STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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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, *Plaintiff*, vs. **PAUL W. DAUGHARTY, individually, PAUL DAUGHARTY PA, and DOES ONE THROUGH TWENTY inclusive,** *Defendant*.	Case No. **CV 2017 4677** **MEMORANDUM DECISION AND ORDER: GRANTING DEFENDANTS' REQUEST FOR JUDICIAL NOTICE; DENYING PLAINTIFFS' IRCP 56(d) MOTION; and GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendants Paul W. Daugharty's and Paul Daugharty PA's (Daugharty) Motion for Summary Judgment.

The facts of this case are based on evidence submitted by Daugharty.[1] Paul W. Daugharty is an attorney who represented Shawn Montee (Shawn) and Shawn's various business entities for more than twenty years. Decl. Paul W. Daugharty Supp. Mot. Summ. J. (Daugharty Decl.) 1. Daugharty represented Shawn, Heather Montee (Heather), and several of Shawn's business entities in *Robert Wolford v. Shawn Montee et al.*, Kootenai County Case No. CV-2014-4713 (*Wolford v. Montee*). *Id.* In that case, on June 11, 2014, plaintiff Robert Wolford (Wolford) filed a complaint against Shawn and Heather (the Montees) and several of Shawn's business entities. Defs. Paul W.

[1] The Montees, now appearing *pro se,* did not submit any evidence in opposition to Daugharty's Motion for Summary Judgment.

Daugharty and Paul Daugharty, P.A.'s Req. Judicial Notice (Judicial Notice Req.) 00001–11. The complaint generally alleged causes of action for recovery of an open account and breach of two promissory notes. *Id.* Wolford subsequently moved for summary judgment, and, in response, Daugharty, as counsel for the Montees and Shawn's business entities, filed a Motion for a Continuance pursuant to Idaho Rule of Civil Procedure 56(f). *Id.* at 000014–19. A hearing on both the Motion for Summary Judgment and the Motion for a Continuance was held on September 17, 2014. Following the hearing, the Court issued a Memorandum Decision denying the Motion for a Continuance and granting Wolford's Motion for Summary Judgment. *Id.* at 000034–53. On September 26, 2014, the Court entered judgments against the Montees and Shawn's business entities.[2] *Id.* at 000045–65. The Montees appealed the Court's decision. *Id.* at 000066–70. On November 23, 2016, the Idaho Supreme Court affirmed the judgment against the Montees, and reversed and remanded the judgment against Shawn's business entities. *Id.* at 000084–98.

While the Montees' appeal in *Wolford v. Montee* was pending, two things happened. First, Wolford filed a Motion for Injunctive Relief, and on March 25, 2015, the Court granted Wolford's request for an injunction. *Id.* at 000071–83. The injunction enjoined the Montees from creating or forming any further business entities. *Id.* at 000079–83. Second, on April 21, 2015, the Montees filed a petition for Chapter 11 bankruptcy. *Id.* at 000099–101. According to the Montees, they filed for bankruptcy based on Daugharty's legal advice.[3] First Am. Compl. 4, ¶¶ 16–10. It is unclear from the

[2] The Court issued two judgments. As summarized by Daugharty, the first judgment was based on a 2009 promissory note and was entered against the Montees. Judicial Notice Req. 000054–57. The second judgment was based on a 2010 promissory note and was entered against Shawn's business entities. *Id.* at 000058–65.

[3] Daugharty has denied that allegation. Daugharty Decl. 2. He states that he did not (and does not) practice bankruptcy law or represent clients in bankruptcy court, and that he advised the

record when Daugharty allegedly provided this advice. The Montees' Chapter 11 bankruptcy action was subsequently converted to a Chapter 7 bankruptcy case. Aff. Shawn Montee Supp. Mot. Continuance Pursuant to Rule 56(f) IRCP (Shawn Aff.) 2, ¶2. Following the conversion to a Chapter 7 bankruptcy case, the Montees allege that they asked Daugharty "if they could form a new business entity to begin to rebuild their business interests." First Am. Compl. 4, ¶ 21. Further, they allege that Daugharty advised them that "the conversion to Chapter 7 guaranteed them a fresh start and further, that the order of [this] Court prohibiting [them] from forming a new business entity without court approval was of no further consequence or concern." *Id.* According to the Montees, Daugharty then prepared and filed documents to form North Pacific, LLC.[4] *Id.* at 4–5, ¶ 22. It is unclear from the record when Daugharty provided the Montees with this alleged advice and when he prepared and filed documents to form North Pacific, LLC.

On June 16, 2017, the Montees began the instant professional negligence case by filing a Complaint against Daugharty based on Daugharty's representation of them in *Wolford v. Montee*, 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. Thereafter, on August 1, 2017, Daugharty filed a Motion for Leave to Withdraw as the attorney of record for the Montees in *Wolford v. Montee*. Judicial Notice Req. 000124–126. On August 24, 2017, the Court issued an order granting Daugharty's Motion for Leave to Withdraw. *Id.* at 000138–140. Daugharty's representation of the Montees ended at that time. Daugharty Decl. 1

Montees to seek out independent bankruptcy counsel for guidance. *Id.*

[4] In response, Daugharty acknowledges that he prepared and filed legal documents to form North Pacific, LLC. Daugharty Decl. 2. However, he denies advising the Montees that "the fresh start provisions of the bankruptcy code trumped the state court injunction or that it could be ignored." *Id.* Daugharty states: "I was always very clear with Mr. Montee that I was not a bankruptcy lawyer and any advice in his bankruptcy case would need to come from his

The Montees subsequently filed the First Amended Complaint on October 6, 2017. The Montees allege six causes of action against Daugharty in the First Amended Complaint. They allege that Daugharty's representation of them in *Wolford v. Montee* and his alleged advice related to their decision to file for bankruptcy and form North Pacific, LLC give rise to claims of 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. First Am. Compl. 5–12, ¶¶ 24–55. On October 23, 2017, Daugharty answered the Montees' First Amended Complaint with general denials and several defenses.

On November 9, 2017, Daugharty filed a Motion for Summary Judgment. A hearing on the summary judgment motion was scheduled for January 3, 2018. In support of his Motion, Daugharty submitted Defendants Paul W. Daugharty and Paul Daugharty, P.A.'s Memorandum in Support of Motion for Summary Judgment, Declaration of Paul W. Daugharty in Support of Motion for Summary Judgment, and Defendants Paul W. Daugharty and Paul Daugharty, P.A.'s Request for Judicial Notice. In general, Daugharty argues that he is entitled to summary judgment on the Montees' claims against him because: the Montees' claims of breach of contract and breach of the covenant of good faith and fair dealing fail to state a claim for which relief can be granted; the Montees' professional negligence claim is the property of the bankruptcy estate, the Montees are judicially estopped from asserting that claim, and Daugharty was not the proximate cause of damage to the Montees; the Montees' claim for breach of fiduciary duty is barred by the statute of limitations; the Montees' fraudulent concealment claim fails on the facts and has not been adequately pled; and the Montees' negligent infliction of emotional distress claim is, in fact, an intentional infliction of emotional distress claim, and Daugharty's

bankruptcy counsel." *Id.*

conduct did not rise to the level of atrocious or beyond all possible bounds of decency.

The Montees did not respond to Daugharty's Motion for Summary Judgment with argument and evidence. Rather, on December 29, 2017, the Montees filed a Motion for Continuance Pursuant to Rule 56(f) (which is now 56(d)) of the Idaho Rules of Civil Procedure. They also submitted a Memorandum and Affidavit in support of that Motion. On January 2, 2018, Daugharty filed Defendants' Opposition to Plaintiffs' I.R.C.P. 56(d) Motion. Daugharty argued that the Montees' Motion was untimely and did not make the showing required by Rule 56(d).

