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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Supreme Court Case No. 46269  
Ada County No. CV01-17-08744

**APPELLANT'S BRIEF**

I.A.R. 35(a)

**APPELLANT'S BRIEF**

An appeal taken from the District Court in the Fourth Judicial District, Ada County.

The Honorable Jonathan Medema, District Judge presiding.

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## CONCISE STATEMENT OF THE CASE

### **a. The Nature of the Case:**

This appeal centers on the correct pleading and dismissal standards for an attorney-client breach of fiduciary duty claim. Appellant Rebecca Parkinson (“Parkinson”) sued her former attorney James Bevis (“Bevis”) for breach of his fiduciary duty. Bevis then moved to dismiss the claim, saying that Parkinson was limited in her claims to professional negligence claims. The District Court granted dismissal, but not on Bevis’ legal theory. The Court held that clients can sue their attorneys for breach of fiduciary duty, and the Court then articulated the correct standards for the claim. But the Court ultimately found that Parkinson’s claim was, in essence, a legal malpractice claim, and the Court refused to let Parkinson litigate her claim as breach of fiduciary duty. Parkinson is appealing that narrow procedural holding.

### **b. Concise Statement of the Facts:**

In July 2014, Parkinson hired Bevis to represent her in a divorce action.

On May 11, 2015, the parties attended a mediation conference at which they reached a stipulated settlement agreement. But on May 12, 2015, Parkinson sent Bevis an email with a subject line “I am sick to my stomach,” in which Parkinson expressed her extreme concern and dissatisfaction to Bevis about the settlement and about how Bevis allowed her to be taken advantage of at the conference. (R. Vol. 1, pp. 46-47, 122). Parkinson then instructed Bevis to move to withdraw the stipulated agreement. On May 14, 2015, Bevis sent Parkinson a letter in which Bevis acknowledged that he had filed a motion to withdraw the mediation stipulation, but that he had also filed a motion to withdraw as her counsel. Notwithstanding his withdrawal motion, Bevis continued to communicate with Parkinson for purposes of pressuring her into changing her mind about the stipulated settlement. (R. Vol. 1, pp. 122-23).

Parkinson finally changed her mind and emailed her acceptance of the settlement to Bevis. However, Bevis subsequently forwarded to opposing counsel a full copy of Parkinson's May 12, 2015 email with the subject line "I am sick to my stomach," greatly diminishing the value of Bevis's divorce services for Parkinson. (R. Vol. 1, p. 121-123; see also pp. 45-61).

**c. Concise Procedural History:**

On May 10, 2017, Parkinson filed a complaint against Bevis. Parkinson alleged breach of fiduciary duty as her only cause of action. And while not specifically stated in her original complaint, Parkinson sought for a fee disgorgement and forfeiture as a remedy to Bevis' breach, as explained in subsequent legal briefing. (R. Vol. 1, pp. 6-8, 35-36). Parkinson later asked for fee disgorgement and equitable forfeiture as remedies in her proposed amended complaint (R. Vol. 1, p. 124) and in her motion for reconsideration. (R. Vol. 1, pp. 133-141).

On December 1, 2017, Bevis filed a motion to dismiss Parkinson's complaint, alleging that Parkinson's claim was really a professional negligence claim and that the claim failed to meet all the necessary elements of a malpractice claim. (R. Vol. 1, pp. 13-23). On January 30, 2018, Parkinson filed her response and opposing declaration. (R. Vol. 1, pp. 33-61).

On March 16, 2018, the District Court granted Bevis' motion to dismiss. Importantly, the Court found that Idaho case law does not prohibit a client from filing a breach of fiduciary duty claim against his or her attorney, independent of a professional negligence claim. (R. Vol. 1, pp. 103-104, 108-109). The District Court found that such a claim is only barred if the claim is one that could be brought as a professional negligence claim, i.e., if it is duplicative. *Id.* Ultimately, the District Court found that Parkinson's breach of fiduciary duty claim was really a professional negligence claim and dismissed the claim. (R. vol 1, pp. 28-29).

On April 6, 2018, Parkinson filed a motion to amend her claim, to remove any confusion on the nature of her claim and her intended remedies. (R. Vol. 1, pp. 118-129). Parkinson also filed a motion for reconsideration. (R. vol 1, pp. 130-146).

On April 6, 2018, Bevis filed a memorandum of costs and fees. (R. Vol. 1, pp. 149-159). On April 20, 2018, Parkinson filed a motion to disallow the costs and fees. (R. vol 1, pp. 180-200). The Court heard these combined matters on June 4, 2018. (R. vol 1, p. 242).

