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

IN THE SUPREME COURT OF 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 Gledhilll Fuhrman Gourley, P.A., Defendants-Respondents.	Supreme Court Docket No. 44477

RESPONDENTS' BRIEF

Appeal from the Fourth Judicial District for Ada County
Honorable Samuel A. Hoagland, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF THE CASE

At issue in this case is whether Appellants, Eric R. Clark and Clark & Associates, PLLC (collectively "Clark"), may bring an action: (1) to enforce an attorney lien under Idaho Code § 3-205 against Clark's ***opposing*** counsel, Respondents Jones Gledhill Fuhrman Gourley, P.A., William Fuhrman and Christopher Graham (collectively "Jones Gledhill"), although Jones Gledhill never actually possessed the funds to which Clark claims he is entitled; or (2) for negligence because of Jones Gledhill's purported "failure to protect" Clark's alleged interest in his former clients' settlement funds.

I. Factual Background

Clark, an attorney, represented Travis Forbush, Gretchen Hymas and Breanna Halowell (collectively "Clients"), in a wrongful death and personal injury action, entitled *Forbush v. Sagecrest Multi-Family Prop. Owners' Ass'n*, Ada County Case No. CV PI 1304325 ("underlying action").[1] (R. 19 at ¶ 17.) Clark filed that underlying action against Anfinson Plumbing, LLC ("Anfinson"), among other defendants. (R. 17 at ¶ 5.) Jones Gledhill represented Anfinson in the underlying action.

Eventually, Spence appeared in the underlying action on behalf of the Clients and co-counseled with Clark against Anfinson. (R. 19 at ¶ 18.) In August 2015, Clark withdrew from representation. (R. 19-20 at ¶¶ 19-20; *see also* Appellants' Brief at p. 3.) After his withdrawal, Clark sent Jones Gledhill a letter in September 2015, stating he was "asserting an attorney lien

[1] A portion of this underying action currently remains pending before this Court. *Forbush, et al. v. Sagecrest Multi-Family Prop. Owners' Ass'n*, Supreme Court No. 44053 (filed March 21, 2016.)

according to I.C. § 3-205" and requesting Jones Gledhill to "include [his] name on any settlements checks." (R. 15.)[2] Clark, however, never filed and served a notice of an attorney lien in the underlying action.

Several months later, Anfinson settled the Clients' claims for policy limits of $1,000,000. The trial date was impending, and to obtain a dismissal for Anfinson, Jones Gledhill conveyed a check from Anfinson's insurer to Spence per the parties agreed upon settlement. Because Clark had withdrawn from the Clients' representation, Jones Gledhill did not communicate with Clark regarding Anfinson's settlement.

In February, Clark threatened to sue Jones Gledhill for its purported "failure to protect settlement funds" for him. (*See* R. 9.) Clark sent Jones Gledhill a draft complaint alleging that Jones Gledhill "owed Clark a duty to protect his lien" by including Clark as a payee on the settlement check and that Jones Gledhill breached this duty by delivering the check to Spence without Clark's name on it. (*See* R. 13 at ¶¶ 25-27.) Notably, however, Jones Gledhill had no personal knowledge of Clark's purported entitlement to any of his former Clients' settlement funds.

Obviously, as Clark's opponent, Jones Gledhill had no means by which to resolve Clark's dispute with his former Clients. Jones Gledhill did not know the terms of any fee agreement between Clark and his former Clients or between Clark and his former co-counsel, Spence. It did not know the nature of any dispute between Clark, the former Clients and Spence. It was not

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[2] Clark's Amended Complaint references this letter as an exhibit, but fails to attach it. (*See* R. 20 at ¶ 20.) It is attached, however, to Clark's original complaint. (R. 15.)

privy to the reasons for Clark's withdrawal. It did not know whether that withdrawal was voluntary or at the former Clients' requests.[3] It did not know whether Clark's termination was for cause or without cause. It did not know whether the Clients had any claims against Clark, which might offset his fees. And, it did not know whether Clark's claim for fees against his Clients or Spence had already been satisfied.

Further, Jones Gledhill's legal research showed Clark had no viable claim against Jones Gledhill. In response to Clark's threat to sue, Jones Gledhill sent Clark a letter citing legal authority that § 3-205 did not provide for an attorney lien against an attorney's ***opponent***. (R. 131-32.) Specifically, Jones Gledhill cited *Frazee v. Frazee*, 104 Idaho 463, 660 P.2d 928 (1983), which provides:

> [The attorney] asserts he may claim any sum in fees without the necessity of proving the reasonableness of such fees in an adjudicative process and that he may then levy against the property of the opposing party, who is a total stranger to the contract under which [the attorney] claims money. ***We decline to so interpret the attorney's charging lien***. . . .

Id. at 465, 660 P.2d at 930 (emphasis added). Jones Gledhill also cited *In re Goldberg*, 235 B.R. 476 (D. Idaho 1999), which relied upon *Frazee* to conclude that "[t]he plain language of [§ 3-205] allows only for a lien in favor of a lawyer against the lawyer's own client. ***There is nothing in § 3-205 or case law that authorizes an attorneys' lien in favor of an opponent's lawyer.***" *Id.* at 484 (emphasis added).

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[3] Clark alleges in this case that "due to [Spence's] malpractice and incompetence, Clark withdrew from the case." (R. 19 at ¶ 19.) Jones Gledhill, however, has since learned that Clark actually withdrew from the case because the Clients terminated his representation. (*See, e.g.*, R. 279.)

II. Procedural Background

Ignoring this authority, Clark sued Jones Gledhill on March 10, 2016. (R. 8-15.) Thereafter, Clark amended his complaint to increase his purported damages from $140,000 to $500,000. (*Compare* R. 13 at ¶ 28 *with* R. 21 at ¶ 28.) The exact nature of Clark's claim against Jones Gledhill is somewhat unclear. Although Clark alleges his case is "an attorney lien case," his allegations suggest he is attempting to sue Jones Gledhill in negligence for breach of a purported "duty to protect Clark's lien." (*Compare* R. 17 at ¶ 1 *with* R. 21 at ¶¶ 25-28.)

Jones Gledhill moved to dismiss Clark's action under Rule 12(b)(6) of the Idaho Rules of Civil Procedure for failure to state a claim, and it construed Clark's complaint broadly as asserting both an action to enforce an attorney lien and a negligence claim. In support of its motion to dismiss, Jones Gledhill argued that: (1) it did not owe Clark a duty of reasonable care to protect his attorney lien, (R. 31-32); (2) regardless, the litigation privilege barred Clark's action because Jones Gledhill was acting on behalf of its client, Anfinson, when settling the claims against it, (R. 27-28); and (3) § 3-205 did not authorize a lien against Jones Gledhill, Clark's opponent. (R. 29-31.)

