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

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| PATRICIA J. SHELTON, an individual,<br><br>Plaintiff,<br><br>vs.<br><br>R. BRUCE OWENS and JANE DOE OWENS, husband and wife and the marital Thereof; OWENS & CRANDALL, PLLC, A limited liability company operating in the State of Idaho; R. BRUCE OWENS and JEFFRREY J. CRANDALL, individually, And in their capacities as principals, Managers, agents, partners, representatives And employees of OWENS & CRANDALL, PLLC,<br><br>Defendants. | ) | **CASE NO. CV-09-03597**<br><br>MEMORANDUM OPINION AND ORDER IN RE: PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT |

Plaintiff retained Defendants to represent her in a medical malpractice claim. The Idaho State Insurance Fund made a claim upon Plaintiff's recovery. In this case, Plaintiff alleges causes of action for negligence and breach of contract against Defendants based on their legal representation. Plaintiff filed a Motion for Partial Summary Judgment.

Joseph Jarzabek and Douglas B. Marks, ELSAESSER JARZABEK ANDERSON MARKS ELLIOTT & MACDONALD, attorneys for Plaintiff.

Michael E. Ramsden, RAMSDEN & LYONS, attorneys for Defendants.

## I

## FACTUAL AND PROCEDURAL BACKGROUND

On February 3, 1997, Plaintiff Patricia Shelton was involved in a single car accident that left her a quadriplegic. She was working in her employment at the time of accident. The Idaho State Insurance Fund ("ISIF"), her employer's worker's compensation surety, paid benefits to Ms. Shelton.[1] The benefits included medical benefits.

On September 21, 2006, Ms. Shelton was admitted to North Idaho Advanced Care Hospital ("NIACH") for the purpose of weaning her from the ventilator on which she had become dependent. The care at NIACH resulted in further injury to her. This second injury was life-threatening and the costs of her care "skyrocketed."

Ms. Shelton retained R. Bruce Owens, OWENS & CRANDALL, PLLC, ("Defendants"), to represent her in a medical malpractice action against NIACH.[2] Ms. Shelton entered into a contingency fee agreement whereby Mr. Owens would receive forty percent (40%) of any recovery.

Ms. Shelton and Defendants participated in mediation with the care facility, its insurer, and its lawyers on September 9, 2008. The mediation was held in Seattle. Mr. Owens and Lois Bishop, who is Ms. Shelton's sister and was the holder of her power of attorney, attended the mediation. Ms. Shelton was unable to attend personally because of ill health, but she was available by media. Ms. Shelton's initial demand was for $5,000,000.00. ISIF also participated by telephone in the mediation.

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[1] The case involving worker's compensation benefits before the Idaho Industrial Commission was ***Shelton v. Auto Phone Corporation and Idaho State Insurance Fund***, IC-1997-005067.

[2] ***See Patricia J. Shelton v. Ernest Health, Inc., et al***, Kootenai County Case No. CV-08-00405 (Hosack, J.). The case was filed on January 16, 2008, and dismissed on March 3, 2009.

The medical malpractice case did not settle on that day. Eventually, the case settled for $1,500,000.00 on or around February 6, 2009. Ms. Shelton was to receive $664,543.54 from the settlement proceeds after Mr. Owens, pursuant to the contingency fee agreement, took his fees and the costs expended by Defendants on Ms. Shelton's behalf from the settlement amount.

ISIF had a subrogation interest in the settlement proceeds. Mr. Owens believed that ISIF had agreed to accept approximately $62,000 as full settlement of ISIF's subrogation interest through its employee, Teresa Raymond. However, Mr. Owens did not get anything to that effect in writing. Mr. Owens told Ms. Bishop that he had taken care of the ISIF lien against the settlement proceeds.

After the settlement of the medical malpractice claim, ISIF claimed the entirety of Ms. Shelton's share of the proceeds as reimbursement for medical benefits ISIF had paid for Ms. Shelton's care. Ms. Shelton claims that Mr. Owens did not advise her of the extent of ISIF's subrogation interest when she agreed to settle the medical malpractice action.