In addition to their Motion for Continuance Pursuant to Rule 56(f) of the Idaho Rules of Civil Procedure, the Montees have submitted a number of motions and other documents with the Court over the past two months. For example, on November 20, 2017, the Montees filed a document captioned Notice of Automatic Stay, in which the Montees assert that they filed a bankruptcy case with the bankruptcy court and, as a result, they are entitled to an automatic stay of this case pursuant to 11 U.S.C. § 362(a). Similarly, on December 20, 2017, the Montees submitted a document captioned Notice of Federal Motion Filing with the United States Bankruptcy Court for the District of Idaho. The purpose of this Notice appears to be to inform the Court that bankruptcy counsel for the Montees in the Montees' pending bankruptcy case filed an Emergency Motion to Enforce the Automatic Stay with the bankruptcy court.[5]

On December 20, 2017, the Montees filed a Motion for Disqualification Without Cause. In response, Daugharty noted that the Montees' Motion for Disqualification

[5] The Montees attached a copy of the Emergency Motion to Enforce the Automatic Stay to their Notice. In the Motion, counsel for the Montees seek an order from the bankruptcy court directing this Court to not proceed on the hearing for the Daugharty's Motion for Summary Judgment. Daugharty later informed the Court that the Montees' Emergency Motion to Enforce the Automatic Stay was unsuccessful. *See* Reply Supp. Defs. Paul W. Daugharty and Paul Daugharty, P.A.'s Mot. Summ J. 2–4, Ex. A.

Without Cause was untimely.[6] On January 2, 2018, the Court issued an Order denying the Montees' Motion for Disqualification Without Cause as it was untimely. In response to the Court's Order, on January 9, 2018, the Montees submitted a document captioned Statement of Clarification Re: Motion for Disqualification Without Cause.

In addition to the Motion for Disqualification Without Cause, on December 20, 2017, the Montees submitted a Motion for Disqualification for Cause and an Affidavit of Shawn Montee in Support of Motion for Disqualification for Cause. In their Motion and supporting Affidavit, the Montees express an intent to depose Judge John T. Mitchell, the assigned judge in this case and the judge assigned to *Wolford v. Montee*. On December 27, 2017, Daugharty filed Defendants Paul W. Daugharty and Paul Daugharty, P.A.'s Opposition to Plaintiffs' Motion for Disqualification for Cause in which he points out that the Montees' Motion is not based upon any of the grounds specified for a motion for disqualification for cause under Rule 40(b)(1).

On January 3, 2018, the Court held a hearing in this case. Counsel for Daugharty appeared at that hearing. The Montees did not appear. As previously noted, the original purpose of that hearing was to hear oral argument related to Daugharty's Motion for Summary Judgment. However, because of the Montees' pending Motion for Disqualification for Cause, the Court declined to move forward with the summary judgment motion at that time. Instead, the Court informed the parties that because the Montees had failed to notice up their Motion for Disqualification for Cause for a hearing, the Court would notice up that Motion for hearing on its own. The Court did so because I.R.C.P. 40(b)(2) requires a hearing on a motion for disqualification for cause, and, while interpreting prior versions of that rule, there is case law indicating that until the Court

[6] Daugharty presented this argument in his Reply in Support of Defendants Paul W. Daugharty and Paul Daugharty, P.A.'s Motion for Summary Judgment.

determines the disqualification issue, the Court has no jurisdiction to determine other issues in the case. *Waters v. Barclay*, 57 Idaho 376, 64 P.2d 1079 (1937). The Court scheduled the hearing on the Montees' Motion for Disqualification for Cause for January 18, 2018.

Prior to the January 18, 2018 hearing, the Montees submitted three additional motions related to their Motion for Disqualification for Cause. First, on January 9, 2018, the Montees submitted an Amended Motion for Disqualification for Cause and an Amended Affidavit of Shawn Montee in Support of Motion for Disqualification for Cause. Second, on January 11, 2018, they filed a Motion for Order Shortening Time for Hearing. Third, on January 11, 2018, the Montees submitted an Emergency Motion for Continuance of Hearing, Affidavit of Heather Montee in Support of Emergency Motion for Continuance, and Affidavit of Shawn Montee in Support of Emergency Motion for Continuance. The Montees did not file a notice of hearing related to the Motion for an Emergency Continuance or the Motion for Order Shortening Time for Hearing.

On January 18, 2018, the Court held the hearing on the Montees' Motion for Disqualification for Cause. Counsel for Daugharty appeared at that hearing; the Montees did not appear. Following the hearing, the Court denied the Montees' Motion for Disqualification for Cause for the reasons stated on the record. The Court issued a written Order Denying Motions for Disqualification for Cause that same day.

Because the Court denied the Montees' Motion for Disqualification for Cause, the Court proceeded with the Daugharty's Motion for Summary Judgment. A hearing on Daugharty's summary judgment motion was held on January 29, 2018.

II. STANDARD OF REVIEW.

A. Rule 56(d) Motion for Extension of Time.

A district court's decision to grant or deny a Rule 56(d) "motion for an extension of

time to file additional affidavits, depositions, and interrogatories in opposition to a motion for summary judgment is within the discretion of the district court." *Haight v. Idaho Dep't Transp.*, No. 44863, 2018 WL 327364, at *3 (Idaho Jan. 9, 2018) (citing *Carnell v. Barker Mgmt.*, 137 Idaho 322, 329, 48 P.3d 651, 658 (2002)).

> A district court does not abuse its discretion in denying such a motion if it recognized it had the discretion to deny the motion, articulated the reasons for doing so, and exercised reason in making the decision. The district court need not expressly state that it had discretion to deny the motion if it articulates the reasons for denying the motion and those reasons show that the court knew it had discretion to grant or deny the motion. When reviewing the district court's discretionary decision, [Idaho appellate courts] determine[] whether the [district] court (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with applicable legal standards; and (3) reached its decision by an exercise of reason.

Id. (citations omitted) (internal quotation marks omitted).

B. Motion for Summary Judgment.

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 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. Barnson*, 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.

The Court's analysis in this case consists of five parts. First, the Court addresses the Montees' argument that Daugharty and the Court are violating a bankruptcy stay by proceeding with Daugharty's Motion for Summary Judgment. Second, the Court responds to Daugharty's written and oral requests for judicial notice. Third, the Court considers the Montees' request for more time to conduct discovery pursuant to Rule 56(d). Fourth, the Court addresses whether the Montees are the real party in interest with standing to pursue their claims against Daugharty. Fifth, the Court determines whether Daugharty is entitled to summary judgment on the Montees' claims against him.

A. Daugharty's Motion for Summary Judgment is not subject to the automatic bankruptcy stay because it is not an action or proceeding against the Montees.

In various submissions to the Court, the Montees repeatedly assert that Daugharty and/or this Court are violating an automatic bankruptcy stay by proceeding

with Daugharty's Motion for Summary Judgment.[7] *See, e.g.*, Mem. Supp. Mot. Continuance Pursuant to Rule 56(f) IRCP 2; Shawn Aff. 2–3, ¶¶ 4–9; Notice Federal Mot. Filing U.S. Bankruptcy Court District of Idaho 1; Notice of Automatic Stay 1–2; Emergency Mot. for Continuance of Hearing 2. The Montees cite to 11 U.S.C. § 362(a)(1) to support their argument. Daugharty responds to this argument in his Reply in Support of Defendants Paul W. Daugharty and Paul Daugharty, P.A.'s Motion for Summary Judgment. Daugharty argues that the Montees automatic stay argument is misplaced. Reply Supp. Defs. Paul W. Daugharty and Paul Daugharty, P.A.'s Mot. Summ. J. 2–3. He contends that the automatic stay requirement as provided in 11 U.S.C. § 362(a)(1) "**does not apply to actions or proceedings commenced by the debtor**, either before or after the filing of the bankruptcy petition." *Id.* at 6 (emphasis in original). Daugharty concedes that "[a] counterclaim against the [plaintiff-]debtor may constitute an 'action or proceeding' that is subject to the automatic stay[,]" but argues that a court should exercise caution when a plaintiff-debtor pursues a lawsuit and "then invokes the protection of the automatic stay on a counterclaim." *Id.* at 3.