On July 5, 2018, the District Court denied Parkinson's motion for reconsideration. (R. Vol. 1, pp. 244-248), as well as her motion to amend. (*Id.*, p. 250). The Court also granted Parkinson's motion to disallow Bevis' claim for attorney fees, but the Court granted Bevis' memorandum of costs for \$140.08 in filing fee costs. (*Id.*, pp. 252-254).

Parkinson filed a timely notice of appeal. (R. Vol. 1, pp. 258-260). Bevis has not cross-appealed the Court's judgment or any of the content of the Court's orders or decisions.

### **ISSUES PRESENTED ON APPEAL**

- a. Did the District Court Err in Dismissing Parkinson's Claim?
- b. Did the District Court Err in Not Allowing Amendments to Parkinson's Claim?
- c. Did the District Court Err in Denying Parkinson's Motion for Reconsideration?
- d. Did the District Court Err in Awarding Bevis his Costs?

### **STANDARDS OF REVIEW ON APPEAL**

"When this Court reviews an order dismissing an action pursuant to I.R.C.P. 12(b)(6), we apply the same standard of review we apply to a motion for summary judgment. [The Supreme] Court reviews an appeal from an order of summary judgment de novo, and this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." *Syringa Networks, Ltd. Liab. Co. v. Idaho Dep't of Admin.*, 159 Idaho 813, 367 P.3d 208 (2016) (internal citations omitted). "A 12(b)(6) motion looks only at the pleadings to determine whether a



claim for relief has been stated. On review of a dismissal [the Supreme] Court determines whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief. In doing so, the Court draws all reasonable inferences in favor of the non-moving party.” *Savage v. Scandit Inc.*, 163 Idaho 637, 640, 417 P.3d 234, 237 (2018) (internal citations omitted).

“A court's decision to allow the amendment of pleadings is reviewed for an abuse of discretion. When determining whether a trial court has abused its discretion, this Court asks: (1) whether the court correctly perceived the issue as one of discretion; (2) whether it acted within the outer boundaries of that discretion and consistently with any applicable legal standards; and (3) whether it reached its decision by an exercise of reason.” *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 345, 33 P.3d 816, 819 (2001).

## **ARGUMENTS**

### **1. Findings Not at Issue on Appeal:**

It is necessary to begin Parkinson’s legal arguments by summarizing the District Court’s findings and conclusions, which are not at issue on appeal, as follows:

- A client can sue his or her attorney for breach of fiduciary duty arising out of the attorney-client relationship, just as any other principal can sue his or her agent(s) for breach of fiduciary duty. The standards articulated by the Idaho Supreme Court in *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2001) (“Rockefeller I”), and the standards in the Restatement 3d of the Law Governing Lawyers, § 37 (3rd 2000), “Partial or Complete Forfeiture of a Lawyer’s Compensation,” are the governing standards for an attorney-client breach of fiduciary duty claim. (R. Vol. 1, pp. 108).
- The Supreme Court has not categorically barred a client from suing his or her attorney for a breach of the attorney’s fiduciary duty simply because the duty arose from an attorney-client relationship. The only known exception is when the breach of fiduciary duty claim is capable

of being litigated in the alternative as a professional negligence claim. (R. Vol. 1, pp. 103-104).

- Parkinson based her breach of fiduciary duty arguments on a good faith interpretation of existing Idaho Supreme Court precedent. Bevis' request for Idaho Code § 12-121 fees was therefore not warranted. Bevis did not cite to any other statute that would entitle him to prevailing party attorney fees. (R. Vol. 1, pp. 253-254).

Parkinson is not challenging the above conclusions on appeal, and Bevis has not filed a cross-appeal under I.A.R. 15(a) to further challenge the conclusions. The District Court has already ruled on the propriety of the form of Parkinson's claim (R. vo. 1, pp. 34-38, 133-140), and on the impropriety of Bevis' fees claim (R. Vol. 1, pp. 185-187), and those conclusions should not be disturbed on appeal. Should Bevis attempt to challenge the above conclusions as additional issues on appeal under I.A.R. 35(b)(4), and should the Court somehow permit the challenges, Parkinson reserves the right to address the additional issues in her reply brief. See I.A.R. 35(c). For now, Parkinson is only challenging the Court's procedural errors in dismissing her claim when the claim was not duplicative of a legal malpractice claim.

