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Walsh v. Swapp Law PLLC Appellant's Reply Brief Dckt. 46885

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

SHARON WALSH,

Plaintiff and Appellant,

vs.

SWAPP LAW, PLLC, a foreign business entity, dba CRAIG SWAPP & ASSOCIATES, and STEPHEN REDD, an individual attorney, and DOES I-X,

Defendants and Respondents.

Supreme Court Case No. 46885-2019

District Court Case No. CV01-17-03860

Appellant's Reply Brief

Appeal from the District Court of the Fourth Judicial District
in and for the County of Ada

Honorable Samuel A. Hoagland, District Judge

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ARGUMENT AND REBUTTAL

A. The Defendants and the District Court failed to duly consider or apply this Court's rulings on the Completed Tort Theory to this case.

The Defendants Swapp Law, PLLC dba Craig Swapp & Associates ("CSA") and Stephen Redd ("Mr. Redd" and jointly with CSA, the "Defendants"), seek to confuse the issues pending before this Court. It should not be this confusing. For a legal malpractice case the statue of limitations should not start to run until all the elements of the tort are ascertainable. Something that is ascertainable is not speculative. In a case where a client has multiple claims for indistinguishable injuries from two or more tortfeasors the statute of limitations against a lawyer for malpractice, relating to those claims, cannot start until all of the indistinguishable injury claims have been resolved. If an injured person still has damages which were not fully compensated after all claims have been resolved, it is only at that point that some damage is ascertainable to the legal malpractice. Anything short of this basic rule would put the interests of the negligent lawyer over that of their client. This straightforward rule builds on the very clear rule recently articulated in *Molen v. Christian*, where this Court annunciated the completed tort theory. 161 Idaho 577, 388 P.3d 591 (2017).

The Defendants seemingly seek to confuse the question of breach and damages. When a breach of duty occurs in legal malpractice it does not necessarily follow that there will be damages caused by that breach. Whether or not the Defendants breached the standard of care is not the pertinent question for this Court. The question that needs to be answered is when was some damage ascertainable, or better stated, at what point could the Plaintiff, Sharon Walsh ("Ms. Walsh"), reasonably ascertain some damage that was allocated to the breach.

What is in dispute and determinative in this case, is whether there were any objectively ascertainable damages prior to Donald Lamott ("Mr. Lamott") settling with or being found not liable by a court of competent jurisdiction for at least some of the uncompensated damages suffered by Ms. Walsh. This question goes to the very core of the required analysis of the completed tort theory articulated by this Court in *Molen v. Christian*, 161 Idaho 577, 388 P.3d 591 (2017).

As this Court carefully explained in *Molen*, Idaho Code section 5-219(4)'s "accrual standard operates under a completed tort theory in that the cause of action accrues when the tort is completed, an event that corresponds with the first objectively ascertainable occurrence of some damage. *Id.* at 581, quoting *Minnick v. Hawley Troxell Ennis and Hawley, LLP*, 157 Idaho 863, 866-67, 341 P.3d 580, 583-84 (2015), (internal citations omitted. This Court further explained that to hold otherwise '"would foment future litigation initiated on sheer surmise of potential damages in order to avoid the likely consequence of seeing actions barred by limitations.'" *Id.* at 582, quoting *Mack Financial Corp. v. Smith*, 111 Idaho 8, 12, 720 P.2d 191, 195 (1986). Under this Court's analysis while hindsight may be 20/20, just because you can point to the breach, the statute of limitations does not start until the day at least some damage is ascertainable. There is no way that Ms. Walsh, or anyone, could ascertain the damage caused by the Defendants breach, on the day she followed the advice of her counsel to settle the claim against Troy Hansen ("Mr. Hansen").

The Defendants, however assert that this Court's ruling in *Molen* is inapplicable because it "dealt with the specific issue of accrual of a legal malpractice cause of action in the criminal

context, and whether a malpractice cause of action could begin to accrue before a criminal defendant is exonerated . . ." See Respondent's Brief, p. 16. However, the Defendants' argument wholly belies this Court's analysis and reliance on precedent from multiple civil actions. See *Molen*, 161 Idaho at 581-582, 388 P.3d at 594-595.

