2-28-2017

Clark v. Jones Gledhill Fuhrman Gourley Appellant's Reply 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' REPLY 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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REPLY ARGUMENT

Reasoned argument seemingly would address the language and nature of the attorney lien statute as remedial legislation, and the stated intent or purpose as identified by the Idaho Supreme Court in *Skelton v. Spencer*, 102 Idaho 69, 625 P.2d 1072 (1981)? "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 at 77. Then, 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).

However, Jones Gledhill ignores the fact that Idaho's lien statute is remedial and should be interpreted broadly. In fact, the lion's share, if not every argument raised on appeal by Jones Gledhill disregards or ignores the status of the lien statute as remedial legislation.

Curiously, Jones Gledhill also disregards the "intent of the law," and essentially argues interpretations of the lien statute and case law that directly conflicts the stated purpose. While the very nature of a lien is to protect one's interest in something, Jones Gledhill argues Idaho's attorney lien statute should be construed narrowly and applied even more so. Jones Gledhill advocates for limited application and minimal liability, when the Legislature intended just the opposite.

Even more ridiculous is Jones Gledhill's arguments that no fund existed; just a baseless attempt to disregard the clear ruling in *Frazee*. "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. In reality, whether or not a "fund" existed is a question on fact, which should have prevented dismissal on the pleadings. Likely, Jones Gledhill would have to concede this fact as true as the Spence Firm purports to be holding at least some of the funds at issue in its trust account. (R. p. 282.) Moreover, Jones Gledhill denies it ever possessed the funds, which is also a question of fact.

Finally, Jones Gledhill concedes the likelihood that Judge Hoagland erred in ruling that *Frazee* applied universally to all attorney lien situations when it offers an alternative basis for dismissing the case below. However, while the Supreme Court has found a "general rule" exists providing immunity to counsel in litigation; or a general "litigation privilege," there is no Idaho precedent establishing this general rule applies to a statutory attorney lien claim. Idaho's attorney lien statute states the lien, and therefor liability for ignoring or disregarding such a lien, should attach to funds in "whosoever's hands they may come;...." I.C. § 3-205. Without any direct legislative intent or clear statutory language evidencing a desire to protect or immunize opposing counsel from liability for disregarding an attorney lien, there is no basis to apply a "general" privilege to circumvent or interfere with Idaho's lien statute. Accordingly, the litigation privilege does not apply, as Judge Hoagland ruled below, and the case should be remanded to the District Court for trial.

1. *FRAZEE* DOES NOT APPLY WHERE A FUND IS CREATED BY THE ATTORNEY'S EFFORTS.

Respondents' arguments ignore the stated purpose of and clear wording of the lien statute. First they argue Jones Gledhill never possessed any fund to which Clark's lien attached.

However, Clark's right to assert his lien arose from "commencement of the action," and it attached to "a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come,...." I.C. § 3-205. In other words, Clark's lien attached the second Jones Gledhill's client agreed to settle with Clark's former clients and the fund was created. Contrast these facts here which fit squarely into the lien statute with those in *Frazee*, where there was no fund created by the attorney's efforts and the aggrieved attorney sought to lien the opposing counsel's property.

Then, Jones Gledhill argues that even if Jones Gledhill had possessed the funds, the funds were already delivered to the Spence Firm when Clark filed his suit against Jones Gledhill, so apparently Jones Gledhill is immune from liability? Jones Gledhill's argument ignores the fact that they had actual and constructive notice of Clark's lien and had knowledge of the settlement. Applying the clear wording of the statute, Clark's lien attached before or while Jones Gledhill possessed the settlement funds and did so before delivery to the Spence Firm. If Idaho's attorney lien statute is remedial in nature,[1] and therefore must be construed "broadly to effectuate the intent of the legislature,"[2] and the intent of this statute was to "... allow the attorney an interest in the fruits of his skill and labors....[which] secures his right to compensation for obtaining the recovery or 'fund' for his client.[,]"[3] then to allow Jones Gledhill to avoid liability for ignoring

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[1] *Franklin Bldg. Supply Co. v. SUMPER*, 139 Idaho 846, 851, 87 P.3d 955, 960 (2004)
[2] *Selkirk Seed Co. v. State Ins. Fund*, 135 Idaho 434, 438, 18 P.3d 956, 959 (2000).
[3] *Skelton v. Spencer*, 102 Idaho at 77.

Clark's lien under the circumstances would require this Court to ignore the clear wording of the statute and its stated purpose.

Jones Gledhill notes that Clark sued his former clients before filing this action. This is absolutely true, and a direct and proximate result of Jones Gledhill's disregard for Clark's lien. Had Jones Gledhill placed Clark's name on the settlement check, then Jones Gledhill could have avoided any liability. However, because Jones Gledhill disregarded the lien statute and failed to protect Clark's interest, Clark has had to sue his former clients and former co-counsel to collect the funds which Jones Gledhill once possessed.

