8-31-2011

McCormick Intern. Usa, Inc. v. Shore Respondent's Brief 2 Dckt. 38454

IN THE SUPREME COURT OF THE STATE OF IDAHO

McCORMICK INTERNATIONAL USA, INC., a corporation,

Plaintiff,

vs.

ROBERTA SHORE, an individual,

Defendant-Third Party Plaintiff-Respondent,

and

BEAR RIVER EQUIPMENT, INC., a Corporation; WILLIAM R. SHORE, an individual,

Defendants,

and

NICHOLAS BOKIDES, an individual,

Third Party Defendant-Appellant.

Supreme Court Docket No. 38454-2011

RESPONDENT/CROSS-APPELLANT'S BRIEF

Appealed from the District Court of the Sixth Judicial District for Franklin County
Honorable Mitchell W. Brown, District Judge, Presiding

James G. Reid, ISB #1372
S. Bryce Farris, ISB #5636
Ringert Law Chartered
455 S. Third Street
P.O. Box 2773
Boise, Idaho 83701-2773
Tel: (208) 342-4591
Fax: (208) 342-4657

Attorneys for Third-Party
Plaintiff/Respondent/Cross Appellant
Roberta Shore

Bradley J. Williams, ISB # 4019
Charles Edward Cather III, ISB # 6297
Moffatt, Thomas, Barrett, Rock & Fields,
Chartered
420 Memorial Drive
P.O. Box 51505
Idaho Falls, Idaho 83405
Tel: (208) 522-6700
Fax: (208) 522-5111

Attorneys for Third-Party
Defendant/Appellant/Cross Respondent
Nicholas Bokides
Counter-claimants/Appellants

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES iv

I. STATEMENT OF THE CASE 1

A. NATURE OF THE CASE 1

B. COURSE OF PROCEEDINGS AND DISPOSITION 2

C. STATEMENT OF FACTS 3

II. ISSUES PRESENTED ON APPEAL 7

III. ADDITIONAL ISSUES PRESENTED ON CROSS-APPEAL 7

IV. STANDARD OF REVIEW 8

V. ARGUMENT 8

A. The District Court's Holding that Roberta Shore Did Not Fail to Mitigation Her Damages is Supported by Substantial Evidence. 8

1. Roberta Shore Did Not Have Alternative Remedies which were Viable and Equivalent.. 9

2. The District Court Did Not Err in Holding that Roberta Shore's Actions were taken in the Exercise of Reasonable, Ordinary, Due Care 12

B. The District Court Erred in Not Including the Tractor Floored Prior to the Divorce Decree in the Judgment 15

C. Roberta Shore is Entitled to Attorney Fees and Costs on Appeal 18

VI. CONCLUSION 20

TABLE OF CASES AND AUTHORITIES

CASES:

Alpine Packing Company v. H.H. Keim Company, Limited, 121 Idaho 762, 828 P.2d 325 (Ct. App. 1991) 20

City of McCall v. Buxton, 146 Idaho 656, 201 P.3d 629 (2009) 19

Clear Springs Food, Inc. v. Spackman, 2011 LEXIS 44, 252 P.3D 71 (2011) 15

Davis v. First Interstate Bank, 115 Idaho 169, 765 P.2d 680 (1988) 9

Durrant v. Quality First Marketing, Inc., 127 Idaho 558, 903 P.2d 147(Ct. App. 1995) 20

Eliopulos v. Kondo Farms, Inc., 102 Idaho 915, 643 P.2d 1085 (Ct. App. 1982) 9

Fuller v. Wolters, 119 Idaho 415, 425, 807 P.2d 633, 643 (1991) 19

Lewis v. Superior Court, 77 Cal. App. 3d 884 (Cal. Ct. App. 1978) 11

Nampa & Meridian Irrigation District v. Washington Federal Savings, 135 Idaho 518, 521, 20 P.3d 702, 705 (2001) 8

O'Neil v. Vasseur, 118 Idaho 257, 796 P.2d 134 (Ct. App. 1990) 9, 10

Robertson Supply, Inc. Nicholls, 131 Idaho 99, 952 P.2d 914 (Ct. App. 1998) 19

Theobald v. Byers, 193 Cal. App. 2d 147 (Cal. Ct. App. 1961) 11

Weinstein v. Prudential Property & Cas. Ins. Co., 149 Idaho 299, 318, 233 P.3d 1221, 1240 (2010) 16

Whitehouse v. Lange, 128 Idaho 129, 136, 910 P.2d 801, 808 (Ct. App. 1996) 11

STATUTES AND RULES:

IDJI2d 9.14 ..... 8, 9

I.C. § 12-120 (3) 18, 19, 20

COMES NOW, Third Party Plaintiff/Respondent/Cross-Appellant, Roberta Shore (hereinafter"Roberta Shore"), by and through her attorneys of record, Ringert Law Chartered, and submits this Respondent/Cross-Appellant's Brief in the above-titled matter.