When Mr. Owens still had not resolved the claims of ISIF as of March 16, 2009, he sent a letter to Teresa Raymond in which he stated:

> As you recall, during the mediation last September, you were contacted by the mediator, Gregory L. Bertram, and you advised him that the State Insurance Fund would settle on their subrogation of $62,000 less a pro rata share of fees and costs.

In response, ISIF asserted entitlement to one hundred percent (100%) of the settlement amount, less attorney fees and costs.

On March 31, 2009, Ms. Shelton filed a worker's compensation complaint with the Idaho Industrial Commission seeking an adjudication of the amount due ISIF on its

subrogation claim to her recovery in the medical malpractice action. In its answer, ISIF claimed a subrogated interest to the extent of its payments as of April 5, 2009 in the amount of $4,065,337.17[3] and for those amounts it would pay on Ms. Shelton's behalf in the future. The only issue presented to the Commission was ISIF's subrogation claim against Ms. Shelton's remaining recovery amount of $644,543.54.

On April 30, 2009, an attorney[4] wrote on behalf of ISIF that

> The subrogation claim of the State Insurance Fund for medical benefits paid to date, and for future medical benefits resulting from the medical malpractice, exceeds the total amount of $1,150,000 less our pro rata share of reasonable attorney fees and costs.

When she learned of these developments, Ms. Shelton believed that she was not going to receive the amount "promised" by Mr. Owens. Ms. Shelton retained Mr. Jarzabek to assist in recovering some or all of the money she had been told she would receive.

Although he acknowledged that the money did not belong to him, Mr. Owens maintained possession of the amount of $644,543.54. He sought to intervene in the case before the Industrial Commission and attempted to interplead the amount. The Commission denied intervention/interpleader on grounds that it did not have any procedural rule allowing intervention/interpleader. Furthermore, according to the Commission, it did not have jurisdiction because Mr. Owens did not assert a claim against Ms. Shelton or ISIF nor did they assert a claim against him under worker's compensation law.[5]

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[3] Between September 29, 2006 (shortly after Ms. Shelton's admission to NIACH) and the mediation on September 10, 2008, ISIF paid benefits for medical expenses for Ms. Shelton in the amount of $1,506,775.96. However, the total amount paid by ISIF since the initial accident in 1997 was $4,056,337.17.

[4] The attorney representing ISIF was David Skinner.

[5] In a separate case, Defendants sought to interplead the money in the District Court. ***See Owens & Crandall, PLLC v. Patricia J. Shelton***, Kootenai County Case No. CV-09-04435 (Luster, J.).

On June 17, 2009, a hearing was held before the Industrial Commission. Mr. Owens and Mr. Ramsden, who was representing Mr. Owens, testified. When it became apparent that ISIF could be entitled to the whole amount of Ms. Shelton's recovery, Mr. Jarzabek worked to reach a compromise with ISIF.

On July 28, 2009, the Industrial Commission approved a settlement between Ms. Shelton and ISIF.[6] Under the approved settlement, ISIF received $270,000.00 of Ms. Shelton's proceeds in the medical malpractice action against NIACH and Ms. Shelton received $394,543.43.

Meanwhile, on May 6, 2007, Ms. Shelton filed the instant lawsuit for legal malpractice against Defendants.[7] The Complaint alleges causes of action for: (1) Negligence; and (2) Breach of Contract. Defendants responded with an Answer and a Third Party Complaint naming ISIF as the Third Party Defendant.[8]

Plaintiff Patricia J. Shelton filed a Motion for Partial Summary Judgment.[9] Both parties have filed affidavits and submitted memorandums in support of their positions. Plaintiff also filed a Motion in Limine, Objections to Affidavit of Michael J. Verbillis, Objections to Affidavit of R. Bruce Owens, and Motions to Strike.

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[6] ***See Shelton v. Auto Phone Corporation and Idaho State Insurance Fund***, Order Approving Apportionment of Third Party Settlement Proceeds, IC-1997-005067 (July 28, 2009).

