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McCormick Intern. Usa, Inc. v. Shore Appellant's Brief 1 Dckt. 38454

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IN THE SUPREME COURT OF THE STATE OF IDAHO

NICHOLAS BOKIDES,

Third-Party Defendant/
Appellant/Cross
Respondent,

Supreme Court No. 38454-2011

vs.

ROBERTA SHORE,

Third-Party Plaintiff/
Respondent/Cross
Appellant.

APPELLANT'S BRIEF

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho in and for the County of Franklin

Honorable Mitchell W. Brown, District Judge, presiding

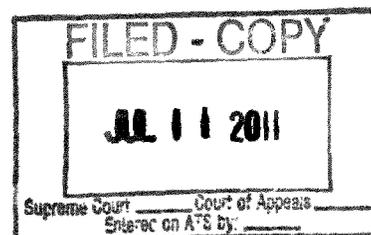
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I. STATEMENT OF THE CASE

A. Nature of Case.

Roberta Shore (“Roberta”) brought a legal malpractice action against Nicholas Bokides (“Bokides”) arising from Bokides’ representation of Roberta during her divorce from William R. Shore (“Bill”). R. at 30-44. Roberta’s claims against Bokides arise from the failure of Bokides to notify McCormick International USA, Inc. (“McCormick”) and Agricredit Acceptance, LLC (“Agricredit”) that Roberta would no longer guaranty future notes or advances to Bear River Equipment, Inc. (“Bear River”). R. at 37, 332.

On March 22, 2005, Roberta executed guaranty agreements wherein she guaranteed payment for machinery and equipment financed by Bear River, a closely held corporation then owned by Bill and Roberta. R. at 180, 247-248. Pursuant to the terms of the guaranty, Roberta’s guarantees would terminate upon the giving of written notice. R. at 37, 180, 247-248.

In or around May of 2006, Roberta requested that Bokides notify Agricredit and McCormick in writing that she would no longer be a guarantor for the obligations of Bear River. R. at 36, 301. Bokides agreed to notify Agricredit and McCormick after the divorce was finalized. R. at 303, 333.

On November 15, 2006, a Decree of Divorce was entered. R. at 76, 91-95. However, Bokides did not give notice to Agricredit and McCormick and McCormick continued to provide equipment to Bear River pursuant to the guaranty. R. at 37, 187, 212-221.

Roberta filed a third-party complaint against Bokides for legal malpractice after McCormick filed a complaint against her and Bill to enforce the terms of the guarantees. R. at 30-44.

B. Course of Proceedings and Disposition Below.

McCormick filed its complaint against Bear River, Roberta, and Bill on August 29, 2008. R. at 1-16. The court entered an order granting McCormick leave to amend its complaint on October 23, 2008. R. at 18-19.

Bear River, Roberta, and Bill filed an answer to McCormick's amended complaint on November 19, 2008. R. at 20-26.

On August 3, 2009, Bear River, Roberta, and Bill filed an amended answer to McCormick's amended complaint, together with a third-party complaint by Roberta against Bokides. R. at 30-44. On September 14, 2009, Bokides filed an answer to Roberta's third-party complaint. R. at 48-55.

On March 12, 2010, Bokides filed a motion for summary judgment asserting that Roberta failed to mitigate her damages and that her ex-husband, Bill, had a duty to indemnify her for any claims asserted by McCormick. R. at 71-106. Roberta filed a response to Bokides' motion for summary judgment on March 24, 2010 (R. at 110-119), and on April 1, 2010, Bokides filed a reply memorandum. R. at 127-132. The motion was heard on April 8, 2010, and the district court took the matter under advisement.

On May 20, 2010, McCormick filed a motion for summary judgment seeking a money judgment against Bear River for amounts advanced on account, and Roberta and Bill as

the guarantors of Bear River's obligations. R. at 252-267. On June 7, 2010, defendants Bear River, Bill, and Roberta filed a notice of nonopposition of McCormick's motion for summary judgment. R. at 315-317. On June 29, 2010, the district court entered judgment against the defendants Bear River, Bill, and Roberta, jointly and separately, in the amount of \$319,977.98 plus fees. R. at 434-437. On August 8, 2010, the district court awarded fees and costs in the amount of \$22,439.49 to McCormick, for a total judgment of \$342,417.42 against the defendants Bear River, Bill, and Roberta. R. at 468-476.

On May 26, 2010, Roberta filed a motion for summary judgment against Bokides asserting that as a result of Bokides' failure to notify Agricredit and McCormick she suffered damages in the amount of the McCormick judgment. R. at 274-311. Bokides filed a response to Roberta's motion for summary judgment on June 11, 2010. R. at 318-407. The motion was heard on June 21, 2010, and the district court took the matter under advisement. R. at 432-433.

On June 29, 2010, the court entered its Memorandum Decision and Order on Motions for Summary Judgment. R. at 441-456. The district court concluded that there were genuine issues of material fact as to when Bokides' duty to notify Agricredit and McCormick arose and as to whether Roberta mitigated her damages. R. at 454. Accordingly, the court denied the motions for summary judgment filed by both Bokides and Roberta. R. at 454-455.

On August 24, 2010, a one-day court trial was held to determine whether Bokides was liable to Roberta for failing to provide written notice that Roberta would no longer guaranty the obligations of Bear River. R. at 595-615. The court found that Bokides breached his duty to send letters to Agricredit and McCormick terminating Roberta's guarantees and that Roberta

suffered damages in the amount of \$299,085.53. R. at 611-612. The court further found that Roberta did not fail to mitigate her damages. R. at 612. On November 29, 2010, the court entered judgment in favor of Roberta, and against Bokides, in the amount of \$299,085.53. R. at 624-626.