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This appeal involves the legal malpractice of Nicholas Bokides (hereinafter "Bokides") arising from his representation of Roberta Shore during her divorce from William R. Shore (hereinafter "William Shore"). Roberta Shore's claims against Bokides arise from the failure of Bokides to notify McCormick International USA, Inc. (hereinafter "McCormick") and Agricredit Acceptance, LLC (hereinafter "Agricredit") that Roberta Shore would no longer guaranty repayment of future advances of funds to Bear River Equipment, Inc. (hereinafter "Bear River") based upon her guarantee. As a result of Bokides' failure to notify McCormick and Agricredit, McCormick and Agricredit sued Roberta Shore on her guaranty and subsequently obtained a judgment against Roberta Shore in the amount of $342,417.42 for eight (8) tractors and/or loaders financed by Bear River.

Bokides does not dispute that he failed to notify McCormick and Agricredit, as agreed, or that his failure/negligence resulted in a judgment against Roberta Shore. Instead, Bokides attempts to shift the blame to Roberta Shore and asserts that Roberta Shore failed to mitigate her damages by failing to pursue a separate legal action against William Shore even though she testified that she considered such an action, and based upon her finances and her knowledge of William Shore's finances, determined such an action to be futile. The trier of fact, the Honorable Mitchell W. Brown, agreed with Roberta Shore and concluded that Roberta Shore's actions were "taken in the exercise

of due care" and she did not fail to mitigate her damages. The trier of fact considered the arguments of Bokides and found that he "did not present sufficient evidence" and did not meet his burden of proving Roberta Shore failed to mitigate her damages. Bokides now seeks to not only second guess Roberta Shore's decisions regarding her ability to fund a separate lawsuit against William Shore, and her conclusions as to William Shore's assets, liabilities and financial capability of paying a judgment, but to also second guess the trier of fact's decision that her decisions were reasonable and with due care. However, there is substantial evidence supporting the district court's decision that Roberta Shore did not fail to mitigate her damages and the district court's decision should be affirmed.

The district court also held that the judgment entered against Roberta Shore involving her guarantee for one of the eight tractors/loaders, which was financed more than five months after Bokides had agreed to provide notification to McCormick and Agricredit, was not proximately caused by the negligence/malpractice of Bokides because it was financed prior to the divorce decree being entered. Roberta Shore has filed a cross-appeal as to this portion of the district court's decision because she contends that allowing Bokides five to six months to provide notification to McCormick and Agricredit was not a reasonable time as a matter of law. Bear River was in the business of financing and selling tractors, loaders and other equipment and it was reasonable to expect that it would be financing equipment during the divorce. Thus, Roberta Shore respectfully requests that the district court's decision be reversed with respect to the one tractor financed prior to the entering of the divorce decree.

B. COURSE OF PROCEEDINGS AND DISPOSITION.

Bokides provided a course of proceedings section in his opening brief and Roberta Shore

does not disagree with the course of proceedings provided by Bokides. Thus, rather than redundantly restating the course of proceedings Roberta Shore will refer the Court to Bokides' opening brief.

C. STATEMENT OF FACTS.

Roberta Shore disagrees with portions of the statement of facts submitted by Bokides, and therefore, submits her own statement of facts. Furthermore, Roberta Shore would point the Court to the findings of fact by the district court which also summarize the facts and evidence presented to the district court during the one day court trial (*See* R. pgs. 595-613).

1. McCormick is a manufacturer of farm equipment. In order to market its equipment, McCormick establishes retail distributor/dealerships with local, but independently owned dealers. In 2005, a dealership with Bear River was created for the retail sale of McCormick tractors and other farm equipment. (R. pg. 149).

2. In order to finance the acquisition of its inventory from McCormick, Bear River entered into agreements with Agricredit which were executed by William Shore and Roberta Shore on behalf of Bear River. Bear River executed an "Inventory Security Agreement" and a "Retail Financing Agreement" with Agricredit on March 22, 2005. As part of the Inventory Security Agreement, Bear River granted to Agricredit a limited power of attorney which provided Agricredit with authority to execute, on behalf of Bear River, certain documents in the normal course of business, including "Wholesale Financing Requests and Agreements." As Bear River ordered farm equipment from McCormick, the equipment would be financed or "floored" through Agricredit. Wholesale Financing Agreements would be executed by Bear River through the use of the limited power of attorney. Once the equipment was sold to the customer, the proceeds of the sale were to be placed in a trust account, separate and apart from Bear River's other funds.