## **2. The District Court Erred in Dismissing Parkinson's Claim:**

The District Court erred in dismissing Parkinson's claim. This error is subject to an abuse of discretion review standard. "When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of four essentials. Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *State v. Le Veque*, 426 P.3d 461, 464 (2018). The District Court abused its discretion under the third prong of this test because it did not follow appropriate Rule 12(b) dismissal standards and Rule 15(a) amendment standards. Also, the District abused its

discretion under the fourth prong of this test because it reached a decision, which was contrary to its own conclusions of law. The Supreme Court should reverse the District Court's dismissal and reconsideration orders and allow the claim to be amended and to proceed to trial on its merits.

**a. The District Court Did Not Follow Rule 12 Dismissal Standards:**

The Supreme Court should reverse the District Court's dismissal order because the District Court did not follow appropriate Rule 12(b) dismissal standards. Specifically, the District Court erred in dismissing Parkinson's breach of fiduciary duty claim based on a finding that the claim did not have enough supporting details. The Court explained:

Plaintiff's allegations are mixed assertions of fact and conclusions of law. The allegation that Defendant shared information with her husband's attorney is an assertion of fact. The argument that such information was confidential is a proposition of law. Plaintiff has failed to allege in her complaint what information it is that she claims Defendant disclosed or when and how Defendant acquired it. Therefore, this Court cannot independently determine whether her proposition that such information was 'attorney-client confidential' is correct. Similarly, Plaintiff alleges Defendant breached his fiduciary duty by 'disclosing attorney-client privileged communications.' The assertion that Defendant disclosed communications is an assertion of fact, albeit a vague one. The argument that those communications were privileged under I.R.E. 502 is a legal one. The Plaintiff has failed to allege what the communications were, whom they were between, or the circumstances under which she alleges those took place. Therefore, the Court cannot assess her legal argument is correct.

(R. Vol. 1, pp. 109-110).

The legal error with the Court's conclusion is that it required Parkinson to prove her legal theories at the same time she was trying to assert the theories for the first time in her pleadings. The Supreme Court has expressly rejected such requirements. See *Hammer v. Ribi*, 162 Idaho 570, 575 n.1, 401 P.3d 148, 153 (2017) (the Supreme Court approved of using legal terminology as a means to complying with notice pleading standards and avoiding a Rule 12(b)(6) dismissal). In short, the Court erred in requiring Parkinson to plead her claim to such a degree that the Court could assess whether "her legal argument [was] correct" as a means of overcoming Bevis' defenses. (R. Vol. 1, p. 110). The Court's view on the sufficiency of Parkinson's pleadings runs contrary to Idaho case law,

which imposes a relatively low burden of presenting claims: “The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it.” *Seiniger Law Office, P.A. v. N. Pac. Ins. Co.*, 145 Idaho 241, 246-47, 178 P.3d 606, 611-12 (2008). Here, Parkinson put Bevis on full notice of the nature of her claim, i.e., breach of fiduciary duty. As a matter of law, the Court should have recognized this and allowed Parkinson’s claim to proceed on its merits under the *Rockefeller I* and Restatement 3d of the Law Governing Lawyers, § 37 (3rd 2000) standards.

In *Savage v. Scandit Inc.*, 417 P.3d 234 (Idaho 2018), the Supreme Court confirmed that Rule 12(b) dismissal is not proper if the pleadings contain allegations which, if proven, would constitute a triable claim. In that case, Savage claimed that her employer, Scandit, had breached the Idaho Wage Claim Act by withholding certain commissions and bonuses. Scandit responded by saying that these items were not yet earned at the time Savage had filed her complaint. Scandit then filed a Rule 12(b)(6) motion to dismiss, and the District Court granted the motion. On appeal, this Court reversed and remanded. The Court noted the key question in such cases is “...whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief. In doing so, the Court draws all reasonable inferences in favor of the non-moving party.” *Id.*, at p. 237. The Court found that the allegations stated in Savage’s complaint, i.e., that she had already earned the wage items, together with reasonable inferences in Savage’s favor, were enough to defeat Scandit’s dismissal motion. The Court also found that the question of whether Savage would ultimately prevail on her wage claims was immaterial in a dismissal context: “While Scandit may be able to show later that the deal was not formally booked or that there were contingencies that prevented the booking, for purposes of a motion to dismiss pursuant to Idaho Rule of Civil Procedure 12(b)(6) Savage has stated a claim under the Idaho Wage Claim Act.” *Id.*, at p. 239. Here, Parkinson met this pleading standard by alleging that Bevis had disclosed her confidential communi-

cations to her litigation opponent and that she was entitled to relief from the Court. Parkinson did not have to support her claim with any further evidence.<sup>1</sup> The Court erred in dismissing the claim.

