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

MARTY D. FRANTZ, et ux, et al,)
)
Plaintiffs,)
)
vs.)
)
WITHERSPOON, KELLEY, DAVENPORT & TOOL, P.S..)
)
Defendant.)

Case No. **CV 2008 2630**

MEMORANDUM DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

Plaintiff Marty Frantz (Frantz) was represented by the defendant law firm Witherspoon, Kelley, Davenport & Tool, P.S., (Witherspoon) in the Nez Perce County, Idaho civil case number CV 2005 1476, entitled *Lewiston Vineyard, LLC v. Marty D. Frantz, et al*. In that case, Witherspoon defended Frantz and brought a counterclaim on Frantz' behalf for fraud against the plaintiff in that case, Lewiston Vineyard, LLC. Frantz bought some land in Lewiston, Idaho, and later refused to pay a portion of the property purchase price when the promissory note came due. That real estate transaction closed on August 22, 2000, for $531,702.00. That price amounted to $4.25 per square foot for 2.71 acres. A portion of the purchase price was paid by Frantz and three promissory notes secured the remaining balance. When Frantz later felt he had paid too much for the property, he refused to pay the promissory notes when they came due. The property seller, Steed, then sued Frantz on the note and Frantz hired Witherspoon to represent him.

In June 1999, more than a year before that real estate transaction closed, Frantz had entered into an exclusive buyer representation agreement with Shelley Bennett (Bennett), a realtor in Moscow, Idaho. Bennett was hired by Frantz to find property suitable for an assisted living facility. After being unable to find property in Frantz' price range in Moscow, Bennett began to look in Lewiston, Idaho.

Bennett and Steed knew one another and Bennett learned that Steed owned property in Lewiston that might be suitable. At the time, Steed had the property at issue listed with Lewiston realtor Ray White until January 2000. In late 1999, Steed informed Bennett that the listing with White was about to expire, and after that listing expired, Steed would list his property with Bennett. In November 1999, Bennett viewed the property with Frantz. On April 18, 2000, Frantz and his partners entered into a written agreement with Steed to purchase the property for $531,702.00. That transaction closed on August 22, 2000.

In 2003, while obtaining financing for his upcoming promissory note, Frantz became concerned that he had purchased the property for a greater price than its value and sought to negotiate a reduction in the remaining amount due. When the amount owed on the promissory note was not paid on July 5, 2005, Steed filed suit against all makers for failure to pay the promissory note. Two months before that lawsuit was filed by Steed, Frantz had sought the advice of Witherspoon in May of 2005.

In that Nez Perce County lawsuit brought by Steed, on May 29, 2007, Second District Court Judge Jeff Brudie granted summary judgment in favor of Steed against Frantz. Frantz appealed to the Idaho Supreme Court. At the time of summary judgment, Frantz was now represented by different counsel, Owens & Crandall, PPLC, (Frantz' present counsel in the instant lawsuit), because Frantz and Witherspoon had

disagreed over whether to file a claim against Bennett. That Nez Perce county case settled at mediation while the appeal to the Idaho Supreme Court was pending.

On April 13, 2007, through his attorney at the time, Jay Q. Sturgell, Frantz filed a lawsuit against Bennett in Latah County. Latah County Case No. 2007 361; Affidavit of Peter C. Erbland in Support of Defendant's Motion for Summary Judgment, Exhibit B, Exhibit 7 to the deposition of Marty Frantz taken in the instant case. On January 3, 2008, Second District Court Judge John R. Stegner granted Bennett's summary judgment motion as to Frantz' fraud claim against Bennett, due to the applicable statute of limitations and the fact that Frantz knew or should have known of the fraud on August 7, 2003. Affidavit of Peter C. Erbland in Support of Defendant's Motion for Summary Judgment, Exhibit B, Exhibit 6 to the deposition of Marty Frantz taken in the instant case. As of January 3, 2008, Frantz was represented in the Latah County lawsuit by his present counsel, Owens & Crandall. No appeal was taken from Judge Stegner's granting of summary judgment in favor of Bennett, against Frantz. Defendant's Statement of Undisputed Material Facts, p. 10. Frantz then stipulated to dismissal of the case against Bennett. Judge Stegner's decision did not involve Frantz' negligence claim against Bennett. Affidavit of Peter C. Erbland in Support of Defendant's Motion for Summary Judgment, Exhibit B, Exhibit 6 to the deposition of Marty Frantz taken in the instant case. Frantz then voluntarily dismissed the negligence claim.

On April 2, 2008, Frantz filed this present lawsuit against Witherspoon. On January 21, 2009, Witherspoon filed its motion for summary judgment. On summary judgment Witherspoon argues: it did not commit professional negligence; it did not have a conflict of interest regarding Bennett; and Frantz has not proven negligent or intentional infliction of emotional distress as a matter of law. The parties briefed the

issue, and oral argument on Witherspoon's motion for summary judgment was held on February 17, 2009.

On February 18, 2009, Frantz filed a Motion to Supplement Record on Defendant's Motion for Summary Judgment and a Supplemental Affidavit of Regina M. McCrea in support of that motion. Frantz did not notice this Motion to Supplement Record on Defendant's Motion for Summary Judgment for hearing, and in that motion itself, Frantz' attorneys state they do not request oral argument on that motion. Motion to Supplement Record on Defendant's Motion for Summary Judgment, p. 2. On March 11, 2009, Witherspoon filed an "Objection to Motion to Supplement Record Regarding Summary Judgment." On April 9, 2009, Frantz noticed up the Motion to Supplement Record on Defendant's Motion for Summary Judgment for hearing on April 23, 2009. On April 21, 2009, the parties filed a "Stipulation Re: Plaintiffs' Motion to Supplement the Record on Summary Judgment." Accordingly, this Court will review the material requested by Frantz in his Motion to Supplement Record on Defendant's Motion for Summary Judgment, that material being attached to the Supplemental Affidavit of Regina M. McCrea filed on February 18, 2009. That material is Exhibit S, a copy of the Memorandum in Support of Defendants' Revised Motion for Summary Judgment and the Affidavit of Rudy J. Verschoor in Support; and Exhibit T, a copy of Exhibit 2 to the deposition of Marty Frantz taken September 29, 2008, and continued on October 1, 2008.

Ordinarily, Witherspoon's Motion for Summary Judgment would be deemed under advisement from immediately after the February 17, 2009, oral argument on the motion. However, the filing the next day by Frantz of his Motion to Supplement Record on Defendant's Motion for Summary Judgment kept the matter from being under

advisement until the filing of the stipulation on April 21, 2009, which resolved that issue.