Bokides filed a timely Notice of Appeal from the judgment seeking appellate review of the district court's holding that Roberta did not fail to mitigate her damages. R. at 629-635.

Roberta Shore filed a notice of cross-appeal on January 27, 2011, based on the trial court's refusal to award damages for financing that occurred prior to the entry of the divorce decree. R. at 640-643.

C. Statement of Facts.

1. Bill and Roberta acquired Bear River during the course of their marriage. Transcript of 8/24/10 Court Trial ("Tr."), p, 6, LL. 18 – p. 7, LL. 11.

2. Bear River sold farm equipment and machinery, including machinery and products manufactured by McCormick. R. at 186. On or about March 22, 2005, Roberta executed personal guarantees wherein she guaranteed the obligations of Bear River in favor of McCormick and Agricredit ("Guarantees"). R. at 180, 247-248.

3. In order to finance its inventory from McCormick, Bear River entered into agreements with Agricredit that were executed by Bill and Roberta on behalf of Bear River. R. at 186, 192-211.

4. On March 22, 2005, Bill and Roberta executed personal guarantees wherein they unconditionally guaranteed any obligation owed by Bear River to Agricredit and McCormick. R. at 36.

5. The guaranty signed by Bill and Roberta contained a provision, which stated, in pertinent part:

And that this shall be a continuing guaranty, and shall cover all the liabilities which the Dealer may incur or come under until AAC shall have received at its Head Office, written notice from the guarantor or the executor, administrators, successors or assigns of the Guarantor, to make no further advances on the security of this guarantee.

R. at 36, 247-248.

6. In or about March 2006, Bill and Roberta decided to terminate their marriage. Roberta retained Bokides to represent her interest in the divorce proceeding. R. at 36.

7. As part of the divorce, Roberta wanted to completely extricate herself from any involvement with Bear River. R. at 332. To accomplish this, Roberta and Bill agreed that all ownership of the company would be given to Bill, and Bill would be responsible for any and all liabilities from the company. R. at 92-95.

8. Roberta asked Bokides to remove her from the guarantees. R. at 36-37, 303. Roberta and Bokides did not discuss a specific date or timeline as to when written notice terminating the guarantees would be sent to Agricredit. R. at 603, Tr., p. 13, LL. 23 – p. 14, LL. 4.

9. Bokides advised Roberta that all debts incurred up to the time of the divorce decree were community debts and that until the decree was entered, he would not take any action to cancel her guarantees. R. at 332-333.

10. The divorce decree was entered on November 16, 2006. R. at 87, 91-96.

11. Under Paragraph IV of the decree, the parties agreed that Bill would retain possession of a ranch/farm property located in Adams County, Council, Idaho (hereinafter, the "Council Ranch"). R. at 91-96. Under the decree, Bill was to market the property without the assistance of a realtor up until March 31, 2007. R. at 91-96. Upon the sale of the property, Roberta would receive \$1,300,000 out of the net proceeds, with the balance of the proceeds to go to Bill. R. at 91-96.

12. Under Paragraph VI of the decree, Bill agreed to defend and hold Roberta harmless from the following indebtedness:

All indebtedness relating to operation of the farm property.

All indebtedness incurred by defendant.

All indebtedness related to the closely held corporation Bear River Farm Equipment, Inc., including, but not limited to, any claims or litigation against the parties arising out of the business operated by Bear River Farm Equipment, Inc. including attorney fees and costs.

R. at 91-96.

13. In March 2008, Bill and Roberta agreed to amend the decree, by entering an amended decree that gave her a mortgage in the property for \$1.3 million dollars.

Exhibit 219. The amended divorce decree removed any requirement that Bill actively market the

property in good faith, thereby giving Bill the right to retain the property and control if and when he would sell it, and also to determine the price. Exhibit 219.

14. Bokides did not send written notice terminating the guarantees following entry of the decree. R. at 303, 333.

15. In or about July or August 2007, an audit performed by McCormick and Agrifcredit revealed that Bear River had been selling equipment financed through Agrifcredit, receiving proceeds from the sales, but failing to apply said proceeds to Agrifcredit as required by the agreements with Agrifcredit. R. at 269.

16. In or about August 2008, McCormick sent a demand letter to Roberta relative to the guaranty she had signed with Agrifcredit. R. at 3, 305, Exhibit 105. This was the first time Roberta learned that Bokides had failed to send written notice terminating her from the Agrifcredit guarantees. R. at 305.

17. On August 29, 2008, McCormick filed suit against Bear River, as well as Bill and Roberta in their individual capacities. R. at 1-6. The complaint alleged that Bear River failed to pay McCormick the sum of \$273,080.60 in principal, together with accruing prejudgment interest at the legal rate. R. at 3.

18. After McCormick filed the complaint in August 2008, Roberta discussed the complaint with Bill and they both agreed that Bill was responsible for the claims in the McCormick complaint under the terms of the decree. R. at 304, Tr., p. 54, LL. 24 – p. 55, LL. 10.

19. Bill had retained James G. Reid, of Ringert Law, Chartered, to represent him in several matters arising from the problems with Bear River. Tr., p. 56, LL. 14-21. Bill also retained Mr. Reid and his firm to represent him in the McCormick case. Tr., p. 56, LL. 14-21. Bill and Roberta agreed that Mr. Reid would also represent Roberta in the McCormick case. Tr., p. 21, LL. 9-15.

20. Roberta believed that Bill would resolve and settle the case with McCormick at the time it was filed. Tr., p. 55, LL. 14-17. They both assumed that Bill would settle the claims with McCormick and, therefore, it would be appropriate for Mr. Reid to represent them both, in order to minimize any expenses that Roberta would incur. Tr., p. 58, LL. 13 – p. 59, LL. 5.