In opposition to Jones Gledhill's motion, Clark filed numerous documents outside the pleadings, including documents containing his former Clients' attorney-client privileged communications and protected work product. (*See, e.g.*, R. 236-48, R. 250-54, R. 266.) Jones Gledhill moved to strike all of Clark's submissions under Rule 12 because they were outside the pleadings and unnecessary for resolving Jones Gledhill's Rule 12(b)(6) motion. *See* Idaho R. Civ. P. 12(d) (matters outside the pleadings but not excluded require motion to be treated as

summary judgment motion); *see also* Idaho R. Civ. P. 12(f) ("The court may strike . . . any redundant, immaterial, impertinent, or scandalous matter."). Meanwhile, Clark's former Clients specially appeared per Rule 32 of the Idaho Court Administrative Rules to request that a subset of Clark's submissions outside the pleadings—*i.e.*, their attorney-client communications and work product—be sealed from public disclosure. (R. 356-65.)

At the conclusion of the hearing on Jones Gledhill's Rule 12(b)(6) motion and other pending motions, the district court stated that it intended, among other things, to grant Jones Gledhill's motion to dismiss and that it would prepare a written order. (R. 144-45, pp 33:17-34:16.) Before that written order was entered, however, Clark moved for reconsideration and also to amend his complaint to add new defendants, including Anfinson and its insurer. (*See* R. 61-63, R. 305-17, R. 318-25, R. 326-52.)

Before Jones Gledhill responded to Clarks' new motions, the district court entered its Order Denying Motion to Reconsider and Motion to Amend Complaint. (R. 74-76.) At the same time, the district court also entered its Memorandum Decision and Order Granting Motion to Strike, Motion to Seal, and Motion to Dismiss and Denying Motion for Judicial Notice ("Memorandum Decision"). (R. 64-73.) In its Memorandum Decision, the district court dismissed Clark's complaint, correctly concluding that Clark could prove no set of facts in support of a claim that would entitle him to relief against Jones Gledhill. (R. 72.)

In support of this conclusion, the district court ruled that Jones Gledhill "owed no contractual or other legal duty to Clark to protect his interests." (*Id.*) Further, it ruled that Clark could not assert an unperfected lien (*i.e.*, one that had not already been reduced to an enforceable

sum certain) against Jones Gledhill. (*See* R. 71.) Specifically, it ruled that "[w]ithout 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." (*Id.*) The district court also noted that even if Clark eventually did perfect his lien, he could never enforce it against Jones Gledhill because Jones Gledhill no longer possessed the settlement check or proceeds. (R. 72.) Finally, the district court denied Clark's motions for reconsideration and to amend his complaint concluding that Clark's "filings do not add any new facts or authorities that bear on the correctness of the judgment of the court." (R. 75.)

Subsequently, the district court awarded Jones Gledhill $26,250 in attorney fees under Idaho Code § 12-121, concluding Clark "brought and pursued this case frivolously, unreasonably and without foundation. . . ." (R. 213.) In support of this conclusion, the district court found that Clark (1) had disregarded established case law; (2) did not argue a new or novel interpretation of § 3-205, but rather argued that the district court should reject established case law; and (3) had been specifically warned by Jones Gledhill before filing the action that it was barred by established case law. (R. 212-13.) Further, the district court noted that Clark unnecessarily increased the cost of litigation by filing confidential documents in the record that had no bearing on Clark's case. (R. 213.)

Clark appeals the district court's award of fees, the dismissal of Clark's action, and the sealing of his former Clients' confidential information. In support of his appeal, Clark attempts to "incorporate" the "facts" in his opposition to Jones Gledhill's motion to dismiss and in his allegations in another complaint, an action against his former Clients, *Clark v. Forbush,* Ada

County Case No. CV-OC-1604217 ("*Clark*").[4] An overwhelming majority of these purported "facts," however, are irrelevant to this appeal, including Clark's self-serving descriptions of events in the underlying action and of his disagreements with his former Clients' and co-counsel's decisions in that action.

One collateral fact is important to note, however: One week ***before*** Clark sued Jones Gledhill on March 10, 2016, he filed the *Clark* action against his former Clients on March 3. (*See* R. 329-52.) Among other things, Clark alleges in *Clark* that his former Clients breached their fee agreements with him and that they tortiously interfered with Clark's fee-split agreement with Spence. (*See* R. 336 at ¶¶ 41-44; R. 338-39, ¶¶ 62-66.) Further, he alleges in *Clark* that he is owed fees in various different amounts, including $40,000, (R. 338 at ¶ 55); $140,000, (R. 339 at ¶ 66); $500,000, (R. 336 at ¶ 44; R. 338 at ¶ 61) and an indeterminate amount into the future. (R. 337 at ¶ 50.) Jones Gledhill also understands that Clark subsequently amended his complaint in *Clark* to assert claims against Spence. (*See* Appellants' Brief at 3 (stating Clark has sued his former co-counsel for fees).) Clark's allegations in *Clark* highlight that even Clark cannot definitively state whether his former Clients or Spence or both owe him fees and in what amount—the very concern which prompted the district court to conclude in this case that Clark had to perfect his lien.

[4] Clark filed *Clark* in the wrong venue, and the district court has since transferred it to Canyon County, Case No. CV-2016-06347.

ADDITIONAL ISSUES PRESENTED ON APPEAL

In Clark's "Issues Presented on Appeal," Clark challenges the district court's dismissal of his complaint, its award of attorney fees to Jones Gledhill and its decision to seal certain records. Clark does not list the district court's denial of his motion to amend as an issue for appeal. (Appellants' Brief at 4 (listing issues). But, Clark appears to challenge that decision. (*Id.* at 11 ("The District Court also erred when it denied Clark's Motion to Amend.") Jones Gledhill, therefore, addresses whether the district court abused its discretion when it denied Clark's motion to amend.

ARGUMENT

I. The District Court's Dismissal Under Rule 12(b)(6) Was Proper.

This district court properly dismissed Clark's complaint under Rule 12(b)(6) for failure to state a claim. Under *Frazee*, Clark's claim fails because he did not perfect his lien before attempting to enforce it against Jones Gledhill. Furthermore, Clark fails to meet the five requirements for enforcing an attorney lien set forth in *Skelton v. Spencer*, 102 Idaho 69, 625 P.2d 1072 (1981), *overruled on other grounds by Kinghorn v. Clay,* 153 Idaho 462, 467, 283 P.3d 779, 784 (2012). To the extent Clark's claim is an attempt to allege negligence, it fails because Jones Gledhill had no legal duty to include Clark's name as a payee on Anfinson's settlement check or otherwise to protect Clark's interest in his former Clients' settlement funds. Moreover, the litigation privilege protects Jones Gledhill from liability for acting on Anfinson's behalf and in its best interests.

A. Standard of Review

Clark incorrectly states that the standard of review is for an abuse of discretion. (Appellants' Brief at 11 ("[T]he District Court abused its discretion by applying the wrong legal standard."); *see also id.* at 10 (same); *id.* at 13 (same).) A motion to dismiss is proper if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Taylor v. Maile,* 142 Idaho 253, 127 P.3d 156 (2005). In reviewing a dismissal under Rule 12(b)(6), the proper standard requires this Court to view all facts and inferences from the record in favor of the non-moving party to determine whether a claim for relief has been stated. *Coalition for Agric. Future v. Canyon County*, 160 Idaho 142, 145, 369 P.3d 920, 923 (2016).