The automatic bankruptcy stay applies to the commencement or continuation of a judicial action or proceeding against the debtor that was or could have been commenced before the bankruptcy action. 11 U.S.C. § 362(a)(1). "The stay does not prevent a plaintiff/debtor from continuing to prosecute its own claims nor does it prevent a defendant from protecting its interests against claims brought by the debtor." *In re Palmdale Hills Prop., LLC*, 654 P.3d 868, 875 (9th Cir. 2011) (citing *Gordon v.*

[7] This argument assumes that the Montees' claims against Daugharty are pre-petition claims (i.e., the claim or the potential for the claim existed before the Montees filed their petition for bankruptcy). Legal claims arising after the Montees filed their bankruptcy do not belong to the bankruptcy estate. While the undisputed facts demonstrate that Daugharty's representation of the Montees in *Wolford v. Montee* and his alleged advice recommending the Montees file for bankruptcy arose before the Montees filed for bankruptcy, it is unclear when Daugharty

Whitmore (In re Merrick), 175 B.R. 333, 337–38 (9th Cir. BAP 1994)). Thus, "[d]efenses, as opposed to counterclaims, do not violate the automatic stay because the stay does not seek to prevent defendants sued by a debtor from defending their legal rights." *Houey v. Carolina First Bank*, 890 F. Supp. 2d 611, 617 (W.D.N.C. 2012) (quoting *ACandS, Inc. v. Travelers Cas. and Sur. Co.*, 435 F.3d 252, 259 (3rd Cir.), *cert. denied* 547 U.S. 1159, 126 S.Ct. 2291, 164 L.Ed.2d 833 (2006)). "This is true even if the defendant's successful defense will result in the loss of an allegedly valuable claim asserted by the debtor." *Id.* (citing *Martin-Trigona v. Champion Fed. Sav. and Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989)).

Here, the Montees are the plaintiffs-debtors in this case. They initiated this action against Daugharty when they filed a Complaint, and later the First Amended Complaint, against Daugharty. Therefore, this case is not an action or proceeding *against* the Montees as debtors; rather, it is an action by the Montees *against* Daugharty. Moreover, Daugharty's decision to seek summary judgment does not change the posture of the parties, or otherwise transform this case into an action against the Montees as debtors that triggers the automatic bankruptcy stay. Instead, Daugharty's summary judgment motion on the Montees' claims against him is an example of a defendant asserting his legal rights against the debtors who sued him.[8] As noted, Daugharty is entitled to defend his legal rights even if, as the Montees assert, Daugharty's success on his Motion for Summary Judgment will result in their loss of allegedly valuable claims. In summary, in this case, the automatic bankruptcy stay

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allegedly advised the Montees that they could form North Pacific, LLC.

[8] The Court would likely reach a different conclusion if Daugharty was seeking summary judgment on a counterclaim against the Montees. *See Parker v. Bain*, 68 F.3d 1131, 1137–38 (9th Cir. 1995) (explaining that claims, counterclaims, cross-claims, and third-party claims must be treated independently in order to determine which claim or claims are subject to the automatic bankruptcy stay).

does not prevent Daugharty from bringing this Motion for Summary Judgment nor does it prevent the Court from reaching the merits of the summary judgment motion.

B. The Court grants Daugharty's written and oral requests for judicial notice of certain documents pursuant to Idaho Rule of Evidence 201(d).

Daugharty has made two requests for judicial notice. First, Daugharty submitted a written request asking the Court to take judicial notice of certain records and exhibits on file in *Wolford v. Montee* and the Montees' pending bankruptcy action pursuant to Idaho Rule of Evidence 201(c) and/or 201(d). *See* Judicial Notice Req. 1–2. Second, during oral argument on Daugharty's summary judgment motion, counsel for Daugharty informed the Court that on January 18, 2018, the bankruptcy court issued an order abandoning the Montees' claims against Daugharty. In turn, counsel for Daugharty made an oral request that the Court take judicial notice of the proceedings before the bankruptcy court.

Idaho Rule of Evidence 201(d) provides:

> **When Mandatory.** When a party makes an oral or written request that a court take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information.

I.R.E. 201(d). Pursuant to this rule, Daugharty made a written and oral request that the Court take judicial notice of records, exhibits, and/or transcripts in *Wolford v. Montee* and in the Montees' bankruptcy action. In his written request, Daugharty has identified the documents for which judicial notice is requested and provided copies of those documents to the Montees and the Court. In his oral request, counsel for Daugharty has asked the Court to take judicial notice of the Montees' bankruptcy proceeding and, more specifically, the bankruptcy court's order in abandoning the Montees' claim(s)

against Daugharty issued January 18, 2018. Because Daugharty has requested that the Court take judicial notice of certain court documents and supplied the Court with the necessary information, the Court grants Daugharty's written and oral requests for judicial notice of the documents as listed in Defendant Paul W. Daugharty and Paul Daugharty, P.A.'s Request for Judicial Notice and of the bankruptcy court's order issued on January 18, 2018.

C. The Montees' Motion requesting additional time to conduct discovery pursuant to I.R.C.P. 56(d), (formerly I.R.C.P. 56(f)) must be denied as it is untimely; additionally, the Montees' affidavit submitted in support of their Motion lacks the requisite specificity.

The Montees ask the Court to deny or defer considering Daugharty's summary judgment motion in order to allow them more time to conduct discovery as provided for under Idaho Rule of Civil Procedure 56(f). Mot. Continuance Pursuant to Rule 56(f) 1. The Montees start by asserting that Daugharty is violating the automatic bankruptcy stay. Mem. Supp. Mot. Continuance Pursuant to Rule 56(f) 2; Aff. of Shawn Montee (Shawn Aff.) 2–3, ¶ 7. They then generally argue that Daugherty's responses to their discovery requests were deficient. Rule 56(f) Mem. 3; Shawn Aff. 3, ¶ 8–9. They explain that they have been unable to correct this deficiency and conduct adequate discovery because they can't hire an attorney to represent them in this matter given that their claims against Daugharty belong to the bankruptcy estate. Rule 56(f) Mem. 3; Shawn Aff. 2–3, ¶¶ 4–5, 8–9. If given more time, the Montees state that additional discovery will show that in *Wolford v. Montee*, Daugharty failed to conduct discovery, obtain a continuance, protect their interests, exercise reasonable care and diligence, explain the scope, substance, and meaning of the asserted claims, conduct adequate research of Idaho law, prepare a defense strategy, ensure their (the Montees) compliance with court orders, and timely submit evidence in opposition to a motion for

summary judgment.[9] Shawn Aff. 4–5, ¶¶ 13–17.

In response, Daugharty asks the Court to deny the Montees' Rule 56(d) Motion. Daugherty asserts that the Motion is untimely and does not make the showing required by Rule 56(d). Def.'s Opp'n Pls.' I.R.C.P. 56(d) Mot. 2. Further, Daugharty explains that the Montees "cannot present facts required to justify opposition to the motion for summary judgment[,]" and "the bases for Daugharty's motion for summary judgment do not depend upon the development of facts from further discovery that would create a genuine issue of material fact." *Id.* at 2.

The Court concludes that the Montees' Rule 56(d), formerly Rule 56(f), Motion is untimely. Rule 56(b)(2) requires the non-moving party to serve any opposing documents on the moving party at least 14 days before the date of the hearing. I.R.C.P. 56(b)(2). This time requirement may be altered by a court for good cause shown. I.R.C.P. 56(b)(3). In this case, the hearing on Daugharty's summary judgment motion was initially scheduled for January 3, 2018.[10] The Montees served Daugharty with their Rule 56(d) Motion on December 29, 2017. Because the Montees served their Motion and supporting documents only four days before the originally scheduled hearing on Daugharty's Motion for Summary Judgment, they failed to meet Rule

[9] The Montees do not state that they need more time to conduct discovery related to Daugharty's alleged recommendation that they file for bankruptcy and alleged advice that they could form a new business entity despite the Court's injunction in *Wolford v. Montee.*

[10] The Court held a hearing on January 3, 2018. The purpose of that hearing was to hear oral arguments on Daugharty's Motion for Summary Judgment. Daugharty and his counsel appeared at that hearing; the Montees did not appear. At that hearing, the Court noted that the Montees filed a Motion for Disqualification for Cause pursuant to Rule 40(b). As mentioned above, because the Motion for Disqualification for Cause was pending, the Court expressed concerns regarding its ability to proceed with the Motion for Summary Judgment without first addressing the Montees' Motion for Disqualification for Cause. As a result, the Court decided to continue the hearing on Daugharty's Motion for Summary Judgment and schedule a hearing on the Montees' Motion for Disqualification for Cause. The hearing on the Montees' Motion for Disqualification for Cause was held on January 18, 2018. The Montees did not appear at that hearing. Following the hearing, the Court denied the Montees' Motion for Disqualification for Cause.