[7] Plaintiff seeks damages in the amount of $343,684.87. This amount is calculated as follows. Ms. Shelton expected to receive $664,543.54 ($1,150,000.00 less $460,000.00 in fees for Mr. Owens and less costs of $25,456.46). This amount would be reduced by $62,000.00 for ISIF's subrogation claim. Thus, Ms. Shelton's final recovery would be $602,543.54. Instead, Ms. Shelton received $258,858.97 ($394,543.54 paid to Shelton after the Industrial Commission Order minus Mr. Jarzabek's fee of $115,031.37 and costs of $2,082.44 in the worker's compensation case and attorney fees of $13,840.00 and costs of $4,730.76 in the interpleader action). Ms. Shelton received $258,858.97 instead of $602,543.54. Therefore, the difference between the two amounts was $343,684.87.

[8] ISIF has not taken a position with regard to the instant Motion for Partial Summary Judgment by Plaintiff.

[9] Defendants also filed a Motion for Summary Judgment. That Motion was denied. ***See*** Order on Defendants' Motion for Summary Judgment, which was filed on May 13, 2010.

## II

## STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is granted where there is no genuine issue and the moving party is entitled to judgment as a matter of law. In order to make that determination, the court must look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . . ." ***Rule 56, Idaho Rules of Civil Procedure***.

Where the parties have filed cross-motions for summary judgment, the court must still evaluate each party's motion on its own merits to determine whether or not issues of material fact exist. ***Sorenson v. Saint Alphonsus Regional Medical Center, Inc.***, 141 Idaho 754, 118 P.3d 86 (2005).

On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion. Where a jury has been requested, the party opposing the motion is to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. 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).

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).

Supporting and opposing affidavits must set forth such facts as would be admissible in evidence. ***Rule 56(e), Idaho Rules of Civil Procedure***.

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).

If there are no genuine issues of material fact, the court will determine whether a party is entitled to judgment as a matter of law. ***Venters v. Sorrento Delaware, Inc.***, 141 Idaho 245, 108 P.3d 392 (2005); ***Zumwalt v. Stephan, Balleisen & Slavin***, 113 Idaho 822, 748 P.2d 405 (Ct.App. 1987), ***rev. denied*** (1988).

**III**

**MOTION TO STRIKE**

In opposition to Plaintiff's Motion for Partial Summary Judgment, Defendants filed an Affidavit of Michael J. Verbillis and an Affidavit of R. Bruce Owens. Plaintiff objects to certain portions of the Affidavits and filed a Motion to Strike those sections.[10]

Affidavits filed in opposition to a motion for summary judgment must be made on personal knowledge and must set forth facts that would be admissible in evidence. ***Rule 56(e), Idaho Rules of Civil Procedure***.

[10] Plaintiff also filed a Motion in Limine. The Motion in Limine, which is related to the Motions to Strike, challenges the admission of evidence from the mediation in the underlying case based on sections of the Washington State Uniform Mediation Act, ***RCW 7.07***, and ***Rule 507, Idaho Rules of Evidence***. Plaintiff claims that confidential communications made during mediation are not subject to disclosure under these authorities.

### A. Affidavit of Michael J. Verbillis

Plaintiff objects to Paragraphs 5(c), 5(d), and 5(e) on grounds that the statements are not within personal knowledge and are hearsay. For purposes of the discussion here, the statements, standing alone, are outside Mr. Verbillis's personal knowledge and are hearsay.

However, facts or data upon which an expert bases an opinion or inference may be made known to the expert. The facts or data do not have to be admissible in evidence in order for the opinion or inference to be admitted. ***Rules 703 and 705, Idaho Rules of Evidence; Doty v. Bishara***, 123 Idaho 329, 848 P.2d 387 (1992); ***State v. Scovell***, 136 Idaho 587, 38 P.3d 625 (Ct.App. 2001). Thus, Mr. Verbillis could rely upon hearsay facts or data to form the basis for his expert opinion.