21. At some point during the litigation, McCormick offered to settle its claims with Bill for \$200,000. Tr., p. 56, LL. 3-13. Bill had offered \$100,000, but this amount was rejected by McCormick. Tr., p. 56, LL. 3-13.

22. Thereafter, it became apparent to Roberta and Bokides that Bill was not going to settle the claims with McCormick. At that point, Bokides advised Roberta that she needed to retain separate counsel and put pressure on Bill to settle with McCormick. Bokides recommended that Roberta speak with Stan Welsh in Boise, Idaho, because he was a recognized and aggressive attorney in the divorce field. Tr., p. 178, LL. 7-23.

23. Roberta filed the third-party complaint against Bokides in August 2009. R. at 30-44.

24. Roberta paid Mr. Reid's firm approximately \$15,000 in attorney fees as of January 2010, in connection with the McCormick case. Tr., p. 66, LL. 22 – p. 67, LL. 1.

Roberta did not ask or demand that Bill pay the attorney fees, even though he was obligated to do so under the express terms of the decree. Tr., p. 67, LL. 1-20.

25. Roberta did not tender the defense of the McCormick case to Bill. Roberta did not demand that Bill defend, indemnify, and hold her harmless from the claims in the McCormick case. Tr., p. 70, LL. 1 – p. 72, LL. 8.

26. Roberta did not file a cross-claim against Bill in an effort to seek a judgment declaring that he was responsible for the McCormick claims under the decree, in the event that McCormick succeeded in obtaining a judgment against her. Tr., p. 70, LL. 1 – p. 72, LL. 8. Roberta did not submit any written discovery to Bill, or take any depositions of Bill or anyone who might have knowledge of the nature and extent of Bill's assets and net worth. Tr., p. 70, LL. 1 – p. 72, LL. 8.

27. Roberta did not pursue her rights under the decree in an effort to bring pressure on Bill to market the property in good faith, but instead allowed him to continue to market the property for \$6.2 million up until November or December 2009. Tr., p. 86, LL. 16 – p. 87, LL. 25.

28. McCormick moved for summary judgment on May 20, 2010. R. at 252-267. On June 7, 2010, defendants Bear River, Bill, and Roberta filed a notice of nonopposition of McCormick's motion for summary judgment. R. at 315-317. As Roberta and Bill did not oppose McCormick's motion, judgment was entered against Bear River, Bill, and Roberta on

June 29, 2010, for the sum of \$319,977.98. R. at 434-437. Thereafter, an amended judgment was entered which included attorney fees that had been incurred, on August 12, 2010, for the total amount of \$342,417.42. R. at 468-476.

29. The initial judgment related to five tractors and three loaders. R. at 186-187, 258. The proceeds from the sale of the equipment were not paid to Agricredit as required by the agreements between Bear River and Agricredit. R. at 186-187. Among the items included was a tractor, model number MC115, which was financed prior to the Shore's divorce. R. at 602. All of the remaining items of equipment were financed on or after December 21, 2006. R. at 601-602.

Bill's Net Worth

30. The Shores received a Broker's Opinion prepared by Creed Noah, dated September 21, 2006. Mr. Noah valued the Council Ranch at \$3,165,000. Exhibit 217.

31. Mr. Noah assigned a value of \$372,000 to the "unfinished custom home" on the Council Ranch and stated that that value was based on the home's "current unfinished condition," and that there was a "great deal more expense required to complete this building in conformance with the current plan." Exhibit 217.

32. After November 2006, and prior to the time of trial, Bill spent over \$100,000 on improvements to the home. Tr., p. 143, LL. 8-20, Roberta did not retain any experts to appraise the value of the Council Ranch as of August 2008, or at any time up to and including the trial. Tr., p. 71, LL. 25 – p. 72, LL. 8.

33. Sometime in 2007, Bill received an offer on the property for \$5 million dollars; however, upon further investigation, the offer turned out to be a sham. Tr., p. 143, LL. 25 – p. 144, LL. 8

34. In February 2010, Bill prepared a financial statement in response to discovery requests propounded by Bokides. Tr., p. 107, LL. 23 – p. 108, LL. 8, Exhibit 113. As of February 2010, Bill estimated that his net worth, after subtracting all current liabilities from his total assets, was \$230,920. Exhibit 113. Bill's net worth in February 2010 would have been sufficient to pay McCormick's \$200,000 settlement offer.

35. In February 2010, Bill claimed that the value of the Council Ranch had declined from \$3.16 million to \$1,625,000. Exhibit 113. Bill testified that the value of the property had declined significantly since the divorce. Tr., p. 144, LL. 21 – p. 145, LL. 19. Bill did not offer an opinion as to the fair market value of the property as of August 2008, when McCormick filed its complaint, but both Bill and Roberta agreed the property was worth much more in August 2008 than in February 2010, a fact that was borne out by Bill's continuing efforts to market the property for \$6.2 million. Tr., p. 144, LL. 21 – p. 145, LL. 19; p. 151, LL. 12-18.

36. Bill received an offer of \$900,000 for the Council Ranch. Tr., p. 116, LL. 7-14.

37. Both Bill and Roberta testified that following the divorce, and the ensuing financial problems with Bear River, Bill had exhausted a significant portion of his assets paying claims and judgments filed against Bear River. Tr., p. 114, LL. 1-18.

38. In addition to the Council Ranch, Bill also owned real property in Preston, Idaho, upon which Bear River's facility was located. Tr., p. 154, LL. 15-24. Bill estimated the fair market value of this property as \$220,000 in February 2010. Exhibit 113. The Preston real estate was valued at \$300,000 as the time of the Shores' divorce. Tr., p. 155, LL. 6-15.