Jones Gledhill also argues that if it had acknowledged Clark's lien then somehow that would have interfered with the settlement with Clark's former clients. However, this is a ridiculous contention. The parties reached a settlement amount and Jones Gledhill was required to tender the amount agreed to for settlement. At that time, both Jones Gledhill and the Spence Firm knew Clark was entitled to and was asserting a lien. If the Spence Firm refused tender of the settlement check with Clark's name on it as Clark requested, then Jones Gledhill certainly could have enforced the settlement upon tender of the funds to the Court and asserted it had fully complied with I.C. § 3-205. Jones Gledhill could have also required Clark to sign any settlement agreement. Instead, Jones Gledhill concealed the settlement from Clark and processed and delivered the funds to the Spence Firm. Such conduct is hardly authorized by a statute enacted to protect an attorney's hard work; not to protect and immunize attorneys who disregard a statutory lien.

Jones Gledhill's "interference" argument also ignores the fact that Clark could have asserted his entitlement to a lien in the *Forbush v. Sagecrest* case, had he know there was a settlement; again which both former clients and Jones Gledhill concealed from Clark. "In our view, the attorney's charging lien may not only be asserted, but may be enforced, in the civil action which gave rise to the lien claim, or, in the alternative, in an independent action." *Skelton v. Spencer*, 102 Idaho at 75. If Clark had authority to adjudicate his entitlement to a lien and the amount to which he was entitled in the *Forbush v. Sagecrest* case then it is a nonsensical argument that he somehow would have interfered with the Anfinson Plumbing settlement by asserting his lien. Now, however, that case stands dismissed, and Clark was forced to file separate actions to recover his damages, which again he is entitled to do according to *Skelton.*

Jones Gledhill also argues that it had no knowledge of the terms of Clark's agreement, so how can they be held liable for ignoring Clark's lien? The problem with this argument is that determining the amount of any lien is not a prerequisite to the lien arising and attaching to settlement funds. As discussed in *Skelton v. Spencer*, 102 Idaho at 76, and ignored by Jones Gledhill here, knowledge of or a determination of the amount of the lien is not a pre-requisite to the creation of a valid lien in the first place.

Nor is Clark trying to "levy against the property of Jones Gledhill"; which Jones Gledhill argues as a basis to claim *Frazee* applies. Actually, Clark is seeking damages because Jones Gledhill ignored Clark's lien and now Clark has had to sue to collect the money that Jones Gledhill once possessed. Unlike the *Frazee* situation, there was a fund, Jones Gledhill had knowledge of Clark's claim of lien, knew that according to I.C. § 3-205 Clark was entitled to a

lien, and at some time possessed or controlled money in the form of settlement funds. As Jones Gledhill disregarded its statutory duty to protect Clark's interest in the settlement funds, Jones Gledhill faces liability up to the amount of Clark's lien, plus Clark's costs of litigation for now having to pursue recovery of the funds Jones Gledhill failed to protect.

The reality, which Jones Gledhill ignores, is *Frazee* was decided and necessary because there was no "fund" upon which the lien attached. Some "adjudicative process" was required to determine if in fact the attorney was entitled to a lien in the first place, because the facts in *Frazee*; notably there was no "fund," did not align with the language in the lien statute. However, that simply is not the case if there is a fund created, and any tortured argument to the contrary must fail. The Supreme Court specifically did not overrule *Skelton* in *Frazee,* so *Skelton* remains good law and the case law applicable to the unique facts presented here. If the *Frazee* Court had intended *Frazee* to apply universally, regardless of whether a "fund" was created, then *Frazee* would have overruled *Skelton*. As noted above, however, the *Frazee* Court distinguished the facts in *Frazee* from those in *Skelton*, but did not overrule. Consequently, there is no case law to support Judge Hoagland's erroneous decision that *Frazee* applies universally to every attorney lien situation. As Judge Hoagland misapplied the law, he abused his discretion, and this Court must reverse.

2. CLARK HAS MET THE REQUIREMENTS IN *SKELTON*.

First, whether Clark has met the elements of *Skelton,* which Jones Gledhill argues is not the case, involves questions of fact which should have prevented dismissal in the first place. By

now arguing Clark *could not* have met the *Skelton* criteria, Jones Gledhill concedes facts remain at issue and this case should not have been decided below on the pleadings.

Skelton criterion (1) requires the existence of a "fund." Although it appears undisputed that there were settlement funds generated from the Anfinson Plumbing settlement; Jones Gledhill argues there was no "fund" because Jones Gledhill just received a "check," and had already sent the check to Spence. Once again Jones Gledhill ignores the plain meaning and purpose of the lien statute. Clark's right to assert his lien arose from "commencement of the action," and it attached to "a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come,...." (I.C. § 3-205.) (Is Jones Gledhill really arguing that a check for the settlement funds does not constitute "proceeds" as stated in the lien statute?) Clark's lien therefor attached to the settlement the instant the settlement was consummated, not when Jones Gledhill received any funds or "proceeds" and concealed the settlement from Clark, or upon delivery to the Spence firm.