On May 19, 2009, Frantz filed a Second Motion to Supplement Record on Defendant's Motion for Summary Judgment. An "Affidavit of Counsel" (Regina M. McCrea) in support of that motion was also filed that day. That motion has been scheduled for oral argument on August 5, 2009, but as of the date of this writing, no notice of hearing has been received from Frantz. The Court has not reviewed the materials sought to be submitted, but is cognizant from the motion itself that Frantz would like this Court to review the written opinion of its expert, attorney Merlyn Clark, in deciding this summary judgment motion. This Court has determined that because it has been nearly four months since oral argument on summary judgment, defendant's motion for summary judgment must be decided in advance of any determination of Frantz' Second Motion to Supplement Record on Defendant's Motion for Summary Judgment. Additionally, the expert testimony of Merlyn Clark was referenced by counsel for Frantz at oral argument on February 17, 2009, yet it was not until May 19, 2009, that Frantz filed his Second Motion to Supplement Record on Defendant's Motion for Summary Judgment.

II. STANDARD OF REVIEW.

The standard of review on appeal from an order granting summary judgment is the same standard that is used by the District Court in ruling on the summary judgment motion. *Baxter v. Craney,* 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). Idaho Rule of Civil Procedure 56 sets forth that, in considering a motion for summary judgment, summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all

facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

III. ANALYSIS.

A. Claims of the Parties.

Witherspoon argues in its summary judgment motion that: (1) any claim of negligence against Bennett, which Frantz asked Witherspoon to bring, would have been barred by the applicable statute of limitations; (2) any breach of Witherspoon's duty of care based on a contractual promise would also be barred by the statute of limitations; (3) Witherspoon correctly determined that any claim of fraud against Bennett, or claim of civil conspiracy to commit fraud by Bennett and Steed, was inappropriate and could not properly be brought; and (4) the doctrine of estoppel bars Frantz' current claim against Witherspoon regarding the claim of fraud or civil conspiracy to commit fraud. Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 5-15. Witherspoon goes on to argue that, following investigation, it properly determined that no conflict of interest existed because it never represented Bennett and its representation of Frantz was not materially limited by its representation of her father or Bennett Lumber Products, Inc. *Id.,* pp. 15-18. Finally, Witherspoon argues that Frantz

does not meet the "outrageous" element for a claim of intentional infliction of emotional distress, has not provided any evidence of physical injury to support a negligent infliction of emotional distress claim, and that Frantz owes $34,564.45 in attorney fees and costs related to the underlying *Steed v. Frantz* litigation. *Id.,* pp. 18-21.

Frantz replies that questions of material fact remain regarding when his causes of action accrued. Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 7-9. Frantz states that he could have proven the civil conspiracy to commit fraud allegation and Witherspoon was obligated to make both parties to the conspiracy parties to the action, necessitating a claim against Bennett. *Id.,* pp. 9-12. Frantz argues that Witherspoon's estoppel argument is improper because arguments of counsel cannot be used against a client in a later malpractice action. *Id.,* p. 14. Regarding Witherspoon's fiduciary obligations, Frantz argues that the alleged conflict of interest was never disclosed by Witherspoon or waived by him and circumstantial evidence exists to show that Witherspoon's decisions were impacted by Bennett being the daughter of a long-standing client. *Id.,* pp. 15-18. Finally, Frantz argues that his lay testimony is sufficient to support an allegation of negligent infliction of emotional distress and that any fees and costs owed Witherspoon should be offset by the damages caused by Witherspoon's malpractice. *Id.,* pp. 18-19.

B. Professional Negligence.

As cited by Witherspoon, *J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford,* 146 Idaho 311, 193 P.3d 858 (2008), sets forth the requirements to establish a claim for professional negligence. The plaintiff must show: (1) the existence of an attorney-client relationship; (2) the existence of a duty owed by the lawyer; (3) the failure to perform that duty; and (4) that the failure to perform the duty was a proximate cause of the

injuries suffered by the client. 146 Idaho 311, ___, 193 P.3d 858, 864. (citations omitted). In *Mainor v. Nault,* 120 Nev. 750, 774, 101 P.3d 308, 324, (Nev. 2004), the Nevada Supreme Court held:

> The required elements of a legal malpractice claim are: (1) an attorney-client relationship; (2) a duty owed to the client by the attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake; (3) a breach of that duty; (4) the breach being the proximate cause of the client's damages; and (5) actual loss or damage resulting from the negligence.

120 Nev. 750, 774, 101 P.3d 308, 324 (citing in footnote 61: *Day v. Zubel,* 112 Nev. 972, 976, 922 P.2d 536, 538 (1996)).

In the present case, Witherspoon does not argue the attorney-client relationship did not exist, or that no duty was owed to Frantz. Rather, Witherspoon's argument appears to be that the duty Witherspoon owed to Frantz was not breached as Frantz' attorneys researched possible causes of action against Bennett and determined that *any* tort claim against Bennett would have expired under the applicable statute of limitations on August 22, 2004, well before Frantz engaged Witherspoon in May 2005. Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 7-8. At oral argument, Witherspoon also argued that Frantz has no proof that Witherspoon's attorney Joel Hazel caused any damages to Frantz.

1. No Breach of any Duty Resulted if the Statute of Limitation had Expired.

The parties disagree as to when Frantz' fraud cause of action accrued. Witherspoon states the date of the real estate transaction closing, August 22, 2000, is the date any damages to Frantz accrued. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 7. Frantz argues the limitations period begins to run at the earliest time he had any objective proof of damages related to Bennett's actions

and “[p]rior to that date, there was no conceivable injury to Plaintiff’s relating to their purchase of the subject real property.” Memorandum in Opposition to Defendant’s Motion for Summary Judgment, p. 9. In Idaho, “[i]t is axiomatic that in order to recover under a theory of negligence, the plaintiff must prove actual damage. As a general rule ‘the statute of limitations does not begin to run against a negligence action until some damage has occurred.’” *Stephens v. Stearns,* 106 Idaho 249, 254, 678 P.2d 41, 46 (1984). Thus, while Witherspoon is likely correct in arguing that the catch-all statute of limitations applies, that statute, Idaho Code § 5-224 states an action for relief must be commenced within four years “after the cause of action shall have accrued.” *See Jones v. Runft, Leroy, Coffin, & Matthews, Chtd.,*125 Idaho 607, 613, 873 P.2d 861, 867 (1994) (holding ”[b]ecause there is no statute of limitations specifically governing negligence actions that do not involve personal injury or malpractice, we apply the four-year statute of limitations found in I.C. § 5-224”). Similarly, where a duty of care arises irrespective of a contract and the defendant is negligent, the action is one of tort. *Taylor v. Herbold,* 94 Idaho 133, 138, 483 P.2d 664, 669 (1971) (citing 52 Am.Jur. 379, Torts, § 26); *Sumpter v. Holland Realty, Inc.,* 140 Idaho 349, 353, 93 P.3d 680, 684 (2004). In *Sumpter,* the Idaho Supreme Court stated, “if a cause of action for breach of a duty based on a contractual promise could also be maintained without the contract by virtue of a statutory or common law duty, then the action is founded upon tort.” 140 Idaho 349, 354, 93 P.3d 680, 685. It follows that where Bennett had a statutory duty enumerated in Idaho Code § 54-2087 (statutory duties of real estate agents towards clients) and Frantz was not seeking to sue Bennett on a contract, the catch-all statute of limitation in Idaho Code § 5-224 would apply once the cause of action accrued.

