

I

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are set forth in this Court's "Order on Defendants' Motion for Summary Judgment," issued May 13, 2010, and "Memorandum Opinion and Order Re: Plaintiff's Motion for Partial Summary Judgment," issued on June 10, 2010.¹ The pertinent facts for purposes of this opinion and order are that the Plaintiff passed away on November 10, 2009, and notified the Defendants of the event on April 22, 2010, by serving an unfiled copy of "Plaintiff's Motion to Substitute Lois M. Bishop as Personal Representative."

The Defendants filed "Defendants' Second Motion for Summary Judgment" on May 6, 2010, supported by the Affidavit of Michael Ramsden. The Plaintiff filed "Plaintiff's Motion to Substitute Lois M. Bishop as Personal Representative of Patricia J. Shelton" May 10, 2010. The Plaintiff also filed "Plaintiff's Response to Defendants' Second Motion for Summary Judgment" on June 28, 2010. The Defendants replied on July 6, 2010.

II

STANDARDS FOR SUMMARY JUDGMENT

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, based on the "pleadings, depositions, and admissions on file, together

¹ Defendants' Motion for Summary Judgment was denied. See Order on Defendants' Motion for Summary Judgment, which was filed on May 13, 2010. Plaintiff's Motion for Partial Summary Judgment was denied. See, Memorandum Opinion and Order Re: Plaintiff's Motion for Partial Summary Judgment, June 10, 2010.

with any affidavits.” Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 405 (Ct. App. 1987).

In order to make that determination, the court must look to “the pleadings, depositions, and admissions on file, together with the affidavits, if any” (I.R.C.P. 56.) Supporting and opposing affidavits must set forth such facts as would be admissible in evidence. (I.R.C.P. 56.) Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. Zehm v. Associated Logging Contractors, Inc., 116 Idaho 349, 775 P.2d 1191 (1988). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied. Roell v. City of Boise, 130 Idaho 197, 938 P.2d 1237 (1997); Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

The facts in the record are to be liberally construed in favor of the party opposing the motion. The opposing party cannot rest upon mere allegations or denials, but the party’s response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue of material fact. (I.R.C.P. 56(e)); Smith v. Meridian Joint School District No. 2, 128 Idaho 714, 918 P.2d 583 (1996); G & M Farms v. Funk Irrigation Co., 119 Idaho 514, 808 P.2d 851 (1991); Edwards v. Conchemco, Inc., 111 Idaho 851, 727 P.2d 1279 (Ct.App. 1986).

I. DISCUSSION

A. Negligence Claim

The Plaintiff has alleged negligence in her complaint. The elements for a claim for professional negligence or legal malpractice are: (1) the existence of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the failure to perform that duty; and (4) the failure to perform that duty is the proximate cause of damages suffered by the client. J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford, 146 Idaho 311, 193 P.3d 858 (2008).

In “Defendants’ Second Motion for Summary Judgment” (“Second Motion”), the Defendants assert that the Plaintiff’s claims abated upon her death because her claim is a tort claim and at the time the Plaintiff instituted this action and at the time of her death Idaho did not have a statute of general survivability.² Thus, Defendants’ present a common law issue of *ex contractu* (based in contract) verses *ex delicto* (based in tort) in the context of a legal malpractice claim. At common law, cases based in contract survive the death of the plaintiff, and cases in tort do not. Kloepfer v. Forch, 32 Idaho 415, 814 P. 477 (1919)

The Defendants argue that the Plaintiff’s legal malpractice claim, as alleged in her complaint, is a tort claim that would benefit her only personally. Defendants rely heavily on Idaho cases holding that in cases of personal injury, if the victim died before she recovered a judgment, then the victim’s right of action also died. Evans v. Twin Falls County, 118 Idaho 210, 215, 796 P.2d 87, 92 (1990); Craig v. Gellings, 148 Idaho 192, 219 P.3d 1208 (Ct. App. 2009); Steele v. Kootenai Medical Center, 142 Idaho 919,

² On July 1, 2010, Idaho Code § 5-327(b) came into effect, providing for general survivability of negligence claims.