56(b)(2)'s time requirements. In addition, the Montees did not ask the Court to alter or shorten Rule 56(b)(2)'s time requirements or otherwise show good cause for doing so. Therefore, the Montees' Rule 56(d) Motion is untimely. The Montees could argue that their Motion is timely, since Daugharty's summary judgment motion did not in fact occur until January 29, 2018. This Court is unwilling to make that interpretation because to do so would be to reward the Montees for failing to notice up a hearing on their motion to disqualify for cause and for failing to notice up a hearing on their Rule 56(d) motion. To do so would allow a party's failure to notice matters for hearing to paralyze progress of the case.

In addition, the Montees' affidavit submitted in support of their Rule 56(d) Motion does not meet Rule 56(d)'s specificity requirements. Rule 56(d) provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

I.R.C.P. 56(d). Here, the Montees are asking the Court to allow them more time to take discovery. "Control of discovery is within the discretion of the trial court." *Jen-Rath Co. v. Kit Mfg. Co.*, 137 Idaho 330, 336, 48 P.3d 659, 665 (2002). The Idaho Supreme Court recently explained that when a party asks a court to allow it more time to conduct discovery under Rule 56(d), the requesting party "has the burden of setting out what further discovery would reveal that is essential to justify their opposition, making clear what information is sought and how it would preclude summary judgment." *Haight*, No. 44863, 2018 WL 327364, at *4 (quoting *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2004) (internal quotations and citation omitted)).

After reviewing the Affidavit of Shawn Montee submitted in support of the Montees' Rule 56(d) Motion, the Court finds the assertions in the Affidavit to be vague, conclusory, and lacking in specificity. The Montees state that discovery and depositions will reveal that Daugharty, in *Wolford v. Montee*, failed to conduct discovery, obtain a continuance, protect their interests, exercise reasonable care and diligence, explain the scope, substance, and meaning of the asserted claims, conduct adequate research of Idaho law, prepare a defense strategy, ensure their (the Montees) compliance with court orders, and timely submit evidence in opposition to a motion for summary judgment. While this list of Daugharty's alleged failures *may* set forth what the Montees contend discovery will reveal, the Montees have not made clear what specific information they are seeking from Daugharty in relation to each alleged failure and how the information they seek will demonstrate a genuine issue of material fact as to each of their claims such that the Court would deny Daugharty's Motion for Summary Judgment. Therefore, the Montees' Affidavit submitted in support of their Rule 56(d) Motion does not meet Rule 56(d)'s requirements.

Lastly, with regard to the pending bankruptcy action, the Montees' allegation that Daugharty is violating the bankruptcy stay by filing a Motion for Summary Judgment was addressed by the Court in Part (III)(A) above. Additionally, the Montees' argument that they are unable to hire an attorney to litigate this case because of the pending bankruptcy action is unpersuasive.[11] The pending bankruptcy action may impact the Montees' rights to pursue these claims; however, it does not impact or otherwise

[11] The Court notes that their stated reason for being unable to hire an attorney is not entirely clear. If the Montees are suggesting that Idaho or federal law prevents them from hiring an attorney to represent them in this matter because of the bankruptcy action, they have cited no legal authority for that proposition. If the Montees are suggesting that no attorney will represent them in light of their pending bankruptcy action, such a fact is not a basis for giving the Montees more time to conduct discovery.

prevent them from retaining counsel to advise them on how to preserve their claims against Daugharty in light of their pending bankruptcy (assuming they can preserve their claims), or to otherwise assist them in pre-trial civil motion practice. In short, the Montees' failure to hire an attorney is not an adequate basis for the Court to grant them more time to conduct discovery.

In summary, the Court denies the Montees' request for additional time to conduct discovery as their Motion is untimely and the Affidavit submitted in support of the Motion does not meet Rule 56(d)'s requirements.

D. The bankruptcy estate has abandoned its interest in the Montees' claims against Daugharty, and as a result, the Montees are the real party in interest with standing to pursue their claims against Daugharty.

In his Memorandum in Support of Motion for Summary Judgment, Daugharty initially argued that the Montees were not the real party in interest and did not possess the right to enforce their professional negligence claim against Daugharty.[12] Defs. Paul W. Daugharty and Paul Daugharty, P.A.'s Mem. Supp. Summ. J. 8–9. Based on that, Daugharty asked the Court to dismiss the Montees' First Amended Complaint because the Montees lacked standing. However, at the hearing on his summary judgment motion, Daugharty withdrew his argument that the Montees were not the real party in interest. In response to questions from the Court, counsel for Daugharty explained that the bankruptcy estate had recently abandoned its interest in the Montees' claims against Daugharty. Accordingly, Daugharty stated that the Montees were now the real party in interest and in a position to pursue their claims against Daugharty. To support

[12] While Daugharty only applies the real-party-in-interest principles to the Montees' claim that Daugharty was negligent in representing them in *Wolford v. Montee*, the Court concludes that these same principles apply to the Montees' remaining claims, to the extent that those remaining claims are pre-petition claims. *See Arambarri v. Armstrong*, 152 Idaho 734, 738, 274 P.3d 1249, 1253 (2012) (stating that standing is a jurisdictional issue and explaining that appellate courts have a duty to raise issues of standing sua sponte).

its assertion that the bankruptcy estate had abandoned its interest in the Montees' claims, Daugharty directed the Court to an order issued by the bankruptcy court on January 18, 2018.

A bankruptcy action begins when a potential debtor files a petition with the bankruptcy court. 11 U.S.C. § 301. The commencement of a bankruptcy action creates a bankruptcy estate. 11 U.S.C. § 541(a). The bankruptcy estate consists of all legal or equitable interests held by the debtor at the time the bankruptcy action is commenced, including causes of action that belong to the debtor. 11 U.S.C. § 541(a)(1); *McCallister v. Dixon*, 154 Idaho 891, 897–98, 303 P.3d 578, 584–85 (2013) (citing *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008)). Thus, after a debtor files for bankruptcy, any potential legal claims he or she had against another party is no longer his or hers to assert. *Houpt v. Wells Fargo Bank, Nat'l Ass'n*, 160 Idaho 181, 187, 370 P.3d 384, 390 (2016) (citing *McCallister*, 154 Idaho at 898, 303 P.3d at 585). Instead, the legal claim is "an asset of the bankruptcy estate for the bankruptcy trustee to assert." *Id.* Moreover, "when a plaintiff has knowledge of a claim during the pendency of his bankruptcy[,] the claim becomes 'an asset of the bankruptcy estate, and [] a claim for the bankruptcy trustee alone to assert.'" *Id.* (quoting *Mowrey v. Chevron Pipe Line Co.*, 155 Idaho 629, 635, 315 P.3d 817, 823 (2013)).

In this case, the Montees filed for bankruptcy on April 21, 2015. Thereafter, any claims the Montees had against Daugharty became the property of the bankruptcy estate and were no longer the Montees to assert. Thus, when the Montees filed their Complaint against Daugharty on June 16, 2017, and their First Amended Complaint on October 6, 2017, they did not have the legal right to do so. The Montees were not the real party in interest and lacked standing to assert any claims against Daugharty, at

least to the extent that the claims asserted existed prior to the Montees' bankruptcy filing.

However, as noted by Daugharty, since the Montees filed their Complaint and First Amended Complaint, the bankruptcy estate has abandoned any interest in the Montees' claims against Daugharty.[13] The issue then becomes whether the bankruptcy estate's decision to abandon its interest in the Montees' claims resolves the problem with the Montees' standing as the real party in interest such that the Court can proceed to the merits of Daugharty's Motion for Summary Judgment. The Idaho Supreme Court addressed this issue in *Houpt v. Wells Fargo Bank, National Association*, 160 Idaho 181, 370 P.3d 384 (2016). It stated:

> [The] Houpts were not the real party in interest at the time they filed their Complaint. But, because the issue of Houpts' standing as the real party in interest has not been ruled on until this time, under I.R.C.P. 17(a),[14] the

[13] The bankruptcy court issued an Order Granting Motion for Abandonment on January 18, 2018. The Order, in part, stated:

> Upon consideration of the record before this Court and the Notice for Abandonment filed by the Trustee [Doc. 321], with notice having been given in accordance with the applicable Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rules, and no objection having been raised, and good cause existing:
>
> **IT IS HEREBY ORDERED:**
>
> That the "Personal Injury Claim" against Paul Daugharty is abandoned from the bankruptcy estate.

Order Granting Mot. Abandonment 1.