See also *Markstaller v. Markstaller*, 326 P.2d 994, 997, 80 Idaho 129, 134-135 (1958) (a trial court abuses its discretion by dismissing a complaint if the complaint is capable of amendments); *Clark v. Olsen*, 110 Idaho 323, 325, 715 P.2d 993, 995 (1986) (the purpose of a complaint is to inform, and a complaint need only contain a concise statement of facts; issue formulation is for discovery, and pleadings do not carry the burden of factual revelation); *Crews v. Ellis*, 531 So. 2d 1372, 1377, 1988 Fla. App. LEXIS 4393, \*15, 13 Fla. L. Weekly 2247 (1988) (it is error to dismiss a complaint when additional factual development is possible); *Beal v. Mars Larsen Ranch Corp.*, 99 Idaho 662, 667-68, 586 P.2d 1378, 1383-84 (1978) (“The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in dealing with his client. In the discharge of that trust, an attorney must act with complete fairness, honor, honesty, loyalty, and fidelity in all his dealings with his client. An attorney is held to strict accountability for the performance and observance of those professional duties and for a breach or violation thereof, the client may hold the attorney liable or accountable.”). See also *Blough v. Wellman*, 132 Idaho 424, 426, 974 P.2d 70, 72 (1999) (citing *Beal v. Mars*). For arguments to this effect, see Tr. Vol. 1, p. 17, ln. 15-25, p. 18, ln. 1, 7-16.<sup>2</sup>

Parkinson explained to the District Court the impropriety in dismissing her breach of fiduciary duty claim when she was not capable of advancing the claim as a legal malpractice claim. (Tr. Vol. 1, p. 18, ln. 19-25). Parkinson reminded the District Court that *Rockefeller I* imposed a high duty of loyalty on Bevis and that Bevis’ breach of that duty was remediable, even in the absence of dam-

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<sup>1</sup> See R. Vol. 1, p. 235, where Parkinson explains that Bevis has, is, and continues to withhold his litigation files from Parkinson, and that she needs to conduct discovery on the files in order to further support her claims.

<sup>2</sup> There were two hearings in this matter. “Tr. Vol. 1” is used by Appellant to refer to the February 6, 2018 hearing, and “Tr. Vol. II” is used by Appellant to refer to the June 4, 2018 hearing.

ages. (Tr. Vol. 1, p. 21, ln. 8-20). The District Court erred by disregarding these legally valid arguments and in dismissing the claim when it was clearly not duplicative of a malpractice claim. (R. Vol. 1, pp. 114, 247-248) (Tr. Vol. 2, p. 19, ln. 18-25; p. 20, ln. 1-7).

**b. The District Court Should Have Permitted Parkinson's Amendments:**

The District Court also erred because it did not allow Parkinson a chance to amend her claim. The Court relied extensively on the Texas case *Beck v. Law Offices of Edwin J. Terry, Jr., P.C.*, 284 S.W.3d 416 (Tex. App. 2009), together with the Restatement 2d of Agency § 395, to conclude that a breach of fiduciary duty claim must include allegations that the attorney tried to obtain an improper benefit from his or her breach. (R. Vol. 1, p. 112). The Court then denied Parkinson's proposed amendments because Parkinson had not alleged that Bevis personally benefited from his breach of her attorney-client confidences:

Here Plaintiff does not allege Defendant had a conflict of interest, that he stood to benefit himself by sharing her email with the other attorney, or that he lied to her in any way. She simply claims, essentially, that the rules of conduct that govern Defendant's profession precluded him from sharing her email without her permission and that he did so anyway. While Plaintiff has chosen to articulate that claim in the language of an action for breach of fiduciary duty, it is, at its essence, a claim that Defendant did not exercise the care his profession demands in handling her communications. That is a claim for professional negligence.

(R. vo. 1, p. 113).