136 P.3d 905 (2006); Doggett v. Boiler Engineering & Supply Co., 93 Idaho 888, 477 P.2d 511 (1970); Vulk v. Haley, 112 Idaho 855, 736 P.2d 1309 (1987). However, each of these cases cited by the Defendants addresses medical malpractice or personal injury, not legal malpractice.

Conversely, the Plaintiff argues that her legal malpractice claim a mixed claim of contract and tort, and therefore survives her death. In Kloepfer v. Forch, 32 Idaho 415, 418, 814 P. 477, 480 (1919), the Idaho Supreme Court stated:

[t]he true test is, not so much the form of the action, as the nature of the cause of action. Where the latter is a tort unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander, and the like, there the rule, *Actio personalis*, etc., applies. But where, as in the present case, the action is founded on a contract, it is virtually *ex contractu*, although nominally in tort, and there it survives.

(citations omitted; emphasis added.) In that case, the plaintiff contracted with the defendant to purchase sodium arsenite, but the defendant provided sodium arsenate. When the plaintiff applied the sodium arsenate to his crops, the crops were destroyed. During the litigation, the plaintiff died. The Idaho Supreme Court held that

“the injury for which recovery is sought grows out of the contract of purchase . . . These facts distinguish this case from those where recovery is sought for injury to the person or for torts resulting in damage to the estate, generally, and make these claims assignable and cause them to survive the death of a party to the action.”

Kloepfer, 32 Idaho at 418-419, 814 P. at 480-481 (1919).

The Idaho Supreme Court addressed as similar question in Johnson v. Jones, 103 Idaho 702, 704, 652 P.2d 650, 652 (1982), concluding that “legal malpractice actions are an amalgam of tort and contract theories.” (citing Neel v. Magana, et. al, 6 Cal.3d 176, 491 P.2d 421 (1971) and Higa v. Mirikitani, 155 Haw. 167, 517 P.2d 1

(1973).) The Idaho Supreme Court recognized that the “tort basis” for a legal malpractice claim are the elements of an attorney-client relationship, failure to perform the duty owed, and negligence that is the proximate cause of the alleged injury. Johnson, 103 Idaho at 706-707. However, the Court noted that the attorney’s duty is contractual and the scope of that duty is defined by the purposes for which the attorney is retained. Id. at 704.

Like Kloepfer, the Plaintiff’s negligence claim arises out of the contract between the Plaintiff and the Defendants. The Plaintiff entered into an attorney-client relationship and fee agreement with the Defendants to represent her in settling her claims against the Idaho State Insurance Fund (“ISIF”) and the North Idaho Advanced Care hospital (“NIACH”). From this contract arose the duty to use the degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful, and prudent attorney to represent the Plaintiff, inform her of the law, and provide her with accurate advice in settling her claims. See Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker, 133 Idaho 1, 981 P.2d 236 (1999). The Plaintiff claims that the Defendants breached the duty when they failed to obtain a subrogation settlement and properly advise her of the effect of the ISIF subrogation claim, and as a result, the Plaintiff did not receive the amount “promised” by the Defendants.

B. Breach of Contract Claim

The Plaintiff also alleged a second cause of action in her complaint: breach of contract. To be successful on her claim, the Plaintiff must prove that 1) a contract existed between the Plaintiff and the Defendants; 2) the Defendant’s breached the

contract, and 3) the Plaintiff suffered damages as a result of the breach. Samuel v. Hepworth, Nungster & Lezamiz, Inc., 134 Idaho 84, 996 P.2d 303 (2000).

The Defendants previously moved for summary judgment on the Plaintiff's breach of contract claim, arguing that the Plaintiff failed to state a claim. Idaho Rule of Civil Procedure 12(b) provides that if a motion to dismiss for failure to state a claim is presented with "matters outside the pleading . . . the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Because the Defendants desire to present this Court with affidavits and other evidence, the Defendants' motion is a motion for summary judgment, subject to the standard of I.R.C.P. 56.

The Defendants argued that,

[a]gainst an attorney, the sole cause of action is in tort and not contract. Trimming v. Howard, 52 Idaho 412, 413 16 P.2d 661, 662 (1932). A claim for breach of contract does not state a claim where a claim for malpractice exists. Hayward v. Valley Vista Care Corp., 136 Idaho 342, 350, 33 P.3d 816, 824 (2001); Trimming v. Howard, 52 Idaho 412, 16 p.2d 661, 662 (1932).

