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## Draggin' Y Cattle Co., Inc. v. Addink, 2013 MT 319

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*Draggin' Y Cattle Co., Inc. v. Addink*, 2013 MT 319, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_.

Tort/Contract

**(1) Failure to discover the accrual of a self-concealing claim in a complex transaction tolls the statute of limitations. (2) Communication between insured and insurer falls under attorney-client privilege if legal advice was given respecting a concrete claim. (3) Documents rendered after a claim file was opened and while investigating the claim, even if litigation is not in process, may fall under work product privilege.**

Roger and Carrie Peters (the Peters) own Draggin' Y Cattle Company and the Alaska Basin Grazing Association. In 2006, the Peters asked their longtime accountant, Larry Addink of Junkermier, Clark, Campanella, Stevens, P.C. (JCCS), to explore a § 1031 tax-deferred exchange in which Alaska Basin would sell one property, free of any capital gain tax liability, and use the proceeds to purchase a qualifying exchange property owned by the Peters, individually. Addink researched the § 1031 exchange issue and concluded that the transaction qualified as a tax-deferred exchange.

The Peters then hired attorney Max Hansen to draft the closing documents for the property sale. Although Hansen was not hired to provide tax advice, he repeatedly told the Peters that he was concerned that the transaction was not eligible for tax-deferred treatment because it was a "related-party" transaction under 26 U.S.C. § 1031(f). Addink assured the Peters each time they raised the concern that it would qualify as a tax-deferred exchange. On January 17, 2007, Alaska Basin sold its property, and on January 22, 2007, Alaska Basin purchased a property from the Peters.

In November 2007, Addink learned that the Peters' transaction failed as a tax-deferred exchange. Their tax liability was about \$2.5 million. Addink immediately notified JCCS of his error, and JCCS notified its insurer and attorney. Four months later Addink met with the Peters and disclosed his error, claiming that the law on related-party transactions had recently changed.

Addink persuaded the Peters to pursue a tax-mitigation plan, which included hiring Hansen to negotiate a compromise with the IRS. In March 2009, Hansen informed the Peters that Addink had misled them about the nature of his error and had only disclosed it at all to avoid liability as the tax-preparer under a new law.

On January 21, 2011, the Peters filed a complaint against Addink and JCCS on several counts of negligence, breach of duty, breach of contract, and misrepresentation. During discovery, the Peters requested documents from JCCS regarding its correspondence with insurance adjusters and attorneys, JCCS shareholders meetings, and other related documents. At the defendants' request, the trial court granted a protective order that blocked discovery of the requested items under the attorney-client and work product privileges. Then, the defendants moved for summary judgment, arguing that the Peters' claims were barred by the statute of limitations. The trial court granted the defendants' motion for summary judgment on all counts.

On appeal, the Peters argued that the Court should apply the discovery rule and find that their claims were self-concealing. After the Court examined three previous cases of self-concealing claims involving professional services, it reasoned that the Peters only could have discovered the concealed claims with assistance from other professionals and that Peters *did* inquire when Hansen raised his concerns. The Court concluded that the claim was self-concealing and thus the discovery rule applied to the statute of limitations.

This case stands for the following propositions: (1) a lay person does not have a duty to understand errors made by professionals such as accountants; (2) when a professional works pursuant to a contract, his errors might create liability in tort *and* in contract; (3) the attorney-client privilege may protect communication between an insured and an insurer only when the communication was directed at obtaining legal advice for a concrete claim; and (4) the work

product privilege may protect documents generated after a claim file is opened but before any litigation has commenced.

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Honorable David Cybulski, District Court Judge of the Eighteenth Judicial District.

For Appellants: Timothy B. Strauch of Strauch Law Firm, Missoula, Montana.

For Appellees: G. Patrick HagEstad and Tim E. Dailey of Milodragovich, Dale & Steinbrenner, P.C., Missoula, Montana.

Thomas J. Bourguignon