3. On March 22, 2005, William and Roberta each separately executed personal guarantees in which they unconditionally and absolutely guaranteed any obligation owed by Bear River to Agricredit.

4. In July and August of 2007 an audit revealed that Bear River had been selling equipment financed through Agricredit, receiving proceeds from the sales but failing to apply said proceeds to its obligation to Agricredit or to place said monies in a trust account as required by the agreements with Agricredit.

5. McCormick and Agricredit had previously entered into an agreement wherein McCormick reimbursed Agricredit for the amounts financed to McCormick's dealers if Agricredit was unable to collect monies it had provided for the purchase or flooring of McCormick equipment. By assignment dated March 14,2008, Agricredit transferred to McCormick all of its right, title and interest to the obligation owed by Bear River to Agricredit. The personal guarantees referenced in paragraph 3 were part of the all-inclusive rights assigned to McCormick.

6. The Guaranty signed by Roberta Shore contained the following provision:

> 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 guaranty.

(R. pg. 37, 43).

7. On August 29, 2008 McCormick filed suit against Bear River as well as William Shore and Roberta Shore in their individual capacities. (R. pg. 1). McCormick moved for summary judgment on May 20, 2010. (R. pg. 252). McCormick's Motion for Summary Judgment was

granted June 10, 2010. (R. pg. 408). Judgment was entered against Bear River, William and Roberta on June 29, 2010 in the sum of $319,977.98. (R. pg. 434).

8. The Judgment related to five (5) tractors and three (3) loaders. The proceeds from the sale of the equipment were not paid over to Agricredit as required by the Agreements between Bear River and Agricredit. The Wholesale Financing Requests and Agreements for each of these items of equipment are listed and identified in the Affidavit of Kevin Peters and are summarized as follows:

Serial No.	**Model No.**	**Date Financed**
JJE2026767	MC115 Tractor	10/23/06
JJE3337250	MTX135 Tractor	12/21/06
JJE3337193	MTX120 Tractor	12/21/06
7183970	MCQL145 Loader	12/21/06
JJE2059356	CX105 Tractor	1/04/07
JJE2058843	CX85 Tractor	3/15007
7217799	MCQL165 Loader	5/29/07
7217796	MCQL165 Loader	5/29/07

(R. pg. 187, *see also* Exhibits 203 and 105).

9. On August 12, 2010, attorney fees and costs were awarded and an Amended Judgment was entered against Bear River, William and Roberta in the amount of $342,417.42. (R. pg. 477).

10. In March of 2006, Roberta Shore engaged the services of Bokides to represent her in a divorce proceeding in Washington County, Idaho, Shore v. Shore Case No. CV 2006-000368. Roberta Shore advised Bokides of the above-referenced personal guarantee and Bokides agreed to

notify, in writing, Agricredit that Roberta Shore would no longer be a guarantor for the obligations of Bear River. While there has been some dispute around this issue at trial, it is clear Bokides acknowledged that Roberta Shore asked him to send the letters revoking her guarantee prior to May of 2006. (Tr. pgs. 13, lns. 4-22; *see also* R. pg. 603).

11. The evidence is undisputed that Bokides did not send the letters he promised to send to Agricredit revoking Roberta Shore's personal guarantee. (Tr. pg. 173, lns. 5-7). Bokides did not contact McCormick or Agricredit to determine if removing Roberta Shore's personal guarantee would negatively impact Bear River's ability to obtain financing in the future. (Tr. pg. 193, lns. 7-22). Further, Bokides did not dispute had he sent the letters which he agreed to do before October 23, 2006, Roberta Shore would never have been a party to this action and McCormick/Agri-Credit would not have obtained the above-referenced Judgment against her. (Tr. pgs. 188-189, lns 21-1).

12. Bokides suggests that Roberta Shore failed to mitigate her damages by failing to bring a cause of action against William Shore. At the time the cause of action was brought against Roberta Shore, she met with James G. Reid to discuss her options. She was advised of a potential conflict and a written waiver of that conflict was obtained from both Roberta Shore and William Shore. (Tr. pg. 21, lns. 9-20). Roberta Shore independently determined not to make a claim against William Shore based upon her personal knowledge of his assets, liabilities, including pending actions, and net worth. (Tr. pg. 21-22, lns. 21-23).

13. Roberta Shore testified that having been married to William Shore she was aware of the assets, liabilities, judgments and pending lawsuits of William Shore. The testimony was also undisputed that Roberta Shore was also aware of those same assets, liabilities, judgments and pending lawsuits after the divorce. *Id.* In fact, Roberta Shore was a party to some of the lawsuits

and continues to have a security interest in some of the assets of William Shore.

