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AT 12:10 o'Clock P M
CLERK OF DISTRICT COURT


Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**SHAWN MONTEE and HEATHER
MONTEE, individually and as husband
and wife,**)
Plaintiffs,)
vs.)
**PAUL W. DAUGHARTY, individually, PAUL
DAUGHARTY PA, and DOES ONE
THROUGH TWENTY inclusive,**)
Defendants.)

Case No. **CV 2017 4677**

**MEMORANDUM DECISION AND
ORDER: DENYING PLAINTIFFS'
MOTION FOR RECONSIDERATION,
and GRANTING DEFENDANTS'
SECOND MOTION FOR SUMMARY
JUDGMENT**

SHAWN MONTEE'S MOTION FOR RECONSIDERATION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

This matter is before the Court on plaintiff Shawn Montee's *pro se* Motion for Reconsideration. The Court notes at the outset that Heather Montee has not made this Motion for Reconsideration, has not signed off on such, and did not participate at the oral argument. Recently, both Shawn and Heather Montee have participated in this lawsuit on a *pro se* basis. However, because Shawn Montee is not a lawyer, Shawn Montee can only represent himself and cannot represent Heather Montee. Shawn Montee alone asks the Court to reconsider its decision to grant, in part, Paul W. Daugharty's and Paul Daugharty P.A.'s (collectively, Daugharty) Motion for Summary Judgment.

The procedural history and factual background of this case was previously summarized in the Court's January 31, 2018, Memorandum Decision and Order.

Therefore, the Court incorporates by reference the procedural history and factual background of this case as set forth in its January 31, 2018, Memorandum Decision and Order. However, for context, the Court briefly re-summarizes the relevant facts and procedural history below.

On June 16, 2017, the Montees filed a Complaint against Daugharty. They filed a First Amended Complaint on October 6, 2017. The Montees alleged six causes of action against Daugharty, which include breach of contract, breach of the implied covenant of good faith and fair dealing, professional negligence, fraudulent concealment, breach of fiduciary duty, and negligent infliction of emotional distress. On November 9, 2017, Daugharty moved for summary judgment of the Montees' claims against him. A hearing on Daugharty's Motion for Summary Judgment was held on January 29, 2018, and on January 31, 2018, the Court issued a Memorandum Decision and Order granting in part and denying in part Daugharty's summary judgment motion.

Thereafter, on February 13, 2018, Shawn Montee filed a Motion for Reconsideration, Memorandum in Support of Motion for Reconsideration, and the Affidavit of Shawn Montee in Support of Motion for Reconsideration. Shawn Montee generally asks the Court to reconsider its decision to grant, in part, Daugharty's Motion for Summary Judgment. Shawn Montee argues that he and Heather lacked standing. Because they lacked standing, Shawn Montee seems to assert (1) that the bankruptcy trustee was obligated to oppose Daugharty's summary judgment motion and (2) that they were precluded from responding to Daugharty's summary judgment motion.

On April 9, 2018, Daugharty filed a Memorandum in Opposition to Plaintiffs' Motion for Reconsideration and Declaration of Michael E. Ramsden. In response to the Montees' first argument, Daugharty contends that whether the Montees or the bankruptcy trustee was obligated to respond to his summary judgment motion is a dispute between

them. As for the Montees' second argument, Daugharty generally argues that under Idaho Rule of Civil Procedure 17(a) and the Idaho Supreme Court's holding in *Houpt v. Wells Fargo Bank, N.A.*, 160 Idaho 181, 370 P.3d 384 (2016), the Montees were not "disabled" from opposing Daugharty's Motion for Summary Judgment. Therefore, Daugharty asks the Court to deny the Montees' Motion for Reconsideration.

In his Motion for Reconsideration, Shawn Montee expressly declined oral argument on his Motion to Reconsideration. However, Daugharty scheduled the Montees' Motion for Reconsideration for oral argument by filing a Notice of Hearing.