B. Clark Cannot Enforce an Attorney Lien Against Jones Gledhill.

Clark failed to state a viable claim to enforce an attorney lien, as the district court correctly ruled. Clark challenges this ruling by claiming there was a "fund" against which to assert his lien so the district court incorrectly analyzed his claim under *Frazee* instead of *Skelton.* (Appellants' Brief at 10-11.) Clark's argument is without merit. Regardless of whether Clark's claim is analyzed under *Frazee* or *Skelton*, Clark's claim necessarily fails.

In *Skelton*, a law firm sought to enforce an attorney lien under § 3-205 against its former client, Spencer. 102 Idaho at 70, 625 P.2d at 1073. Spencer had retained the law firm to handle numerous matters related to her husband's estate. *Id.* at 70-71, 625 .2d at 1073-74. Spencer became dissatisfied with the law firm and discharged it. *Id.* at 71, 625 P.2d at 1074. Subsequently, the law firm filed a "notice of claim of attorney's lien" in three separate cases

including case no. 20500, which was an action against Spencer to enforce a settlement agreement that the law firm had previously negotiated on Spencer's behalf. *Id.* at 71, 625 P.2d at 1074. Later, the plaintiffs in case no. 20500 deposited with the court a fund of $157,500, which they owed Spencer under the former settlement. *Id.* at 72, 625 P.2d at 1075. The law firm "filed a petition in no. 20500 to enforce the lien against the fund." *Id.* Spencer opposed the petition, but the court entered findings of fact and conclusions of law awarding the law firm a portion of the funds deposited with the court for Spencer's benefit. *Id.* at 72-73, 625 P.2d at 1075-76.

On appeal, the Court upheld the award to the law firm. It concluded that "[t]he law is well settled that an attorney in asserting a charging lien is entitled to recover against sums which his efforts have brought forth." *Id.* at 75, 625 P.2d at 1078. Further, the Court specifically concluded that the law firm's efforts created the deposited funds: "The monies paid into court in case no 20500 were the product of the settlement brought forth by the efforts of [the law firm]." *Id.* Finally, the Court concluded that the law firm had met the five requirements necessary for enforcing a charging lien against its former client, including:

> (1) That 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.

Id. at 76, 625 P.2d at 1079 (citation, quotations and parentheses omitted); *see also In re Harris*, 258 B.R. 8, 13 (D. Idaho 2000) (identifying *Skelton* requirements); *Jarman v. Hale*, 112 Idaho 270, 274, 731 P.2d 813, 817 (Ct. App. 1986) (same).

In contrast to *Skelton*, which affirmed the enforcement of an attorney lien, the Court in *Frazee* rejected an attorney's attempt to enforce a lien under § 3-205. In *Frazee*, attorney Reeves represented Elaine Frazee against her husband, Kenneth, in a divorce. 104 Idaho at 464, 660 P.2d at 929. The divorce decree required Kenneth to pay $3,000 in cash to Elaine overtime. *Id.* Meanwhile, Reeves had billed Elaine $2,800 in fees for representing her in the divorce, which fees remained unpaid. *Id.* After Kenneth had already paid Elaine nearly the entire $3,000, Reeves filed a notice of attorney lien for $2,800 in the divorce action and sought to foreclose his lien against Kenneth. *Id.* The court denied Reeves' claim of lien against Kenneth, and Reeves appealed.

On appeal, this Court affirmed the denial. In doing so, the Court rejected Reeves' broad interpretation of § 3-205:

> Reeves asserts that he may claim any sum in fees without the necessity of proving the reasonableness of such fees in an adjudicative process and that he may then levy against the property of the opposing party, who is a total stranger to the contract under which Reeves claims money. We decline to so interpret the attorney's charging lien statute. . . .

Id. at 465, 660 P.2d at 930; *see also In re Goldberg*, 235 B.R. at 484 ("The plain language of [§ 3-205] allows only for a lien in favor of a lawyer against the lawyer's own client. There is nothing in § 3-205 or case law that authorizes an attorneys' lien in favor of an *opponent's*

lawyer. *Frazee* . . . expressly rejected the attempted assertion of a charging lien 'against the property of the opposing party.'" (emphasis in original)).

In rejecting Reeves' argument, the Court considered "the ethical and policy considerations" involved in construing an attorney lien statute to allow an attorney to attach property for "unadjudicated and unliquidated claims." *Frazee,* 104 Idaho at 465, 660 P.2d at 930. It noted that allowing an unperfected attorney lien would in turn allow an attorney to cloud the title of property "with 'claims of an attorney lien' without resort to any adjudication of such claims" and thereby create "[t]he potential for economic coercion by the attorneys." *Id.* (*citing Ross v. Scannell*, 647 P.2d 1004, 1008-09 (Wash. 1982)).

The *Frazee* Court also noted that allowing the attachment of an unperfected attorney lien against Kenneth's property would deny him due process to challenge the amount or propriety of Reeves' claim for fees. *Id.* at 466, 660 P.2d at 931. *See also Dragotoiu v. Dragotoiu*, 133 Idaho 644, 648, 991 P.2d 369, 373 (Ct. App. 1998) ("When seeking enforcement of an attorney's lien, due process must be afforded."). Finally, the Court distinguished *Skelton* by noting that there was no "fund" against which to assert a lien because Kenneth had already paid Elaine: "[In *Skelton*], a 'fund' was in existence representing the sums that the attorney had obtained for his client. Here no such 'fund' existed, since ***the moneys had already been paid to the client***." *Id.* at 466, 660 P.2d at 931 (emphasis added).

1. The District Court Properly Relied Upon *Frazee*.

Frazee is directly on point. Contrary to Clark's assertion, there is not and never was any "fund" in Jones Gledhill's possession against which Clark could assert a lien. As Clark

expressly acknowledges in his allegations, by the time Clark sued Jones Gledhill, Anfinson had ***already sent*** the settlement check to Spence via Jones Gledhill. (*See* R. 20 at ¶ 21 (alleging Anfinson sent check to Spence).) Because Anfinson had already paid the Clients before Clark's lawsuit, there was no "fund" in Jones Gledhill's possession created by Anfinson's payment against which Clark could enforce a lien. *See id.* (concluding no fund exists if "the moneys had already been paid to the client"). As the district court correctly ruled, the settlement check had "already gone through the hands of [Jones Gledhill], never to return." (R. 72.)

Moreover, there was no "fund" in this case because, as Clark concedes in his allegations, what Jones Gledhill received from Anfinson and conveyed to Spence was merely a ***check***—not actual "proceeds." A check is a type of negotiable instrument. Idaho Code § 28-3-104(6). A negotiable instrument is not property, but rather a promise or order to pay: "'[N]egotiable instrument' means an unconditional promise or order to pay a fixed amount of money. . . ." Idaho Code § 28-3-104(1). "A lien is an encumbrance on ***property***." *Liberty Mortgage Corp. v. Fiscus*, 379 P.3d 278, 285 (Colo. 2016) (concurrence) (emphasis added). A lien cannot encumber a check because it is not "property." Accordingly, that Jones Gledhill conveyed a check does not mean, as Clark contends, that Jones Gledhill possessed property against which Clark could assert a lien.