As Jones Gledhill points out, Judge Hoagland did find that because Jones Gledhill no longer had the funds, it somehow escaped liability. However, neither the District Court below nor Jones Gledhill on appeal provides any basis to conclude liability for ignoring a valid lien is extinguished once the funds are no longer in one's possession. As argued in Clark's initial brief, such a ruling undermines the very purpose of the lien statute, and actually promotes the kind of subterfuge that occurred here. "If we conceal the settlement and deliver the funds, then we avoid the lien statute?" Is that really what the Legislature intended?

Jones Gledhill concedes Clark has established *Skelton* criterion (2); "that the services of the attorney operated substantially or primarily to secure the fund out of which he seeks to be paid."

Jones Gledhill then misconstrues *Skelton* criterion (3). *Skelton* discusses the criteria necessary for the *creation* of the lien. However, Jones Gledhill ignores this fact and argues Clark's pleadings against former clients and Jones Gledhill, which are irrelevant. In both the Clark Contingency Fee Agreement and the Spence Contingency Fee Agreement, the attorney's compensation is based on recovery from the defendants in the *Forbush v. Spence* case. If there is no recovery, then the attorneys are not entitled to compensation. Accordingly, regardless of which contract applies, "it was agreed that counsel look to the fund rather than the client for his compensation; [for the lien to be created]." *Skelton v. Spencer*, 102 at 77. If that was the agreement between Clark and former clients, which it was, then criterion (3) is satisfied.

Additionally, Jones Gledhill's argument is based on the nonsensical contention that Criteria 3 somehow addresses Clark's claims in litigation, not the facts giving rise to the creation of the lien. Nothing, however, prevents Clark or any other aggrieved attorney from seeking additional damages from former clients, co-counsel or anyone subject to liability for disregarding the lien statute. While Clark's *lien* is limited to the funds he claims to be entitled from the settlement, nothing in the statute prevents Clark from seeking any additional damages from Jones Gledhill, former clients, or the Spence Firm.

Clark is not suing former clients and Jones Gledhill for the "same fees," as Jones Gledhill misrepresents to the Court, he is suing Jones Gledhill for the fees and his damages incurred for

now having to sue to collect those fees. Moreover, if Clark cannot collect his fees from clients or the Spence Firm, as most are out of state, then certainly, Jones Gledhill would be liable to Clark pursuant to the lien statute for these fees.

Skelton criterion (4) states "that the lien claimed is limited to costs, fees or other disbursements incurred in the litigation by which the fund was raised[.]" *Id.* Once again, Jones Gledhill confirms its misunderstanding of, or outright disregard for, the *Skelton* criteria, which apply to determine whether a lien was created, not what damages or claims may arise in litigation. Jones Gledhill confuses Clark's entitlement to a lien by arguing facts related to Clark's claims. However, the two issues are distinct and exclusive. Again, while the lien is limited to the amount of the fees to which Clark was entitled from clients, there is no cap or limit in the lien statute to Clark's actual damages he seeks in litigation.

Clark performed the lion's share of the investigation and discovery in the *Forbush v. Sagecrest* case, including discovery of facts that proved Anfinson Plumbing and its employee acted recklessly and were responsible for McQuen's death.[4] Anfinson Plumbing's only defense was that A.O. Smith (the manufacturer of the water heater) knew or should have known that plumbers would remove a safety device when trying to fix a non-working water heater, which had occurred scores of times at Sagecrest. However, unaccountably, Jones Gledhill failed to join former client's opposition to A.O. Smith's motion for summary judgment or file any opposition to protect their client.

[4] Clark had actually demanded Anfinson Plumbing pay policy limits long before the Spence Firm joined the case, and the Spence Firm sent the same demand while Clark was still counsel for the Defendants.

One of Clark's conflicts with the Spence Firm was its failure to present known facts in opposition to A.O. Smith's motion for summary judgment, and then lying to the Clients to conceal the Spence Firm's negligence. (The Spence Firm told Clients, "We [the Spence Firm] made a tactical decision" not to present relevant evidence in opposition to Summary Judgment; which resulted in the loss of a multi-million dollar claim.) In response to the ruling in favor of A.O. Smith, Jones Gledhill filed a motion to reconsider, yet failed to present the same evidence the Spence Firm failed to file; the "Plank letter," or the "Smoking Gun" letter that proved A.O. Smith knew its water heaters were unsafe in 2004 and before manufacturing the water heater that killed McQuen.

Judge Copsey ultimately denied Jones Gledhill's motion to reconsider because she ruled Anfinson Plumbing lacked standing to intervene when Anfinson Plumbing had neither joined the Forbush Plaintiffs in opposing summary judgment nor had filed its own opposition to summary judgment. Notwithstanding its failure to oppose A.O. Smith's motion for summary judgment, Anfinson Plumbing seemingly had standing to contest the decision granting summary judgment to A.O. Smith because Anfinson Plumbing as a co-defendant did suffer appreciable harm due to the dismissal of a party to which Anfinson Plumbing may have shared comparative fault. I.C. § 6-801. However, Jones Gledhill not only failed to join client's opposition to summary judgment or to oppose summary judgment itself, Jones Gledhill also failed to argue that it had standing pursuant to Idaho's comparative fault statute when moving to reconsider Judge Copsey's decision granting summary judgment.