A hearing on Montees' Motion to Reconsider was held on April 19, 2018.

II. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration may present new evidence but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006). The trial court must consider new evidence or authority bearing on the correctness of a summary judgment order. *Fagnella v. Petrovich*, 153 Idaho 266, 276, 281 P. 3d 103, 113 (2012). "When deciding the motion for reconsideration, the [trial] court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered." *Id.* Because the order sought to be reconsidered in this case is a summary judgment order, the standard of review under Idaho Rule of Civil Procedure 56 applies. *Id.* Therefore, the trial court must determine whether the evidence presented raises a genuine issue of material fact to defeat summary judgment. *Id.*

III. ANALYSIS ON MOTION FOR RECONSIDERATION.

Shawn Montee asks the Court to reconsider its decision to grant, in part, Daugharty's summary judgment motion. In its Memorandum Decision, the Court in part considered whether it should dismiss the Monte'es' First Amended Complaint on the ground that the Monte'es lacked standing to pursue their claims against Daugharty. Mem. Dec. 18–21. The Court concluded that dismissal was not warranted and relied on *Haupt v. Wells Fargo Bank, National Association*, 160 Idaho 181, 370 P.3d 384 (2016) to support that conclusion. *Id.* In doing so, the Court explained that while the Monte'es were not the real party in interest when they initiated this action against Daugharty, the bankruptcy estate had since abandoned any interest in the Monte'es' claims. *Id.* Because the bankruptcy estate had abandoned its interest in the Monte'es' claims, the Court reasoned that the Monte'es were now the real party in interest with standing to pursue their claims and any defect in their standing had been cured. *Id.* Therefore, the Court proceeded to consider the merits of Daugharty's summary judgment motion.

In their Motion for Reconsideration, Shawn Montee appears to take issue with the Court's conclusion that he and his wife are the real party in interest with standing to pursue their claims against Daugharty. Mem. Supp. Mot. Reconsideration 5–6. Shawn Montee contends that the bankruptcy estate "owned" their claims against Daugharty until January 18, 2018, and that counsel for Daugharty knew that the bankruptcy estate "owned" their claims. *Id.* Because the bankruptcy estate "owned" their claims and they lacked standing, Shawn Montee argues that they could not respond to Daugharty's summary judgment motion. *Id.* Instead, in Shawn Montee's opinion, the bankruptcy trustee "was charged with the responsibility of responding to the summary judgment

[motion], not the Montees.” *Id.* at 6. Because the bankruptcy trustee was the responsible party, Shawn Montee asserts that this Court should not have made “findings of fact” against them given that they lacked standing to respond to the summary judgment motion. *Id.*

The Court has reconsidered the briefs and evidence submitted in support of and in opposition to Daugharty’s Motion for Summary Judgment, as well as the Shawn Montee’s memorandum and affidavit in support of their Motion for Reconsideration and Daugharty’s Memorandum in Opposition to Plaintiffs’ Motion for Reconsideration. After doing so, the Court concludes that this Court’s Memorandum Decision and Order was correct, i.e., the conclusion that the Montees are now the real party in interest with standing to pursue their claims was correct and the conclusion that any defect in their standing was cured when the bankruptcy estate abandoned its interest in the Montees’ claims was correct. The Court begins by noting that Shawn Montee submitted an affidavit in support of his Motion for Reconsideration. This evidence, however, does not affect the Court’s decision that the Montees are the real party in interest with standing because it does not raise a genuine issue of material fact. Shawn Montee’s evidence demonstrates that the Montees’ bankruptcy attorney was in communication with counsel for Daugharty regarding the Montees’ pending bankruptcy action and that the bankruptcy trustee abandoned its interest in the Montees’ claims on January 18, 2018. See Shawn Montee Aff., at Exs. 1–3. The Court relied on the undisputed fact that the bankruptcy estate abandoned its interest in the Montees’ claims on January 18, 2018, to reach its conclusion that the Montees were the real party in interest. Additionally, any communication between counsel for the parties is irrelevant to the issue of whether the Montees were the real party in interest with standing to pursue their claims.