Plaintiff also objects to Paragraphs 5(f), 5(g), 5(h), 5(i), and 5(j) on grounds that such statements are not within Mr. Verbillis's personal knowledge, are hearsay, and are based on confidential communications made during mediation. Again, for purposes of the discussion here, the statements, standing alone, are outside his personal knowledge and are hearsay. To the extent that these are only facts or data upon which Mr. Verbillis is basing his expert opinion or inference, such facts or data do not have to be admissible in evidence and may contain hearsay.

On September 9, 2008, the parties in the underlying case participated in a mediation in Seattle, Washington. The case did not settle on that day and the mediator engaged in further efforts to resolve the matter until a settlement was reached. With regard to confidential communications during mediation, both the Washington State Uniform Mediation Act and the Idaho Rules of Evidence provide for a privilege.

However, a privilege may be waived or an exception to the privilege may exist. No privilege exists for a communication that is "offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation." ***Rule 507(5(a)(6), Idaho Rules of Evidence; RCW 7.07.060(1)(f)***. The evidence contained in Paragraphs (f) through (j) of Mr. Verbillis's Affidavit will not be stricken and can be relied upon in forming an opinion.

Plaintiff objects to Paragraph 8 in which Mr. Verbillis avers that it was reasonable and within the standard of care of an Idaho lawyer for Mr. Owens to rely on the statement of Mr. Bertram that ISIF had agreed to compromise its subrogated interest. Plaintiff also objects to Paragraph 10 in which Mr. Verbillis renders his expert opinion. Since these paragraphs are based on the facts contained in Paragraph 5, they will not be stricken.

In summary, the evidence contained in the Affidavit of Michael J. Verbillis is admissible for the purpose for which it was set forth. Plaintiff's Motion to Strike certain portions of the Affidavit of Michael J. Verbillis is denied.

**B. <u>Affidavit of R. Bruce Owens</u>**

With limited exceptions, Plaintiff objects to the statements made by Mr. Owens in his Affidavit beginning with the last sentence of the next to last paragraph on Page 2. Plaintiff objects on grounds that the statements are hearsay, not based on facts within personal knowledge, and are confidential. The facts or data set forth by Mr. Owens in his Affidavit do not form the basis for an expert opinion. Therefore, different standards from those above apply here.

Plaintiff requests the exclusion of any evidence of communications between ISIF and the mediator in Shelton's medical malpractice action on grounds that such statements are hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ***Rule 801(c), Idaho Rules of Evidence***. Defendants contend that the statements were verbal acts constituting oral offers and should be admitted to show that a settlement offer was made to Ms. Shelton. However, the statements by ISIF to the mediator and by the mediator to Mr. Owens are hearsay under the definition.

Defendants also contend that the statements were admissions by a party-opponent since ISIF is named as a Third Party Defendant in the Third Party Complaint brought by Defendants in this case. An admission by a party-opponent is not hearsay when the "statement is offered against a party and is . . ." (1) "a statement by a person authorized by a party to make a statement concerning the subject" or (2) "a statement by a party's agent . . . concerning a matter within the scope of the agency or employment of the . . . agent." ***Rule 801(d)(2)(C), Idaho Rules of Evidence***. Teresa Raymond, Senior Claims Examiner, and attorneys Ron Coston and David R. Skinner were agents and/or employees of ISIF. However, at this point, the statement by ISIF is being offered by Defendants Owens against Ms. Shelton – not by ISIF against Mr. Owens. ***See State v. Gerardo***, 147 Idaho 22, 205 P.3d 671 (Ct.App. 2009).

Plaintiff also requests the exclusion of the evidence in the Affidavit of R. Bruce Owens on grounds that the statements were not based on facts within Mr. Owens' personal knowledge and are confidential. Because the statements are inadmissible as hearsay, these grounds will not be addressed here.

In summary, any statements made by the mediator to Mr. Owens regarding what ISIF said or agreed to are inadmissible hearsay and must be stricken. Plaintiff's Motion must be granted.