Rather than analyze, when there were actual and objectively ascertainable damages to Ms. Walsh that were caused by the Defendants' breach of their duty, the Defendants wrongly focus on the fact that when Ms. Walsh signed the release on February 5, 2015, she was legally barred from recovering any additional damages from Mr. Hansen. See Respondent's Brief p. 13. The question as to whether Ms. Walsh could recover anything more from Mr. Hansen however is wholly irrelevant to the question of whether she had suffered some objectively ascertainable damages due to the Defendants' violation of their required standard of care.

What the Defendants, and the District Court entirely failed to consider is that at the time Ms. Walsh signed the settlement agreement with Mr. Hansen, she could have still obtained full compensation for the remainder of her uncompensated damages from Mr. Lamott. This is true because Mr. Lamott could have either voluntarily agreed to pay the full extent of Ms. Walsh's uncompensated damages, or because a court of competent jurisdiction could have found that Mr. Lamott was liable for the full extent of Ms. Walsh's uncompensated and remaining damages.

Critically, under Idaho law, to establish negligence, a "plaintiff must prove the existence of . . . actual loss or damage." See *Fragnella v. Petrovich*, 153 Idaho 266, 272, 281 P.3d 103, 109 (2012). Damages are an essential element of every negligence claim and such a claim cannot be supported without evidence of damages which are uncompensated. Thus, in order for Ms. Walsh to bring an actionable claim for malpractice against CSA and Mr. Redd, she had to have some

evidence that she had suffered some damage as a result of the Defendants' violation of their standard of care. Had Ms. Walsh been able to recover the full extent of her uncompensated damages from Mr. Lamott, she would have been barred from bringing an action against either CSA or Mr. Redd because she would not have suffered any damages by their malpractice.

While one can speculate that Mr. Lamott would not have willingly paid Ms. Walsh the full extent of her uncompensated damages or that a trier of fact would not have held Mr. Lamott liable for the full extent of Ms. Walsh's uncompensated damages, unless or until there was a legal determination or other legal basis absolving Mr. Lamott of full liable, there was no objectively ascertainable evidence that Ms. Walsh had suffered any damages due to the Defendants' breach of their duty. Moreover, such speculation is entirely inappropriate under a motion for summary judgment. When considering a motion for summary judgement, the Court must "liberally construes the facts and existing record in favor of the non-moving party" in making such determination. See *Hall v. Forsloff*, 124 Idaho 771, 773, 864 P.2d 609, 611 (1993). "If reasonable people could reach different conclusions or inferences from the evidence, the motion must be denied." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005). Thus, the District Court erred when it determined that the statute of limitations in this case started before it was known to anyone that Mr. LaMott would not fully compensate Ms. Walsh for the full extent of her damages. The best indicator of when the statute of limitations should have started to run is when there was an objectively ascertainable event that barred Ms. Walsh from obtaining full compensation for her loss. That event in this case only occurred when Mr. LaMott settled the claim closing the door for full compensation.

Critically, in instances where there are multiple tortfeasors, a settlement with one tortfeasor is not determinative as to whether or not the Plaintiff can recovery the full extent of the damages from the second tortfeasor. One legal theory where this is exemplified is under the eggshell skull rule. Under this rule, the frailty, weakness, sensitivity, or feebleness of a victim cannot be used as a defense in a tort case. See Dr. J. Stanley McQuade, *The Eggshell Skull Rule and Related Problems in Recovery for Mental Harm in the Law of Torts*, 24 Campbell L. Rev. 1 (2001). So, even though it is certainly not a good idea and may well be very difficult to deal with, settling one claim without settling the second claim, such conduct does not necessarily result in damage to the plaintiff.

Moreover, this is not a question that the judge should have taken away from the jury in this case. Unless or until there is a legal determination – rather than just speculation or opinion – as to the percentages of negligence between Mr. Hansen and Mr. Lamott, it is impossible to know whether settling Mr. Hansen's claim resulted in damages to Ms. Walsh. More important to the appeal at hand, up until the settlement with Mr. Lamott was signed, it was impossible for Ms. Walsh to objectively ascertain whether she suffered any damages due to the Defendants' violation of their duty.

B. The Defendants failed to duly consider or analyze that the question of when Ms. Walsh knew or should have been put on inquiry regarding the Defendants' malpractice are issues of fact that should have been presented to the jury.