Even if a check were "property," Jones Gledhill would be deprived due process if Clark were allowed to proceed against it, just as in *Frazee*. Jones Gledhill is a complete stranger to Clark's relationship with his Clients and Spence. Indeed, the preservation of the Clients' attorney-client privilege and work product necessitates that Jones Gledhill—which is adverse to

Clark, the Clients and Spence—remain unaware of the specifics of their relationship. As a result, Jones Gledhill has no meaningful opportunity to determine whether the Clients or Spence owe Clark anything. That Jones Gledhill knew Clark had previously represented the Clients and had asserted a lien several months before Anfinson's settlement is entirely inadequate to conclude, as Clark does, that Jones Gledhill was privy to all the information necessary to challenge Clark's claim as due process requires. (*See, e.g.*, Appellants' Brief at 9 (arguing "Jones Gledhill knew Clark had been Plaintiffs' counsel for several years, knew that Clark was claiming a lien, and knew there was a settlement").)

For example, Jones Gledhill has no personal knowledge of: (1) the terms of Clark's fee agreements with his Clients or Spence; (2) the number of hours Clark spent working on the underlying case; (3) the value, if any, he added to that case; (4) the amount of costs Clark paid for the underlying case; (5) whether Clark was terminated for cause; and (6) whether the Clients or Spence had any viable claims against Clark. These facts, which are unknown to Jones Gledhill, impact Clark's right to fees. Because Jones Gledhill is not privy to that information, it has no meaningful opportunity to challenge Clark's claim for fees. Rather, Clark is required to "take affirmative steps in an adjudicative process [other than an action against Jones Gledhill] to perfect and reduce his lien to a judgment or order of the court." *See Frazee*, 104 Idaho at 466, 660 P.2d at 931.

The district court correctly relied upon *Frazee* to reach this conclusion when dismissing Clark's complaint under Rule 12(b)(6). (R. 70-71.) Clark's action against Jones Gledhill is simply an attempt to recover his fees (and perhaps more) "without the necessity of proving the

reasonableness of such fees in an adjudicative process" and to "levy against the property of [Jones Gledhill], who is a total stranger to the contract under which [Clark] claims money." *Id.* at 465, 660 P.2d at 930. This attempt is precisely the one this Court rejected in *Frazee*. *Id.* ("We decline to so interpret the attorney's charging lien statute. . . .").

2. Clark Cannot Meet the Requirements in *Skelton*.

Challenging the district court's reliance on *Frazee*, Clark asserts that the *Skelton* analysis is the proper analysis in this case. While Clark relies upon *Skelton*, he ignores entirely the five requirements set forth in that case for enforcing an attorney lien. *See Skelton,* 102 Idaho at 76, 625 P.2d at 1079 (identifying requirements). Clark did not allege any of the *Skelton* requirements, and he makes no effort on appeal to argue that he has met them. (*See* R. 16-23; *see also* Appellants' Brief 9-13.) Regardless, Clark can prove no set of facts in support of his claim that would entitle him to relief.

Clark cannot meet any of the *Skelton* requirements. The first *Skelton* requirement is that "there is a fund in court or otherwise available for distribution." *Id.* As discussed above, there is no "fund" in this case because Jones Gledhill only received a check—not actual proceeds—from Anfinson; that check had already been sent to Spence when Clark sued Jones Gledhill; and none of the Anfinson settlement proceeds are ever going to return to Jones Gledhill, as the district court correctly noted. (*See infra* at pp. 15-16.)

Even assuming there were an actual fund under Jones Gledhill's control, Clark still fails to meet the other four remaining *Skelton* requirements to enforce a lien. Clark has certainly not "agreed that [he will] look to the fund rather than the client[s] for his compensation." *Id.*

Indeed, Clark sued his Clients for the very same damages he seeks against Jones Gledhill—one week ***before*** suing Jones Gledhill. (*Compare* R. 8-15 (filed March 10, 2016) *with* R. 329-52 (filed March 3, 2016).) Having sued his Clients for the same fees for which he is suing Jones Gledhill, Clark cannot credibly assert he has agreed to look ***only*** to the purported "fund" he contends Jones Gledhill has.

Likewise, Clark cannot credibly claim his lien "is limited to costs, fees or other disbursements incurred in the litigation by which the fund was raised." *Id.* Notably, Clark failed to allege an exact amount of fees he is owed or the terms of any agreement under which such amount could be determined. Rather, Clark has alleged "damages of at least $500,000" and also damages for his "time and costs expended in recovering his attorney fees from [Spence and the Clients in *Clark*] in an amount to be proven at trial." (R. 21 at ¶¶ 28-29.)

Clark's damage allegation of $500,000 greatly exceeds any amount to which Clark could possibly be entitled from the $1,000,000 Anfinson settlement—a fact that Jones Gledhill has learned as a result of Clark's extraneous submissions in this case. According to Clark's fee agreements with his Clients, Clark has a 33.3 percent contingency on the Clients' net recovery. (R. 343-52.) In contrast, Clark's communications with Spence indicate Clark is entitled to a different amount under a fee-split arrangement, *i.e.*, 35 percent of a 40 percent contingency or a 14 percent contingency on the Clients' recovery. (R. 237-39.) Regardless of which terms apply, Clark's portion of the Anfinson settlement is nowhere near the $500,000 in damages he claims against Jones Gledhill. Furthermore, Clark's allegation that he is entitled to damages for pursuing his claims in *Clark* also shows that Clark is not limiting his claim against Jones Gledhill

to the fees he alleges he earned in the underlying action. (R. 21 at ¶ 29 ("Defendants are required to compensate Clark for Clark's time and costs expended in recovery his fees from [Spence] and/or [the Clients].").)

Clark also cannot show his services "operated substantially or primarily to secure the fund out of which he seeks to be paid." *Id.* The Clients terminated Clark on August 26, 2015, (R. 279), but they did not settle their claims against Anfinson until several months later. (R. 20 at ¶ 21.) Given this time lapse, Clark is incorrect to assert that his efforts "substantially or primarily" resulted in a settlement occurring many months after his withdrawal. *Id.* Moreover, Jones Gledhill, not Clark, was privy to certain legal services on behalf of the Clients that occurred after Clark's termination and that gave rise to Anfinson's settlement, and it personally knows that Clark did not participate in those efforts.

Finally, there are no equitable considerations necessitating enforcement of a lien against Jones Gledhill. That Clark worked on the underlying action and was discharged before the Anfinson settlement is inadequate to establish an equitable reason to allow Clark to pursue his opponent, Jones Gledhill, for fees that his former Clients or co-counsel purportedly owe him.

3. The District Court Did Not Misconstrue § 3-205.

Clark misperceives the issue in this case as one of "statutory interpretation" and attempts to read much more into § 3-205 than its plain language provides. The plain language of the statute provides only for the attachment of a lien to proceeds—and nothing more: "[T]he attorney . . . has a lien . . . which ***attaches*** to . . . ***proceeds*** . . . in whosoever hands they may come." Idaho Code § 3-205 (emphasis added). It does not provide the means by which Clark

must perfect his lien or enforce his lien. Those issues are addressed by case law, including *Frazee* and *Skelton*, the requirements of which Clark cannot meet.