[14] Idaho rule of Civil Procedure 17 provides:

> *Joinder of the Real Party in Interest.* The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

I.R.C.P. 17(a)(3).

> action cannot be dismissed until a reasonable time has been allowed for the Houpts to cure the defect through "ratification . . . by, or joinder or substitution of," the real party in interest. Accordingly, under I.R.C.P. 17(a), Houpts must be allowed the opportunity to cure any defect in the real party of interest. Yet, here, unlike in *McCallister* and *Mowrey*, the bankruptcy trustee has, since the original filing of the Complaint, specifically abandoned his interest in the property. Consequently, Houpts, unlike the plaintiffs in *McCallister* and *Mowrey* where the bankruptcy estates did not abandon their interests in the plaintiffs' claims, are now, in fact, the real party in interest and any such attempted cure would only result in Houpts seeking "ratification ... by, or joinder or substitution of," themselves.
>
> Therefore, even though Houpts may not have been the real party in interest at the time of filing—they are now. Requiring Houpts to start over would only result in needless waste. . . . Accordingly, in the interest of judicial economy and our policy favoring "the just resolution of actions [by] providing litigants their day in court" we allow Houpts' claims to proceed.

Houpt, 160 Idaho at 187–88, 370 P.3d at 390–91 (footnote added) (citations omitted).

Likewise, in this case, the Montees were not the real party in interest when they filed their Complaint or First Amended Complaint. However, after filing the Complaint and First Amended Complaint, the bankruptcy estate abandoned its interest in the Montees' claims. Because the bankruptcy estate abandoned its interest in the Montees' claims, the Montees are now the real party in interest with standing to pursue their claims against Daugharty. Therefore, any defect in the Montees' standing as the real party in interest has been cured.

E. MOTION FOR SUMMARY JUDGMENT.

Daugharty seeks summary judgment on the Montees' claims of breach of contract, breach of an implied covenant of good faith and fair dealing, professional negligence, fraudulent concealment, breach of a fiduciary duty, and negligent infliction of emotional distress.

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1. Daugharty, as the moving party, has not met his burden of demonstrating that there is no genuine dispute of material fact as to the Montees' breach of contract claim.

Daugharty seeks summary judgment of the Montees' breach of contract claim on the ground that the Montees failed to state a claim for which relief can be granted. Def. Paul W. Daugharty and Paul Daugharty, P.A.'s Mem. Supp. Mot. Summ. J. 6–8. In support of his request, Daugharty generally argues that, in Idaho, legal malpractice claims sound in tort, not in contract. *Id.* at 7. To the extent that a legal malpractice claim may be a breach of contract claim, Daugharty states that the "contract basis of a legal malpractice action[] is the failure to perform obligations directly specified in [a] written contract." *Id.* (citing *Bishop v. Owens*, 152 Idaho 616, 620, 272 P.3d 1247, 1251 (2012)). He concludes by asserting that "[i]n this case, there was no written fee agreement and no agreement that guaranteed a result or specified a higher standard of care than the general standard of care." *Id.* at 8. As a result, Daugharty argues that the Montees' claim is for legal malpractice (i.e., professional negligence), not breach of contract. *Id.* Thus, according to Daugharty, the Montees' breach of contract claim fails to state a claim for which relief can be granted. *Id.*

Idaho appellate courts recognize that legal malpractice claims are a blend of tort and contract principles. *Bishop v. Owens*, 152 Idaho 616, 620, 272 P.3d 1247, 1251 (2012) (citing *Johnson v. Jones*, 103 Idaho 702, 706, 652 P.2d 650, 654 (1982)). The Idaho Supreme Court has explained the difference between a legal malpractice claim sounding in tort and a legal malpractice claim based on contract.[15] It stated:

> The ***tort basis of legal malpractice actions*** flows from the elements of legal malpractice: "(a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been a proximate

[15] This explanation was provided in the context of the applicability of the abatement rule to the deceased plaintiff's legal malpractice claim against her attorney.

> cause of the damage to the client . . . . " *Id.* (quoting *Sherry v. Diercks*, 29 Wash. App. 433, 437, 628 P.2d 1336, 1338 (1981)). "The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained." *Johnson*, 103 Idaho at 704, 652 P.2d at 652; *Fuller*, 119 Idaho at 425, 807 P.2d at 643 (holding that the tort of legal malpractice is also a breach of the attorney-client relationship). Breach of an attorney's duty in negligence is a tort. *See Harrigfeld v. Hancock*, 140 Idaho 134, 136, 90 P.3d 884, 886 (2004); *Johnson*, 103 Idaho at 704, 706–07, 652 P.2d at 652, 654–55. The ***contract basis of legal malpractice actions*** is the failure to perform obligations directly specified in the written contract. *See Johnson*, 103 Idaho at 704, 706–07, 652 P.2d at 652, 654–55 (holding that a breach of contract claim would arise if the attorney did not do what he promised to do in the contract, e.g., failing to draw up a contract of sale). Thus, . . . , breach of duty is an action in tort, not contract; that is, unless an attorney foolhardily contracts with his client guaranteeing a specific outcome in the litigation or provides for a higher standard of care in the contract, he is held to the standard of care expected of an attorney. Breach of that duty is a tort.

Id. (emphasis added).

In *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012), the Idaho Supreme Court concluded that the deceased plaintiff-client's action was really a legal malpractice claim (i.e., a tort) disguised as a breach of contract claim. *Id.* at 621, 272 P.3d at 1252. It explained that "because the contingent fee agreement . . . contained no express language providing for a higher standard of care, the duty owed by [the defendant-attorney] is not defined by the contingent fee agreement. The language in the contingent fee agreement that '[a]ttorneys shall represent Client in said matter and do all things necessary, appropriate, or advisable, in regard thereto' is not materially different from the standard applied in the legal malpractice claim." *Id.* Therefore, because the agreement between the plaintiff-client and the defendant-attorney did not impose a higher standard of care on the defendant-attorney, the Idaho Supreme Court concluded that the plaintiff-client's breach of contract claim failed to state a claim upon which relief can be granted. *Id.*

While the principles expressed in *Bishop* apply to this case, there is an important difference between the *Bishop* case and the case before this Court. The difference is that the *Bishop* court had evidence as to the existence of a contract and the language of that contract, while this Court does not have evidence related to the non-existence of the alleged contract. In his Memorandum, Daugherty asserts that there was no written agreement and there was no agreement that guaranteed a result or specified a higher standard of care than the general standard of care. However, Daugharty does not direct the Court to the materials in the record that support his assertion that no contract exists as required by Rule 56(c)(1), nor has the Court found support for that assertion. Daugherty has not made the affirmative statement in his declaration that no contract existed. This misstep is important because before the Court can determine whether the Montees' breach of contract claim fails to state a claim, it must decide whether or not there is a genuine issue of material fact related to the existence of a contract.[16] Only if the undisputed facts demonstrate that there is no written contract between Daugharty and the Montees promising a certain outcome or providing for a higher standard of care will the Montees' breach of contract claim fail to state a claim for which relief can be granted. There is a lack of evidence at the present time, and this Court will allow Daugherty to present evidence of a lack of a contract pursuant to I.R.C.P. 56(e)(1), (3).

Alternatively, the moving party (Daugherty) can 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. The Montees will bear the burden of proving the existence of a contract (and the other elements of a breach of contract claim) at trial. As a result, Daugharty could meet his burden by pointing to its evidence

[16] From a pleading perspective, the First Amended Complaint appears to adequately state a claim for breach of contract. First Am. Compl. 5, ¶¶ 24–25.

or Montees' evidence and arguing that proof of a contract is lacking. However, Daugherty has not actually made that argument at this time, and the Court is concerned about improper "burden-shifting" were the Court to decide this *sua sponte*.

2. From a factual standpoint, Daugharty is not entitled to summary judgment on Montees' claim for breach of covenant of good faith and fair dealing; from a legal standpoint, summary judgment is granted as to Montees' cause of action for breach of the covenant of good faith and fair dealing.