But the Court's conclusion on the matter is focused too narrowly on the *Beck* case and the Restatement 2d of Agency § 395. For instance, the Court in *Beck* reminds us that the general prohibition against claim-fracturing is meant to exclude claims which are truly duplicative of each other: "When cases say that clients cannot divide or fracture their negligence claims against their attorneys into other claims, this does not mean that clients can sue their attorneys only for negligence. Nor does the non-fracturing rule necessarily bar a client from simultaneously asserting professional negligence and non-negligence claims against an attorney that are predicated on some common or over-

lapping facts. However, the claimant must do more than merely reassert the same claim for legal malpractice under an alternative label.” *Id.*, p. 427 (emphasis added). Instead of focusing its attention on the “improper benefits” factor, the District Court should have focused on whether Parkinson was trying to “reassert the same claim” that she might otherwise have asserted in a legal malpractice context. The Court would have then discovered that Parkinson’s breach of fiduciary duty claim was not truly duplicative of a malpractice claim due to Parkinson’s lack of actual damages. (R. Vol. 1, pp. 133-135). The District Court had already found that “the Supreme Court will not permit clients in Idaho to sue their attorneys under a legal theory other than professional negligence if the client’s claim is one that could be brought in professional negligence.” (R. Vol. 1, pp. 103-104, emphasis added). Using this logic, the District Court could have, and should have found that sometimes a breach of fiduciary duty claim cannot be litigated as a professional negligence claim due to the lack of actual damages. (Tr. Vol. 2, p. 17, ln. 12-25; p. 18, ln. 1-8). The Court should have then found that Parkinson’s claim fits this category of claims and should have permitted the claim to proceed under the standards of *Rockefeller I* and the Restatement 3d of the Law Governing Lawyers, § 37 (3rd 2000). The District Court erred in finding that Parkinson’s claim was “at its essence” a malpractice claim, because the claim did not fit the definition of a traditional malpractice claim. (R. Vol. 1, p. 113). Parkinson made it very clear to the Court that her breach of duty claim was not a malpractice claim due to lack of the necessary element of damages. (R. vol 1, pp. 38, 133-135). (See also Tr. Vol. 2, p. 7, ln. 3-11; p. 8, ln. 16-24).

The Court in *Beck* continues: “If a client seeks the remedy of equitable fee forfeiture and proves a breach of fiduciary duty by the attorney, the client may obtain that remedy without need to prove causation or damages if the court finds the attorney’s conduct was a clear and serious breach of duty and that forfeiture of the fee (or some portion of it) is necessary to satisfy the public’s interest in protecting the attorney-client relationship.” *Beck*, p. 429. Parkinson explained to the Dis-

trict Court in her briefing that Bevis had an ethical duty under I.R.P.C. 1.6 to keep her emails confidential. (R. Vol. 1, pp. 138-139). Parkinson further explained to the District Court that she did not give Bevis permission to share her “I am sick to my stomach” email with her litigation opponent, and that the disclosure has significantly impaired the value of Bevis’ general services to Parkinson. (Id.). The official comments to Rule 1.6 explain the mandatory nature of Bevis’ duty to keep Parkinson’s confidences:

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation...this contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter... The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

I.R.P.C. 1.6, Comments [2] and [3]. According to these official comments, Idaho’s rule on confidentiality applies to all case-related information, including all of the client’s personal or embarrassing information. Here, Bevis disclosed an embarrassing and emotionally damaging email to Parkinson’s soon-to-be ex-husband, leaving Parkinson with feelings of shame and inferiority as to how she fared in divorce—something she can never repair in terms of her own self-image and emotional esteem. Surely, Idaho public policy, including the policies contained in I.R.P.C. 1.6 and *Rockefeller I*, is broad enough to cover Parkinson’s situation, where the public has an interest in deterring attorneys like Bevis from sharing their clients’ private email communications with their litigation opponents just because the case is over. That policy is broad enough to subject Bevis to a civil claim for partial fee disgorgement.

The District Court also erred in applying the Restatement 2d of Agency § 395 to Parkinson’s claim. (R. Vol. 1, p. 113). This Restatement section is limited to scenarios where the disloyal agent