The decision granting summary judgment in favor of A.O. Smith was based on the finding that A.O. Smith owed no duty of care and was so excused because it could not have anticipated that plumbers would act so recklessly as to remove a safety device. Without any duty, A.O. Smith would not be on the verdict form, and Anfinson Plumbing could not argue that the lack of warnings and defective design as a defense to its negligence. Accordingly, the decision granting summary judgment to A.O. Smith was extremely detrimental to Anfinson Plumbing's case. Since January 2015, when Judge Copsey granted summary judgment to A.O. Smith, Anfinson Plumbing and Bakken had no defense or any basis to shift the blame to A.O. Smith, or anyone else for that matter, so Jones Gledhill's continuing litigation after January 2015 was as wasteful as it was futile.

Jones Gledhill's contention that it was "privy to certain legal service on behalf of the Clients that occurred after Clark's termination that gave rise to the Anfinson Settlement,....,"[5] while likely false, apparently was stated to imply that the settlement resulted due to *something* that occurred after August 2015, and before January 2016. If so, Clark should have been entitled to seek discovery of these *alleged* facts.

In all reality, the Anfinson Plumbing settlement occurred due to the undisputed facts that Anfinson Plumbing and its employee were completely incompetent and acted recklessly when they removed not only one, but tens of safety devices from water heaters at Sagecrest, which Clark had proved, and then the temporal and economic force exerted by the pending trial date. Clark had worked on the case for over three years, and to suggest Clark should be denied any

[5] Respondents' Br., p. 17.

fees for what may have occurred in the short months after he was wrongfully discharged flies in the face of the stated purpose of the lien statute.

Finally, Jones Gledhill once again misconstrues the *Skelton* criteria in its argument on criterion (5), which states; "...there are equitable considerations which necessitate the recognition and application of the charging lien." In its brief, Jones Gledhill claims; "...there are no equitable considerations necessitating enforcement of a lien against Jones Gledhill."[6] (Emphasis added.) The ethical considerations criterion addresses whether a lien is created in the first place as are all of the other criteria; not "ethical considerations" related to *enforcing* the lien. Here, Clark worked for over three years on the case only to be stabbed in the back by his co-counsel at the eleventh hour, who then kept all of Clark's fees and sought to extort a universal settlement from Clark, all because Jones Gledhill failed to protect Clark's interest. Moreover, Clark had demanded Anfinson Plumbing tender the policy limits even before the Spence Firm joined the case, and premised the demand on the same facts that ultimately Jones Gledhill could not let a jury hear for fear of a judgment in excess of policy limits. Anfinson Plumbing had no reasonable defenses once A.O. Smith was dismissed, yet Jones Gledhill milked the case of another year with no legitimate defenses to causing McQuen's death, before finally tendering policy limits on the eve of trial.[7] Again, Anfinson Plumbing's only motivation to settle were the facts Clark had discovered though his investigation and the pending trial date, not any pressure the Spence Firm asserted after Clark withdrew in August 2015.

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[6] Id.

[7] Actually, the settlement had to be in the works for some time before the trial date as neither former clients nor Jones Gledhill presented proposed jury instructions and vacated the last scheduled pretrial conference.

Not only has Clark established facts entitling him to an attorney's lien, he had timely filed a motion to amend his complaint to specifically allege the *Skelton* elements, assuming such specific pleadings were necessary. Clark also pled that Jones Gledhill had interfered with Clark's ability to obtain a lien in the *Forbush v. Sagecrest* base became Jones Gledhill purposefully concealed the settlement from Clark and proceeded to dismiss the case.

Finally, the Court will note that none of the *Skelton* criteria address the amount of the lien as a requisite to the lien's creation or attachment. Thus, a lien may attach even when the amount of the lien is in dispute. "The trial judge who heard the proceedings which gave rise to the lien is in a position to determine whether the amount asserted as a lien is proper and can determine the means for the enforcement of the lien." *Skelton v. Spencer,* 102 Idaho at 73. While the *Skelton* Court was discussing the entitlement to an attorney filing and adjudicating his lien in the current case, a Judge presiding in a case filed outside of the underlying case would be in the same position to "determine whether the amount asserted in the lien is proper...." Otherwise, as is occurring here, a defendant could attempt to undermine the lien statute simply by arguing the amount of the attorney fees is in dispute. The better result, one that conforms with the statute, is the lien arises and attaches based on the five *Skelton* criteria to the settlement funds, and remains attached until such time as the amount of the funds may be determined and thereafter, and the lien is satisfied. If adjudication of the amount due is necessary, notwithstanding the existence of the lien, then that issue can be resolved in litigation, just like in *Skelton*, and in the present case.