Therefore, Shawn Montee’s affidavit does not present any new evidence that creates a

genuine issue of material fact that might alter the Court's Memorandum Decision and Order.

Next, the Court notes that Shawn Montee has not directed the Court to any new legal authority in support of their request for reconsideration. For example, Shawn Montee argues that because he and his wife lacked standing, the bankruptcy trustee was obligated to respond to Daugharty's summary judgment motion and, in turn, they were precluded from doing so. Shawn Montee cites no authority for this proposition. While the bankruptcy trustee was the real party in interest prior to January 18, 2018, the bankruptcy trustee had not ratified, joined, or been substituted in as the real party in interest in this case, or otherwise moved to intervene in this action. See I.R.C.P. 17(a)(3), 24. As such, the bankruptcy trustee was not in a position to respond to Daugharty's Motion for Summary Judgment, nor was the bankruptcy trustee obligated to do so.

Shawn Montee also suggests that Daugharty should have served all motions filed in this case on the bankruptcy trustee and failed to do so. Shawn Montee cites no legal authority for this proposition. Idaho Rule of Civil Procedure 5 requires a "party" to be served. I.R.C.P. 5. As noted, while the bankruptcy trustee was the real party in interest prior to January 18, 2018, the bankruptcy trustee was not and has never been a named party in this case. The Montees never took any action to join the bankruptcy trustee in this case despite having notice that they may not be the real party in interest.¹ In addition, it is noteworthy that on December 17, 2017, Daugharty himself notified and served the bankruptcy trustee via email of his pending Motion for Summary Judgment.

¹ In his Answer to Amended Complaint, Daugharty pointed out the Montees may not be the real party in interest. See Answer to Am. Compl. 6 (Fifth Defense). Additionally, on or about October 26, 2017, the Montees acknowledge that they knew they might not be the real party in interest. Aff. Shawn Montee Supp. Mot. Continuance 2, ¶ 4.

Decl. Michael E. Ramsden 2. Despite this notice and service from Daugharty, the bankruptcy trustee never took any steps to ratify, join, be substituted in, or otherwise intervene in this action. In summary, because the bankruptcy trustee was never a party to this action, the Idaho Rules of Civil Procedure did not require Daugharty to notify and serve the bankruptcy trustee.

Altogether, the Court concludes that Shawn Montee has not presented any new evidence or directed the Court to any legal authority to support his Motion for Reconsideration. Accordingly, plaintiff Shawn Montee's Motion for Reconsideration is denied.

DAUGHARTY'S SECOND MOTION FOR SUMMARY JUDGMENT

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

This matter is also before the Court on defendants Paul W. Daugharty's and Paul Daugharty P.A.'s (collectively, Daugharty) Second Motion for Summary Judgment.

On June 16, 2017, plaintiffs Shawn Montee and Heather Montee (collectively, the Montees) filed a Complaint against Daugharty. The Montees submitted a First Amended Complaint on October 6, 2017. The allegations in the First Amended Complaint stem from Daugharty's representation of the Montees in *Wolford v. Montee* (Kootenai County case no. CV-2014-4713), Daugharty's alleged advice related to the Montees' decision to file for bankruptcy, and Daugharty's alleged advice regarding the formation of North Pacific, LLC. First Am. Compl. 3–4, ¶¶ 8, 16, 21. In their First Amended Complaint, the Montees alleged six causes of action: breach of contract, breach of the implied covenant of good faith and fair dealing, professional negligence, fraudulent concealment, breach of fiduciary duty, and negligent infliction of emotional distress. *Id.* at 5–10, ¶¶ 24–55.