39. With respect to the liabilities listed on the February 2010 financial statement, Bill lists that he was personally liable for payroll taxes to the IRS in the amount of \$272,000. Exhibit 113. Bill testified at trial that he assumed that he was personally liable for this entire amount. Tr., p. 128, LL. 2-11.

40. The May 17, 2010, letter from the IRS to Bill denying his appeal states that Bill is only personally liable for \$94,669 in trust fund taxes. Tr., p. 128, LL. 21 – p. 130, LL. 9, Exhibit 106. This figure is supported by two (2) separate forms, Form 2751, which assert liabilities of \$64,364.74 and \$30,303.41. These documents were attached to the May 17, 2010, letter. Tr., p. 128, LL. 21 – p. 130, LL. 9, Exhibit 106.

41. The December 12, 2007, letter from the IRS that is addressed to Bear River sets forth the outstanding balance for payroll taxes in the amount of \$176,888.57, which is the amount assessed against the corporation, not against Bill. Exhibit 106. Under the Trust Fund Recovery Act, Bill is only personally liable for the \$94,669 and accordingly, Bill had overstated his liability by approximately \$177,000. Tr., p. 128, LL. 21 – p. 130, LL. 9, p. 160, LL. 23 – p. 161, LL. 8, Exhibit 106.

42. In his financial statement of February 2010, Bill also lists a liability in the amount of \$20,900 for Idaho payroll taxes. Exhibit 113. Although Bill may be liable pursuant to

Idaho Code Section 63-378, the August 25, 2007, notice of deficiency shows an assessment of \$12,209.07, not the \$20,900 as reported by Bill on his financial statement. Exhibit 107. Bill has again overstated his liabilities, this time in the amount of \$8,690.93. Exhibits 107 and 113.

43. Bill also lists on his financial statement a liability in the form of a claim for attorney fees by the law firm Merrill and Merrill, in the amount of \$69,700. Exhibit 113. This amount was incurred by the firm in representing Bill in one of his lawsuits with Mr. Peterson. Tr., p. 110, LL. 7-23. There is no evidence that Merrill and Merrill has made any active attempts to collect on this amount, other than sending Bill monthly invoices. Tr., p. 110, LL. 7-23. Bill does not believe this is a valid debt, or at a minimum, that he has defenses to this potential debt based upon incompetence of representation. Tr., p. 138, LL. 18 – p. 139, LL. 21. Further, the liability listed on his financial statement exceeds the invoiced amount by more than \$3,000. Exhibits 109 and 113.

44. In addition, Bill lists as a liability a loan to his aunt, Elmina Harper, for \$62,500, which he borrowed in order to pay one of his claims. Exhibit 113. Bill's aunt is in her 90's and has made no active attempts to execute on the judgment or accelerate the debt. Bill is voluntarily paying his aunt \$500 a month. Tr., p. 149, LL. 22 – p. 150, LL. 11.

II. ISSUES PRESENTED ON APPEAL

- A. Did the district court err in finding that Roberta mitigated her damages?
- B. Did the district court err in declining to bar or reduce Roberta's damages based on Bill's duty to indemnify as set forth in the divorce decree?

C. Did the district court err when it awarded damages to Roberta when McCormick has not, and may never enforce its judgment against Roberta?

D. Bokides requests attorney fees on appeal.

III. ARGUMENT

A. Standard of Review.

When reviewing a lower court's decision, the Court determines whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Anderson v. Larsen*, 136 Idaho 402, 405, 34 P.3d 1085, 1088 (2001). The Court exercises "free review over the lower court's conclusion of law to determine whether the trial court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found." *Id.* at 406, 1089.

B. The District Court Erred In Finding That Roberta Mitigated Her Damages.

It is universally recognized by courts and commentators that a party who has been injured by the conduct of another, whether in contract or in tort, has an obligation to take reasonable steps to mitigate his/her damages. *See, e.g., Davis v. First Interstate Bank of Idaho*, 115 Idaho 169, 765 P.2d 680 (1988); *Casey v. Nampa & Meridian Irrigation Dist.*, 85 Idaho 299, 379 P.2d 409 (1963); *Belk v. Martin*, 136 Idaho 652, 39 P.3d 592 (2001). The duty to mitigate, also known as the doctrine of avoidable consequences, "provides that a plaintiff who is injured by actionable conduct of a defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts" *U.S. Bank Nat'l Ass'n v. Kuenzli*, 134 Idaho 222, 228, 999 P.2d 877, 883 (2000). The policy underlying the doctrine of avoidable consequences is to

prevent “persons against whom wrongs have been committed from *passively suffering economic loss which could be avoided by reasonable efforts.*” *Indus. Leasing Corp. v. Thomason*, 96 Idaho 574, 577, 532 P.2d 918, 919 (1974), quoting *Wright v. Baumann*, 398 P.2d 119 (1965) (emphasis added).

Idaho courts have also specifically held that the doctrine of mitigation of damages is applicable to a legal malpractice claim. Thus, in the case of *O’Neil v. Vasseur*, 118 Idaho 257, 796 P.2d 134, the Idaho Supreme Court stated that “if an attorney’s negligent conduct in representing a client leaves the client with an alternative remedy or remedies which are both viable and equivalent, *the result maybe that the client suffers no loss or a reduced loss as the proximate cause of the attorney’s negligent conduct.*” 118 at 262, quoting *Swanson v. Sheppard*, 445 N.W.2d 654, 658 (N.D. 1989) (emphasis added).

The facts and issues in the *O’Neil* case are instructive to the case at bar, because in that case, the defendants’ lawyer had allegedly committed malpractice by failing to pursue a claim on behalf of the plaintiffs. However, the plaintiffs recognized their duty to mitigate damages, and therefore pursued the claim and recovered, and thereafter brought a legal malpractice claim against the defendants. The supreme court specifically endorsed the action of the plaintiffs in pursuing the litigation, and obtaining a recovery, and noted that by doing so, they had fulfilled the duty to mitigate.