Clark has satisfied the five *Skelton* criteria and therefor had a valid and enforceable attorney lien upon settlement, which attached either before or during a time when Jones Gledhill

possessed or controlled proceeds to which Clark's lien attached. It was therefore error below to dismiss this case and to refuse to allow Clark to amend his Complaint.

3. THE DISTRICT COURT MISCONSTRUED I.C. § 3-205.

Judge Hoagland's ruling is based on the false premise that *Frazee* applies to all attorney lien situations. However, as the Idaho Supreme Court found in *Frazee,* that decision did not overrule *Skelton,* and therefore *Frazee* does not apply universally. "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. Jones Gledhill also appears to argue that Judge Hoagland ruled that some adjudicative process was necessary, regardless of the *Frazee* case, and based on the statue alone. To the extent that Judge Hoagland ruled that I.C. § 3-205 alone requires some type of adjudicative process before a lien arises or attaches, then he has misconstrued the lien statute.

Despite the Supreme Court's clear and unequivocal distinction in *Frazee* between a "fund" situation were the lien automatically attaches by statute, and a "non-fund" situation where the statute does not apply thereby warranting "some adjudicative act" to perfect a lien, Jones Gledhill continues with its baseless argument that *Frazee* applies universally to all attorney lien cases.

Recently, the Idaho Supreme Court in *Hoffer v. Shappard*, 160 Idaho 870, 884, 380 P.3d 681, 695 (2016) reiterated its role as interpreters of the law enacted by the legislature, and not as

legislators by drafting rules of law not supported by the plain meaning of a statute.[8] The *Frazee* Court imposed a procedural process not addressed in the language of I.C. § 3-205, but did so after having found that the *Frazee* fact situation did not fall into the facts or circumstances discussed in the lien statute. In *Frazee* no fund was created. While the *Frazee* Court was justified in distinguishing the facts and stating additional procedural requirements not stated or envisioned in the lien statute, under the circumstances, applying the *Frazee* decision to all attorney fee cases would create the very conflict discussed in *Hoffer,* and result in the Court unjustifiably modifying the lien statute.

Although continuing to argue *Frazee* applies universally, Jones Gledhill fails to identify where in I.C. § 3-205 is there any requirement for a judicial procedure or "perfection," if the criteria in the statute are met and there is a fund to which the lien automatically attaches. As the Court concluded in *Skelton*, no such procedure is needed or warranted for a lien to attach if there is a fund, which is clearly what the lien statute requires.

Jones Gledhill also argues that the lien statute cannot be interpreted to subject "anyone who has ever touched (no matter how briefly) proceeds if that person no longer possesses the proceeds,"[9] to liability. However, that argument is the very basis for why Judge Hoagland erred

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[8] "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)).

[9] Respondents' Br., p. 18.

when he dismissed this case on the pleadings. An attorney lien case should be decided on the relevant facts and not dismissed on the pleadings. Here, Jones Gledhill knew of Clark's involvement as Plaintiffs' counsel, and knew Clark was claiming a lien on any settlement proceeds. Moreover, as Anfinson Plumbing's counsel, Jones Gledhill possessed or controlled the settlement funds, or at least that fact is disputed.

While Jones Gledhill argues factually ridiculous scenarios in its brief, in reality, the facts are important in each case. As an example, Jones Gledhill argues, "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."[10] However, whether a party is a "total stranger" to a claim for liability for disregarding an attorney lien is a question of fact. If for example, a party, unlike Jones Gledhill, really had no knowledge of an entitlement to an attorney lien, then perhaps they can avoid liability. However, as an attorney's involvement in a case is a matter of record, it is an unlikely scenario that opposing counsel could claim ignorance of a potential claim for a lien.

Additionally, the economic coercion fear discussed in *Frazee* does not apply to a claim of lien against a fund, because the lien only attaches to those funds. As noted in *Frazee*, economic cohesion can exist when an attorney seeks to attach property not at issue in the case before any type of judicial process has occurred. Because that is not the fact scenario in this case, no possibility of economic coercion exists here.

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[10] Id.

Jones Gledhill also argues that an attorney "could obstruct settlement, as Clark attempted to do in this case by demanding to be a payee on the Anfinson settlement check."[11] As argued above, however, in *Skelton*, the Court ruled that a party could seek to enforce the lien in the very action from which the fund was created; notwithstanding his clients were parties to that action. Why should a client be entitled to deny an attorney's lien, yet in the same breath demand settlement funds that resulted from the attorney's efforts? If there is a dispute, then equitably, neither co-counsel nor clients should be entitled to recover settlement funds, until the dispute is resolved.

Moreover, this argument ignores the purpose of the lien statute and the protection it affords aggrieved attorneys. The reason Clark is in litigation with his former clients and former co-counsel, and Jones Gledhill, is because Jones Gledhill, former clients and former co-counsel ignored Clark's lien. If the Spence Firm or former clients refused to accept payment if Clark's name was on the check, when Jones Gledhill had notice of Clark's claim, then Jones Gledhill could have tendered the agreed amount to the Court and sought an order directing former clients to accept the agreed upon settlement.