Witherspoon, as argued by Frantz, has cited no authority for its contention that

the cause of action here accrued on the date of the real estate closing. Witherspoon only argues that Bennett's negligence must have taken place during the time Bennett represented Frantz. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 7. Because Witherspoon did not fully and properly address accrual of the action and did not take into account the date on which Frantz had objective proof of some damage (the date he began to seek refinancing in 2003), Witherspoon is not entitled to judgment as a matter of law on this issue. Taking the facts in the light most favorable to Frantz, whether Bennett's actions should have given rise to Witherspoon filing an action on behalf of Frantz against Shelley Bennett, whether the statute of limitations had in fact expired, and if the statute of limitations had not expired, whether Witherspoon's failure to do so breached its duty of care and damaged Frantz, are all factual determinations which remain in question.

Mainor v. Nault, 120 Nev. 750, 767-68, 101 P.3d 308, 320, (Nev. 2004), cited by Frantz (Memorandum in Opposition, p. 15) states: "We have previously recognized that where the breach of the standard of care is not so obvious that negligence can be determined as a matter of law, 'expert evidence is generally required in a legal malpractice case to establish the attorney's breach of care.'" (citing in footnote 35: *Allyn v. McDonald,* 112 Nev. 68, 71, 910 P.2d 263, 266 (1996)). To be clear, this Court is denying Witherspoon's motion for summary judgment on the issue of the running of the statute of limitations being in dispute, and not because Frantz has not come forward with expert evidence as to breach of any duty of care.

2. Fraud or Civil Conspiracy Cause of Action Against Bennett.

A claim of fraud requires the plaintiff to allege nine elements with particularity: (1) a statement or representation of fact, (2) its falsity, (3) its materiality, (4) the speaker's

knowledge of its falsity, (5) the speaker's intent that there be reliance, (6) the hearer's ignorance of the falsity of the statement, (7) reliance by the hearer, (8) justifiable reliance, and (9) resultant injury. *Lettunich v. Key Bank Nat. Association,* 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005). The essence of a civil conspiracy cause of action is the civil wrong committed as the objective of the conspiracy, not the conspiracy itself. *McPheters v. Maile,* 138 Idaho 391, 395, 64 P.3d 317, 321 (2003). The agreement to defraud that is the foundation of a conspiracy charge must be demonstrated by specific evidence. *Mannos v. Moss,* 143 Idaho 927, 935, 155 P.3d 1166, 1174 (2007). And, where a claim of fraud does not exist, no claim of a civil conspiracy to commit fraud can rest upon it. *See McPheters,* 138 Idaho 391, 395, 64 P.3d 317, 321. Thus to demonstrate the acts of Steed and Bennett constituted a civil wrong, Frantz must have not only made a showing of the elements of fraud, but must have also offered specific evidence of Steed and Bennett agreeing or planning to defraud him.

In support of his fraud/civil conspiracy claims, Frantz cites the following: (1) Bennett and Steed's failure to disclose the property had been listed with another realtor for eight years without any offers; (2) the failure to disclose the property's listing price had been $3.00 per square foot not $4.25 per square foot; (3) Bennett and Steed's collusion to let the listing expire and thereby concealing its existence from Frantz; (4) Bennett divulging Frantz' price offers for land in the Moscow market to Steed; (5) Bennett's failing to research Lewiston property values or comparable market sales; (6) Bennett's telling Frantz the property was not for sale and she was attempting to convince Steed to sell; (7) Bennett's assurances that the price was a good one; (8) Steed substantiating the price was fair and in line with market values; (9) Steed

acknowledging the premium price received along with above-market interest on the note; and (10) Bennett and Steed adopting a position of ignorance when property value discrepancies arose. Memorandum in Opposition to Defendants' Motion for Summary Judgment, pp. 11-12. Witherspoon states it was correct in concluding no viable claim of fraud existed because: Frantz consistently stated he had no problem with the price as long as the property appraised for the purchase price, which it had; any statements about the price being a good one was a statement of opinion, not fact; a listing price is not necessarily proof of fair market value; the increase in price was reasonable as the seller was accepting portions in unsecured promissory notes, not cash; and Frantz personally negotiated with Steed and provided documentation that he was willing to pay $4.25 per square foot. Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 9-12.

It should be noted that as a factual matter, Witherspoon has stated that in November 1999, when Frantz and his partners viewed the property, a Ray J. White realtor sign was on the property. *See* Defendant's Statement of Undisputed Material Facts, p. 4. The collusion Frantz alleges between Bennett and Steed to let the listing with White expire, thereby concealing its existence, is also called into question because the property was viewed by Frantz in November 1999 and the listing did not expire until January 2000. Thus, it seems unlikely that Bennett and Steed concealed the existence of this prior listing with Ray J. White. However, that does not keep the issue from being in dispute. This Court must determine whether Witherspoon is entitled to judgment as a matter of law on Frantz' claim that it was professional negligence to not pursue 1) a fraud cause of action against Bennett, and 2) a civil conspiracy claim against Bennett and Steed. The facts as presented by the parties now are in dispute. This Court is not

in a position to make findings and conclusions about Bennett and Steed's actions in 1999, based on the record before this Court. Taking the facts in the light most favorable to Frantz, while it is unlikely that any of the support for Frantz' fraud claim listed above met the requirements of fraud elements, and Witherspoon's conclusion not to pursue a fraud claim against Bennett would have been reasonable, this Court cannot determine as a matter of law that Bennett's actions amounted, or did not amount, to fraud. It is for the trier of fact to evaluate Frantz' possible fraud and conspiracy causes of actions against Bennett and Steed, and to determine whether Witherspoon properly reached the conclusion that the claims were not winnable.

3. Estoppel.

Witherspoon's final argument regarding its alleged professional negligence is that Frantz should be barred from asserting his claims because he never appealed Judge Stegner's decision on the fraud statute of limitations and should be estopped from changing his position on when a claim for fraud against Bennett accrued. Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 13-14. Witherspoon argues that because Judge Stegner's decision that the statute of limitations on a fraud cause of action against Bennett accrued when Frantz knew or should have known of facts constituting fraud, which was August 7, 2003, the statute of limitations ran on August 7, 2006, and Frantz' claim must be barred because this decision was never appealed. *Id.,* p. 13. Witherspoon cites no authority for the proposition that a decision on the statute of limitations must be appealed or the underlying claim is waived as a matter of law. Frantz, meanwhile, argues that he attempted to mitigate Witherspoon's malpractice by instituting suit against Bennett and that Idaho does not require an adverse ruling in an underlying claim before a professional malpractice claim can be

brought. Memorandum in Opposition to Defendant's Motion for Summary Judgment, p, 14 (citing *McColm-Traska v. Baker,* 139 Idaho 948, 953, 88 P.3d 767, 772 (2004). *McColm-Traska* dealt with reversal of a district court's decision to dismiss Traska's claim for professional malpractice as not ripe because the underlying claim, regarding Baker's failure to memorialize an agreement, had not resulted in an adverse ruling. The Idaho Supreme Court held that I.C. § 5-219(4) provides the two-year statute of limitations for professional malpractice and "some damage" must occur before it begins to run. 139 Idaho 948, 953, 88 P.3d 767, 139 (citing *Fairway Dev. Co. v. Petersen, et al.,* 124 Idaho 866, 868, 865 P.2d 957, 959 (1993)). Traska's claim was unsuccessful because she failed to show some damage from the lack of a memorialized agreement. *Id.* Here, Frantz had received an adverse ruling and the reasoning of *McColm-Traska* would likely permit Frantz to bring the instant claim regardless of whether there had been an appeal of Judge Stegner's decision on the statute of limitations. Witherspoon is not entitled to judgment as a matter of law on this issue.