has used his principal's confidential information for profit, e.g., use of the principal's trade secrets, customer lists, etc. See Comment B, *Scope of Rule* ("The rule stated in this Section applies not only to those communications which are stated to be confidential, but also to information which the agent should know his principal would not care to have revealed to others or used in competition with him. It applies to unique business methods of the employer, trade secrets, lists of names, and all other matters which are peculiarly known in the employer's business."). The section is not commonly used by courts to disgorge attorney fees in cases where an attorney has been disloyal to his or her clients.<sup>3</sup> In such cases, the courts typically cite to Restatement 2d of Agency § 469, which says: "An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned." For examples, see *Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184, 200 (2d Cir. 2003) (citing Section § 469 to hold that one who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation); *Brown v. Bilek*, No. H-09-2193, 2009 U.S. Dist. LEXIS 73770, at \*18 (S.D. Tex. Aug. 20, 2009) (citing Section § 469 to hold that fiduciary duties are designed not merely to protect the principal, but to regulate the fiduciary agent); *Rash v. J.V. Intermediate, Ltd.*, 498 F.3d 1201, 1212 (10th Cir. 2007) (citing Section § 469 to hold that forfeiture is based on two propositions: (1) the principal is considered not to have received what he bargained for if the agent breaches his fiduciary duties while representing the principal, and (2) fee forfeiture is designed to discourage agents from being disloyal to their principal or to protect relationships of trust by discouraging agents' disloyalty; the remedy of forfeiture applies generally in agency relationships); *Searcy, Denney, Scarola, Barnhart &*

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<sup>3</sup> Even the Court in *Beck* does not cite Restatement 2d of Agency § 395.

*Shipley, P.A. v. Scheller*, 629 So. 2d 947, 952 (Fla. Dist. Ct. App. 1993) (citing Section § 469 and the Restatement of the Law Governing Lawyers to hold that one of the justifications for forfeiture is that it is sometimes difficult to ascertain the harm a lawyer's misconduct may have caused. The harm may be intangible, such as the client's loss of trust in the lawyer's loyalty and good faith.).

The year following the *Beck* case, i.e., in 2010, the Texas Supreme Court expanded its forfeiture analysis to include scenarios where the agent does not obtain any benefit from his or her breach of duty: “Even if a fiduciary does not obtain a benefit from a third party by violating his duty, a fiduciary may be required to forfeit the right to compensation for the fiduciary's work.” *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010). The Court in *ERI* then cited extensively to the Texas case *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999), in which the Texas Supreme Court had found that “a [legal] client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client,” and that “the central purpose of the remedy is to protect relationships of trust from an agent's disloyalty or other misconduct.” *Id.*, at p. 873. Finally, the Court concluded that forfeiture is still sometimes warranted even if the principal is ignorant of the agent's disloyalty. *Id.*, p. 874. The Supreme Court then remanded the case back to the trial court for a consideration of the *Burrow v. Arce* forfeiture standards. In our case, Parkinson asked the District Court to apply the standards found in Restatement Section § 469 and *Burrow v. Arce*. (R. Vol. 1, pp. 140, 35, 79, 139, 234). The Court erred in not doing so.

In *Rockefeller I*, the Idaho Supreme Court held that the remedy of fee forfeiture is an appropriate remedy against an agent who breaches his or her fiduciary duty to a principal. The case is similar to the *ERI Consulting Eng'rs* case in that the Court does not require an express showing that a disloyal agent has tried to personally benefit from his or her disloyalty. Before *Rockefeller I*, the Supreme Court had only sparsely developed its forfeiture doctrine. Not surprisingly, the Court in *Rockefeller I* relied on non-Idaho case law to further develop the doctrine. Citing to the Texas case *Burrow v. Arce*,

mentioned above, the Court listed several factors that should be considered in any Idaho forfeiture analysis. These factors included: the gravity and timing of the violation, its willfulness, its effect on the value of the agent's work for the principal, threatened or actual harm, and the adequacy of other remedies. *Rockefeller v. Grabow*, p. 642. The Supreme Court then explained that harm is not necessarily the controlling factor in a proper forfeiture analysis, and that the real focus is on punishing the disloyal agent:

Allowing an agent to retain his entire commission as a matter of law when he has breached his fiduciary duties would eviscerate agency law. Secure in his compensation from the principal as long as the assigned task is completed, an agent's only chance of loss from violating his duties would be if he harmed the principal. The higher requirement of acting in the interest of the principal, without a means of enforcement, would simply cease to exist.

(*Id.*, p. 642). Importantly, the Supreme Court's forfeiture framework in *Rockefeller I* (which it borrowed from *Burrow v. Arce*) relied on the language in Section § 37 of the Restatement (Third) of the Law Governing Lawyers, titled "Partial or Complete Forfeiture of a Lawyers Compensation."

That Restatement section reads in pertinent part:

A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.