Further, § 3-205 does not provide a claim for relief against literally anyone who has ever touched (no matter how briefly) proceeds if that person no longer possesses the proceeds. *See Frazee*, 104 Idaho at 466, 660 P.2d at 931 (concluding no fund exists where "the moneys had already been paid to the client").) Clark's overly broad reading of the statute ignores this fact and would result in the "potential for economic coercion by attorneys" that the *Frazee* Court sought to avoid. *See id.* at 465, 660 P.2d at 930. Under Clark's overreaching interpretation, an attorney could simply email every person—attorney or not—whom he thought might potentially come into contact with his clients' recovery—even if only briefly for transmission purposes—to create a claim for relief for himself against anyone who touched the proceeds. Clark's interpretation would require total strangers to an attorney's claim for fees to take affirmative action to protect that attorney's potential interest in his clients' recovery.

With this power, the attorney could obstruct settlement, as Clark attempted to do in this case by demanding to be a payee on the Anfinson settlement check. (*See* R. 15.) Including Clark as a payee would have prevented Spence from negotiating the check, stymied Anfinson's settlement, hindered Jones Gledhill's ability to obtain a dismissal and avoid the impending trial date, and otherwise unnecessarily embroiled Anfinson, its insurer and Jones Gledhill in Clark's fee dispute—a dispute in which they have no stake and about which they have no personal knowledge. This Court should decline to interpret § 3-205 to allow a discharged attorney to

interfere in this manner with the resolution of the litigation in which he formerly provided services under the auspices of enforcing an attorney lien.

C. Jones Gledhill Owed Clark No Duty of Care.

Contrary to Clark's allegations, Jones Gledhill had no legal duty to protect Clark's attorney lien by including Clark's name as payee on the Anfinson settlement check. (R. 21 at ¶ 26.) Clark misrepresents that the district court rejected Jones Gledhill's argument that it did not owe Clark a duty of care. (Appellants' Brief at 15-16 ("The District Court also rejected Jones Gledhill's arguments in their Motion to Dismiss . . . that defendants owed no duty of reasonable care.").) The district court actually ruled the exact opposite: "[Jones Gledhill] 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. 72 (emphasis added).)

The district court's ruling is correct. Jones Gledhill owes Clark no duty of care to protect his interest in his Clients' settlement. Section 3-205 does not provide for a legal duty on behalf of anyone, let alone Clark's opponent, to protect his lien interests in his Clients' recovery. Section 3-205 only provides a means by which Clark may protect his interests in his fees but not a means by which others must protect that interest. Other than his reliance on § 3-205, Clark offers no argument or authority to support his assertion that Jones Gledhill owed him a duty to protect his interest in his Clients' settlement, and no such authority exists. (*See* R. 31-32 (setting forth additional argument and authorities Jones Gledhill owed Clark no duty of care).)

1. The Litigation Privilege Protects Jones Gledhill.

Moreover, any claim against Jones Gledhill is barred by the litigation privilege.[5] "This privilege is predicated on the long-established principle that the efficient pursuit of justice requires that attorneys and litigants must be permitted to speak and write freely in the course of litigation without the fear of reprisal through a civil suit for defamation or libel." *Taylor v. McNichols*, 149 Idaho 826, 836, 243 P.3d 642, 652 (2010) (citation omitted). In *Taylor*, this Court expanded the privilege to "encompass conduct, as well as statements, which occur during the course of litigation. . . ." *Id.* at 837, 243 P.3d at 653. It held that "where attorneys are being sued by the opponent of their client in a current or former lawsuit, and that suit arises out of the attorneys' legitimate representation of that client pursuant to that litigation, the privilege does apply." *Id.* at 839, 243 P.3d at 655.

Once the lone prerequisite is met—"namely, that an attorney is acting within the scope of his employment"—the litigation privilege is an absolute privilege. *Id.* at 841, 243 P.3d at 657. "It is presumed that an attorney who is acting or communicating in relation to his representation of a client is acting on behalf of that client and for that client's interests." *Id.* "To find otherwise would invite attorneys to divide their interest between advocating for their client and protecting themselves from a retributive suit," a result plainly contrary to an attorney's ethical obligations. *Id.* (*citing* I.R.P.C. 1.3(1)).

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[5] Similar to Clark's misrepresentation that the district court rejected Jones Gledhill's argument that it owed Clark no duty of care, Clark misrepresents that the district court "rejected" Jones Gledhill's argument that it had a litigation privilege. (*See* Appellants' Brief at 16.) To the contrary, the district court never reached this issue, perhaps because it concluded there was no legal duty.

As the Court succinctly ruled:

> [W]here an attorney is sued by the current or former adversary of his client, as a result of actions or communications that the attorney has taken or made in the course of his representation of his client in the course of litigation, ***the action is presumed to be barred by the litigation privilege***. An exception to this general rule would occur where the plaintiff pleads facts sufficient to show that the attorney has engaged in independent acts, that is to say acts outside the scope of his representation of his client's interests, or has acted solely for his own interests and not his client's.

Id. (emphasis added); *see also Despain v. Unigard Ins. Co.*, No. 4:14-CV-184-BLW, 2015 WL 1003640, at *1 (D. Idaho Mar. 6, 2015) (requiring allegation of conduct such as malicious prosecution or tortious interference with "personal desire to harm" to avoid privilege).

Per Clark's own allegations, the litigation privilege applies to bar his action against Jones Gledhill. Clark expressly alleges that Jones Gledhill is a law firm and Graham and Fuhrman are attorneys; that they represented Anfinson in the underlying action at all relevant times; and that they conveyed a check from Anfinson to Spence in their capacity as legal counsel for Anfinson per a settlement agreement between the parties. (*See* R. 17 at ¶¶ 2-5; R. 20 at ¶¶ 21, 23.) Notably, Clark does not—and cannot credibly—allege any independent act by Jones Gledhill outside the scope of its representation that indicates it was acting solely for its own interest and not in Anfinson's interests. Absent allegations of such conduct, the litigation privilege bars Clark's action. Although the district court never had to reach this issue, the privilege is an alternative basis upon which to affirm the district court's dismissal of Clark's complaint under Rule 12(b)(6). *See Martel v. Bulotti*, 138 Idaho 451, 454-55, 65 P.3d 192, 195-96 (2003) (noting Court "may uphold decisions on alternate grounds").

II. The District Court Did Not Abuse Its Discretion By Denying Clark's Motion to Amend.

The district court denied Clark's motion to amend his complaint to add new defendants, including Anfinson and its insurer, and to assert several new allegations. (*See* R. 74-76 (order denying motion to amend); R. 308-17 (proposed amendments).) Although Clark does not identify the district court's denial of his motion to amend as an issue on appeal, he expressly states that it erred by denying his motion to amend. (*See* Appellants' Brief at 4, 11 ("The District Court also erred when it denied Clark's Motion to Amend.").) Clark fails to make any direct argument or cite any authority challenging the district court's denial, but out of an abundance of caution, Jones Gledhill addresses the district court's denial, which was proper.