Plaintiff did not respond regarding this issue, and this Court did not make a ruling on this issue in its "Order on Defendants' Motion for Summary Judgment," issued May 13, 2010. In light of the issue raised by the Defendants in the Second Motion, this Court clarifies its "Order on Defendants' Motion for Summary Judgment."

The Trimming decision cited by the Defendants addressed the tolling of a statute of limitations for a medical malpractice claim and has since been limited by Johnson v. Gorton, 94 Idaho 595, 495 P.2d 1 (1972). In that case, the plaintiff brought a medical malpractice claim against a doctor. The Idaho Supreme Court held that

[t]he gist of a malpractice (sic) action is negligence, not a breach of the contract of employment. Hall v. Steele, 193 Cal. 602, 226 P. 854;

Carpenter v. Walker, 170 Ala. 659, 54 So. 60; Peters v. Howard, 206 Ill. App. 610, 617.

Trimming, 52 Idaho at 413, 16 P.2d at 662. The Defendants, then, misquote the Trimming decision. The Defendants' reliance on Hayward v. Valley Vista Care Corp, 136 Idaho 342, 33 P.3d 816 (2001) is also misplaced because that case also addresses contract based claims in medical malpractice cases.

The Defendants do not cite to any case law or statute that prohibits the Plaintiff from asserting a breach of contract claim in addition to negligence in a legal malpractice case. Conversely, there are multiple legal malpractice cases where a plaintiff has alleged both negligence and breach of contract. See, e.g., Samuel v. Hepworth, Nungster & Lezamiz, Inc., 134 Idaho 84, 996 P.2d 303 (2000); J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford, 146 Idaho 311, 193 P.3d 858 (2008); Lapham v. Stewart, 137 Idaho 582, 51 P.3d 396 (2002).

Based upon the arguments of the parties and the pleadings before this Court, this Court clarifies its "Order on Defendants' Motion for Summary Judgment," issued May 13, 2010, concludes that the Plaintiff has stated a claim for breach of contract, a claim upon which relief can be granted. Defendants' Motion for Summary Judgment on this issue is hereby denied.

C. Economic Loss Rule and Attorney-Client Relationship Claims

The Defendants also assert that if the Plaintiff's negligence claim is abated upon the Plaintiff's death, then the Plaintiff cannot substitute a personal representative in this action because the Defendants did not have an attorney-client relationship with the potential substitute. However, because this Court has determined that the Plaintiff's claims are not abated by her death, this Court need not address this issue.

The Defendants also claim that the economic loss rule prevents the personal representative from recovering against the Defendants. Similarly, because this Court has determined that the Plaintiff's claims are not abated by her death, this Court need not address this issue.

D. Plaintiff's Motion to Substitute Lois M. Bishop as Personal Representative of Patricia J. Shelton

Plaintiff has moved to substitute Lois M. Bishop, the personal representative of the Plaintiff's estate, as the Plaintiff's personal representative of the Plaintiff in this case. In support, the Plaintiff has supplied copies of "Letters Testamentary" issued November 10, 2009, by a magistrate in Bonner County showing that the Plaintiff's sister Lois M. Bishop is appointed as personal representative of the Plaintiff's estate. Based on the pleadings in this action and because the Plaintiff's claims are not abated by her death, it is appropriate that the personal representative of the Plaintiff's estate be substituted for the Plaintiff in this action.

V

CONCLUSION AND ORDER

Based on the foregoing discussion, it is hereby ORDERED that the Defendants' Second Motion for Summary Judgment be and the same is hereby DENIED. It is further ORDERED that the Plaintiff's Motion to Substitute Lois M. Bishop as Personal Representative of Patricia J. Shelton is GRANTED.

DATED this _____ day of July, 2010.

John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER IN RE: DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION TO SUBSTITUTE PERSONAL REPRESENTATIVE was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the _____ day of July, 2010, to the following:

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DANIEL J. ENGLISH
Clerk of the District Court

By: _____
Deputy Clerk