(*Id.*). Parkinson cited to these standards in its response briefing. She also cited the following comments on fee disgorgement from the Restatement (Third) drafters:

- The remedy of fee forfeiture presupposes that a lawyer's clear and serious violation of a duty to a client destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer's claim to compensation;
- The damage that misconduct causes is often difficult to assess. In addition, a tribunal often can determine a forfeiture sanction more easily than a right to compensating damages;
- A violation is clear if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful;
- To warrant fee forfeiture a lawyer's violation must also be serious. Minor violations do not justify leaving the lawyer entirely unpaid for valuable services rendered to a client, although some such violations will reduce the size of the fee;

- Whether the breach involved knowing violation or conscious disloyalty to a client is also relevant;
- Conduct constituting malpractice is not always the same as conduct warranting fee forfeiture. A lawyer's negligent legal research, for example, might constitute malpractice, but will not necessarily lead to fee forfeiture.

(R. Vol. 1, pp. 35-36). Using these standards, Parkinson properly plead and alleged her claim as a breach of fiduciary duty claim, not as a legal malpractice claim. Parkinson was not required to show that Bevis had personally benefited from his breach.

The District Court should have allowed Parkinson to amend her claims. As seen in the record, the proposed amendments help to clarify several points: (1) that Parkinson is not asserting a legal malpractice action (R. Vol. 1, p. 121); (2) that Bevis disclosed Parkinson's confidential emails in violation of I.R.P.C. 1.6 (*Id.*, p. 122-124); (3) that Parkinson does not have an adequate legal remedy for Bevis' breach of duty (*Id.*, p. 124); (4) that Bevis' breach has significantly impaired the value of Bevis' services to Parkinson (*Id.*); and (5) that Parkinson is entitled to fee disgorgement and fee forfeiture. (*Id.*). The District Court should have followed Idaho's liberal amendment standards and should not have dismissed the amended claim due to a narrow reading of non-Idaho case law. The Idaho Supreme Court reminds us: "It is well settled that, in the interest of justice, courts should favor liberal grants of leave to amend." *Wickstrom v. N. Idaho Coll.*, 111 Idaho 450, 453, 725 P.2d 155, 158 (1986), and that "the purpose of the [amendment] rule is, in part, to allow the best chance for each claim to be determined on its merits rather than on some procedural technicality." *Drennon v. Fisher*, 141 Idaho 942, 945, 120 P.3d 1146, 1149 (Ct. App. 2005). The Court should have allowed Parkinson's amendments and should not have dismissed her claim on a mere interpretive technicality.

**c. Public Policy Considerations:**

The District Court's dismissal of Parkinson's claim sets a bad public policy example. The Court is effectively telling Idaho attorneys that it is acceptable to disclose a client's email confidences

once a case is over, and that the attorney will be immune from liability to the client so long as the attorney does not personally benefit from the disclosures. The client in such cases will be powerless to get any civil litigation relief. The client will be told that his or her only remedy is to sue the attorney for legal malpractice. If attempted, the case will be dismissed for lack of actual damage. This no-win, no-relief outcome is unfair to the client. It violates the spirit of *Rockefeller I*, which says that a disloyal agent should not receive their full compensation, and that without a sufficient enforcement mechanism, i.e., fee disgorgement or forfeiture, the “higher requirements” of acting in the principal’s best interests will cease to exist.

**d. The District Court Erred in Its Analysis on *Bishop v. Owens*:**

In denying Parkinson’s motion for reconsideration, the District Court said: “As this Court reads the opinions in *Bishop*, the majority concluded that if you are going to sue your lawyer and allege that your lawyer breached one of the ethical rules imposed by the Idaho State Bar Association and the Idaho Supreme Court on lawyers in Idaho, you may only do so in an action for professional negligence. That means you have to prove damages. Plaintiff here concedes she cannot.” (R. Vol. 1, p. 245). Parkinson believes that this was not an accurate summary of the case. In *Bishop v. Owens*, 152 Idaho 617, 272 P.3d 1247 (2012), the Supreme Court found that the plaintiff’s breach of contract claim was nothing more than a disguised professional negligence claim, and that the plaintiff was not entitled to assert both the breach of contract claim and the legal malpractice claim and was instead limited to asserting only a legal malpractice claim. *Id.*, p. 621. As to the source of attorney’s duties, the Court in *Bishop* explained: “The contours of the duties owed by an attorney to his or her client are defined by the Idaho Rules of Professional Conduct.” *Id.*, p. 620. But the Court in *Bishop* never held that a breach of the Rules of Professional Conduct could only be litigated as a professional negligence claim, as suggested by the District Court. On appeal, the Supreme Court should disregard the District Court’s anomalous conclusion from *Bishop* and should instead adopt the District Court’s

earlier (and better reasoned) conclusion that *Bishop* does not limit independent breach of fiduciary duty action as long as the actions are not duplicative of a legal malpractice action.<sup>4</sup>

