion to Dismiss that the statutory language of Idaho Code § 3-205 controls, (R. pp. 255–60), and on reconsideration, that the Court should distinguish *Frazee* because that ruling conflicted with the clear wording of Idaho Code § 3-205, (R. pp. 319–22). Clark therefore did not pursue the case frivolously or without foundation.

Additionally, in opposition to Jones Gledhill's Motion for Costs and Attorney fees, Clark argued this case presented the novel legal issue of opposing counsel's interference with Clark's ability to perfect his lien. (R. pp. 181–82). Accordingly, even if Clark was required to perfect his lien, there was no case law that addressed the issue presented here that the Defendants had notice of Clark's entitlement to a lien, but concealed the settlement and delivered the funds to the Spence Firm without Clark's knowledge. The facts below were sufficiently distinguishable from *Frazee*, and Clark argued in good faith that *Frazee* did not apply. Clark's conduct in the case was therefore not frivolous.

Clark also presented the "novel legal question" of opposing counsel's liability, as opposed to his client's liability, under this statute, which was not addressed in *Frazee* or any other Idaho case. Clark prevailed on this issue as the District Court ultimately ruled that a perfected lien under the circumstances would have been "applicable to the parties and their counsel." (R. p. 68). The District Court also rejected Jones Gledhill's arguments in their Motion

to Dismiss that any "litigation privilege" applied, and that defendants owed no duty of reasonable care. (R. pp. 26–31).

Additionally, Clark presented reasoned argument that notwithstanding the lack of a "perfected" lien, liability attached according to the statute. Clark argued based on the undisputed facts that Jones Gledhill had knowledge of Clark's lien claim, that there was a fund to which the lien attached, and because Jones Gledhill possessed the liened funds but concealed the settlement until after Jones Gledhill had delivered the funds, then Jones Gledhill should be liable, perfected lien or not. (R. p. 181–82). Again, if the intent of the lien statute was to protect the attorney's hard work and entitlement to fees, Judge Hoagland's decision effectively did just the opposite and actually promotes subterfuge and deception by opposing counsel.

Finally, Clark argued in good faith that based on the Court's ruling that perfection is ultimately required to enforce the lien, and as Clark was seeking to perfect the lien through adjudication in the *Clark v. Forbush* case, at best the *Jones Gledhill* case was not yet ripe and any dismissal should have been without prejudice. (R. p. 322).

The District Court also based the award of fees on its erroneous conclusion about records being sealed in the *Clark v. Forbush* case.

> Furthermore, Plaintiffs' took action that increased the cost of litigation by filing **documents that were under seal in another case** but were not sealed in this case. Defendants responded by filing a Motion to Seal in this case, which the Court granted. And ultimately, the documents did not add anything to the Plaintiffs' case anyhow. (R. p. 212-13) (Emphasis added).

This simply is not true. Clark filed a motion to reconsider and showed the Court that the documents and information that Judge Hoagland sealed in the Jones Gledhill case

were public record and remained unsealed in the *Clark v. Forbush* case. (R. pp. 326–52). Clark has also filed a Motion for Judicial Notice with the Idaho Supreme Court that confirms the same documents and information that Judge Hoagland claimed was "under seal in another case," were not in fact under seal and remained a public record.

While a Judge has discretion to award attorney fees pursuant to authority to grant attorney fees under I.C. § 12-121, the Court must reach its decision "through an exercise of reason." Judge Hoagland's myopic focus on the holding in *Frazee,* without due consideration to distinguishing facts presented here resulted in a decision to award attorney fees that lacked reason. Therefore, Judge Hoagland abused his discretion when he awarded attorney fees to Jones Gledhill and that decision should be reversed.

V. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SEALED DOCUMENTS IN THIS CASE

As shown by Clark's Motion for Judicial Notice below, (R. pp. 48–52), which Judge Hoagland denied, and Clark's recent Motion for Judicial Notice filed with the Supreme Court, each record and all information Judge Hoagland ordered to be sealed in the *Jones Gledhill* case was of record and unsealed in the *Clark v. Forbush* case. Notwithstanding Judge Hoagland knew that the records sought to be sealed were unsealed and a public record in *Clark v. Forbush*, Judge Hoagland ruled that the information should be sealed because the disclosure could result in "economic or financial loss or harm to Clark's former clients."

