STATE OF IDAHO)
County of KOOTENAI)ss
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CLERK, DISTRICT COURT
Deputy

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

AMY CLEMMONS, as Guardian for ETHEL LUCK,,

Plaintiff,

VS.

SARAH ROHEL,

Defendants.

Case No. **CV28-19-1782**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND TOLLING OF STATUTE OF LIMITATIONS

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On March 13, 2017, Ethel Luck (Luck) and Defendant Sarah Rohel (Rohel) were in a vehicle accident. Compl., ¶ 1.4; Pl.'s Decl. in Supp. of Opp'n of Def.'s Mot. to Strike Compl. and Mot. to Dismiss, Ex. 1. Luck had two years within which she could bring a personal injury action against Rohel. I.C. § 5-219(4). On March 13, 2019, the last day of the two-year statute of limitations, Plaintiff Amy Clemmons (Clemmons), on behalf of Luck, drafted, signed, and filed a Complaint for negligence against Rohel. Rohel filed a Motion to Strike Complaint Pursuant to Special Appearance and Motion to Dismiss Pursuant to Special Appearance, alleging that Clemmons engaged in the unauthorized practice of law. Clemmons filed Memorandum in Response to Defendant's Motion to Strike Complaint and Motion to Dismiss the Case, along with a declaration of Clemmons. Rohel filed Reply to Plaintiff's Opposition to Motions on

Special Appearance. After considering the pleading, as well as all supporting and opposing motions, the Court granted Rohel's Motion to Strike and Motion to Dismiss, and provided a memorandum detailing the reasons for its decision. *See generally* Mem. Decision and Order Granting Def.'s Mot. to Strike and Mot. to Dismiss Pursuant to Special Appearance.

On July 9, 2019, Clemmons filed a Motion for Reconsideration and Tolling of Statute of Limitations, Memorandum Supporting Motion for Reconsideration, and Declaration of Amy Clemmons Supporting Motion for Reconsideration. On August 6, 2019, Rohel filed Defendant's Opposition to Plaintiff's Motion to Reconsider. On August 12, 2019, Rohel filed Declaration of Jaron A. Robinson in Opposition to Plaintiff's Motion to Reconsider. A hearing on Clemmons' Motion for Reconsideration was held August 29, 2019. At that hearing the Court denied the Motion for Reconsideration and indicated it would issue a written decision.

At the hearing, the Court also granted defendant's Motion to Strike Clemmons' Second Amended Complaint because Clemmons failed to comply with Idaho Rule of Civil Procedure 15(a)(2).

II. STANDARD OF REVIEW

When a district court is to decide a motion to reconsider, "the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered." *Westby v. Schaefer*, 157 Idaho 616, 621, 338 P.3d 1220, 1225 (2014) (quoting *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012)) (internal quotations omitted). "If the original order was within the trial court's discretion, then so is the decision to grant or deny the motion to reconsider." *Id.* (quoting *Fragnella* at 276, 281 P.3d at 113).

"Where a motion to dismiss for failure to state a claim upon which relief can be granted is supported by information outside of the pleadings, the motion is treated as a motion for summary judgment." *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 159 Idaho 813, 367 P.3d 208, 218 (2016) (quoting *McCann v. McCann*, 152 Idaho 809, 814, 275 P.3d 824, 829 (2012)) (internal quotations omitted).

III. ANALYSIS OF CLEMMONS' MOTION FOR RECONSIDERATION AND TOLLING OF STATUTE OF LIMITATIONS.

A. Luck has not been found to be legally incompetent, as a petition for a finding of incapacity and appointment of guardian has not been filed with the Court, as required by Idaho law, and thus a hearing to determine Luck's competency was not held.

Clemmons argues that the Court failed to address its "legal or equitable duty to protect incompetent parties under I.C. § 5-306 and under I.C. § 5-230." Mem. Supp. Mot. for Reconsideration, 1. Counsel for Clemmons asserts that the statute of limitations provided under I.C. § 5-219 should have been tolled "based upon Ms. Luck's incompetence." *Id.* at 2. As noted in the original decision, a hearing to determine Luck's competency as it relates to this lawsuit has neither been requested nor held.[1]

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[1] The Idaho Rules of Civil Procedure use the term "incompetent person," but does not provide a definition of the phrase. *See* I.R.C.P. 17. The Idaho Code uses the phrase "incapacitated persons" and does provide a helpful and detailed definition. *See* I.C. § 15-5-101. Idaho Code § 15-5-101(a) defines "incapacitated person" as follows:

> (a) "Incapacitated person" means any person who is impaired, except by minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, provided, that the term shall not refer to a developmentally disabled person as defined in section 66-402(5), Idaho Code, and provided further that:
>
> (1) "Incapacity" means a legal, not a medical disability and shall be measured by function limitations and it shall be construed to mean or refer to any person who has suffered, is suffering, or is likely to suffer, substantial harm due to an inability to provide for his personal needs for food, clothing, shelter, health care, or safety, or an inability to manage his or her property or financial affairs;
>
> (2) Inability to provide for personal needs or to manage property shall be evidenced by acts or occurrences, or statements which strongly indicate imminent acts or occurrences; material evidence of inability must have occurred within twelve (12) months prior to the filing of the petition for guardianship or conservatorship;
>
> [...]

Further, Black's Law Dictionary defines "incompetency" as a "[l]ack of legal ability in some respect, esp. to stand trial or to testify." Black's Law Dictionary, 768–69 (7th ed. 1999). Black's Law Dictionary defines "incapacity" as a "[l]ack of physical or mental capabilities." *Id.* at 764. Therefore, these terms are used

Subsection (a) of I.C. § 15-5-303 states, "[t]he incapacitated person or any person interested in his [or her] welfare may petition for a finding of incapacity and appointment of a guardian..."[2] I.C. § 15-5-303. Subsection (b) explains that "[u]pon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem." *Id.* Subsection (b) further states, "[t]he person alleged to be incapacitated shall be examined by a physician or other qualified person appointed by the court who shall submit his report in writing to the court." *Id.* Subsection (c) states, "[u]nless excused by the court for good cause, the proposed guardian shall attend the hearing. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition." *Id.* Lastly, subsection (a) of I.C. § 15-5-304 states, in part, "[t]he court shall exercise the authority...and make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure." I.C. § 15-5-304. In sum, to have an adult declared legally incompetent by a court, and to have a court appoint a guardian for purposes of a lawsuit, a petition for a finding of incapacity would need to be filed and a hearing on the issue of capacity would need to be held.

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interchangeably for purposes of this decision.

[2] Idaho Code § 66-355 reaffirms, once again, that a hearing to determine competency must occur before that person is deemed legally incompetent. "The incompetency of a mentally ill person shall be determined in **the same manner that incompetency is determined in any other person and shall be a separate judicial proceeding**. Any guardian appointed in the case of a mentally ill incompetent person, is subject to all the provisions of the general laws of the state of Idaho in relation to guardians and wards. [...]." I.C. § 66-355 (emphasis added).

Idaho courts have frequently held hearings to determine a person's capacity in cases other than those involving matters of probate. For example, in *Mefford-Stanger v. Stanger*, an unpublished case from the Court of Appeals of Idaho involving a claim for continuing child support, "[t]he district court inquired as to [the appellant]'s mental status in an attempt to determine if there was any evidence [the appellant] was not competent to proceed and to determine if a guardian or conservator needed to be appointed on [the appellant]'s behalf." No. 41262, 2014 WL 3555781, at *5 (Idaho Ct. App. July 17, 2014). Additionally, in *State v. Vondenkamp*, the Court held a hearing to determine if the victim of the crime was competent to testify at trial, pursuant to Idaho Rule of Evidence 601(a).[3] 141 Idaho 878, 880, 119 P.3d 653, 655 (Ct. App. 2005). The victim was an elderly woman who had previously suffered a stroke, was paralyzed on her right side, suffered from both speech and hearing impediments, and was completely dependent on others to care for her. *Id.* at 880, 119 P.3d at 655. When determining the victim's competency, the district court considered the testimony of her guardian of two and one-half years, the testimony of her treating physician of twelve years, and the videotape of her deposition. *Id.* at 882, 119 P.3d at 657. The district court found that although the victim was physically incapacitated, her diminished physical abilities "did not render her incompetent." *Id.* at 883, 119 P.3d at 658.

Here, as noted in the original decision, a petition for a finding of incapacity as it relates to Luck was not filed with the Court, and thus a hearing on the issue of Luck's capacity was not held. Therefore, Luck is presumed competent for purposes of this matter until incompetency is proven. Further, the Court notes the entirety of Clemmons'

[3] Idaho Rule of Evidence 601(a) states "[e]very person is competent to be a witness except...[p]ersons whom the court finds are incapable of receiving just impressions of the facts about which they are examined, or of relating them accurately." I.R.E. 601.

Motion to Reconsider holds Luck out to be incapacitated, despite the fact that the proper method of determining legal capacity was not followed.