By taking over the *Schuckardt* case and proceeding *pro se*, O’Neil has so far been successful in the lawsuit and has mitigated any damages allegedly caused by the attorneys. It is well established that the party entitled to the benefit of a contract has a duty to use

'reasonable exertion' to mitigate his damages. *Wicker v. Hoppock*, 73 U.S. 94, L. Ed. 752 (1878) . . .

Here, O'Neil had a duty to mitigate the damages he could have suffered by *Vasseur and Jissul's* breach of the attorney-client relationship contract. O'Neil did so. He pursued the *Schuckardt* case *pro se* and was awarded damages therein

O'Neil v. Vasseur, 118 Idaho 257, 262-63, 796 P.2d 134, 139-40 (Ct. App. 1990).

This issue is exemplified in the following cases from other jurisdictions. In *Theobald v. Byers*, 193 Cal. App. 2d 147 (Cal. Ct. App. 1961), the plaintiffs had hired the defendant attorney to prepare a note and chattel mortgage in connection with a loan of \$5,000 that plaintiffs were making to John Higgins and Charles Fette. Higgins and Fette executed the note and mortgage, but failed to have them acknowledged or recorded, which the defendant attorney failed to verify. Higgins and Fette later filed for bankruptcy, and because of the irregularities in the mortgage, the plaintiffs were relegated to the position of unsecured creditors. The plaintiffs did not file a claim in the bankruptcy, but filed a legal malpractice suit against the defendant attorney. One of the issues on appeal was whether the plaintiffs had taken efforts to reasonably mitigate their damages. The California Court of Appeals held:

Evidence was produced at the trial that appellants failed to file a claim in bankruptcy as general unsecured creditors of Higgins and Fette, and that had they done so they would have recovered 16.1% of their claim, or the amount of \$862.02. ***Since appellants could still have recovered this amount despite the negligence of respondents had they only chosen to file a claim, such sum should be applied to reducing the damages proximately resulting from respondents' negligence.*** Therefore, the judgment is reversed and the cause remanded for a determination of the amount which appellants could have recovered in bankruptcy in order that this sum may be deducted from the damages...

Theobald, 193 Cal. App. 2d at 153 (emphasis added). Likewise, in *Lewis v. Superior Court*, 77 Cal. App. 3d 844 (Cal. Ct. App. 1978), the plaintiff sued her divorce attorney after he allegedly failed to claim an interest in her ex-husband's military pension. The court found that the plaintiff potentially still could assert a claim in the pension even though a final divorce decree had been issued. With respect to mitigation of damages, the court noted:

Finally, we note that defendant is not required to compensate for damages avoidable by reasonable effort. If plaintiff, by her own action, unnecessarily enhances her loss she may not recover for such enhanced loss. ***Upon trial of the matter defendant may seek to establish that plaintiff has a collectible interest in the pension, and to the extent that this is established defendant will be exonerated from liability.***

Lewis, 77 Cal. App. 3d at 853 (emphasis added) (citations omitted).

The cases stand for the proposition that in legal malpractice actions, if there is another potential source of recovery for the plaintiff, then the recovery against the defendant attorney is reduced or eliminated by the amount potentially recoverable. In this case, Roberta could potentially recover against her ex-husband's assets. Bill is the guarantor of the obligations to McCormick. He is primarily responsible, under the divorce decree, notwithstanding Bokides' alleged negligence. Bokides presented evidence at trial that Bill does have assets to at least minimize the claims of McCormick, if not eliminate them altogether.

In this case, Roberta could have recovered and still can recover against Bill's assets. He is primarily responsible for satisfaction of the judgment under the divorce decree, notwithstanding Bokides' alleged negligence. Roberta has done exactly what the policy underlying the doctrine of avoidable consequences seeks to prevent. Upon the advice of counsel

for both Bill and her, Roberta has passively stood by, rather than pursuing claims against Bill. Since the commencement of this litigation, rather than take any action against Bill, Roberta has watched Bill's net worth decrease and his ability to satisfy the claims diminish.

Roberta's failure to take any steps to mitigate her damages certainly creates the impression that Bill and Roberta colluded to have Bokides pay the judgment. Additionally, her failure to retain her own attorney is indicative that she never had any intention of holding Bill responsible. Further, the fact that neither Bill, Roberta nor Bear River filed any opposition to McCormick's summary judgment motion, clearly suggests that Bill and Roberta had no real motivation to avoid having Bokides pay the entire amount of the judgment. Faced with the motion for summary judgment, Roberta did nothing. She did not assert a claim against Bill, nor did she seek the advice of independent counsel, but rather, she simply agreed with Bill not to contest the motion for summary judgment.

The case at bar exemplifies the very evils that the doctrine of mitigation was designed to prevent, *i.e.*, where a party injured by the conduct of another sits back and passively allows damages to be incurred, without taking any steps to eliminate or reduce those damages. Roberta has taken absolutely no steps whatsoever, much less any reasonable steps, to attempt to force her former husband, Bill, to satisfy part or all of McCormick's claims and judgment, even though Bill is contractually and legally obligated to defend and indemnify Roberta from those very claims.

The district court stated that Roberta's failure to act was an exercise of due care, based on its conclusion that any action by Roberta against Bill would have been fruitless and

would have only resulted in an uncollectible judgment against Bill. R. at 610. However, as discussed herein, the district court did not even consider or analyze whether Roberta was prohibited from taking any meaningful steps to mitigate her damages, because she retained the same legal counsel as her ex-husband, nor did the court consider or address that Bill, at a minimum, had the ability to pay part of the McCormick judgment.