On November 9, 2017, Daugharty moved for summary judgment in his favor on

the Montees' six claims against him. A hearing on Daugharty's summary judgment motion was held on January 29, 2018. Thereafter, on January 31, 2018, the Court issued a Memorandum Decision and Order, in which it granted in part and denied in part Daugharty's request for summary judgment. The Court's conclusion and order provided:

[T]he Court: (1) denies summary judgment on the Montees' breach of contract claim; (2) denies summary judgment on the Montees' breach of covenant of good faith and fair dealing from a factual standpoint, but grants summary judgment on Montees' claim of breach of covenant of good faith and fair dealing as a matter of law; (3) grants summary judgment on the Montees' professional negligence claim to the extent the claim is based on Daugharty advising the Montees to form North Pacific, LLC in violation of an injunction, and the Montees are judicially estopped from pursuing their claim that Daugharty was negligent by advising them to file for bankruptcy; (4) grants summary judgment on the Montees' fraudulent concealment claim; (5) grants in part and denies in part summary judgment of the Montees' claim for breach of fiduciary duty (i.e., the grant of summary judgment is limited to Daugharty's representation of the Montees in *Wolford v. Montee* because it is barred by Idaho Code § 5-219's two year statute of limitations); and (6) grants summary judgment on the Montees' intentional infliction of emotional distress claim, which the Montees refer to as a claim for negligent infliction of emotional distress.

....

IT IS FURTHER ORDERED that the defendants' summary judgment motion on the Montees' breach of contract claim is DENIED, but defendants are allowed to present additional evidence under I.R.C.P. 56(e)(1), (3).

IT IS FURTHER ORDERED that the defendants' summary judgment motion on the Montees' breach of covenant of good faith and fair dealing is DENIED from a factual standpoint, but defendants are allowed to present additional evidence under I.R.C.P. 56(e)(1), (3), and GRANTED as a matter of law because Montees' claim of breach of covenant of good faith and fair dealing does not constitute a separate cause of action.

IT IS FURTHER ORDERED that the defendants' summary judgment motion on the Montees' professional negligence claim to the extent the claim is based on Daugharty advising the Montees to form North Pacific, LLC in violation of an injunction is GRANTED, and the Montees are judicially estopped from pursuing their claim that Daugharty was negligent by advising them to file for bankruptcy.

IT IS FURTHER ORDERED that the defendants' summary

judgment motion on the Montees' fraudulent concealment claim is GRANTED;

IT IS FURTHER ORDERED that the defendants' summary judgment motion is GRANTED in part and DENIED in part as to the Montees' claim for breach of fiduciary duty (i.e., limited to Daugharty's representation of the Montees in *Wolford v. Montee* because it is barred by Idaho Code § 5-219's two year statute of limitations);

IT IS FURTHER ORDERED that the defendants' summary judgment motion on the Montees' intentional infliction of emotional distress claim (which the Montees refer to as a claim for negligent infliction of emotional distress) is GRANTED.

Mem. Decision and Order 39–40.

On March 19, 2018, Daugharty filed a Second Motion for Summary Judgment. Daugharty seeks summary judgment on the Montees' claims for breach of contract and breach of an implied covenant of good faith and fair dealing. In support of that Motion, Daugharty submitted Defendants Paul W. Daugharty and Paul W. Daugharty, P.A.'s Memorandum in Support of Second Motion for Summary Judgment and the Declaration of Paul W. Daugharty in Support of Second Motion for Summary Judgment. Daugharty generally argues that he is entitled to summary judgment on the Montees' breach of contract and breach of an implied covenant of good faith and fair dealing claims because the undisputed facts demonstrate that Daugharty did not agree to complete a specific task or provide the Montees with a higher standard of care than what he owed under the Idaho Rules of Professional Conduct and Idaho law. Because he did not agree to complete a specific task or provide the Montees with a higher standard of care, Daugharty argues that the Montees' claims against him sound in tort, not contract. Therefore, Daugharty contends that the Montees' breach of contract and breach of an implied covenant of good faith and fair dealing claims fail.