A. Standard of Review

The denial of a plaintiff's motion to amend a complaint is reviewed for an abuse of discretion. *Spur Products Corp. v. Stoel Rives LLP*, 142 Idaho 41, 43, 122 P.3d 300, 302 (2005). In reviewing an exercise of discretion, the Court must consider: "(1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason." *Id.* (quotations omitted). The denial of a motion to amend is appropriate if the proposed claim is futile. *Shapley v. Centurion Life Ins. Co.*, 154 Idaho 875, 882, 303 P.3d 234, 241 (2013).

B. Clark's Proposed Amendments Are Futile.

Clark's proposed amendments are futile. Notably, Clark did not attempt to assert a new or different claim for relief. Rather, he proposed (1) additional allegations in support of his original claim, (R. 313 at ¶¶ 26-32); and (2) the inclusion of additional defendants, including Anfinson and "John Doe Insurance Companies"—presumably Anfinson's insurer. (R. 308-10.) Regarding the proposed defendants, the district court ruled that "[t]o the extent that Plaintiffs seek to add new Defendants to this case, those new Defendant[s] would have no liability to Plaintiffs for the same reason that the existing Defendants have no liability." (R. 75.) This ruling is correct, and Clark does not challenge it on appeal.

Regarding Clark's new allegations in support of his original claim, the district court "reviewed Plaintiffs' Motion to Amend, the Proposed Amended Complaint, Memoranda, and Declaration" and concluded that "[t]hese filings do not add any new facts or authorities that bear on the correctness of the judgment of the court." (*Id.*) Clark appears to challenge this ruling arguing that "the District Court's ruling ignores the fact that Jones Gledhill directly interfered with Clark's ability to 'perfect' his lien. . . . Clark sought leave to amend his complaint ***to very specifically plead*** that Jones Gledhill had interfered with Clark's ability to perfect his lien." (Appellants' Brief at 11 (emphasis added).)

Clark's proposed allegations, however, belie this argument. Contrary to Clark's assertion, he never even uses the words "interfere" or "interference" in his proposed allegations. (*See* R. 313 at ¶¶ 26-32.) Further, he never argued in support of his motion to amend that he was attempting to specifically plead Jones Gledhill interfered or otherwise prevented him from

perfecting his lien. (*See* R. 322-23.) Rather, Clark argues for the first time on appeal that he alleged "interference" by Jones Gledhill. Because Clark failed to raise this argument below, the Court should reject it. *Crowley v. Critchfield*, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007) ("'The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal.'"). Moreover, to the extent Clark is attempting to assert a negligence claim for tortious interference, his proposed allegations fail to state any of the requisite elements of such a claim. *See Jensen v. Westberg*, 115 Idaho 1021, 1027, 772 P.2d 228, 234 (Ct. App. 1988) (identifying elements of tortious interference).

Rather than "specifically" pleading interference, Clark's proposed allegations appear to be an effort allege the *Skelton* requirements, which he originally failed to allege. His efforts, however, fail. Despite his new allegations, Clark still cannot meet the elements of *Skelton*. Most obviously, that he sued his Clients *before* suing Jones Gledhill establish he was not "look[ing] to the fund rather than the client for his compensation." *See Skelton*, 102 Idaho at 76, 625 P.2d at 1079. (R. 313 at ¶ 27 (proposing allegation that he sued his Clients first).) Also, Clark's allegation that his lien is limited to his earned fees is contradicted by his allegation that he is seeking fees against Jones Gledhill both for pursuing *Clark* ***and*** for general damages of "at least $500,000," which greatly exceeds any amount that Clark would be entitled under the terms of his fee agreements. *See id.* (requiring lien limited to amount incurred in underlying litigation). (*See* R. 314 at ¶¶ 39-40 (damage allegations); *see also infra* at pp.19-20 (discussing Clark's fee agreements).) Because Clark's newly proposed allegations still do not state a viable claim and

because Clark raises arguments not raised below, this Court should affirm the district court's denial of Clark's motion to amend.

III. The Fee Award Under § 12-121 Was Not an Abuse of Discretion.

Clark pursued this case frivolously, unreasonably and without foundation. He disregarded established law; he did not argue any new or novel interpretation of § 3-205; he did not argue the law should be extended or modified; and he was specifically warned by Jones Gledhill before filing his action that existing case law precluded his claim. Furthermore, Clark unnecessarily increased the cost of litigation by filing extraneous information in the record unrelated to Jones Gledhill's Rule 12(b)(6) motion and by repeatedly disclosing confidential information in the record. For these reasons, the district court properly awarded Jones Gledhill fees under Idaho Code § 12-121.

A. Standard of Review

This Court reviews an award of attorney fees under § 12-121 at the trial level, applying a three-part test. *Anderson v. Larsen*, 136 Idaho 402, 409, 34 P.3d 1085, 1092 (2001). The inquiry is:

> (1) whether the trial court perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to do it; and (3) whether the trial court reached its decision by an exercise of reason.

Id.

B. Clark's Action Is Frivolous, Unreasonable and Without Foundation.

This Court should affirm the district court's award of $26,250 in attorney fees to Jones Gledhill under § 12-121. Rule 54 of the Idaho Rules of Civil Procedure provides that attorney

fees under § 12-121 may be awarded if the court finds that "the case was brought, pursued or defended frivolously, unreasonably or without foundation, which finding must be in writing and include the basis and reasons for the award." Idaho R. Civ. P. 54(e)(2). In support of its fee award, the district court ruled that "Defendants are the prevailing parties in this case, which is undisputed by Plaintiffs." (R. 207; *see also* R. 100 (conceding Jones Gledhill is prevailing party).)

Regarding the frivolous, unreasonable and foundationless nature of the case, the district court further concluded:

> Plaintiffs disregarded established case law finding that the failure to take affirmative adjudicative steps to perfect an attorney's lien renders the claim unenforceable. . . . 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 [sic] "novel legal question" merely argued that the Court should ignore established precedent, which it has declined to do.
>
> Moreover, in correspondence before the suit was filed, Plaintiffs were specifically warned by Defendants that the claim failed based on Idaho case law.
>
> Furthermore, Plaintiffs' [sic] took action that increased the cost of litigation by filing [confidential] documents [which] did not add anything to Plaintiffs' case anyhow.
>
> . . . . [T]here was no legal basis for Plaintiffs' claim, of which Plaintiffs' [sic] were fully aware before filing suit, and then Plaintiffs also unnecessarily increased the cost of litigation.
>
> Therefore, the Court finds and concludes that Plaintiffs brought and pursued this case frivolously, unreasonably and without foundation. . . .

(R. 212-13 (footnote citations to record omitted).)

In support of its award, the district court also cited *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 329 P.3d 1072 (2014). (R. 211.) In that case, Maslen had possession of a historical "Fairchild" airplane owned by the Idaho Military Historical Society ("IMHS"). *Id.* at 626, 329 P.3d at 1074. Maslen volunteered to store the plane in his hangar space and never indicated he expected payment. *Id.* at 627, 329 P.3d at 1075. Later, Maslen refused to surrender the plane to the IMHS and filed a claim of lien with the FAA seeking compensation for expenses incurred while storing the plane. *Id.* at 626, 329 P.3d at 1074. After a bench trial, the court found Maslen's "claim of lien was with reckless disregard for the truth or falsity of the charges therein" and ordered Maslen to surrender the plane to IMHS. *Id.* at 629, 329 P.3d at 1077. Further, the court awarded IMHS fees under § 12-121 and Rule 54. *Id.*

Maslen challenged the fee award on appeal, but the Court affirmed. It noted that Maslen's "claim of lien was without foundation, because there was no evidence that [he] was entitled to compensation." *Id.* at 631, 329 P.3d at 1079. It also noted that "[t]he record in this case is clear that litigation to obtain possession of the aircraft should never have been necessary. The litigation was necessitated by factual claims that were indefensible." *Id.* at 632, 329 P.3d at 1080.