- 1. By failing to retain independent counsel, Roberta was prohibited from taking any steps to mitigate her damages, because of a non-consentable conflict of interest.**

The decree of divorce between Bill and Roberta provides that Bill was obligated to indemnify, defend, and hold Roberta harmless for any and all indebtedness related to Bear River.

Defendant (Bill) shall pay when due, and hold plaintiff (Roberta) harmless from the following indebtedness:

All indebtedness related to the closely held corporation Bear River Farm Equipment, Inc., including, but not limited to, any claims or litigation against the parties arising out of the business operated by Bear River Farm Equipment, Inc. including attorney fees and costs.

See Divorce Decree at 4, § VI. R. at 94.

While Bill is contractually and legally obligated to defend and indemnify Roberta from those very claims, Roberta now argues that it is not certain that she could bring a claim against Bill. This argument is refuted by Bill's own acknowledgement that he is responsible for the McCormick and Agricredit liabilities pursuant to the divorce decree and further exemplifies the conflict created by the same attorney representing Roberta and Bill.

Upon the filing of the complaint by McCormick against Bill and Roberta in August of 2008, Roberta should and could have tendered the defense of the case to her ex-husband, Bill. Bill would have been required, under the express language of the divorce decree, to both indemnify Roberta, and defend her, by paying any costs and legal fees that would have been incurred. If Bill would have rejected the tender of defense, then Roberta should and could have filed a cross-claim at that point in time, seeking to enforce the indemnification provision of the decree in the lawsuit brought by McCormick.

Rather than making any effort or attempt to force Bill to indemnify and defend her, Roberta did the one thing that effectively precluded her from insisting that Bill indemnify and defend her; she retained the same law firm that was representing Bill! More importantly, by failing to retain independent counsel, Roberta was precluded from making any attempt to mitigate her damages. In particular, Rule 1.7 of the Idaho Rules of Professional Conduct, which governs conflicts of interest, provides in relevant part, under sub-section “b,” as follows:

- (b) Notwithstanding the existence of a concurrent conflict of interest under Paragraph (a), a lawyer may represent a client if:
 - (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;

Under the Idaho Rules of Professional Conduct, Roberta’s law firm could not assert a claim against Bill and continue to represent her. Nor could they reasonably evaluate the merits of taking such an action against Bill. Such representation would have constituted a non-consentable conflict. After consulting with Bill’s attorney, Roberta determined that rather than asserting a claim against Bill and take reasonable steps to mitigate her damages, she should file a

third-party complaint against her attorney, Nicholas Bokides, alleging that he should be held exclusively responsible for the entire amount of McCormick's judgment against Bill and Roberta because of his failure to submit written notice to McCormick that Roberta would no longer be liable on the continuing guarantees.

It is axiomatic that Roberta's law firm had a duty to zealously represent and defend her. Likewise, that firm had the same obligation to vigorously represent and defend Bill. Roberta's law firm could not take any steps to seek to enforce the indemnification provisions of the divorce decree against Bill, while at the same time representing Bill. Therefore, Roberta has focused all of her efforts and resources on shifting responsibility for Bill's debts to McCormick onto Bokides, who is, at best, only secondarily liable for damages to Roberta. This is precisely the type of conflict that Rule 1.7 was designed to prevent. The comments to subsection (b)(3) state, in pertinent part:

Paragraph (b)(3) describes conflicts that are non-consentable because of the institutional interest and vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding.

As discussed above, Bill has a clear, unequivocal obligation to both defend and indemnify Roberta from any and all indebtedness from Bear River Farm Equipment, Inc., and Bill has clearly admitted this obligation in this case. Given the indemnification provision in the divorce decree, Roberta's interests are unquestionably aligned directly against Bill. Unfortunately, because Roberta and Bill were represented by the same law firm, there has been

no effort to “vigorously develop” the claims against Bill. Instead, Roberta stood by silently, while Bill used the assets he had to pay every creditor except McCormick, quite possibly because of the assumption that Bill and Roberta could shift that liability to Bokides and his insurer.

Given the patently obvious conflict of interest described above, Roberta was precluded from taking any steps to mitigate her damages and, accordingly, as a matter of law, the district court should have dismissed Roberta’s claims against Bokides. Notwithstanding, the district court failed even to address whether the conflict precluded Roberta from taking any meaningful steps to mitigate her damages, and merely swept the matter under the rug as though the issue did not exist.

2. Roberta has taken no steps to mitigate her damages, much less any reasonable steps.

In virtually every case that can be found, in Idaho or anywhere else, the courts have stated that a party who has been injured by the actionable conduct of another must take “reasonable steps” or make “reasonable efforts” or “actions” in order to mitigate his/her damages. In this case, Roberta has not taken any steps whatsoever to mitigate her damages, much less any reasonable ones. Under such circumstances, the district court should have ruled, as a matter of law, that Roberta failed to mitigate her damages, and dismiss her claims against Bokides.

At the time McCormick filed its complaint against Bear River Equipment, Bill, and Roberta, the reasonable steps that Roberta should and could have taken include the following:

- Hire independent counsel to represent and defend her in the case;
- Tender the defense of the claims to Bill, thereby forcing Bill to retain separate counsel;
- File a cross-claim against Bill;
- Sue to enforce the terms of the divorce decree, which required Bill to defend and indemnify Roberta;
- Sue to enforce the terms of the divorce decree, which required Bill to make good faith efforts to sell the property to satisfy his debts;
- Propound written discovery to Bill to discover the current state of his assets;
- Take depositions of persons with knowledge of Bill's assets;
- Send subpoenas to all institutions or banks that may have knowledge of Bill's wealth or assets;
- Conduct an asset search to determine assets he may have or may be concealing;
- Conduct a title search for any and all real property owned by Bill;
- Retain an expert to appraise the current value of the property owned by Bill, as of the time McCormick filed its complaint; and

- File a brief or affidavits in opposition to the summary judgment motion filed by McCormick, rather than merely passively allowing judgment to be taken and thereafter trying to force Bokides to pay that judgment.