On March 28, 2018, plaintiff Shawn Montee alone filed Plaintiff's Continued Objection to Motions for Summary Judgment. Shawn Montee argues that Daugharty

failed to properly notify and serve the bankruptcy trustee with his summary judgment motions as required by the Idaho Rules of Civil Procedure. Because Daugharty did not notify or serve the bankruptcy trustee, Shawn Montee generally objects to Daugharty's summary judgment motions. As argued in their Motion for Reconsideration, Shawn Montee also argues that the bankruptcy trustee was obligated to respond to Daugharty's first Motion for Summary Judgment, not them.²

On April 9, 2018, Daugharty filed a Reply in Support of Second Motion for Summary Judgment and in Opposition to Plaintiffs' Continued Objection to Motions for Summary Judgment. In the Reply, Daugharty points out that the Montees have not submitted evidence to create a genuine issue of material fact to support a denial of his summary judgment motion. With regard to notice and service of Daugharty's summary judgment motions, Daugharty generally argues that the Second Motion for Summary Judgment was properly filed with the Court and served on the Montees. With regard to his first Motion for Summary Judgment, Daugharty disagrees with the Montees assertion that he did not timely serve the bankruptcy trustee. Daugharty explains that at the request of the Montees' bankruptcy trustee, he served the first Motion for Summary Judgment on the bankruptcy trustee on December 17, 2017, more than 28 days before the January 29, 2018, hearing.

A hearing on Daugharty's Second Motion for Summary Judgment was held on April 19, 2018.

II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted "if the movant shows that

² On February 13, 2018, Shawn Montee submitted a Motion for Reconsideration related to Daugharty's first Motion for Summary Judgment.

there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by “citing to particular parts of materials in the record” or “showing that the materials cited do not establish the absence or presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact.” I.R.C.P. 56(c).

If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
- (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). “Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party” to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). To do so, the non-moving party “must come forward with evidence by way of affidavit or

otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact.” *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). “Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence.” *Shea*, 156 Idaho at 545, 328 P.3d at 525 (quoting *Park West Homes, LLC v. Bamson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep’t of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet “the ‘genuine issue of material fact’ burden . . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial.” *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994).

Such an absence of evidence may be established either by an affirmative showing with the moving party’s own evidence or by a review of all the nonmoving party’s evidence and the contention that such proof of an element is lacking. *Dunnick*, 126 Idaho at 311 n.1, 882 P.2d at 478 n.1. Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994).

Heath v. Honker’s Mini-Mart, Inc., 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000).

III. ANALYSIS.

Daugharty seeks summary judgment on the Montees' claims for breach of contract and breach of an implied covenant of good faith. The Court addresses each request in turn.

A. The undisputed facts demonstrate that Daugharty did not agree to provide the Montees with a higher standard of care or to perform specific tasks.

Daugharty argues that he is entitled to summary judgment on the Montees' breach of contract claim because any duty he owed to the Montees was in tort, not in contract. Defs. Paul W. Daugharty, P.A.'s Mem. Supp. Second Mot. Summ. J. 3–4. Daugharty explains that, in the course of representing the Montees, he did not agree to provide the Montees with a higher standard of care or perform specific tasks and, therefore, under Idaho law, the Montees' "sole cause of action" against him is a tort claim for legal malpractice. *Id.* To support this argument, Daugharty cites to several Idaho appellate court opinions including *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012), and *Johnson v. Jones*, 103 Idaho 702, 652 P.2d 650 (1982). *Id.* In addition to this legal authority, Daugharty contends that the Montees "would have the burden of establishing at trial that there was a written contract between [the] Montee[s] and Daugharty that provided for a higher standard of care than the duties owed by the Idaho Rules of Professional Conduct[,]" and the Montees will be unable to meet this burden. *Id.* at 4. Daugharty also directs the Court to the evidence he submitted, which demonstrates that he had a written contract of engagement with the Montees and, under that contract, he did not agree to provide the Montees with a higher standard of care. *Id.*