Even though the failure of the Defendants to disclose the letter from counsel representing Blue Cross of Idaho ("Blue Cross Letter") to Ms. Walsh demonstrates a clear violation of the standard of care the Defendants owed to Ms. Walsh, the Defendants argue that the existence of the letter is irrelevant. See Respondents' Brief, p. 25. The Defendants' arguments, however, are

wholly disingenuous and unconscionable. While the existence of the Blue Cross Letter may not be determinative as to whether Ms. Walsh knew or should have been put on notice, it is a critical and damning piece of evidence that shows the willingness of the Defendants to fraudulently conceal information from their former client, Ms. Walsh. Moreover, the date this information was finally revealed to Ms. Walsh establishes a backstop for a date when Ms. Walsh knew that the Defendants committed malpractice in handling her case.

As this Court has held: "where discovery of a cause of action commences the statute of limitations the date of discovery is a fact question for the jury unless there is no evidence creating a question of fact." *McCoy v. Lyons*, 120 Idaho 765, 773, 820 P.2d 360, 368 (1991); see also *Reis v. Cox*, 104 Idaho 434, 438, 660 P.2d 46, 50 (1982). At minimum, Ms. Walsh's sworn statement that she did not know and had no reason to believe that CSA or Redd had committed malpractice until the Blue Cross Letter was disclosed presents a question of fact that should have been presented to the jury rather than summarily disposed of by the District Court.

The Defendants further argue that Mr. Beckett's knowledge must be imputed to Ms. Walsh. Even negating the absurd results that would come from imputing the knowledge of an agent of a tortfeasor to the victim, it is entirely in dispute what Mr. Beckett knew and when. Here again, what Mr. Beckett knew and when is a clear question of fact that should have been left for the jury. Critically, as argued in Ms. Walsh's original brief, the only evidence the Defendants present is based on internal memos, emails, and notes that were under the control of the alleged tortfeasor. The veracity of this information and the ability to impute such information to Ms.

Walsh are all questions for the jury, not for the District Court or this Court to summarily extinguish based on pure speculation.

C. **The Defendants fail to duly evaluate the legal basis for determining whether Idaho Code § 5-219-(4) should be found unconstitutionally void for vagueness.**

As the Defendants point out, this Court has held that the question of vagueness is based on whether "persons of reasonable intelligence can derive core meaning from it." In this case, multiple lawyers including Craig Swapp and Mr. Redd asserted in their depositions that they did not believe Ms. Walsh had a triable claim for malpractice unless or until there was a resolution with Mr. Lamott that left Ms. Walsh with unreimbursed damages. See R. p. 471-472, Email Chain from Craig Swapp. When multiple experienced lawyers cannot derive the core meaning of the statute, it is entirely and lawfully unreasonable for this Court to determine that lay individuals, such as Ms. Walsh must be tasked with understanding what the term "some damage" means even in instances where the individual has multiple claims against multiple defendants and overlapping injuries. The void for vagueness doctrine must be broad enough to incorporate due process notions of fair notice and warning and must at minimum require lawmakers set reasonably clear guidelines for triers of fact in order to prevent absurd results. See *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 715, 791 P.2d 1285, (1990), (citing *Florida Businessmen for Free Enter. v. State*, 499 F.Supp. 346 (Fla.1980).

Allowing the Defendants in this case to avoid justice without ever having to face a jury, based on a statute of limitations that even the Defendants did not comprehend would be beyond the pale. To avoid this result if the Court does not find any other basis to overrule the District

Court, the Court should invalidate the statute as applied to Ms. Walsh and remand this matter back to the District Court for further proceedings.

D. <u>The prevailing party should be allowed costs</u>.

Ms. Walsh concurs that Idaho Rules of Appellate Procedure Rule 40 provides for costs to be awarded to the prevailing party in this action. Accordingly, Ms. Walsh requests that the Court award costs in this matter in accordance with the requirements and provisions of Rule 40.

RESPECTFULLY SUBMITTED this 25th day of October 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.R.E.F.S., and that an electronic copy was served on each party via ECF.

Dated and certified this 25th day of October 2019.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of the Appellant was mailed by first class mail, postage prepaid to the following:

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