As in *Maslen*, Clark's litigation to recover his fees against his opponent, Jones Gledhill, should have never happened. Indeed, Clark eventually conceded that his lien was not enforceable against Jones Gledhill because he had not perfected his lien. Clark made this concession in support of his motion to amend, which he filed after oral argument but before the district court entered its Memorandum Decision. Specifically, Clark concedes "the lien is not

enforceable or collectable until such time [as] it is ultimately reduced to judgment, because the actual damages are not yet determined." (R. 320.) Further, Clark concedes he has no idea what the judgment amount will be but that he is attempting to determine that amount in his separate *Clark* action. (R. 321-22.)

Clark cites to these concessions and argues that he was in "good faith" because his claim against Jones Gledhill "was not yet ripe." (Appellants' Brief at 16.) Apparently, Clark's assertion is that he could eventually enforce his lien against Jones Gledhill after adjudicating the amount of the lien against his Clients and Spence. Clark's claim, however, will never be ripe against Jones Gledhill because Jones Gledhill does not now and will never possess the Clients' settlement proceeds, as Clark's allegations conceded, and this district court correctly noted. (R. 20 at ¶ 21; R 72.) Accordingly, Clark's claim of "good faith" is hollow.

Clark's argument that he presented a "novel legal issue" is also meritless. (*See* Appellants' Brief at 15.) Clark contends his "novel" issue is Jones Gledhill's purported "interference" with his ability to perfect his lien. (*Id.*) As discussed above, however, this issue was never alleged or raised below and, regardless, Clark still fails to state a valid claim. (*See infra* at pp. 26-27.) Moreover, it is not "novel" to request that the court simply "ignore established precedent," as the district court noted. (R. 212.)

Finally, contrary to Clark's argument, the district court did not abuse its discretion by referring to Clark's filing of confidential records in support of its fee award.[6] (Appellants' Brief

[6] Notably, Jones Gledhill did not seek fees associated with sealing the records. (*See* R. 148-53 (identifying billing entries but excluding any for motion to seal).) Rather, the Clients specially

at 16-17.) The court clearly understood the nature of Clark's wrongful disclosures in both this case and *Clark*. In its Memorandum Decision, the district court noted that Clark had filed the same confidential records in *Clark* but had stipulated to a protective order in that case to rectify his wrongful disclosures. (R. 68.) Clark's agreement with counsel to maintain confidentiality—followed the very next day by his disclosure of confidential information in the record in this case—is also explained elsewhere in the record. (*See* R. 367-68 at ¶¶ 4-7 (explaining Clark's disclosures); R. 139 at pp. 12:1-13:24 (same).) Clark has no valid excuse for his improper disclosures or for unreasonably increasing the cost of this litigation by making them.

The district court obviously perceived the issue as one of discretion and acted both within the boundaries of its discretion and consistently with the applicable legal standards while exercising reason. *See Anderson*, 136 Idaho at 409, 34 P.3d at 1092 (2001). It carefully reviewed the filings in support of Jones Gledhill's fee request, made specific findings and conclusions, and awarded Jones Gledhill the amount it concluded was reasonable. This Court should affirm that award.

IV. The District Court Properly Sealed the Clients' Confidential Records.

At the outset, Jones Gledhill notes that the district court's decision to seal records has absolutely no bearing on the merits of this appeal, including Jones Gledhill's motion to dismiss, Clark's motion to amend or the fee award. Clark does not and cannot argue that the district

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appeared under Rule 32 of the Idaho Administrative Rules to request sealing. They, however, did not file a petition for fees.

court's decision to seal documents somehow impacted its decisions on the merits, other than to conclude that Clark had unnecessarily increased the cost of this litigation.

Further, Clark's former Clients—not Jones Gledhill—requested the documents to be sealed to protect their attorney-client privilege and work product, which Clark intentionally filed in the record. Jones Gledhill has no stake in whether these documents are sealed or not. The Clients, however, continue to assert that the documents the district court sealed should remain sealed to protect their interests in their underlying case, which remains on-going. *See Forbush v. Sagecrest Multi-Family Prop. Owners' Ass'n*, Supreme Court No. 44053 (filed March 21, 2016).

A. Standard of Review

This Court reviews the district court's decision to seal records under Rule 32 of the Idaho Court Administrative Rules for an abuse of discretion. *State v. Gurney,* 152 Idaho 502, 503, 272 P.3d 474, 475 (2011). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *Id.*

Furthermore, "[h]armless error is not grounds for reversal." *Rogers v. Trim House*, 99 Idaho 746, 750, 588 P.2d 945, 949 (1979). An error is harmless if it does not affect the substantial rights of a party. *Clark v. Klein*, 137 Idaho 154, 156, 45 P.3d 810, 812 (2002). A substantial right is one that potentially affects the outcome of the litigation. *Rogers*, 99 Idaho at

749, 588 P.2d at 948. Clark has the burden of showing a prejudicial error, but he fails to make any argument that the district court's sealing of documents somehow adversely affected his substantial rights. *See id.*

B. The Disclosure of the Sealed Materials Would Harm the Clients.

The district court did not abuse its discretion when sealing certain documents in the record. In January 2016, counsel for the Clients sent Clark a letter expressly informing him that the Clients "have not authorized you, and you are not authorized to disclose—in court filings or otherwise—any protected information related to your representation of them, including your communications with The Spence Law Firm, its lawyers, or its personnel." (R. 367 at ¶ 4.) Despite this warning, Clark filed his former Clients' confidential information in the record in *Clark*. Thereafter in that case, on May 3, 2016, Clark deposed the Clients. (R. 367-38 at ¶ 5.) During the course of those depositions, the Clients' counsel discussed their concerns about Clark's disclosures of privileged information in the record and that the Clients did not intend to waive their attorney-client privilege or other protections. (*Id.*) At that time, Clark agreed on the record and in the presence of his former Clients that he would stipulate to a protective order to allow for the sealing of records. (*Id.*; *see also* R. 139 at 11:14-13:24.)

Despite this agreement—***the very next day***—on May 4, Clark ***again*** filed his Clients' confidential information in the record in this case. Just as in *Clark*, the information included written communications about the underlying action between Clark and Spence, between Spence and the Clients, and between Clark and the Clients. (R. 236-48.) Additionally, in opposition to Jones Gledhill's Rule 12(b)(6) motion, Clark included a detailed description of his views on

Spence's internal handling of the underlying case, including activities entirely unrelated to Anfinson. (R. at 250-54.)

Because the Clients' underlying action remains on-going, the Clients moved under Rule 32 to seal the documents containing their protectable information. (R. 353-76.) In response to the Clients' motion, Clark ***again*** filed yet more of the Clients' confidential documents in the record. (R. 266.)