Because Roberta did not take *any* steps to mitigate her damages, by definition, she has not taken “reasonable” steps to mitigate her damages and, therefore, the district court erred when it failed to dismiss her claims against Bokides.

C. Roberta Is Not Relieved from Her Obligation To Mitigate Damages Because of Her Claim That It Was Futile To Make Such Efforts.

Based on the evidence presented at trial, Roberta’s excuse for failing to mitigate is that it would have been “futile” to make a claim against Bill, because he allegedly did not have the financial ability to retire the debt. At trial, Roberta seemed to contend that Bill had *no* assets whatsoever or, conversely, that Bill did not have sufficient assets to satisfy the entire amount of McCormick’s judgment for approximately \$340,000. However, Bill has admitted he had sufficient assets to satisfy at least a portion of the judgment.

On the other hand, if Roberta’s claim is that Bill does not have sufficient assets to satisfy the judgment in its entirety, and therefore she has no duty to mitigate, her argument is contrary to all of the cases and opinions which hold that a party has a duty to mitigate damages, even if the efforts are only successful in *reducing* the amount of the damages incurred, as opposed to eliminating the damages in their entirety.

Accordingly, “mitigation” is not generally an affirmative theory of recovery. It is a vehicle employed by the defendants to show a plaintiff did not take reasonable steps to

minimize its damages. If the defendant is successful, *the court can reduce or even deny the damages asserted by the plaintiff*. . . .¹

Bokides recognizes that under Idaho law, he has the burden of proving that Roberta failed to reasonably mitigate her damages. *See Clark v. Int'l Harvester Co.*, 99 Idaho 326, 347, 581 P.2d 784, 805 (1978). However, once the party asserting the affirmative defense has shown that available alternatives existed to the other party which would have minimized the damages, the burden shifts back to the other party to prove that there were no other reasonable alternatives. *Brewster Wallcovering Co. v. Blue Mountain Wall-coverings, Inc.*, 864 N.E.2d 518, 543-44 (Mass. Ct. App. 2007); *Alamo Cmty. Coll. Dist. v. Miller*, 274 S.W.3d 779, 790 (Tex. Ct. App. 2008). Bokides demonstrated at trial that there were other alternative sources from which Roberta could have at least reduced her damages, *i.e.*, by filing a claim against Bill. The burden then shifted to Roberta to prove that this was not a reasonable alternative source. Roberta failed to establish that Bill does not have, at a minimum, the ability to satisfy part of the judgment.

Both Bill and Roberta recognized that McCormick's claims continued to increase in value over time because of interest and attorney fees, and at the same time Bill was spending his assets paying other claims, and the value of the real property was diminishing. As such, Roberta understood that her potential damages would actually increase over time. If Roberta had acted promptly in an attempt to mitigate, her potential damages would have been much less in

¹ *In Re: JL Korn*, 352 B.R. 228 (Bankr. D. Idaho 2006). *See also Clark v. Int'l Harvester Co.*, 99 Idaho 326, 581 P.2d 784, 805 (1978).

August 2008 than they were in August 2010. A party must take steps to mitigate her damages and not stand idly by while the damages increase.

Despite Roberta's self-serving claim that it would have been futile to sue her ex-husband because he was broke, she is not relieved from the obligation of bringing suit, and attempting to pursue her claims of indemnification against him. As the supreme court has stated, "the doctrine [of avoidable consequences] requires reasonable effort to mitigate damages. Thus, if reasonable, the efforts need not be successful." *Davis v. First Interstate Bank of Idaho, NA*, 115 Idaho 169, 171, 765 P.2d 680 (1988), *citing* J.D. Calamari & J.P. Perillo, *CONTRACTS* § 14-5 (2d ed. 1977).

1. If Roberta had made any effort to mitigate, she could have eliminated or, at a minimum, reduced her damages.

When it became apparent that Roberta did not undertake any efforts to attempt to mitigate her damages and hold Bill responsible for McCormick's claims, Bokides undertook efforts to conduct discovery to investigate what assets Bill had available to pay McCormick's claims. In connection with the discovery requests propounded by Bokides, Bill prepared a financial statement in February 2010 demonstrating, by his own admission, a net worth of approximately \$230,000, which would have been available to at least partially satisfy McCormick's claims. Moreover, Bokides believes the financial statement, which was prepared for purposes of litigation, most likely understated Bill's net worth, and over-exaggerated his liabilities, thereby skewing his real net worth. For example, Bill owns a ranch property in Council, Idaho, which, at the time of the divorce, was valued at approximately \$3.6 million

dollars. Additionally, Bill also significantly overstated his liabilities to the IRS, the Idaho State Tax Commission, and Merrill and Merrill.

Bill was able to pay virtually all of his claims and creditors with the exception of McCormick, and exhausted numerous assets in the effort, between November 2006 and February 2010. Nevertheless, Bill, by his own admission, still had \$230,000 of net worth in February 2010. Moreover, given Bill's mistaken assumptions about his personal liabilities to the IRS, the Idaho State Tax Commission and Merrill and Merrill, Bill actually had a net worth closer to \$470,000 in February 2010, which amount would have been sufficient to satisfy the entire amount of McCormick's judgment and significantly more than McCormick's \$200,000 settlement offer.

Moreover, McCormick filed the initial lawsuit in August 2008, and therefore, the relevant timeframe for determining whether Bill had any assets was in August 2008, and not two (2) years later in August 2010, at the time of the trial. If the property declined in value in the two (2) years between 2008 and 2010, then the decline further exemplifies Bokides' argument that Roberta has not taken reasonable steps to mitigate her damages, by filing a timely cross-claim against Bill.