Similarly, Witherspoon cites no authority for its argument that Frantz is estopped from changing his position, as to Bennett and any fraud committed by her to the detriment of Witherspoon, following Bennett's deposition. Witherspoon cites case law which broadly discusses the doctrine of quasi-estoppel in Idaho, but not the specific issue of whether knowledge gained in a deposition would nevertheless prohibit a party from asserting a right inconsistent with a previous position taken. Quasi-estoppel applies where:

> (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from the one he or she had previously derived a benefit or acquiesced in.

C & G Inc. v. Canyon Highway Dist. No. 4, 139 Idaho 140, 145, 75 P.3d 194, 199 (2003).

Witherspoon states that Frantz' argument that the fraud action against Bennett accrued on the date of the February 15, 2006, deposition of Bennett, as opposed to the August 7, 2003, date determined by Judge Stegner would have required an appeal of Judge Stegner's decision. Memorandum in Support of Defendant's Motion for Summary Judgemnt, p 13. Frantz argues that positions taken by counsel on behalf of their clients and arguments by attorneys, including statements in motion practice, cannot form the basis of a quasi-estoppel argument by the opposing party. Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 14-15 (citing *Heinze v. Bauer,* 145 Idaho 232, 237, 178 P.3d 597, 602 (2008)).

Here, it appears that the position taken by Frantz prior to the deposition of Bennett did not garner him an advantage or induce Witherspoon to change its position in any regard. Witherspoon has not set forth how it would be unconscionable to permit Frantz to claim Bennett's fraud accrued on the date of her deposition in light of *McColm-Traska,* 139 Idaho 948, 953, 88 P.3d 767, 772. Witherspoon has not established its entitlement to judgment as a matter of law on this issue.

4. No Proof of any Damages Sustained by Frantz.

At oral argument, counsel for Witherspoon made the argument that there is no proof that Witherspoon caused any damage to Frantz. The argument is that even if Witherspoon had done something different, what proof is there of damages? The argument of lack of damage is made at two levels, at two points of time. **First**. Frantz bought the property in 2000, at the time saying he did not care what the property sold for as long as it appraised high enough (which it did), and then in 2005 he refuses to

pay the note claiming he paid too much. It was only later when Frantz went to expand and sought a loan, that Frantz found out the property would not appraise at the $4.25 per square foot level. However, Frantz still obtained his loan. **Second,** Witherspoon argues that even if Witherspoon refused to file a lawsuit against Bennett, Frantz' second and current lawyers did file a lawsuit, in which Judge Stegner ruled against Frantz and Frantz voluntarily dismissed his negligence claim against Shelley Bennett.

In briefing, Witherspoon touched on this issue, but in the following context: Witherspoon argued that if the price for the property wasn't a concern for Frantz as long as the property appraised appropriately, then Frantz cannot prove materiality, reliance or causation in his fraud claim.

While Frantz may indeed have multiple problems proving damage, this Court is unable to state as a matter of law, at summary judgment, Frantz has no proof of any damage, given that all reasonable inferences must be given to Frantz at this time.

C. Conflict of Interest.

The Idaho Rules of Professional Conduct address conflicts of interest in representing one or more clients where a risk of a lawyer's responsibilities to one would materially limit his responsibilities to another in Rule 1.7.

> (A) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.
>
> (B) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

If representation is not "directly adverse" under IRPC 1.7(A)(1), and is not "materially limited" under IRPC (A)(2), then attorneys Hazel and Ellingsen had no duty to get consent from Frantz. The Idaho Rules of Professional Conduct changed in 2004, such that if Hazel and Ellingsen had a duty to get Frantz' consent, they had to get that consent from Frantz in writing.

This Court must analyze the meaning of "directly adverse" in IRPC 1.7(A)(1), and "materially limited" in IRPC 1.7(A)(2). The "official commentary" to Idaho Rule of Professional Conduct 1.7 gives some meaning to those terms.

1. Directly Adverse.

An illustration under the official commentary for "directly adverse" is given: "…absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in another matter." IRPC 1.7, Commentary 6. That is not the circumstances present here between Frantz, Witherspoon and Shelley Bennett. Witherspoon simply did not represent Shelley Bennett. That commentary continues: "On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients." *Id.* Again, Witherspoon did not represent Shelley Bennett. Even if by some stretch of the imagination the fact that

Witherspoon represented Shelley Bennett's father and the corporation in which she owns a minority interest of non-voting stock could be viewed as adverse to Frantz, those facts would be at most "in regard to a competing economic enterprise in unrelated litigation." That being the case, under Commentary 6, such "does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients." Bennett Lumber and Frank Bennett are not involved in any way with Frantz' lawsuits against Shelley Bennett, against Steed, and against Witherspoon.

Frantz alleges all acts performed by Witherspoon were performed by two attorneys in that firm, Mark Ellingsen and Joel Hazel. Complaint and Demand for Jury Trial, p. 2, ¶ VII. Other lawyers in Witherspoon represent Frank Bennett and Bennett Logging. Idaho Rule of Professional Conduct 5.1(a) requires partners and managers of law firms to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct, and that means they must make reasonable efforts to detect and resolve conflicts of interest. IRPC 5.1, Commentary 1 and 2. Idaho Rule of Professional Conduct 1.10 states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."

This "directly adverse" definition of "concurrent conflict" seems to be focused on the attorney-client privilege and confidential information. See *Paul* below. *Med-Trans Corporation, Inc., v.City of California City,* 156 Cal.App.4th 655, 664, 68 CalRptr.3d 17, 24 (Cal.Ct.App. 5th Dist. 2007). There is no confidential information that the firm of

Witherspoon could have had from its representation of Shelley Bennett's father's logging company, or from its representation of that logging company in which Shelley Bennett owned shares, which Witherspoon could have then shared in its representation of Frantz against Shelley Bennett in her own business as a realtor.