## IV

## DISCUSSION

Plaintiff Patricia J. Shelton filed a Motion for Partial Summary Judgment on grounds that, "by failing to get the agreement with State Insurance Fund in writing, Defendants have breached their duties to Plaintiff and caused damages in the amount of $343,684.57." Ms. Shelton is not moving for judgment on the other allegations in the Complaint. Over the course of the argument, the focus moved away from the lack of a writing and the issue became whether or not Mr. Owens had properly obtained an enforceable agreement prior to the settlement and, if not, whether this constituted a breach of a duty. Simply stated, Ms. Shelton contends that Mr. Owens had a duty to Ms. Shelton, breached that duty, and caused damages in the claimed amounts.

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).

The first element, which is the existence of an attorney-client relationship between Defendants and Ms. Shelton, is undisputed. The second element is the existence of a duty on the part of Defendants. Attorneys have a duty to use the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful,

and prudent attorney. ***Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker***, 133 Idaho 1, 981 P.2d 236 (1999). Defendants owed a duty of care to Ms. Shelton as their client.

The third element is a breach of the duty or standard of care. Ms. Shelton claims that Defendants were negligent by failing to obtain an enforceable agreement from SIF regarding its subrogation claim.[11] Initially, Defendants challenged Ms. Shelton's proof.

Expert testimony is necessary to establish the negligence and causation of damages elements in a legal malpractice case.[12] The plaintiff bears the burden of proving that the attorney was negligent and that the negligence proximately caused the plaintiff's damages, *i.e.*, that the negligence proximately caused the plaintiff to lose the right to recover in the underlying case. The reason for requiring expert evidence of negligence and causation of damages is that the factors involved generally are not within the knowledge or experience of laymen on a jury. However, an exception exists so that expert testimony is unnecessary as to the negligence element where the attorney's alleged breach of duty of care is so obvious that it is within the ordinary knowledge and experience of laymen. ***Samuel v. Hepworth, Nungester & Lezamiz***, 134 Idaho 84, 996 P.2d 303 (2000).

Ms. Shelton contends that no expert witness is necessary in this case because the exception applies. Ms. Shelton argues that it would be obvious to a layman juror that a confirmation of the amount in writing was required of a lawyer. Nevertheless, she has

[11] In this discussion, the issue of an enforceable agreement is in regard to its form, such as, for example, a writing or record of an agreement. The question is whether or not there was any agreement to enforce. The enforceability of terms of an agreement is not at issue here.

[12] The standards set forth here were originally part of Defendants' Motion for Summary Judgment and are generally applied in cases where defendants move for summary judgment. However, these standards can be applied where a plaintiff seeks summary judgment as well. Additionally, Mr. Kelso's Affidavit and Supplemental Affidavit were part of Plaintiff's opposition to Defendants' Motion for Summary Judgment, but the evidence contained therein also pertains to Plaintiff's Motion for Partial Summary Judgment.

provided the Affidavit of Starr Kelso as an expert. Mr. Kelso's opinion is that Mr. Owens breached the standards of care required of an attorney. In Mr. Kelso's expert opinion, Mr. Owens had a duty to "get it in writing" when he reached an agreement with SIF to settle their subrogation claim for $62,000.00.[13]

To support their position regarding the standard of care, Defendants filed the Affidavit of Michael J. Verbillis. In Paragraph 7, Mr. Verbillis asserts that the standard of care of an Idaho lawyer does not require the lawyer to obtain a written agreement;[14] in Paragraph 9, Mr. Verbillis avers that the standard of care for an Idaho lawyer does not require a lawyer to obtain a settlement in compromise of a subrogated interest before the lawyer reaches a settlement with the tortfeasor.[15] Mr. Verbillis's opinion is that "on a

[13] Specifically, Mr. Kelso states in Paragraph 9 of his Affidavit as follows:

It is my professional opinion that the standard of care required of an attorney requires that any lien upon the proceeds of a settlement be fully identified and the methods for compromising and paying such subrogation lien amount, in full or as compromised, be disclosed to the client before settlement of the claim is formalized. Failure to do so is a breach of the duty the attorney owes the client. Further, it is my professional opinion that any compromise reached with a party who asserts a subrogation lien, such as the State Insurance Fund in this case, should be reduced to writing before the settlement of the claim is formalized. If an attorney fails to reduce such a compromise of a subrogation claim lien to writing prior to the claim being settled formally then that attorney has breached his duty to his client. Further, if, as a result of the faiure to reduce the compromise of the subrogation lien claim to writing, the client is then subjected to a claim of a lien beyond what the lien holder may have verbally stated it would accept, then that attorney has breached the duty of care he owes his client and proximately caused damages. In this case, it is my opinion that the failure of Bruce Owens to reduce the compromise of the State Insurance Fund's subrogation lien claim, that he claims occurred but was disputed by the State Insurance Fund, to writing, was a breach of his duty to his client. It was also a breach of his duty to his client to fail to fully disclose the nature of his discussions with the State Insurance Fund, and the fact that alleged verbal discussions were not binding upon the State Insurance Fund, to his client. As a direct and proximate result of Bruce Owens not obtaining written confirmation from State Insurance Fund of the subrogation lien compromise settlement agreement that he alleged occurred, and State Insurance Fund disputed occurred, Shelton has suffered damages.

[14] Mr. Verbillis states in Paragraph 7 of his Affidavit as follows:

The standard of care of an Idaho lawyer does not require the lawyer to obtain a written agreement with a subrogee to a client's settlement of a bodily injury claim before that settlement is reached. Often times, in mediation, the mediator acting as the neutral communicates with a party claiming a subrogated interest in the settlement of a bodily injury claim. These communications are oral. The lawyer for a party, such as Owens, is entitled to rely on the representations of the mediator as to the position of the subrogee in compromise of its subrogated interest in a settlement with a tortfeasor. The lawyer for a party, such as Owens, is entitled to rely upon the mediator to communicate back to the subrogee that the subrogee's offer in compromise is accepted.

[15] Mr. Verbillis states in Paragraph 9 of his Affidavit as follows:

more probable than not basis that the defendant R. Bruce Owens complied with the standard of care applicable to him."

In general, the attorney's duty to his client when settling a case requires him or her to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated. The attorney is not bound to exercise extraordinary diligence. Instead, the attorney is required only to use a reasonable degree of care and skill. ***See*** 87 A.L.R.3d 168, ***Legal Malpractice in Settling or Failing to Settle Client's Case*** (1978).

In this case, Mr. Owens did not obtain a written agreement with SIF. However, agreements may be oral or written. Although a writing may not have been necessary, Mr. Owens had a duty to exercise a reasonable degree of knowledge, skill, and ability to obtain an enforceable agreement with ISIF for Ms. Shelton. Defendants claim that an agreement was reached with ISIF for a subrogation amount of $62,000.00 during mediation. The mediation occurred in September of 2008 but the medical malpractice claim against NIACH did not settle until February of 2009. Although Mr. Owens may have believed that an agreement had been reached with ISIF for a subrogation claim of $62,000.00, ISIF denied any such agreement.

The question then becomes whether or not Mr. Owens met the applicable standard of care when he failed to obtain a written or other form of enforceable agreement. In opposition to Ms. Shelton's Motion for Partial Summary Judgment, Defendants have filed Mr. Verbillis's Affidavit, wherein Mr. Verbillis states that it is his opinion, on a

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The standard of care for an Idaho lawyer does not require a lawyer to obtain a settlement in compromise of a subrogated interest before the lawyer in behalf of the client reaches a settlement with the tortfeasor. Oftentimes, a lawyer representing an injured client reaches a settlement with a tortfeasor, which settlement is inclusive of all subrogated interests, and negotiates with those claiming those subrogated interests after a settlement has been reached between the bodily injury claimant and the tortfeasor.

more probable than not basis, that Mr. Owens complied with the standard of care applicable to him. The facts and inference to be drawn from them must be viewed most favorably to Defendants, who are the non-moving parties. A genuine issue of material fact exists as to whether or not Mr. Owens breached his duty of care to Ms. Shelton. Therefore, Ms. Shelton's Motion for Partial Summary Judgment must be denied on this element.