Daugharty argues that he is entitled to summary judgment on the Montees' breach of covenant of good faith and fair dealing for the same reason that he is entitled to summary judgment on the breach of contract claim. Defs. Paul W. Daugharty and Paul Daugharty, P.A.'s Mem. Supp. Mot. Summ. J. 8. From a *factual* standpoint, because the Court denied Daugharty's request for summary judgment on its breach of contract claim and Daugharty does not provide an alternative basis for summary judgment on this claim, the Court denies his request for summary judgment on the Montees' claim of breach of covenant of good faith and fair dealing. For the same reasons as the breach of contract claim, this Court will allow Daugherty to present evidence of a lack of a breach of the covenant of good faith and fair dealing pursuant to I.R.C.P. 56(e)(1), (3).

From a *legal* standpoint, summary judgment must be granted on Montees' claim that Daugherty breached the covenant of good faith and fair dealing. As the Idaho Supreme Court held in *Idaho First Nat. Bk. V. Bliss Valley Foods*, 121 Idaho 266, 824 P.2d 841 (1991), "A violation of the implied covenant is a breach of the 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 good faith covenant." *Idaho First Nat. Bk.,* 121 Idaho at 289, 824 P.2d at 864.

3. Professional Negligence Claim.

Daugharty makes three arguments with regard to the Montees' professional negligence claim. First, he argues that the Montees do not have a right to enforce a claim of professional negligence related to Daugharty's representation of the Montees in *Wolford v. Montee* because the Montees are not the real party in interest. Def.'s Paul W. Daugharty and Paul Daugharty, P.A.'s Mem. Supp. Mot. Summ. J. 8–9. Because this argument raises the issue of standing, the Court addressed it at the outset in Part III(D) above. Second, Daugharty contends that the Montees are judicially estopped from claiming that Daugharty was negligent by advising them to file for bankruptcy because that claim is a pre-petition claim. *Id.* at 9–10. Third, with regard to the Montees claim that Daugharty was negligent by advising the Montees that they could form North Pacific, LLC, Daugharty argues that he was not the proximate cause of damage to the Montees. *Id.* at 10–12.

i. The Montees are judicially estopped from pursuing their claim that Daugharty was negligent by advising them to file for bankruptcy because the Montees have a duty to disclose that claim as an asset in their bankruptcy case and the undisputed evidence demonstrates that they have not done so.

Daugharty argues that "[t]he claim that Daugharty was negligent by advising the Montees to file for bankruptcy is a pre-petition claim that is not listed as an asset of the estate in the debtor's most recent schedules." Defs. Paul W. Daugahrty and Paul Daugharty, P.A.'s Mem. Supp. Mot. Summ. J. 9–10. He contends that "[u]nder the doctrine of judicial estoppel, [the Montees are] barred from asserting the professional negligence claim against Daugharty." *Id.* at 10.

To begin, the Court notes that Daugharty only applies his judicial estoppel argument to the Montees' claim that Daugharty was negligent by advising them to file for bankruptcy. Therefore, the Court only considers the applicability of judicial estoppel

to that claim. The doctrine of judicial estoppel applies to bankruptcy proceedings. *McCallister*, 154 Idaho at 895, 303 P.3d at 582; *see* 11 U.S.C. §§ 521(a), 541(a). "Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *McCallister*, 154 Idaho at 894, 303 P.3d at 581.

> Judicial estoppel takes into account . . . what the [estopped] party knew, or should have known, at the time the original position was adopted. Thus, the knowledge that the party possesses, or should have possessed, at the time the statement is made is determinative as to whether that person is 'playing fast and loose' with the court. Judicial estoppel, however, should only be applied when the party maintaining the inconsistent position either did have, or was chargeable with, full knowledge of the attendant facts prior to adopting the initial position. Bankruptcy rules require disclosing all existing and potential assets. This duty continues during the pendency of the bankruptcy. Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset. It is the knowledge that a party has or is chargeable as having that is considered, not the intent of the party.

Id. at 895, 303 P.3d at 582 (citations omitted) (internal quotation marks omitted).

In this case, the Montees allege Daugharty negligently advised them to file for bankruptcy. The Montees filed a Chapter 11 bankruptcy case on April 21, 2015, which was later converted to a Chapter 7 bankruptcy case. Judicial Notice Req. 000099–126. It follows that Daugharty's allegedly negligent advice must have occurred before April 21, 2015. Therefore, the Montees' claim that Daugharty negligently advised them to file for bankruptcy is a pre-petition claim they were required to disclose. The Montees did not disclose this claim in their Amended Schedule B, filed August 21, 2015. *Id.* at 000118. Moreover, as noted above, the Montees have a continuing duty during the pendency of their bankruptcy to amend their schedules to disclose all potential assets. The only evidence before the Court is the evidence submitted by Daugharty. Based on that evidence, the Court concludes that the Montees have not made the requisite

disclosures in their bankruptcy case. As such, based on the undisputed facts, the Montees claim that Daugharty negligently advised them to file for bankruptcy is an undisclosed prepetition claim. As a result, the Montees are estopped from asserting that claim against Daugharty in this case.

ii. The undisputed facts demonstrate that Daugharty did not advise the Montees that they could form North Pacific, LLC, thereby ignoring the Court's injunction in Wolford v. Montee*.*

As for the Montees' claim that Daugharty was negligent by advising them that they could form North Pacific, LLC, Daugharty argues that the undisputed facts demonstrate that he was not the proximate cause of damage to the Montees. Defs. Paul W. Daugharty and Paul Daugharty, P.A.'s Mem. Supp. Mot. Summ. J. 10–12. Daugharty points out that according to the Montees, he was not the only attorney to allegedly provide the Montees with bankruptcy advice. *Id.* at 11. More importantly, Daugharty explains that he is not a bankruptcy lawyer and he did not advise the Montees that the fresh start provisions of the bankruptcy code allowed them to ignore the Court's order in *Wolford v. Montee*. *Id.*

A claim for professional negligence requires the plaintiff to show: (1) the existence of an attorney-client relationship, (2) the existence of a duty on the part of the lawyer, (3) the breach of the duty or the standard of care by the lawyer, and (4) that the failure to perform the duty was a proximate cause of the damages suffered by the client. *Estate of Becker v. Callahan*, 140 Idaho 522, 96 P.3d 623 (2004) (citing *McColm–Traska v. Baker*, 139 Idaho 948, 951, 88 P.3d 767, 770 (2004); *Jordan v. Beeks*, 135 Idaho 586, 590, 21 P.3d 908, 912 (2001); *Marias v. Marano*, 120 Idaho 11, 13, 813 P.2d 350, 352 (1991); *Johnson v. Jones*, 103 Idaho 702, 652 P.2d 650 (1982)). Here, Daugharty states that he did not advise the Montees that the "bankruptcy code

trumped the state court injunction order or that it could be ignored. That advice came from bankruptcy counsel. Mr. Montee instructed me to form North Pacific LLC on his behalf and I did." Daugharty Decl. 2. Daugharty's declaration makes clear that it was the Montees' bankruptcy counsel who told the Montees that the bankruptcy code allowed them to create North Pacific, LLC despite the Court's injunction. Based on that advice, the Montees went to Daugharty to file the paperwork necessary to create North Pacific, LLC. So, Daugharty helped them create North Pacific, LLC, but he never told the Montees that the bankruptcy code allowed them to do that despite the Court order. *Id.* Because Daugharty denies advising the Montees that they could form North Pacific, LLC in violation of an injunction, the Montees are required to come forward with evidence demonstrating that Daugharty did advise them as they allege. The Montees have not done so. As such, the undisputed facts demonstrate that Daugharty did not breach a duty or standard of care related to the formation of North Pacific, LLC, nor is he the proximate cause of any damages suffered by the Montees. Therefore, Daugharty is entitled to summary judgment on the Montees' professional negligence claim to the extent that the claim is based on Daugharty advising the Montees to form North Pacific, LLC in violation of an injunction.

4. The Montees' claim of breach of fiduciary duty as it relates to Daugharty's representation of the Montees in *Wolford v. Montee* is barred by Idaho Code § 5-219's two year statute of limitations.