This Court finds that Witherspoon's representation of Frantz in a case involving a transaction with Shelley Bennett is not "directly adverse" to other lawyers in Witherspoon who represent Frank Bennett, Shelley Bennett's father. This Court finds it is not "directly adverse" for Witherspoon to represent Frantz in a case involving a transaction with Shelley Bennett, while other lawyers in Witherspoon represent a corporation in which Shelley Bennett owns non-voting shares. This Court finds Witherspoon's representation of Frantz in litigation against Shelley Bennett in her capacity as a realtor in her own business cannot conceivably be determined to be "directly adverse" to Witherspoon's representation of Frank Bennett and Bennett Logging by other lawyers of the Witherspoon law firm.

2. Materially Limited.

While the Court has just found no concurrent conflict of interest because representation of one client (Frantz in his lawsuit against Shelley Bennett) is not "directly adverse" to another client (Frank Bennett), as found in IRPC 1.7(a)(1), the next inquiry is regarding the words "materially limited" found in IRPC 1.7(a)(2). Idaho Rule of Professional Conduct 1.7(a)(2) states a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more of the clients will be materially limited by the lawyer's responsibilities to another client…"

"Material limitation" is defined in "Commentary 8" as:

> Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or

> carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. * * * The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

There can be no "significant risk" when there are separate lawyers (Hazel and Ellingsen) within the Witherspoon firm representing Frantz on one hand, and other lawyers (Tom Cochran) representing Frank Bennett/Bennett Logging on the other hand. This is coupled with the fact that the only testimony when Hazel told Cochran (the attorney representing Frank Bennett/Bennett Logging) that he might have to sue Shelley Bennett, Cochran told Hazel "do what you have to do." Hazel Affidavit, p. 3, ¶ 8. The uncontroverted "facts" eliminate "significant risk".

The "materially limited" definition of "concurrent conflict" seems to be focused on the divided loyalties concern. See *Paul* below.

Witherspoon states it at no time represented Shelley Bennett personally or individually and that it represented her father and Bennett Lumber Products, Inc. in which Bennett owned only 5.95% of shares, none of which were voting shares. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 16. Witherspoon argues that just because Shelley Bennett owned a small percentage of non-voting shares in a corporation it represented does not mean that it represented Shelley Bennett. *Id.,* p. 17. As noted by Witherspoon:

> A corporation's lawyer, even if it is a closely-held corporation, does not represent the shareholders. A corporation is a legal entity, separate and apart from the persons who are shareholders. Where a lawyer represents a corporation, the client is the corporation, not the corporation's constituents. *McKinney v. McMeans*, 147 F.Supp.2d 898 (W.D.Tenn. 2001); *Terre Du Lac Property Owners' Association, Inc., v. Shrum*, 661 S.W.2d 45 (Mo.App. 1983); *Jesse v. Danforth*, 485 N.W.2d 63 (Wis. 1992).

Memorandum in Support of Defendant's Motion for Summary Judgment, p. 17. Further, Witherspoon argues its representation of Bennett Lumber Products, Inc. did not materially limit its representation of Frantz in violation of IRPC 1.7(a)(2), as evidenced by its having not held back and going after her in the deposition. *Id.,* pp. 17-18. Witherspoon also claims that:

> In his first contact with Mark Ellingsen of Witherspoon, Frantz was told that Ellingsen would have to check with his partners concerning taking the Frantz case because of the relationship between Frank Bennett and Shelley Bennett. Ellingsen advised that he would have to talk to his partners. (Frantz. Dep., pp. 128-129). Ellingsen called Frantz back and advised that there was no conflict. "If we need to sue Shelly Bennett, we can do it." (*Id.* P. 130). When Shelly Bennett's deposition was taken in February of 2006, Witherspoon attorney Joel Hazel did not hold back and went after her. (*Id.* p. 134).

Memorandum in Support of Defendant's Motion for Summary Judgment, p. 18. See also Hazel Affidavit, p. 3, ¶ 8. Joel Hazel of Witherspoon confirmed with his partner, Tom Cochran, who handled Frank Bennett's matters at Witherspoon, that Witherspoon had never represented Shelley Bennett. *Id.* When Hazel told Cochran that he might have to sue Shelley Bennett, Cochran said "do what you have to do." *Id.* Hazel stated that under no circumstances did Witherspoon's representation of Frank Bennett and Bennett Lumber Products, Inc. affect the decisions or judgment regarding potential claims against Shelley Bennett. Reply Memorandum in Support of Defendant's Motion for Summary Judgment, p. 10. See also Hazel Affidavit, p. 3, ¶ 8. Frantz has put forth nothing to contradict any of this.

Frantz recognizes the disclosure of a possible conflict of interest. Frantz argues "Witherspoon had a conflict of interest with respect to its representation that was neither fully disclosed nor waived" (Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 16), but then Frantz immediately thereafter states: "Marty

Frantz was initially advised of a potential conflict of interest because of Witherspoon's longstanding representation of Frank Bennett", citing Exhibit C to Affidavit of McCrea at 12-16; Affidavit of Wolny; Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 17. Although Frantz admits he was "initially advised of a potential conflict of interest because of Witherspoon's longstanding representation of Frank Bennett", he claims he never agreed to waive this conflict and Witherspoon concluded it could continue representing Frantz with the potential conflict having no impact on its decisions. *Id.* However, this is not a situation where waiver is required…there is no conflict.

Frantz cites *Paul v. Smith, Gambrell & Russell,* 599 S.E.2d 206, 208 (Ga.App. 2004), for the proposition that if there is a conflict of interest, it is a jury question as to whether the defendant attorneys could exercise honest, reasonable discretion and the requisite independent judgment under the circumstances. Memorandum in Opposition to Motion for Summary Judgment, p. 16. The pertinent portion of *Paul v. Smith, Gambrell & Russell* reads:

> Since the plaintiffs have created in the record disputed issues as to the existence, absence, or waiver of conflicts of interest between the plaintiffs and the defendants in the underlying case and since the existence of a conflict or conflicts of interest have a real or subconscious effect on the judgment of counsel by creating divided loyalties between present and former clients, then there is created a jury question as to whether or not the defendants could exercise honest, reasonable discretion and the independent judgment necessary for judgmental immunity to be a defense as a matter of law. Divided loyalties from a conflict in interest create both an objective and a subjective state of mind in counsel. Generally, preserving the attorney-client privilege as it pertains to the litigation is a general danger from a conflict, and such is an objective standard, existing in some conflict cases. *Summerlin v. Johnson,* supra at 338, 335 S.E.2d 879; *Piedmont Life Ins. Co. v. Lea,* 140 Ga.App. 400, 402(3), 231 S.E.2d 147 (1976); cf. *Atwood v. Sipple,* 182 Ga.App. 831, 833-834(3), 357 S.E.2d 273 (1987). "But there are many subtle, perhaps unconscious ways that confidential information ... can be used, and indeed must be used by the attorney in his representation of