4. JONES GLEDHILL OWED CLARK A DUTY OF CARE.

Judge Hoagland understood the nature of a lien in general, he just misapplied the *Frazee* case to what was really a *Skelton* situation. Notwithstanding this error, Judge Hoagland was correct that Jones Gledhill faced liability if a lien existed.

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[11] Id.

> 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).

Accordingly, if the lien arises automatically by statute, which is the case where a fund is created, then the offending party like Jones Gledhill would be liable if its conduct in disregarding Clark's interest led to Clark's damages. There is nothing to suggest in the statutory language that the Legislature intended to limit the scope of potential liability for ignoring a lien or that anyone other than a client was somehow immune from liability.

Moreover, Clark is merely restating the obvious as the settlement documents in this case likely prove that Jones Gledhill sought to avoid liability for Clark's lien by seeking a waiver of liability from the Spence Firm. Clark should have been allowed to conduct discovery and to obtain a copy of the settlement documents. If Jones Gledhill had obtained a waiver of liability related to Clark's claim or any liens in general, then that would serve as an admission that Jones Gledhill understood the lien statute created liability under the circumstances.

Idaho's lien statute also embodies an attorney's duty to protect property; including property to which even a third person is claiming an interest. Jones Gledhill had an ethical duty according to the Idaho Rules of Professional Conduct to safeguard the settlement funds and to inform Clark of the settlement once they received Clark's letter in September 2015, and based on Jones Gledhill's knowledge of Clark's involvement in the *Forbush* case as counsel for the Plaintiffs.

RULE 1.15: SAFEKEEPING PROPERTY

> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Prior to litigation in correspondence with Clark, Jones Gledhill claimed that *Frazee* applied and that it had obtained an opinion from Idaho Bar Counsel, who coincidentally was formally a partner at Jones Gledhill, that Jones Gledhill had no duty to protect Clark's interest. Clark responded by letter requesting a copy of Bar Counsel's opinion, but Jones Gledhill never provided any proof that such opinion existed. (R. p. 88-89) Considering the duty as stated in I.R.P.C. 1.15, that an attorney has a duty to protect even a third party's property, it is likely no such opinion exists.

5. THE LITIGATION PRIVILEGE DOES NOT CIRCUMVENT THE ATTORNEY LIEN STATUTE.

Contrary to Jones Gledhill's argument, the Supreme Court's establishment of a litigation privilege is not absolute. In fact, the Court stated that it was establishing such a privilege as a "general rule." "Therefore, this Court holds that, as a general rule, where 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." *Taylor v. McNichols*, 149 Idaho 826, 841, 243 P.3d 642, 657 (2010). However, there is no language in *Taylor* or any

other case for that matter suggesting the Supreme Court intended to circumvent the purpose or express wording of the lien statute.

Likewise, there is no language in I.C. § 3-205 that remotely suggests or implies that the Idaho Legislature intended to shield opposing counsel from liability for ignoring or disregarding an attorney lien. In fact, the language chosen suggests just the opposite. The Legislature chose broad and absolute language when identifying all potentially liable parties; "in whosoever hands they may come," (I.C. §3-205), because the Legislature intended to hold all parties who disregarded a valid lien liable.

Moreover, while the litigation privilege as discussed in *Taylor* may be necessary to foster and promote zealous advocacy and to prevent reprisal for an attorney's statements or conduct while representing a client, it is not necessary in all circumstances. The immunity created by the litigation privilege is only crucial where an attorney otherwise has no protection from liability. That is not the case, however, when negotiating settlement terms. As is likely the situation here, Anfinson Plumbing demanded, in consideration for paying the settlement funds, complete indemnification and immunity from any subsequent legal action, including lien claims, and that indemnification and immunity included its counsel, Jones Gledhill. Accordingly, the litigation privilege protection is not warranted in this situation or in any situation for that matter where immunity is not necessary.

6. CLARK WAS ENTITLED TO AMEND HIS COMPLAINT.

Even for the sake of argument that *Frazee* did apply and Clark was required to seek some "adjudicative process" to "perfect" his lien, what basis was there to dismiss the case if there was

possibly an equitable defense to Clark's failure to obtain his perfected lien? Clark moved to amend his complaint based on Judge Hoagland's ruling that *Frazee* applied. Under the category in the Appellants' initial brief titled; "THE COURT ERRED WHEN IT DISMISSED CLARK'S CASE," Clark argued Judge Hoagland should have taken into consideration the fact that Jones Gledhill had concealed the settlement from Clark, thereby preventing Clark from "perfecting" his lien in the *Forbush v. Sagecrest* case.