The fourth element is that failure to perform that duty is the proximate cause of the injuries suffered by the client. This element can be addressed in two parts: (1) proximate cause; and (2) damages.

With regard to causation, Defendants argue that Ms. Shelton cannot establish that any act or omission of Defendants caused the loss of her right to recover in the underlying case. According to Defendants, Ms. Shelton must prove each element of the underlying claim for medical malpractice against NIACH in order to show there is a triable issue of fact supporting the allegation that she would have recovered in the underlying case. On the other hand, Ms. Shelton contends that, under the facts of this case, case law does not require the presentation of a "case within a case."

To prove proximate cause, a plaintiff needs to establish that there would been "some chance of success" in the underlying action but for the attorney's malpractice. ***Nepanuseno v. Hansen***, 140 Idaho 942, 104 P.3d 984 (Ct.App. 2004). When the case in which the attorney malpractice allegedly occurred has actually gone through litigation, the Idaho Supreme Court has further refined the proximate cause element so that the question becomes not whether the plaintiff had "some chance of success," but whether the attorney's conduct in the underlying litigation altered the plaintiff's chance of

success. ***Jordan v. Beeks***, 135 Idaho 586, 21 P.3d 908 (2001). Where the case has been litigated, speculation as to the outcome is unnecessary. Thus, where a case has actually gone through the litigation process, the standard is not whether a plaintiff had "some chance of success," but whether the attorney's negligent acts or omissions caused the client's recovery to be reduced or eliminated.

In the instant case, the question is not whether Ms. Shelton could ever recover in the medical malpractice action or could recover enough to cover and/or exceed the subrogation claim of SIF, which could require evidence of "some chance of success." Rather, the question is whether Mr. Owens' acts or omissions caused Ms. Shelton, once she had achieved a recovery through the medical malpractice settlement, to lose some or all of that recovery. Therefore, the "case within a case" is not the applicable standard in this case.

The case settled for $1.15 million. The narrow focus is on whether, in entering into that settlement, Mr. Owens breached a duty by not getting an agreement with ISIF to settle the subrogation claim for $62,000.00 in some kind of enforceable form and, if so, whether the breach of that duty was the proximate cause of damages to Ms. Shelton. These are genuine issues of material fact for the jury to decide. The proper standard to be applied on the question of proximate cause is whether Mr. Owens' conduct in the underlying litigation altered Ms. Shelton's chance of success, i.e., whether negligent acts or omissions by Mr. Owens caused Ms. Shelton's recovery to be reduced.

The question of damages can only be addressed if it is determined that Mr. Owens breached his duty as an attorney to his client and that the breach resulted in injury to Ms.

Shelton. Because these determinations have not yet been made, damages will not be dealt with here.

While Plaintiff may prevail should this matter go to trial before a jury, the standard on summary judgment requires that the facts and inferences to be drawn from them be considered in a light most favorable to the non-moving party. The non-moving parties here are Defendants.

In summary, genuine issues of material fact exist as to the third and fourth elements of a cause of action for legal malpractice. Therefore, Plaintiff's Motion for Partial Summary Judgment cannot be granted in total. However, certain determinations have been reached herein.

## V

## CONCLUSION AND ORDER

Based on the foregoing discussion, it is hereby ORDERED that the Motion for Partial Summary Judgment by Plaintiff Patricia J. Shelton be and the same is hereby granted in part and denied in part as set forth herein.

DATED this _____ day of June, 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: PLAINTIFF'S MOTINO FOR PARTIAL SUMMARY JUDGMENT was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the _____ day of June, 2010, to the following:

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DANIEL J. ENGLISH
Clerk of the District Court

By: _____
Deputy Clerk