> [the client] if he is to devote his entire loyalties to [this client's] claim." *Summerlin v. Johnson,* supra at 339(1), 335 S.E.2d 879. Any reluctance, hesitation, or inhibition to represent the current client with zeal against the former client would constitute a subjective state of mind, which is more subtle, because the attorney may not consciously recognize such inhibition in the representation. *Thompson v. State,* 254 Ga. 393, 396-397(2), 330 S.E.2d 348 (1985); *Young v. Champion,* 142 Ga.App. 687, 689-690(1), 236 S.E.2d 783 (1977). "[I]f the interests of another client may impair [the lawyer's] independent professional judgment," then the lawyer is prohibited from representing the client against another client or former client. *Summerlin v. Johnson,* supra at 339, 335 S.E.2d 879. "A mere potential of inadequate representation that is caused by a split of loyalties is a harm that the conflict of interest rules were designed to protect." (Citation, punctuation and emphasis omitted.) Id. Thus, when conflicts of interest are raised and when judgmental immunity is also raised as a defense, a jury question as to judgmental immunity arises, because proof of the existence of a conflict also gives rise to the reasonable inference that such conflict influenced the exercise of discretion, requiring the denial of the motion for summary judgment and allowing the jury to resolve such issues. See generally as to former representation of the opposite party giving rise to a conflict of interest, *Castell v. Kemp,* 254 Ga. 556, 557-558, 331 S.E.2d 528 (1985); *Mitchell v. Mitchell,* 184 Ga.App. 903, 907-908(4), 363 S.E.2d 159 (1987).

267 Ga.App. 107, 111-12, 599 S.E.2d 206, 210. In the present case, Frantz has done nothing to rebut Hazel's testimony in his affidavit that when Hazel informed his partner, Tom Cochran, who handled Frank Bennett's matters at Witherspoon, that he (Hazel) might have to sue Shelley Bennett, Cochran responded: "do what you have to do." Hazel Affidavit, p. 3, ¶ 8. Frantz has done nothing to rebut Hazel's testimony in his affidavit that under no circumstances did Witherspoon's representation of Frank Bennett and Bennett Lumber Products, Inc. affect the decisions or judgment regarding potential claims against Shelley Bennett. *Id.* That being the case, the facts as they now stand in the instant matter are different than those in *Paul v. Smith, Gambrell & Russell. Paul v. Smith, Gambrell & Russell* does not stand for the proposition that all divided loyalties cases go to a jury. The initial portion of *Paul v. Smith, Gambrell & Russell* quoted above reads: "Since the plaintiffs have created in the record disputed issues as to the

existence, absence, or waiver of conflicts of interest between the plaintiffs and the defendants in the underlying case…" The plaintiff in the instant case, Frantz, has not created disputed issues as to the existence of a conflict. The only facts are that there was no conflict.

Although Frantz brings *Paul* to this Court's attention, there is language in *Paul* which would seem on point given Witherspoon's claims that: 1) they told Frantz they would not bring the claim against Shelley Bennett, and they told him why they would not bring that claim, and 2) that this communication occurred when the statute of limitations was less of an issue, and occurred at a time when Frantz could have sought other counsel if he did not like Witherspoon's decision. Affidavit of Peter C. Erbland in Support of Defendant's Motion for Summary Judgment, p. 2, ¶ 2, Exhibit A, Deposition of Marty Frantz, p. 341, Ll. 18-23 ("Q. Do you remember Joel suggesting that you may want to get a second opinion on the – whether or not there was a winnable or decent case against Shelley Bennett? A. Yeah, you know, I think he did mention that.") The Court of Appeals of Georgia in *Paul* held:

> Legal malpractice requires that the client carry the burden of proof that there existed: "(1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage[s] to the plaintiff". (Citations and punctuation omitted.) *Mauldin v. Weinstock,* 201 Ga.App. 514, 518(4), 411 S.E.2d 370 (1991); see also *Allen Decorating v. Oxendine,* 225 Ga.App. 84, 88(2), 483 S.E.2d 298 (1997).
>
> Where professional judgment is involved, "[t]his Court will not hold an attorney liable for malpractice based merely on the attorney's choice of trial tactics or strategy or the good faith exercise of professional judgment." *Allen Decorating v. Oxendine,* supra at 89(2), 483 S.E.2d 298.
>
> > There can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an *honest exercise of professional judgment.* This is a sound rule. Otherwise every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight. If this were permitted, the original

> trial would become a "play within a play" at the malpractice trial.

(Citation and punctuation omitted; emphasis supplied.) *Hudson v. Windholz,* 202 Ga.App. 882, 886(3), 416 S.E.2d 120 (1992). See also *Allen Decorating v. Oxendine,* supra at 89, 483 S.E.2d 298. "[T]he tactical decisions made during the course of litigation require, by their nature, that *the attorney be given a great deal of discretion.*" (Citations omitted; emphasis supplied.) *Berman v. Rubin,* 138 Ga.App. 849, 851, n. 2, 227 S.E.2d 802 (1976). The honest exercise of professional judgment is dependent upon the reasonable exercise of discretion free from outside influence. *Hudson v. Windholz,* supra at 886, 416 S.E.2d 120; *Berman v. Rubin,* supra at 851. This exercise of discretion must be free of any conflict of interest to be truly an independent exercise of discretionary judgment, otherwise it may be neither honest nor untainted by divided loyalties, which presence compromises the exercise of honest judgment. Id.

Paul, 267 Ga.App. 107, 108-09, 599 S.E.2d 206, 208-09. This "judgmental immunity" rule was applied by the trial judge in that case, in granting summary judgment against the plaintiff in a conflict of interest setting. 267 Ga.App. 107, 108, 599 S.E.2d 206, 208. The holding of the Court of Appeals of Georgia is quoted in its entirety, *supra* at page 22. However, in *Paul,* the relationships within that firm were in much more direct conflict. The defendant law firm of Smith, Gambrell & Russell represented the plaintiff Paul and others in a lawsuit that was brought by the plaintiffs' former partner Destito, against all the plaintiffs. 267 Ga.App. 107, 108, 599 S.E.2d 206, 208. Specifically, the Court of Appeals of Georgia found:

> Smith, Gambrell & Russell had represented the plaintiffs for 15 years. Defendants represented both plaintiffs and Destito in various corporate matters leading up to the suit that involved the issues raised in this suit. The defendants represented the plaintiffs in the defense against the suit by Destito; this raised issues of conflict of interest. In fact, counsel for Destito raised the issue of the conflict of interest in the underlying suit and pre-suit activities. In *Paul v. Destito,* supra, a full description of such relationship between Destito and the plaintiffs is set forth.

267 Ga.App. 107, 107-08, 599 S.E.2d 206, 207-08. In the present case, the conflict is so attenuated, it cannot be a conflict. The central concern is still confidentiality.