> As required by Idaho Court Administrative Rule 32(i), the Court makes the following findings of fact and conclusions of law: The former clients' interest in privacy of the confidential material predominates, given the privileged and

> confidential nature of the material. The material sought to be sealed relates to sensitive, if not attorney-client privileged, conversations between co-counsel, and clients, during Clark's representation of the former clients in the underlying case. Also, Clark had stipulated to a protection order regarding this same material in the other case where he sued his former clients and Spence. (footnote omitted) The Court finds the materials sought to be sealed contain facts and statements that could reasonably result in economic or financial loss or harm to Clark's former clients.
>
> The Court therefore concludes that it is reasonable, necessary and proper to seal the requested material. Accordingly, the Motion to Seal is GRANTED and pages two through five of Plaintiffs Memorandum in Opposition to Defendants' Motion to Dismiss, and Exhibits 1, 2, 3, 8, and 9 of Eric R. Clark's Declaration filed May 4, 2016 shall be sealed. Exhibits 1, 2, and 3 of Eric R. Clark's March 30 Declaration, attached to Exhibit 1 of the May 9th Declaration shall also be sealed. Finally, Exhibits 1 and 2 of Eric R. Clark's Second Declaration, attached as Exhibit 2 to the May 9th Declaration shall be sealed. (R. p. 69).

While a District Court has discretion to seal records, it is hard to imagine any reasoned basis to seal records or information in one case when exactly the same records or information remains is in the public record and unsealed in another case in the same Idaho Judicial District. Then, as proven in Clark's recent Motion for Judicial Notice filed with the Supreme Court, the very information remains in the public record and unsealed, despite a confidentially order in *the Clark v. Forbush* case. Again, the District Court did not reach its decision to seal records in this case through an exercise of reason and therefore abused its discretion.

VI. ATTORNEY FEES ON APPEAL

The Appellants seek attorney fees on appeal according to I.A.R. 41, and I.C. § 12-121. "An award of attorney fees is appropriate on appeal under I.C. § 12-121 when the appeal has been brought or defended frivolously, unreasonably, or without foundation." *Teurlings v. Mallory E. Larson Nka Mallory E. Martinez*, 156 Idaho 65, 75, 320 P.3d 1224, 1234 (2014).

"However, this Court will not consider attorney fees if a party fails to argue how the appeal was defended unreasonably." *Id.* Moreover, "A party seeking an award of attorney fees must 'support the claim with argument as well as authority'." *Id.*

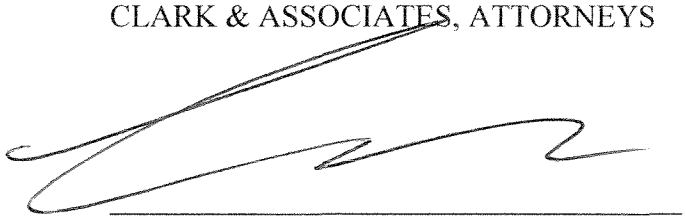
The Appellants reserve argument to support their claim for attorney fees pursuant to I.C. § 12–121 until after the Respondents have filed their brief, as prior to that time, Appellants have no basis to argue the appeal was defended frivolously or without foundation.

CONCLUSION

The District Court erred when it dismissed the Appellants' case pursuant to I.R.C.P. 12(b) and denied the Appellants' Motions to Amend their pleadings and to reconsider, as the Appellants' attorney lien had arisen by statute and attached to settlement funds possessed by the Respondents. Consequently, the Appellants had stated a viable cause of action against the Respondents and it was reversible error for the District Court to dismiss. The District Court also erred when it granted, in part, the Respondents' Motion for Attorney Fees and Intervenor's Motion to Seal Records. The Appellants therefore respectfully request this Court reverse the District Court's rulings below and remand this case for trial in due course.

RESPECTFULLY SUBMITTED this 10th day of January, 2017.

CLARK & ASSOCIATES, ATTORNEYS



Eric R. Clark
For the Appellants

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that on 10th day of January, 2017, I caused to be served two true and correct copies of the foregoing document upon the following individuals via US Mail, postage prepaid. The undersigned also does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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