Jones Gledhill claims that Clark's proposed amended complaint did not allege any interference with Clark's ability to perfect his lien. That is not true. Assuming Clark had to "perfect" the lien in the first place, Clark pled that notwithstanding actual notice that Clark had appeared for clients in the *Forbush v. Sagecrest* case, Jones Gledhill concealed the settlement from Clark. (See paragraph 26, R. p. 313, which is sealed on appeal.) By proceeding to settle the case and not informing Clark, Jones Gledhill interfered with Clark's ability to perfect his lien in the *Forbush* case, if in fact such perfection is necessary. If Clark was supposed to somehow "perfect" his lien through some judicial process, as Judge Hoagland ruled, then concealing the settlement to prevent such judicial process is interference, plain and simple, just as Clark pled.

Clark also attempted to plead facts establishing the five *Skelton* criteria, (See paragraphs 27-33, R. p. 313, which is sealed on appeal.), which Clark argued established his right to a lien. Judge Hoagland ruled that Clark's amended complaint did not provide a basis to salvage his case and dismissed. However, considering the standard for dismissal, that a party is not entitled to dismissal unless it appears "beyond doubt" that he cannot state a claim, *Gardner v. Hollifield*, 96

Idaho 609, 611, 533 P.2d 730, 732 (1975), then Judge Hoagland erred when he dismissed Clark's case and refused to allow Clark's Amended Complaint.

7. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN AWARDING ATTORNEY FEES BELOW.

Clark did not pursue this case frivolously or without foundation. While Jones Gledhill argues Clark admitted the claim was frivolous, Clark has not. Jones Gledhill's claim takes Clark's argument out of the context where the Trial Court had already ruled that *Frazee* applied. Clark argued that if *Frazee* did apply, then the dismissal should be without prejudice, thereby allowing Clark to refile if in fact he had to "perfect" his lien. Clark also argued in the alternative that Idaho Code § 3-205 did not require such perfection, and the Court had erred.

This Court should reverse the award of attorney fees below on several grounds. First, the Trial Court erred when it ruled Clark "disregarded established case law." As argued extensively on this Appeal, *Frazee* does not apply to the facts presented here or in any manner "universally" to all attorney lien cases. Accordingly, Judge Hoagland erred when he ruled Clark had failed to take "affirmative adjudicative steps," as Clark's lien arose by statute. It is never a proper exercise of discretion to misapply the law.

Second, Clark presented a novel legal question in his case. Even if somehow *Frazee* did apply, Clark argued in good faith that Jones Gledhill interfered with Clark's ability to perfect his lien by concealing the settlement from Clark. Below, Clark argued that the case presented the novel legal question of opposing counsel's interference by concealing the settlement from Clark. "Where 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). Clark gave actual notice of his lien via correspondence, which Jones Gledhill concedes it received. While Jones Gledhill suggests Clark should have "filed" a notice of attorney lien, where in I.C. § 3-205 does it require such a pleading? Even if Clark had not sent correspondence to Jones Gledhill in which Clark asserted a lien on the settlement proceeds, Jones Gledhill had actual notice of Clark's attorney-client relationship in the *Forbush* case and the subsequent settlement, which gave rise to Clark's entitlement to a lien according to I.C. § 3-205.

Moreover, Jones Gledhill does not dispute Judge Hoagland's finding, "[i[f Plaintiff had perfected the lien through an affirmative adjudicatory process in the underlying action, then Defendants would have had to protect Plaintiffs' interest, as required by Idaho Code § 3-205." (R.p. 212.) Accordingly, facts establishing whether Jones Gledhill interfered with Clark's ability to "perfect" his lien were material and should have prevented dismissal on the pleadings.

Additionally, Jones Gledhill's reliance on *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 329 P.3d 1072 (2014) is curious under the circumstances and actually supports Clark's claim of error. That case proceeded to a bench trial where the Court heard all relevant facts. Ultimately it turned out the the party claiming the lien had no basis for the claim; unlike the case here, but that was a factual determination. This case should not have been dismissed on the pleadings and Clark should have been afforded the opportunity to pursue discovery and take the case to trial, just like the Plaintiff in the *Maslen* case.

Finally, Jones Gledhill also seeks affirmation based on an alternative basis on appeal. If this Court agrees with Clark that Judge Hoagland erred when applying *Frazee*, but affirms based on an alternative theory that the litigation privilege applies, this Court must reverse the award of attorney fees below. Whether the litigation privilege applies to circumvent Idaho's attorney lien statute and to shield opposing counsel from any liability even if counsel disregarded a valid lien is a question of first impression in Idaho and presented a novel legal issue. Consequently, if this Court affirms, but on the theory that the litigation privilege applies, this Court must also reverse the award of attorney fees against Clark below.

8. THERE WAS NO BASIS TO SEAL ANY RECORDS.

Jones Gledhill claims in its Memorandum in Support of Motion For Fees and Costs; "In this case, Clark also inexplicably chose to file in the public record confidential and privileged information obtained through his representation of his former clients, thereby attempting to make that information available both to the general public and also to Jones Gledhill-the very lawyers who opposed his former clients." (R.p. 112.) This argument begs the question; what confidential and privileged information; and more importantly, why does Jones Gledhill need to strike such information? By this point in time, the settlement between Former Clients and Anfinson Plumbing was consummated, settlement documents signed, and the money delivered. The case was finished, so even confidential information or strategy if disclosed could not have had any detrimental effect.