> A modified version of the substantial relationship test has been applied in situations where the former attorney-client relationship was peripheral or attenuated, rather than direct and personal. (*Faughn v. Perez, supra,* 145 Cal.App.4th at p. 603, 51 Cal.Rptr.3d 692; *Ochoa v. Fordel, Inc.* (2007) 146 Cal.App.4th 898, 907-908, 53 Cal.Rptr.3d 277.) Generally, these situations arise "when an attorney switches law firms and the attorney's new firm becomes involved in litigation against a client of the attorney's former firm." (*Faughn v. Perez, supra,* at p. 603, fn. 7, 51 Cal.Rptr.3d 692.) Under the modified substantial relationship test, the presumption will not be applied in the absence of an adequate showing that "the attorney was in a position vis-à-vis the client to likely have acquired confidential information material to the current representation." (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 710, 3 Cal.Rptr.3d 877.) The court's task in such cases is to determine whether "confidential information material to the current representation would normally have been imparted to the attorney during his tenure at the old firm." (*Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1340, 104 Cal.Rptr.2d 116.) [FN6]
>
> FN6. As recently summarized by the Supreme Court: "When the attorney's contact with the prior client was *not direct,* then the court examines both the attorney's relationship to the prior client and the relationship between the prior and the present representation. If the subjects of the prior representation are such as to 'make it likely the attorney acquired confidential information' that is relevant and material to the present representation, then the two representations are substantially related. [Citations.] When a substantial relationship between the two representations is established, the attorney is automatically disqualified from representing the second client. [Citations.]" (*City and County, supra,* 38 Cal.4th at p. 847, 43 Cal.Rptr.3d 771, 135 P.3d 20, italics added.)

Med-Trans Corporation, Inc., v.City of California City, 156 Cal.App.4th 655, 665-66, 68 CalRptr.3d 17, 24-25 (Cal.Ct.App. 5th Dist. 2007). In the present case, Frantz has made no showing that "the attorney [or the entire firm] was in a position vis-à-vis the client to likely have acquired confidential information material to the current representation." *Id.*

No Idaho case law exists which holds that the breach of a Rule of Professional Conduct gives rise to civil claim for breach of the standard of care. The "preamble" to the Idaho Rules of Professional Conduct states just the opposite:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules

> are designed to provide guidance to lawyers and provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

Preamble to the Idaho Rules of Professional Conduct; *Weaver v. Millard,* 120 Idaho 692, 697, 819 P.2d 110, 115 (Ct.App. 1991). While violation of a rule of professional responsibility cannot give rise to a cause of action nor create any presumption that a legal duty has been breached, the majority view is a violation of a rule of professional conduct is relevant to the standard of care and breach of that standard. *Mainor v. Nault,* 120 Nev. 750, 768, n. 39,101 P.3d 308, 320, n. 39 (Nev. 2004). Footnote 39 reads:

> *See, e.g.,Sears, Roebuck & Co. v. Goldstone & Sudalter,* 128 F.3d 10, 19 (1st Cir.1997) (stating that, under Massachusetts law, "[v]iolations of the rules governing the legal profession are evidence of legal malpractice"); *Universal Mfg. Co. v. Gardner, Carton & Douglas,* 207 F.Supp.2d 830, 832-33 (N.D.Ill.2002) (stating that, while an alleged violation of ethical rules does not by itself give rise to a claim for malpractice under Illinois law, "the rules of professional conduct may be relevant to determining the standard of care in a legal malpractice claim"); *RTC Mortg. Trust 1994 N-1 v. Fidelity Nat. Title,* 58 F.Supp.2d 503, 525 (D.N.J.1999) (noting that, under New Jersey law, a violation of the rules of professional conduct precluding conflict of interests could be considered as evidence of malpractice); *Elliott v. Videan,* 164 Ariz. 113, 791 P.2d 639, 642 (1989) (holding that the jury was properly instructed regarding professional rules of conduct, with an instruction that the rules were merely evidence that could be considered in deciding whether the attorney committed malpractice); *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.,* 265 Ga. 374, 453 S.E.2d 719, 720-21 (1995) (noting that the rules of professional conduct were relevant to the standard of care because "it would not be logical or reasonable to say that the Bar Rules, in general, do not play a role in shaping the 'care and skill' ordinarily exercised by attorneys practicing law in Georgia"); *Krischbaum v. Dillon,* 58 Ohio St.3d 58, 567 N.E.2d 1291, 1301 (1991) (concluding that the norms of behavior codified in the rules of professional conduct were relevant to what a reasonable attorney would have done and, therefore, were admissible); *DiLuglio v. Providence Auto Body, Inc.,* 755 A.2d 757, 772 n. 16 (R.I.2000) ("Even though violations of the rules of professional conduct cannot be used to establish a cause of action or to create any presumption that a legal duty

> has been breached, the violation of a professional rule may be relevant in determining whether a client may void a transaction on the grounds that the lawyer breached his fiduciary responsibilities."); *Roy v. Diamond,* 16 S.W.3d 783, 790-91 (Tenn.Ct.App.1999) (concluding that, although professional rules of conduct do not provide a cause of action for civil liability, they were relevant evidence in determining the standard of care); *Two Thirty Nine Joint Venture v. Joe,* 60 S.W.3d 896, 905 (Tex.App.2001) (concluding that the trier of fact could consider a rule of professional conduct in determining the standard of care because the rules reflected a professional consensus of standards below which an attorney's conduct should not fall and, therefore, "[b]arring the use of the code and denying that the code is relevant to the duties a lawyer has to his client is not logical and would require the re-creation of a standard of care without reference to verifiable or pre-existing rules of conduct").

Frantz has set forth no evidence that Witherspoon did not properly evaluate the potential conflict of interest or that Witherspoon was incorrect in determining no concurrent conflict of interest existed. The decision not to institute litigation against Shelley Bennett was based upon Frantz' inability to establish the elements of fraud/civil conspiracy against her. *See, supra.* Taking the facts in the light most favorable to Frantz and determining that a potential conflict was disclosed but not waived and that Witherspoon protested to filing suit against Bennett, ultimately leading to a termination of representation, Witherspoon is entitled to summary judgment as a matter of law on Frantz' conflict of interest cause of action.

D. Intentional Infliction of Emotional Distress.

Witherspoon argues Frantz' claim of intentional infliction of emotional distress (IIED) must fail because Witherspoon's alleged conduct does not rise to the level of being outrageous and his claim of negligent infliction of emotional distress fails for lack of a showing of any physical injury. Memorandum in Support of Motion for Summary Judgment, pp. 19-20. Frantz replies only with regard to the negligent infliction of emotional distress claim and argues that he has testified to increased stress, losing sleep, being irritable, and gaining weight, and this lay testimony to physical

manifestations of injury is sufficient to withstand summary judgment. Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 18-19.

Frantz does not address Witherspoon's argument that its conduct does not rise to the level of being outrageous and therefore the intentional infliction of emotional distress claim must fail as a matter of law. The elements for the tort of intentional infliction of emotional distress (IIED) are: (1) that the defendant's conduct was intentional or reckless; (2) that the conduct was extreme and outrageous; (3) that there was a causal connection between the wrongful conduct and the plaintiff's emotional distress; and (4) that the emotional distress is severe. *Johnson v. McPhee,* 2009 Opinion No. 25, 09.9 ICAR 471, 474 (April 8, 2009); *Brown v. Matthews Mortuary, Inc.,* 118 Idaho 830, 834, 801 P.2d 37, 41 (1990), *see also Gill v. Brown,* 107 Idaho 1137, 1138, 695 P.2d 1276, 1277 (Ct. App. 1985).