Both Bill and Roberta were aware that the amount of damages McCormick was seeking in the complaint filed in August 2008 was accruing interest, and therefore, their potential liability and exposure would continue to increase over time. Similarly, both Bill and Roberta were cognizant of the fact that the value of the Council Ranch property was diminishing over time. By not taking any steps to mitigate her damages, Roberta allowed the McCormick

judgment to increase, while at the same time allowing Bill's ability to satisfy all, or part, of the judgment to diminish.

Roberta testified at her deposition that Bill was attempting to sell the property in 2007 for approximately \$6.5 million. If the sale price was even remotely close to the fair market value of the property, that value would have been more than adequate to satisfy all of McCormick's claims, and also pay Roberta's lien on the property in the amount of \$1.3 million.

On the other hand, if Bill was deliberately increasing the price of the property well above fair market value, then it is clear that he would not have been acting in good faith in an attempt to market the property, as was his obligation under the divorce decree.

Notwithstanding that Bill had sufficient assets to satisfy McCormick's claim when the complaint was filed, and the ability to satisfy at least part of the judgment by the time of trial, the district court declined "Bokides' request to bar or reduce Roberta's damages in this matter." R. at 610. Even if Bill was forced into bankruptcy, as Bill and Roberta contended, it is likely that there would be some assets from the bankruptcy estate to satisfy a portion of McCormick's judgment.

D. The District Court Erred When It Awarded Damages To Roberta When McCormick Has Not, and May Never Enforce Its Judgment Against Roberta.

The law in Idaho makes clear that a party cannot recover damages in a malpractice action where there is only a potential for damages. *Chicione v. Bignal*, 122 Idaho 482, 835 P.2d 1293 (1992). At the time Bokides filed his motion for summary judgment, McCormick had not obtained its judgment. McCormick has since obtained a judgment, in

June 2010, which judgment is entered in favor of McCormick, and against Bear River, Bill, and Roberta. It is undisputed that Bear River, Roberta, and Bill are jointly and severally liable for the McCormick judgment.

McCormick has the option of pursuing its judgment against either Bear River, Bill or Roberta, or all three, to the extent that one or more of the parties has insufficient funds to satisfy the entire judgment. If McCormick elects to proceed against Bill, and records its judgment against the property owned by Bill, which it may, it would be able to foreclose on its claims and sell the property, and potentially receive full reimbursement for its judgment. If McCormick pursues this option, Roberta will suffer no damages. Not only is it possible that she will not suffer any damages, the judgment could potentially allow Roberta to obtain a windfall, as the judgment entered against Bokides allows Roberta to collect against Bokides, whether or not McCormick satisfies its judgment, in whole or in part, from the assets of Bear River or Bill.

Roberta's claim that she suffered damages by way of attorney fees incurred by having to defend against McCormick's claims is erroneous. First, if Roberta would have tendered the defense to Bill, he was required to defend and indemnify her, from any and all claims, including costs and attorney fees. Moreover, since the undisputed evidence shows that at least one tractor was sold to Bear River prior to the entry of the divorce decree, McCormick would have brought suit against Roberta in any event and she would still have been required to hire an attorney and incur those costs and fees. The district court failed to address or even consider this argument in its finding of fact and conclusions of law.

E. Request for Attorney Fees and Costs On Appeal.

Should the Court find that Bokides prevailed in his arguments, this Court should award attorney's fees and costs to Bokides pursuant to Idaho Code Section 12-120(3) and Idaho Appellate Rules 40 and 41. I.A.R. 40 allows for the award of costs to the prevailing party on appeal. Idaho Code Section 12-120(3) provides the basis for this Court to award Bokides his attorney fees. That statute provides, in pertinent part:

In any civil action to recover on . . . any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

IDAHO CODE § 12-120(3). Commercial transactions are broadly defined in the state statutes to include all transactions except those for personal or household purposes. IDAHO CODE § 12-120(3).

This Court has recognized that a contract for legal services can be a commercial transaction. *Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72, 79, 910 P.2d 744, 751 (1996); *Fuller v. Wolters*, 119 Idaho 415, 425, 807 P.2d 633, 643 (1991). "Until recently, this Court held that prevailing parties could not win attorney fees in tort actions under § 12-120(3), including legal-malpractice actions." *Soignier v. Fletcher*, 2011 WL 2568005, *4 (Idaho 2011).

In *City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009), this Court specifically overruled prior legal-malpractice cases that denied fee awards. In that case, we ruled instead that § 12-120(3) "does not require that there be a contract between the parties before the statute is applied; the statute only requires that there be a commercial transaction." *City of McCall*, 146 Idaho at 665, 201 P.3d at 638 (quoting *Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 136 Idaho 466, 472, 36 P.3d 218, 224 (2001)).

Id.

In this case, the underlying matter is McCormick's claim to enforce the provisions of the guarantees against Roberta. The guarantees enforced by McCormick also form the basis of Roberta's claims against Bokides. An award of attorney fees is mandatory in an action to recover on a commercial transaction. *Grover v. Wadsworth*, 147 Idaho 60, 65, 205 P.3d 1196, 1201 (2009).

IV. CONCLUSION

Based on the foregoing points and authorities, the judgment in Roberta's favor should be reversed in all respects and the matter remanded to the district court for further proceedings on the issues of whether Roberta mitigated her damages, whether it would have been futile to pursue Bill and whether Roberta has been damaged.

DATED this 8th day of July, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By  _____
Bradley J Williams – Of the Firm
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Bokides

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of July, 2011, I caused a true and correct copy of the foregoing **APPELLANT'S BRIEF** to be served by the method indicated below, and addressed to the following:

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