The Idaho Rules of Professional Conduct generally define the duties an attorney owes his or her client. *Bishop v. Owens*, 152 Idaho 616, 620–21, 272 P.3d 1247, 1251–52 (2012). If an attorney breaches a duty specified in the Idaho Rules of Civil

Procedures, the client may bring a tort claim against the attorney for legal malpractice.³ *Id.* (noting that a legal malpractice claim is the proper claim where an attorney breaches his or her duty to a client). Only where the attorney contracts with his client to perform a specific obligation or provide his or her client with a higher standard of care does a claim for breach of contract arise. *Id.* at 620, 272 P.3d at 1251 (citing *Johnson v. Jones*, 103 Idaho 702, 704, 706–07, 652 P.2d 650, 652, 654–55 (1982)). In other words, if an attorney wants to promise to complete a specific task for a client, he or she may do so. *Id.* Additionally, “[i]f an attorney and client want to provide for a higher standard of care, they may do so by express language in the contract.” *Id.*; see also *id.* at 622–23, 272 P.3d at 1253–54 (Jones, J., concurring). In turn, if the attorney fails to perform a specific contractual obligation or comply with a higher standard of care as set forth in a written contract, the client may bring a claim against the attorney for breach of contract. *Id.* at 620, 272 P.3d at 1251; see also *id.* at 622–23, 272 P.3d at 1253–54 (Jones, J., concurring) (explaining that “[s]uch additional undertakings are not required by the [Idaho Rules of Professional Conduct], or the lawyer’s general duty of care and, therefore, are strictly contractual in nature.”).

Here, the threshold issue is whether Daugharty has met his burden and presented evidence showing that he did not contractually agree to provide the Montees with a higher standard of care or agree to perform certain tasks. The Court concludes that Daugharty has met his burden. Daugharty’s evidence demonstrates that he represented the Montees for over twenty years; his representation of the Montees ended when the Montees filed their Complaint in this case. Daugharty Decl. 1. Daugharty

³ The Idaho Rules of Professional Conduct are “not designed to be a basis for civil liability. . . . Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.” I.R.P.C., Scope, ¶ 20.

states that prior to May 27, 2015, he did not have a written contract of engagement with the Montees and, that during the period of representation prior to May 27, 2015, he did not agree to a higher standard of care or agree to do things or perform tasks above and beyond those required by the Idaho Rules of Professional Conduct or Idaho law. *Id.* at 2. In addition, Daugharty states that on May 27, 2015, he entered into a written contract of engagement with the Montees. *Id.* The contract sets forth Daugharty's billing practices and the general scope of his representation of the Montees. *Id.* The written contract was signed by Daugharty and the Montees. *Id.* In the written contract, Daugharty promises to represent the Montees in certain matters, but he does not agree to perform specific tasks or provide the Montees with a higher standard of care. *Id.* In fact, Daugharty states that while he will use his best efforts on the Montees' behalf, he cannot make any guarantees related to disposition of the Montees' case(s).⁴ *Id.* Altogether, Daugharty's evidence shows that while representing the Montees, he did not agree to perform certain tasks or provide the Montees with a higher standard of care.

Because Daugharty has met his burden, the burden shifts to the Montees to present evidence showing that there is a genuine dispute of material fact for trial. The Montees have not done so. As noted above, Shawn Montee submitted an objection to Daugharty's Second Motion for Summary Judgment. The objection only addresses whether notice and service of Daugharty's first Motion for Summary Judgment to the

⁴ The written contract of engagement provides in part:

You[, i.e., the Montees] acknowledge that we have made no guarantees in the disposition of any phase of the matter or matters for which we have been retained, as all expressions relative to it are only out opinions.

.....

You will appreciate that I can make no guarantee of a successfully conclusion in any case. However, I will use my best efforts on your behalf.