> Liability for this intentional tort is generated only by conduct that is very extreme. *Edmonson v. Shearer Lumber Products,* 139 Idaho 172, 180, 75 P.3d 733, 741 (2003). The conduct must be not merely unjustifiable; it must rise to the level of "atrocious" and "beyond all possible bounds of decency," such that it would cause an average member of the community to believe that it was outrageous. *Id.* Examples of conduct that has been deemed sufficiently extreme and outrageous by Idaho courts include: an insurance speciously denying a grieving widower's cancer insurance claim while simultaneously impugning his character and drawing him into a prolonged dispute, prolonged sexual, mental and physical abuse inflicted upon a woman by her co-habitating boyfriend, recklessly shooting and killing someone else's donkey that was both a pet and a pack-animal, and real estate developers swindling a family out of property that was the subject of their lifelong dream to build a Christian retreat.

Johnson, 2009 Opinion No. 25, 09.9 ICAR 471, 474. (citations omitted).

Intentional infliction of emotional distress does not require a showing that there was a physical manifestation of the distress. *Payne v. Wallace,* 136 Idaho 303, 32 P.3d 695 (Ct. App. 2001). Importantly, "[s]ummary judgment is proper where 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." *Edmonson v. Shearer Lumber Prod.,* 139 Idaho 172, 180, 75 P.3d 733, 741 (2003). Here, none of the facts alleged by Frantz could be viewed as extreme or outrageous as a matter of law, and to the extent that Frantz has not conceded this issue by failing to address it in briefing, Witherspoon is nevertheless entitled to judgment as a matter of law.

E. Negligent Infliction of Emotional Distress.

The tort of negligent infliction of emotional distress (NIED) is "…simply a category of the tort of negligence, requiring the elements of a common law negligence action", and some physical manifestation of the plaintiff's emotional injury. *Johnson,* 2009 Opinion No. 25, 09.9 ICAR 471, 475. The tort requires the defendant to have caused some physical injury to the plaintiff and that the physical injury accompanies the emotional distress claimed (i.e. proof of a physical injury which is a physical manifestation of an injury caused by the NIED). *Gill v. Brown,* 107 Idaho 1137, 1138, 695 P.2d 1276, 1277 (Ct. App. 1985). A claim for emotional distress damages will survive summary judgment where the plaintiff alleges physical manifestation of the distress because such an allegation reveals at a minimum that a genuine issue of fact exists with respect to the claim for NIED. *Czaplicki v. Gooding Joint School District,* 116 Idaho 326, 332, 775 P.2d 640, 646 (1989). In G*ill,* the plaintiffs failed to allege that they suffered any physical injury and therefore their claim could not be considered as one for the recovery of damages for the NIED. *Gill,* 107 Idaho 1137, 1138, 695 P.2d 1276, 1277. Only some of the physical manifestations of emotional distress are considered medical conditions to which an expert must testify. *Cook v. Skyline Corp.,* 135 Idaho 26, 35, 13 P.2d 857, 866 (2000). Physical symptoms such as lost sleep, irritability and

anxiety are non-medical conditions to which a lay person can testify. *Id.* The Court may exercise its discretion to determine which physical manifestations are medical conditions to which an expert must testify and which non-medical conditions a lay person can testify he or she has experienced. *Id.*

As argued by Frantz, his own testimony regarding his increased stress, losing sleep, being irritable and gaining weight (mentioned above in discussion of IIED), suffices at a minimum that a genuine issue of fact exists with respect to the claim for negligent infliction of emotional distress. Accordingly, summary judgment is not appropriate.

D. Counterclaim for Attorneys Fees.

Witherspoon argues that it is entitled to judgment as a matter of law on its counterclaim against Frantz for Witherspoon's fees and costs incurred in the *Steed v. Frantz et. al* litigation. Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 20-21. At no time does Frantz contest the amount of those fees.

Frantz replies that any costs and fees owed for the underlying *Steed v. Frantz, et al.* litigation is subject to offset for Witherspoon's malpractice and that breach of an attorney's ethical obligations results in forfeiture of its fees. Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 19. Frantz cites the New York Supreme Court case of *Ulico Cas. Co. v. Wilson, Elser, Moscowitz, Edelman, & Dicker,* 56 A.D.3d 1, 865 N.Y.S.2d 14 (N.Y. 2008), for the proposition that a breach of an attorney's ethical obligations results in a forfeiture of an attorney's fees. Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 19. What that case actually states is: "…it is settled that an attorney who is discharged by a client for cause 'has no right to compensation or a retaining lien, notwithstanding a specific retainer

agreement.'" 56 A.D.3d 1, 7, 865 N.Y.S.2d 14, 12.

However, no support is found for this argument in Idaho law. Nor does any case law support Frantz' argument that Witherspoon's fees are offset by its alleged *malpractice* (the New York case of *Ulico Casualty Co.* simply discusses an attorney who is discharged by a client for cause might not have a right to his fees). As a matter of law, Frantz cannot assert that malpractice should offset any fees and costs owed. From a factual standpoint, even if this Court were to adopt the holding in *Ulico Casualty Co.,* there is no evidence that Witherspoon was discharged by Frantz for cause.

Witherspoon is entitled to summary judgment in the amount of $34,564.45, against Frantz (and the other plaintiff entities) on Witherspoon's counterclaim for attorney fees against Frantz for Witherspoon's fees and costs incurred the *Steed v. Frantz et. al* litigation.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED for the reasons stated above, Defendant's Motion for Summary Judgment on the professional negligence issues of: (1) the applicable statute of limitations and any breach of duty based on a contractual promise being barred by the statute of limitations; (2) whether Witherspoon correctly determined that fraud/civil conspiracy by Bennett and Steed could not properly be brought; (3) estoppel and (4) lack of damages are DENIED.

IT IS FURTHER ORDERED defendant's Motion for Summary Judgment on plaintiff's claim of Negligent Infliction of Emotional Distress is DENIED.

IT IS FURTHER ORDERED defendant's Motion for Summary Judgment on Frantz' alleged conflict of interest is GRANTED.

IT IS FURTHER ORDERED defendant's Motion for Summary Judgment on

Frantz' claim of Intentional Infliction of Emotional Distress is GRANTED.

IT IS FURTHER ORDERED defendant's Motion for Summary Judgment on defendant's counterclaim for fees and costs incurred in the *Steed v. Frantz et. al* litigation, in the amount of $34,564.45, is GRANTED.

Entered this 8th day of June, 2009.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Regina M. McCrea	667-1939	Peter C. Erbland	664-6338

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Jeanne Clausen, Deputy Clerk