The district court properly granted the Clients' motion to seal. Per the requirements of Rule 32(i), the Court entered finding of facts and conclusions of law. (R. 69.) Specifically, the district court found that "[t]he 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." (*Id.*) Further, it found that "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." (*Id.*)

On appeal, Clark challenges the district court's decision to seal documents solely (and boldly) on the basis that he has previously made the same wrongful disclosures in the *Clark* case. Namely, Clark contends that because he disclosed confidential information in the public record in *Clark*, that same information should remain in the public record in this case. (*See* Appellants' Brief at 18.) Clark's challenge should be rejected for numerous reasons. First—and foremost—Clark has no authority in any case or context to disclose his former Clients' protectable

information. To the contrary, Clark has an on-going duty to maintain that information as confidential, which duty he has intentionally breached repeatedly. *See* I.R.P.C. 1.6(a).

Second, that Clark originally disclosed his Clients' confidential information in *Clark* does not excuse his second wrongful disclosure in this case. Although the confidential information Clark filed in the *Clark* case remained in the public record on May 4—the day Clark filed it in this case—the Clients had specifically addressed Clark's duty to maintain their confidentiality the day before on May 3. Regardless, Clark made the same wrongful disclosures that he made in *Clark* in this case—the day after agreeing to maintain confidentiality. Thereafter, Clark refused to enter into a stipulation for a protective order in *Clark*, despite his May 3 agreement, thereby requiring the Clients to file and argue a motion for such an order. (*See* R. 139 at p. 13, ll. 16-24.)

Third, that certain of Clark's improper disclosures in the *Clark* case remained unsealed at the time he filed Appellants' Brief is not a basis to conclude that the district court in this case abused its discretion by sealing confidential records. Instead of taking action in the *Clark* case to seal his improper filings or instead of notifying the Clients that they needed to do so, Clark yet again improperly disclosed documents in the public record in this appeal when requesting that this Court take judicial notice of them. (Motion for Judicial Notice (filed December 9, 2016); *see also* Order Denying Motion for Judicial Notice (January 13, 2017).)

Perhaps, Clark is attempting to suggest that the Clients are not concerned about protecting their confidential information. Clark, however, certainly knows his suggestion is entirely untrue based upon: (1) the correspondence he received from the Clients' counsel before his flurry of lawsuits, (2) the discussion during depositions about the need to maintain the

Clients' confidentiality and his agreement—made in their presence—to do so, (3) the Clients' request that the district court seal their confidential documents in this case, (4) their efforts to obtain a protective order in *Clark* after Clark breached his agreement to stipulate to one, and (5) their opposition to Clark's Motion for Judicial Notice before this Court. Based upon these events, Clark undisputedly knows his Clients intend to protect their attorney-client privileged communications and work product, and Clark's disclosure of that information can only be described as intentional.

Finally, Clark's repeated, intentional disclosures of his former Clients' confidential information in this case is particularly egregious because Clark is attempting to disclose the Clients' confidences to their adversary, Jones Gledhill, which has never been privy to the information. At least in *Clark*, the disclosures, while improper, are only immediately available to the parties in the *Clark* case who were already privy to the information.

While Clark asserts the district court had no "reasoned basis" to seal records in this case, it is Clark who has exercised a serious abuse of discretion by flagrantly disregarding his duty of confidentiality. The district court correctly concluded the information sealed was protectable under Rule 32, and this Court should affirm that decision.

ATTORNEY FEES ON APPEAL

Clark is not entitled to attorney fees on appeal under Idaho Code § 12-121. Rather, Jones Gledhill is. Recently, this Court in *Frantz v. Hawley Troxell Ennis & Hawley LLP,* 161 Idaho 60, 383 P.3d 1230 (2016), articulated when appellate fees under § 12-121 are appropriate:

> Section 12-121 allows an award of attorney fees to a prevailing party where the action was pursued, defended, or brought frivolously, unreasonably, or without foundation. Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law. Further, attorney fees on appeal have been awarded under Section 12-121 when appellants failed to add any new analysis or authority to the issues raised below that were resolved by a district court's well-reasoned authority.

Id. at 66, 383 P.3d at 1236 (quotations and citations omitted). Fees under § 12-121 have also been awarded where "[t]here is no basis in fact or law for [the appellant's] claims and [he] was so instructed by the district court below." *Elliott v. Murdock*, 161 Idaho 281, 289, 385 P.3d 459, 467 (2016).

On appeal, Clark has failed to show that the district court failed to apply well-established law. As the district court noted, Clark "merely argued that the Court should ignore established precedent." (R. 212.) Having failed to convince the district court to ignore the law, Clark appealed and is now requesting that this Court ignore it. Further, Clark has failed to add any new authority or any new analysis in support of his appeal. Finally, Clark's appeal is not well taken given that he has already conceded below that the district court's ruling was correct. (*See* R. 320 (acknowledging his "lien is not enforceable or collectable until such time [as] it is ultimately reduced to judgment, because the actual damages are not yet determined"); R. 321-22 (acknowledging he has "no idea" what amount he is owed).) For these reasons, the Court should award fees on appeal to Jones Gledhill under § 12-121.

This award should include Jones Gledhill's fees incurred in opposing Clark's motion for judicial notice, filed on December 9, 2016, which this Court denied on January 13, 2017.

Clark's motion was not well grounded in existing law or an extension thereof. Most notably, Clark failed to cite any legal authority in support of his motion, and the two Idaho authorities providing for judicial notice, Rule 201 of the Idaho Rules of Evidence and Idaho Code § 9-101, are entirely inapplicable. (*See* Respondents' Opposition to Appellants' Motion for Judicial Notice at pp. 7-9.) Furthermore, Clark undisputedly knows that he should not disclose in the public record the confidential information he submitted to this Court for judicial notice. Clark's repeated and inexplicable violations of his duty of confidentiality appear to be interposed for the improper purpose of increasing the cost of this (and other) litigation and jeopardizing his former Clients' underlying action. As a result, Clark has violated ***both*** the improper purpose clause and the frivolous filing clause of Idaho Appellate Rule 11.2. *See Sims v. Jacobson*, 157 Idaho 980, 987, 342 P.3d 907, 914 (2015) (concluding "attorney fees can be awarded as sanctions when a party or attorney violates either (a) the frivolous filings clause or (b) the improper purpose clause").

CONCLUSION

Based on the foregoing, Jones Gledhill respectfully requests that this Court: (1) affirm the district court's grant of Jones Gledhill's Rule 12(b)(6) motion; (2) affirm the district court's denial of Clark's motion to amend; (3) affirm the district court's award of fees to Jones Gledhill under § 12-121; (4) affirm the district court's decision to seal records under Rule 32; (5) deny Clark's request for fees on appeal; and (6) grant Jones Gledhill's request for fees on appeal, including fees incurred to oppose to Clark's Motion for Judicial notice.

DATED THIS 7th day of February 2017.

ANDERSEN SCHWARTZMAN
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February 2017, I caused to be served two true and correct copies of the foregoing **RESPONDENTS' BRIEF** by the method indicated below and addressed to the following:

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