Thus, Clemmons' argument that the statute of limitations should have been tolled based on Luck's incompetence, ignores the fact that Luck, and others on her behalf, have taken absolutely no steps to have her found incompetent. This Court is left with the legal presumption that Luck is competent. Clemmons' argument that the Court failed to address its "legal or equitable duty to protect incompetent parties under I.C. § 5-306 and under I.C. § 5-230" (Mem. Supp. Mot. for Reconsideration, 1) falls on deaf ears as it is not this Court's duty to thwart a legal presumption that Ms. Luck is competent when Luck, and others on her behalf have done absolutely nothing to overcome that presumption.

B. Clemmons has not been appointed as Luck's guardian either by will or court appointment in this matter.

Clemmons asserts that she was Luck's guardian for purposes of this legal action. Mem. Supp. Mot. for Reconsideration, 8, 10. Rohel argues that guardians must be appointed by court order or by will in the State of Idaho. Def.'s Opp'n to Pl.'s Mot. to Reconsider, 10. "[Clemmons] has shown no testamentary or court appointment to show that she meets the statutory definition of a guardian." *Id.* at 11.

Idaho Code § 15-1-201(21) defines "guardian" as "a person who has qualified as a guardian of a minor or **incapacitated person** pursuant to **testamentary or court appointment** and includes limited guardians as described by section 15-5-304, Idaho Code, but excludes one who is merely a guardian ad litem." I.C. § 15-1-201 (emphasis added). Here, Clemmons was not appointed as Luck's guardian either by will or court appointment.

Subsection (b) of I.C. § 15-5-304 states, "[t]he court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person. I.C. § 15-5-304; *see also* I.C. § 15-5-303 (Clemmons did not file a petition for a finding of incapacity and appointment of a guardian). Here, as stated above, no request was made to the Court that Clemmons be appointed as Luck's guardian. Therefore, as stated in the original decision, Clemmons has not been appointed as Luck's guardian in this matter.

C. Even if Luck had been found to be legally incompetent, the statute of limitations cannot be tolled pursuant to I.C. § 5-230, as the record is devoid of any evidence indicating that Luck was insane at the time the vehicle accident occurred.

Clemmons argues that the Court should toll the statute of limitations because Luck "has no recollection of how, where or when the accident occurred," and "the ability of her relatives to act on her behalf does not take away her right to protection by the court." Mem. Supp. Mot. for Reconsideration, 5; *see* I.C. § 5-230. Rohel asserts that Clemmons has failed to allege that Luck was incompetent when the accident occurred. Def.'s Opp'n to Pl.'s Mot. to Reconsider, 5. Therefore, Luck cannot avail herself to that disability and thus cannot have the statute of limitations tolled in her favor. *Id.*

"Statutes of limitation in Idaho are not tolled by judicial construction[,] but rather by the expressed language of the statute." *Wilhelm v. Frampton*, 144 Idaho 147, 149, 158 P.3d 310, 312 (2007) (quoting *Independent School Dist. of Boise City v. Callister*, 97 Idaho 59, 63, 539 P.2d 987, 991 (1975)); *see also Johnson v. Boundary Sch. Dist. No. 101*, 138 Idaho 331, 335, 63 P.3d 457, 461 (2003). Idaho Code § 5-230 states that if the person who is entitled to bring an action is, at the time the cause of action accrued, either a minor or insane, then "[t]he time of such disability is not a part of the

time limited for the commencement of the action..." I.C. § 5-230. While "insane" is defined as "[m]entally deranged," I.C. § 5-230 seems to indicate that insanity is equivalent to incompetency for purposes of the statute. *Id.* ("...shall not be tolled for a period of more than six (6) years on account of minority, incompetency, ..."); Black's Law Dictionary, 797 (7th ed. 1999). Idaho Code § 5-219(4), which provides a two-year statute of limitation within which a personal injury action can be brought, states "the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom..." I.C. § 5-219.

Here, based on the above statutes, the cause of action accrued at the time the vehicle accident occurred between Luck and Rohel – March 13, 2017. While there are numerous assertions, but no actual proof by admissible evidence, that Luck is currently incompetent, Clemmons' supporting memorandum is completely devoid of any assertion that Luck was incompetent at the time the cause of action accrued. The only evidence submitted by Clemmons that provides some iota of a timeframe within which Luck began to transition from competent to incompetent is a letter from a Dr. Drury which was filed as an exhibit on May 23, 2019. The letter is not dated, not sworn, and provides no admissible evidence in support of Clemmons' position. The letter reads, in part: "Ethel Luck has been a patient of this practice for the past 18 years. **Over the past year**[,] she has had a significant decline in her cognitive function, in particular with her short-term memory..." Pl.'s Decl. in Supp. of Opp'n of Def.'s Mot. to Strike Compl. and Mot. to Dismiss, Ex. 2. In considering the plain language of the letter, and considering the date upon which the letter was filed, Luck has been incompetent since approximately May of 2018. The vehicle accident occurred on March 13, 2017 – over one year prior to Luck's alleged "significant decline in her cognitive function."