The District Court explained near the end of its reconsideration order: “This does not mean Plaintiff is without an avenue to redress what she calls her attorney’s unethical conduct. Plaintiff may complain to the Idaho Bar Association. That body has the power, if it chooses to do so, to sanction her attorney; including the sanction of requiring him to disgorge fees he was paid.” (R. Vol. 1, p. 248). But that statement is simply not true. While the Idaho Bar Commission Rules 700-708 provide for the supervision of attorney-client fee disputes, the Rules do not provide any enforcement mechanisms where attorneys (like Bevis) fail or refuse to participate in the process. Importantly, Rule 703(c) says: “In cases where the attorney refuses or fails to be bound by the arbitration, and mediation is unsuccessful, no further action shall be taken by the Idaho State Bar and the client and attorney shall be left to their respective civil remedies.” (emphasis added). Thus, the Idaho State Bar does not have power, even “if it chooses to do so,” to hear Parkinson’s one-sided fees complaint and to sanction Bevis into disgorging or forfeiting his attorney fees. Having failed at her non-litigation attempts to settle the matter, Parkinson chose to pursue her “civil remedies” under the fee dispute rules. The District Court’s conclusion that Parkinson is somehow limited in her remedies to the Idaho State Bar fee dispute rules is contrary to the text of these rules. See also Tr. Vol. 1, p. 26, ln. 11-

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<sup>4</sup> Later in its decision on reconsideration, the District Court seems to question its new conclusions about *Bishop*, saying: “This Court acknowledges that the decision in *Bishop* does not squarely address the issue presented here... Absent more clear direction from the Supreme Court about the extent of its holding in *Bishop*, this Court feels compelled to conclude Plaintiff may not bring her claim in the Idaho courts.” (R. Vol. 1, pp. 247-248). Parkinson agrees with the District Court’s apparent misgivings on the matter, as *Bishop* does not expressly require all breaches of the Idaho Rules of Professional Conduct to be litigated as legal malpractice actions. In fact, that conclusion contradicts the District Court’s earlier (and more reasoned) conclusion that “Idaho Supreme Court has not expressly prohibited clients from bringing breach of fiduciary duty claims against their attorneys. This Court concludes that the Idaho Supreme Court has not categorically barred principals from suing their agent for alleged breaches of the agent’s fiduciary duty simply because the fiduciary duty arose from an attorney-client relationship.” (R. Vol. 1, p. 103). The District Court’s earlier conclusion supports the idea that *Bishop* does not require all breach of professional conduct claims to be litigated as malpractice claims—especially if those claims (as in Parkinson’s case) cannot be properly litigated as malpractice claims.

22, where Parkinson explained to the District Court that the Idaho State Bar disciplinary procedures don't provide for a disgorgement of Bevis' attorney fees.

**3. The District Court Erred in Denying Reconsideration:**

For the reasons stated above, the District Court erred in not reconsidering its dismissal order. The District Court had adopted all the right legal standards to allow Parkinson's claim to proceed on its merits. (R. Vol. 1, pp. 103-104, 108). If the Court found that Parkinson's claim was still deficient, the Court should have allowed Parkinson a chance to amend her pleadings, to fix the alleged deficiencies. The Supreme Court should reverse the District Court's reconsideration order and remand Parkinson's claim for further proceedings.

**4. The District Court Erred in Awarding Costs:**

The District Court erred in awarding Bevis his prevailing-party filing fee costs (R. Vol. 1, pp. 252, 254) for the simple reason that the Court should not have dismissed Parkinson's claim. In the event the Supreme Court overturns the District Court's dismissal and reconsideration orders, the Court should also reverse the award of prevailing party costs.

**CONCLUSION**

The District Court has abused its discretion in the matter. The District Court improperly dismissed Parkinsons' claim. The District Court improperly denied Parkinson's amendments. The Supreme Court should reverse and remand this case for further proceedings as set out in in this brief.

DATED January 10, 2019

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**CERTIFICATE OF SERVICE**

I certify that on January 10, 2019, I served a true and correct copy of this entire document on the following persons, addressed below:

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