Daugharty seeks summary judgment of the Montees' claim for breach of fiduciary duty on the ground that the claim is barred by the applicable statute of limitation. Defs. Paul W. Daugharty and Paul Daugharty, P.A.'s Mem. Supp. Mot. Summ. J. 12–13. Daugharty argues that Idaho Code § 5-219(4) applies to the Montees' claim for breach of fiduciary duty, and therefore, the Montees are required to bring their claim within two years of the act or omission complained of. *Id.* at 12. He

adds that "[t]he Idaho Supreme Court has interpreted [Idaho Code § 5-219(4)] to require 'some damage' before the cause of action . . . accrues . . . ." *Id.* In turn, Daugharty explains that the Montees' cause of action for breach of fiduciary duty began to accrue on September 26, 2014, when a judgment in *Wolford v. Montee* was entered against the Montees, because they suffered some damage on that date. *Id.* at 13. He contends that "[t]he action must have been commenced within two years of [September 26, 2014,]" it was not, and, as a result, it is barred by the statute of limitations. *Id.*

First, the Court agrees with Daugharty's argument that the Montees' claim for breach of fiduciary duty is subject to Idaho Code § 5-219's two-year statute of limitation.[17] Idaho Code § 5-219(4) provides that an action to recover damages for professional malpractice must be commenced within two years after the cause of action has accrued. I.C. § 5-219(4); *Lapham v. Stewart*, 137 Idaho 582, 585, 51 P.3d 396, 399 (2002). Professional malpractice is defined as "wrongful acts or omissions in the performance of professional services by any person . . . . licensed to perform such services under the law of the state of Idaho." I.C. § 5-219(4). Further, "[t]he label attached to a cause of action will not necessarily take it out of the professional malpractice statute of limitations." *Greenfield v. Smith*, 162 Idaho 246, __, 395 P.3d 1279, 1284 (2017) (citing *Bishop v. Owens*, 152 Idaho 616, 621, 272 P.3d 1247, 1252 (2012)).

In *Lapham v. Stewart*, 137 Idaho 582, 51 P.3d 396 (2002), the Idaho Supreme Court concluded that Idaho Code § 5-219's two-year statute of limitation applied to the plaintiff's proposed breach of fiduciary duty claim. *Id.* at 589, 51 P.3d at 403. It explained that the plaintiff's proposed claim against the attorney was premised on the

[17] As discussed below, this conclusion only applies to the Montees' breach of fiduciary duty claim to the extent that the claim is premised on Daugharty's representation of the

attorney's unauthorized disbursement of loan funds and the attorney allegedly disbursed those loan funds without the plaintiff's authorization in the course of providing professional legal services to the plaintiff. Therefore, because the alleged wrongful conduct giving rise to the breach of fiduciary duty claim occurred in the course of the attorney performing professional services, the Idaho Supreme Court concluded that Idaho Code § 5-219 applied to the plaintiff's proposed breach of fiduciary duty claim.

Here, the wrongful acts or omissions complained of in the Montees' First Amended Complaint are Daugharty's representation of the Montees in *Wolford v. Montee*, Daugharty's alleged recommendation that the Montees file a bankruptcy case, and Daugharty's alleged advice regarding the formation of North Pacific, LLC. First. Am. Compl. 3–5, 9, ¶¶ 7–23, 46–50. In his Memorandum, Daugharty only argues that Idaho Code § 5-219(4) applies to and bars the Montees' breach of fiduciary duty claim to the extent that the claim is based on Daugharty's representation of the Montees in *Wolford v. Montee*. Notably, he does not address whether the statute applies to and is a bar to the other two wrongful acts of or omissions complained of. Therefore, the Court only considers whether Idaho Code § 5-219(4) applies to the Montees' breach of fiduciary duty claim as it relates to Daugharty's representation of the Montees in *Wolford v. Montee*.

With that in mind, the Court concludes that Idaho Code § 5-219(4) applies to the Montees' breach of fiduciary duty claim to the extent that the claim is based on Daugharty's representation of the Montees in *Wolford v. Montee*. There is no dispute that Daugharty is an attorney and that the Montees retained Daugharty to represent them in *Wolford v. Montee*. Daugharty Decl. 1–2. Further, the alleged wrongful conduct giving rise to the Montees' breach of fiduciary duty claim occurred in the course

of Daugharty's representation of the Montees in *Wolford v. Montee*. First Am. Compl. 3–4, 9, ¶¶ 7–15, 46–50. As a result, like in *Lapham*, Idaho Code § 5-219(4)'s two-year statute of limitation applies to the Montees' claim of breach of fiduciary duty.

Second, the Court also agrees with Daugharty's argument that the Montees' claim that Daugharty breached a fiduciary duty in the course of his representation of the Montees in *Wolford v. Montee* is barred by Idaho Code § 5-219's two-year statute of limitation. To determine whether the Montees' breach of fiduciary duty claim is barred, the Court must determine when the cause of action accrued. A "cause of action for professional malpractice accrues 'as of the time of the occurrence, act or omission complained of,' . . . although there must be some damage for the cause of action to accrue." *Lapham*, 137 Idaho at 586, 51 P.3d at 400. "The basis of the 'some damage' requirement is that in order to have a cause of action to recover damages, the plaintiff must prove that he or she suffered some damage, or at least is entitled to recover nominal damages." *Id.* (citations omitted)

In this case, the undisputed facts demonstrate that a judgment in *Wolford v. Montee* was entered against the Montees on September 26, 2014. Judicial Notice Req. 000054–56. While the allegedly wrongful acts or omissions complained of occurred prior to the judgment, the Montees did not suffer 'some damage' until the judgment was entered. That is because when the judgment was entered, Daugharty's allegedly wrongful acts or omissions resulted in a court decision adverse to the Montees. *See City of McCall v. Buxton*, 146 Idaho 656, 661, 201 P.3d 629, 634 (2009) (explaining that objective proof of some damage may occur when there is a court decision adverse to the client because of the attorney's negligence). In turn, because the Montees suffered some damage on September 26, 2014, Idaho Code § 5-219 required them to file their

Complaint no later than September 26, 2016. The Montees did not do so. They filed their Complaint on June 16, 2017, and their First Amended Complaint on October 6, 2017. Therefore, the Montees' claim of breach of fiduciary duty as it relates to Daugharty's representation of the Montees in *Wolford v. Montee* is untimely and barred by Idaho Code § 5-219's two year statute of limitations.

5. The Montees' fraudulent concealment claim was not pled with particularity as required by Rule 9(b).

Daugharty seeks summary judgment of the Montees' fraudulent concealment claim. In doing so, Daugharty appears to make two arguments. First, he seems to argue that the Montees' fraudulent concealment claim must be pled with particularity and that the Montees failed to do so. Defs. Paul W. Daugharty and Paul Daugharty, P.A.'s Mem. Supp. Mot. Summ. J. 13–14. Second, Daugharty seems to argue that the fraudulent concealment exception does not apply to the Montees' professional malpractice claim(s) against Daugharty because the Montees "knew of the adverse outcome at the trial court at the time the judgments were entered and execution, which followed immediately thereafter, the fact of damage, as set out in Idaho Code § 5-219(4) was known to them." *Id.* at 14.

To begin, the Court is not sure whether the Montees, in their First Amended Complaint, are asserting a fraud claim against Daugharty or asserting that their legal malpractice claim(s) qualifies for Idaho Code § 5-219(4)'s fraudulent concealment exception. The allegations in the First Amended Complaint include language common to both. This lack of clarity appears to have impacted Daugharty's argument in support of his Motion for Summary Judgment. That is, Daugharty appears to address both possibilities—the possibility that the Montees are alleging a fraud claim and the possibility that the Montees are alleging that the legal malpractice claim(s) qualifies for

the fraudulent concealment exception—but he does not clearly articulate an argument in support of summary judgment as to either possibility.

Nevertheless, to the extent that the Montees' fraudulent concealment claim constitutes a fraud claim, the Court concludes that the Montees' have not pled a fraud claim with the requisite particularity. Similarly, to the extent that Montees' fraudulent concealment claim reflects the Montees' attempt to invoke the fraudulent concealment exception to the accrual rule under Idaho Code § 5-219(4), the Court concludes that the Montees have not sufficiently alleged fraudulent concealment to warrant application of the exception.[18] Idaho Rule of Civil Procedure 9 requires fraud claims to be pled with particularity. I.R.C.P. 9(b). A prima facie case of fraud consists of nine elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; (9) his consequent and proximate

[18] Idaho Code § 5-219 provides, in part:

> when the fact of damage has, for the purpose of escaping responsibility therefor, been **fraudulently and knowingly concealed** from the injured party by an alleged wrongdoer standing at the time of the wrongful act, neglect or breach in a professional or commercial relationship with the injured party, the same shall be deemed to accrue when the injured party knows or in the exercise of reasonable care should have been put on inquiry regarding the condition or matter complained of; but in all other actions, whether arising from professional malpractice or otherwise, 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 or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer, and, provided further, that an action within the foregoing foreign object or **fraudulent concealment exceptions** must be commenced within one (1) year following the date of accrual as aforesaid or two (2) years following the occurrence, act or omission complained of, whichever is later.