In conclusion, Clemmons has not submitted any evidence, nor made any allegations, indicating that Luck was either insane or incompetent at the time the cause of action accrued. Therefore, the statute of limitations cannot be tolled pursuant to I.C. § 5-230.

D. Even if Luck had been found to be legally incompetent, the statute of limitations cannot be tolled pursuant to I.C. § 5-229, as Rohel was present within the State of Idaho when the vehicle accident occurred.

Clemmons argues that the statute of limitations should be tolled pursuant to I.C. § 5-229 because Rohel allegedly left the State of Idaho. Mem. Supp. Mot. for Reconsideration, 2. In support of this allegation, Clemmons states that the "attempt at service and the actual service filed in this matter" serve as evidence that Rohel "left the State of Idaho during the accrual of the statute of limitations." *Id.* The "attempt at service" was filed on March 28, 2019, and the "actual service" was filed on April 9, 2019, each subsequent to the filing date of the original complaint. Rohel asserts that "the affidavits only prove that Defendant was not living at the address shown, not that she was outside of Idaho" when the cause of action accrued. Def.'s Opp'n to Pl.'s Mot. to Reconsider, 5.

Before the Court discusses I.C. § 5-229, the two flaws in Clemmons argument must be discussed. First, Clemmons does not state when Rohel allegedly left the State of Idaho. Clemmons does not state how long Rohel was allegedly absent from the State of Idaho. Yet, Clemmons asks the Court to toll the statute of limitations, albeit for a period of time that is unknown. Even if this statute was applicable to this case, which it is not, the Court could not toll a statute of limitations if it is not provided with specific dates within which the defendant was absent from the State of Idaho.

Second, the unsuccessful attempt at service upon Rohel merely shows that Rohel was not residing at the address Clemmons was intending to serve her at. *See*

Aff. of Service, filed on March 28, 2019. The unsuccessful attempt at service upon Rohel does not in any way show that Rohel was outside of Idaho. The affidavit of service that was successfully served upon Rohel took place in person in Post Falls, Idaho. *See* Aff. of Service, filed on April 9, 2019. Therefore, neither the unsuccessful nor successful affidavit of service serve as evidence that Rohel left the State of Idaho.

Idaho Code § 5-229 reads:

> If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

I.C. § 5-229. As discussed above, the cause of action accrued at the time the vehicle accident occurred between Luck and Rohel, which took place on March 13, 2017, within Idaho. *See* Compl., ¶ 1.4 ("On or about March 13, 2017, Sarah Rohel negligently operated a motor vehicle striking the passenger side of the vehicle in which Ethel Luck was a passenger at the intersection of E. Wallace Ave. and N. 2nd St. in Coeur d'Alene, Idaho..."); *see also* Pl.'s Decl. in Supp. of Opp'n of Def.'s Mot. to Strike Compl. and Mot. to Dismiss, Ex. 1 (the police report shows that the vehicle collision occurred in Coeur d'Alene, Idaho). Therefore, Rohel was not out of the state when the cause of action accrued. Because Rohel was not out of the state when the cause of action accrued, the statute of limitations cannot be tolled. Further, even if Rohel left the State of Idaho at some point after the cause of action accrued, the statute does not allow for tolling in such a situation. Contrary to Clemmons' argument urging the Court to toll the statute for the time period that Rohel was outside of Idaho, the statute specifically states that if the defendant leaves the state after the cause of action accrues, the time of that person's absence is not part of the time limited for the commencement of the

action. Thus, even if Rohel left Idaho for a period of time after the vehicle accident, her absence does not allow the statute of limitations to be tolled.

IV. CONCLUSION AND ORDER.

For the reasons explained above, Clemmons' Motion for Reconsideration and Tolling of Statute of Limitations is denied.

IT IS HEREBY ORDERED Clemmons' Motion for Reconsideration and Tolling of Statute of Limitations is DENIED.

Entered this 9th day of September, 2019.

John T. Mitchell, District Judge

Certificate of Service

I hereby certify that on the 13th day of September, 2019 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail, facsimile or email to:

Lloyd Herman lloydherm@aol.com	Jaron A. Robinson jaron.robinson@libertymutual.com

By Jeanne Clausen, Secretary