Neither Judge Hoagland, nor Jones Gledhill on appeal, has identified any information Clark included in any pleading in the Jones Gledhill case that could have led Judge Hoagland to

conclude; "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." (R.p. 69) In reality, Clark disclosed nothing but background information related to the *Forbush v. Sagecrest* case and Clark's involvement, which was relevant to establish Clark was entitled to a lien. There are no disclosures that in any way compromised the clients' case against anyone let alone Anfinson Plumbing and Bakken. Clark did not disclose private, confidential facts or information, or any confidential tactical decisions or strategy from the *Forbush* case. Accordingly, there were no facts to support Judge Hoagland's finding that any of the information jeopardized the former client's case.

9. THE COURT SHOULD AWARD ATTORNEY FEES TO CLARK AS JONES GLEDHILL'S DEFENSE ON APPEAL IS FRIVOLOUS AND WITHOUT FOUNDATION.

Appellants seek attorney fees on appeal according to I.C. § 12-121. Recently, in *Frantz v. Hawley Troxell Ennis & Hawley LLP*, 161 Idaho 60, 383 P.3d 1230 (2016), the Supreme Court stated the standard applicable for an award of attorney fees on appeal according to this statute.

> 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." *Idaho Military Historical Soc'y v. Maslen*, 156 Idaho 624, 33, 329 P.3d 1072, 1081 (2014). "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." *Snider v. Arnold*, 153 Idaho 641, 645-646, 289 P.3d 43, 47-48 (2012). 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." *Wagner v. Wagner*, 160 Idaho 294, 302, 371 P.3d 807, 815 (2016) (quoting *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005)).

Jones Gledhill's defense of this appeal is frivolous and without foundation as Jones Gledhill continues its baseless attempt to cram the proverbial square peg into a round hole. *Frazee* simply does not apply to the situation were a fund exists and is not applicable to the facts presented in this case.

Then Jones Gledhill baselessly denies the existence of a "fund," which is a question of fact. Then it argues if in fact a fund did exist, Jones Gledhill denies that it possessed or controlled any settlement funds, which again a question of fact. Jones Gledhill also argues that each case should be considered on its facts, yet continues to argue Judge Hoagland's dismissal on the pleadings was correct.

Additionally, Jones Gledhill, although the Idaho Supreme Court has ruled that lien statutes should be construed "broadly," and the intent of the Idaho Lien Statute was to protect an attorney's entitlement to compensation, ignores this established law and argues just the opposite without any support. That is the epitome of frivolous. Accordingly, the Court should award attorney fees on appeal to Clark.

10. THE RESPONDENTS ARE NOT ENTITLED TO ATTORNEY FEES ON APPEAL.

Clark did not file or pursue the appeal frivolously or without foundation. Judge Hoagland's ruling below that *Frazee* applies universally is at the very least fairly debatable. "[W]hen a party pursues an action which contains fairly debatable issues, the action is not

considered to be frivolous and without foundation." *C & G, Inc. v. Rule*, 135 Idaho 763, 769, 25 P.3d 76, 82 (2001) (internal quotation marks omitted). Clark argued reasonably that *Frazee* did not apply universally as clearly stated in the *Frazee* decision. "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. Additionally, Jones Gledhill claimed Judge Hoagland did not decide below whether the litigation privilege applied and now raised that issue in the alternative on appeal. Accordingly, this appeal presented an issue of first impression in Idaho. Does the litigation privilege apply to circumvent the clear language and intent of Idaho's lien statute and immunize counsel who ignore and disregard the lien statute? "We will typically not award attorney fees under section 12–121 where the appeal involves a matter of first impression." *Doe v. Doe*, 160 Idaho 311, 317, 372 P.3d 366, 372 (2016). Here Clark presented reasoned argument that this "general rule" litigation privilege should not be applied to circumvent the lien statute.

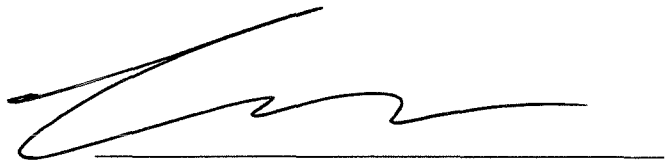
CONCLUSION

This case never should have been dismissed on the pleadings as the Appellants had stated a viable cause of action against the Respondents. Nor should the District Court have awarded attorney fees below and that decision should be reversed on appeal as well. Additionally, this Court should award costs and attorney fees on appeal as Respondents defended this appeal frivolously and without foundation.

Once again, the Appellants respectfully request this Court reverse the District Court's rulings below and remand this case for trial in due course.

RESPECTFULLY SUBMITTED this 28th day of February, 2017.

CLARK & ASSOCIATES, ATTORNEYS



Eric R. Clark
For the Appellants

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that on 28th day of February, 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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