.....

bankruptcy trustee was deficient. That issue is not relevant to Daugharty's Second Motion for Summary Judgment and is the subject of the Montees' Motion for Reconsideration. Further, the Montees have not provided the Court with any evidence demonstrating that Daugharty promised anything above and beyond what is required by the Idaho Rules of Professional Conduct.

As a result, the Court concludes that the undisputed facts demonstrate that Daugharty did not agree to complete a specific task or provide the Montees with a higher standard of care. Therefore, like in *Bishop*, the Montees' breach of contract claim is really a legal malpractice action. As such, the Montees' breach of contract fails as a matter of law.

B. The Court previously granted Daugharty's request for summary judgment on the Montees' breach of the implied covenant of good faith and fair dealing.

Daugharty also seeks summary judgment in his favor on the Montees' claim for breach of the implied covenant of good faith and fair dealing. He argues that "[t]he claim for breach of the covenant of good faith and fair dealing is a subsidiary claim premised on a breach of contract theory and carries with it contract damages." Defs. Paul W. Daugharty and Paul Daugharty, P.A.'s Mem. Supp. Second Mot. Summ. J. 4–5 (citing *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 778 P.2d 744 (1989)). Daugharty then explains that the Montees' breach of the implied covenant of good faith and fair dealing claim fails for the same reason that the Montees' breach of contract claim fails, i.e., the Montees exclusive remedy is in tort, not contract. *Id.*

In its January 31, 2018, Memorandum Decision and Order, the Court granted Daugharty's Motion for Summary Judgment on the Montees' breach of the implied covenant of good faith and fair dealing claim because the Court concluded that the claim

is not a separate cause of action from the Montees' breach of contract claim. Mem. Dec. and Order 25 (citing *Idaho First Nat. Bk. v. Bliss Valley Foods*, 121 Idaho 266, 289, 824 P.2d 841, 866 (1991)). In *Drug Testing Compliance Group, LLC v. DOT Compliance Service*, 161 Idaho 93, 383 P.3d 1263 (2016), the Idaho Supreme Court explained:

In every contract there is an implied covenant of good faith and fair dealing, which requires the parties to perform, in good faith, the obligations *required by their agreement*. A violation of the covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract. The implied covenant of good faith and fair dealing does not create independent obligations, it merely applies to contractual obligations. Thus, before a party can breach this covenant there must be a contract. A violation of the implied covenant is a breach of contract. It does not result in a cause of action separate from the breach of contract claims, nor does it result in separate contract damages unless such damages specifically relate to the breach of the good faith covenant.

Id. at 102–03, 383 P.3d at 1272–73 (citations omitted) (internal quotation marks omitted). Therefore, because the Montees' breach of an implied covenant of good faith and fair dealing claim is based on the same conduct giving rise to the Montees' breach of contract claim, the Court concluded in its Memorandum Decision and Order that the claim did not constitute a separate cause of action.

To the extent that this claim remains at issue, the Court agrees with Daugharty. The Court concluded that the Montees' breach of contract claim fails because it is in fact a tort claim for legal malpractice; therefore, it follows that the Montees' breach of an implied covenant of good faith and fair dealing must also fail.

IV. CONCLUSION AND ORDER ON BOTH MOTIONS.

Based on the above analysis, the Court denies Shawn Montee's Motion for Reconsideration and grants Daugharty's Second Motion for Summary Judgment.

IT IS HEREBY ORDERED the plaintiff Shawn Montee's Motion for Reconsideration is **DENIED**.

IT IS FURTHER ORDERED the defendant Daugharty's Second Motion for Summary Judgment is **GRANTED**. Counsel for Daugherty to prepare an appropriate Judgment.

Entered this 2nd day of May, 2018.



John T. Mitchell, District Judge

Certificate of Service

I certify that on the 2 day of May, 2018, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Party pro se

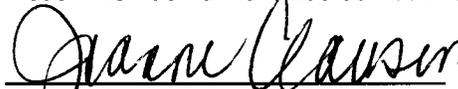
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