I.C. § 5-219(4) (emphasis added).

injury. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 89, 996 P.2d 303, 308 (2000).

The Montees' fraudulent concealment claim consists of the following allegations:

> 39. The Plaintiff repeats and realleges each of the allegations set forth in all preceding paragraphs.
>
> 40. The Plaintiff has a cause of action against the Defendant for fraudulent concealment.
>
> 41. The Defendant intentionally concealed his negligence and legal malpractice from the Plaintiffs.
>
> 42. At the time the Defendant made the representations to the Plaintiffs, he knew that the statements were false.
>
> 43. The statements made by the Defendant were material, and intended to dictate and control the actions of the Plaintiffs.
>
> 44. The Plaintiffs relied on the statements of the Defendant and had a right to rely on the representations.
>
> 45. As a direct, proximate and foreseeable result of the Defendant's knowing and fraudulent concealment and intentional misrepresentations of fact, the Plaintiffs, in detrimental reliance thereon and ignorance of the falsity of Defendant's representations, had been damaged in excess of $3,000,000.00 and in an amount to be proven at trial.

First. Am. Compl. 8, ¶¶ 39–45. In asserting a claim of fraudulent concealment, the Montees appear to have simply recited the elements of a prima facie fraud claim. As a result, they do not state with particularity the alleged facts supporting their fraud claim. For example, the first element of a fraud claim is a representation. The Montees assert that Daugharty made a representation to them, but they do not state what representation(s) he made.[19] Therefore, the first element of the Montees' fraud claim

[19] In the First Amended Complaint, the Montees do not point to any statements Daugharty made to them while representing them in *Wolford v. Montee*. They do state that Daugharty advised them to file for bankruptcy and advised them that they could form North Pacific, LLC. To the extent that these are the representations that the Montees' are referring to in their fraudulent concealment claim, Daugharty has stated that he did not advise the Montees to file for bankruptcy and he did not advise the Montees that they could form North Pacific, LLC

lacks the requisite particularity. Each subsequent allegation is deficient for the same reason. For the same reasons, the Montees have not sufficiently pled fraudulent concealment.

6. Daugharty is entitled to summary judgment on the Montees' claim of intentional infliction of emotional distress, which the Montees refer to as a claim for negligent infliction of emotional distress, because his conduct was not atrocious or beyond all possible bounds of decency.

Daugharty requests summary judgment of the Montees' claim of negligent infliction of emotional distress. First, Daugharty argues that while the Montees' title their sixth claim negligent infliction of emotional distress, they have in fact alleged an intentional infliction of emotional distress claim against Daugharty. Defs. Paul W. Daugharty and Paul Daugharty, P.A.'s Mem. Supp. Mot. Summ. J. 14–15. Second, Daugharty asserts that a claim for intentional infliction of emotional distress requires the Montees to demonstrate that Daugharty's conduct was atrocious or beyond all possible bounds of decency. *Id.* at 15–16. Daugharty argues that the Montees have failed to make this showing. *Id.* at 16.

The Court agrees with Daugharty. While the Montees refer to their claim as a claim for negligent infliction of emotional distress,[20] the allegations in their First Amended Complaint reflect the elements of a claim for intentional infliction of emotional distress. To establish a claim of intentional infliction of emotional distress, the plaintiff

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in violation of the Court's injunction. Daugharty Decl. 1–2. Given this, Daugharty has presented evidence that these two allegations are untrue. Therefore, the burden shifts to the Montees to demonstrate that there is a genuine dispute of material fact related to these allegations such that a trial is necessary. The Montees have not presented any evidence. Therefore, to the extent that the Montees have alleged the first element of a fraud claim with respect to these two allegations, the undisputed facts demonstrate that the first element is unsupported by evidence.

[20] The elements of a negligent infliction of emotional distress claim are: "(1) a legally recognized duty; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the breach; and (4) actual loss or damage." *Wright v. Ada Cty.*, 160 Idaho 491,

must prove four elements: "(1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe." *McKinley v. Guar. Nat. Ins. Co.*, 144 Idaho 247, 253, 159 P.3d 884, 891 (2007) (citing *Estate of Becker v. Callahan*, 140 Idaho 522, 527, 96 P.3d 623, 628 (2004)). Even if "a plaintiff . . . suffered extreme emotional distress[,] . . . no damages are awarded in the absence of extreme and outrageous conduct by a defendant." *Estate of Becker*, 140 Idaho at 527, 96 P.3d at 628 (quoting *Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003)). Similarly, "[e]ven if a defendant's conduct is unjustifiable, it does not necessarily rise to the level of 'atrocious' and 'beyond all possible bounds of decency' that would cause an average member of the community to believe it was 'outrageous.'" *Id.* (quoting *Ford v. Revlon, Inc.*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987)).

In addition, when a plaintiff alleges a claim of intentional infliction of emotional distress,

> [t]he district court acts as a gatekeeper . . . , weeding out weak causes of action. *See Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 180, 75 P.3d 733, 741 (2003) ("It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery," quoting Restatement (Second) of Torts § 46, cmt. h (1965)). If reasonable minds could differ on whether the defendant's conduct was extreme or outrageous, then the [intentional infliction of emotional distress] claim should proceed to a jury. *Id.* The district court may properly grant summary judgment however "when the facts allege conduct of the defendant that could not reasonably be regarded as so extreme and outrageous as to permit recovery for intentional or reckless infliction of emotional distress." *Id.*

Id.

501, 376 P.3d 58, 68 (2016) (citation omitted). "Additionally, the plaintiff must demonstrate physical manifestation of the alleged emotional injury." *Id.*

Here, the Montees' intentional infliction of emotional distress claim is based on Daugharty's representation of them in *Wolford v. Montee*, 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. In making these allegations, the Montees have not identified any conduct by Daugharty that could reasonably be regarded as so extreme and outrageous as to permit recovery for intentional or reckless infliction of emotional distress. Even assuming that the Montees alleged facts are true, the allegations at best suggest negligent, and not intentional or reckless conduct. Moreover, to the extent that Daugharty allegedly advised the Montees to file for bankruptcy and form North Pacific, LLC, Daugharty has specifically denied advising the Montees in this regard. Daugharty Decl. 1–2. Given Daugharty's evidence, the burden shifts to the Montees to present evidence demonstrating that there is a genuine dispute of material fact as to whether Daugharty advised the Montees to file for bankruptcy and advised the Montees that they could form North Pacific, LLC. The Montees have not presented the Court with any admissible evidence related to these two allegations. As such, even if the Montees adequately alleged an intentional infliction emotional distress claim, the undisputed facts demonstrate that Daugharty did not advise the Montees in the way that the Montees allege.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court first finds that defendants Daugharty's Motion for Summary Judgment is not subject to the automatic bankruptcy stay. Second, the Court grants defendants Daugharty's written and oral request for judicial notice of certain documents. Third, the Court denies the plaintiffs Montees' I.R.C.P. 56(d) Motion. Fourth, the Court finds that the bankruptcy estate abandoned its interests

in the Montees' claims against Daugharty and that, as a result, the Montees are the real party in interest with standing to pursue their claims against Daugharty. Fifth, the 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 HEREBY ORDERED that the defendants Daugharty's Motion for Summary Judgment is not subject to the automatic bankruptcy stay.

IT IS FURTHER ORDERED that the defendants Daugharty's written and oral request for judicial notice of certain documents is GRANTED.

IT IS FURTHER ORDERED that the plaintiffs Montees' I.R.C.P. 56(d) Motion is DENIED.

IT IS FURTHER ORDERED that this Court finds that the bankruptcy estate abandoned its interests in the Montees' claims against Daugharty and that, as a result,

the Montees are the real party in interest with standing to pursue their claims against Daugharty.

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.

Entered this 31st day of January, 2018.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 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	**Lawyer**	**Fax #**
Shawn and Heather Montee P. O. Box 2028 Coeur d'Alene, ID 83816	Michael E. Ramsden/Alex Semanko	208 664-5884

_____
Jeanne Clausen, Deputy Clerk