14. The testimony at trial was also undisputed that the Divorce Decree (Exhibit 103), does not specifically state that William Shore will indemnify Roberta Shore for her obligations pursuant to her guarantees. (Tr. 103-104, lns. 12-5). The Divorce Decree provides at paragraph VI that William Shore will indemnify Roberta Shore for "indebtedness related to the closely held corporation Bear River Farm Equipment, Inc."

15. As to William Shore's assets, the undisputed testimony was that William Shore has a negative net worth and William Shore may have to file bankruptcy at some point in the future. (Tr. pg. 103, lns. 1-6). The Financial Statement dated February 26, 2010 (Exhibit 113) does not include the above-mentioned Judgment of McCormick/Agri-Credit. (Tr. pg. 99, lns. 7-18). William Shore's testimony was that the value of the assets listed on the Financial Statement if sold pursuant to execution, would be significantly less than the amounts he listed on the Financial Statement he prepared. (Tr. pg. 101, lns. 2-13). There was a suggestion at trial that William Shore had offered to settle the suit with McCormick for $100,000.00 but the undisputed testimony was that William Shore would have to borrow the money to accomplish a settlement. (Tr. pg. 74, lns. 10-20).

II. ISSUES PRESENTED ON APPEAL

The issues asserted by Bokides on appeal can be summarized as follows:

1. Whether the district court erred in finding that Roberta Shore did not fail to mitigated her damages?

III. ADDITIONAL ISSUES PRESENTED ON CROSS-APPEAL

Roberta Shore raises the following issues on cross-appeal:

2. Whether the district court erred in ruling that Roberta Shore's damages did not

include the amount due to McCormick for the tractor that was floored on or about October 28, 2007?

3. Whether Roberta Shore is entitled to its attorney fees and costs incurred as a result of this appeal?

IV. STANDARD OF REVIEW

When reviewing the district court's decision, the appellate court's:

> decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. A district court's findings of fact in a bench trial will be liberally construed on appeal in favor of the judgment entered, in view of the district court's role as trier of fact. It is the province of the district judge acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. [The appellate court] will not substitute [its] view of the facts for the view of the district court. Instead, where findings of fact are based on substantial evidence, even if the evidence is conflicting, those findings will not be overturned on appeal. [The appellate courts] exercise free review over the lower court's conclusions of law, however, to determine whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found.

Nampa & Meridian Irrigation District v. Washington Federal Savings, 135 Idaho 518, 521, 20 P.3d 702, 705 (2001) (citations omitted).

V. ARGUMENT

A. The District Court's Holding that Roberta Shore Did Not Fail to Mitigation Her Damages is Supported by Substantial Evidence.

While packaged in a number of different arguments, Bokides' entire appeal is limited to arguments concerning mitigation of damages. Mitigation of damages is defined by IDJI2d 9.14 as follows: "Any person who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered." Idaho courts have consistently held that the burden of proof lies with the party asserting

the affirmative defense. More specifically, the burden of proof as to mitigation of damages is on the party causing the alleged damages, Bokides in this instance. *See Davis v. First Interstate Bank*, 115 Idaho 169, 765 P.2d 680 (1988); *Eliopulos v. Kondo Farms, Inc.*, 102 Idaho 915, 643 P.2d 1085 (Ct. App. 1982). Thus, the burden is on Bokides to prove that Roberta Shore did not exercise reasonable care to mitigate her damages.

The district court, relying upon IDJI 9.14 and *O'Neil v. Vasseur*, 118 Idaho 257, 796 P.2d 134 (Ct.App. 1990), found that Bokides did not meet his burden and that Roberta Shore's actions were taken in the exercise of due care. As the trier of fact, the district court considered the testimony of Roberta Shore and William Shore, along with the documentary evidence, and concluded that Roberta Shore made a "knowing and intelligent decision based upon her knowledge of the circumstances surrounding [William Shore's] finances" and that Roberta Shore did not have alternative remedies which were viable and equivalent. The district court's conclusions were supported by the testimony of Roberta Shore that she had personal knowledge of the finances of William Shore arising out of her fifteen year marriage and the finances, and debts, associated with the dissolution of said marriage. While Bokides may second guess or question the findings and evidence, Bokides has not and cannot demonstrate that the district court's findings and conclusions are not supported by substantial evidence.

1. Roberta Shore Did Not Have Alternative Remedies which were Viable and Equivalent.

Bokides argues that the facts and issues presented in *O'Neil v. Vasseur* are instructive to the case at bar. Interestingly, the district court also found *O'Neil v. Vasseur* insightful in that it provides 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 may be that the client suffers no loss as the proximate loss of the attorneys negligent conduct." *Id.* at 262. (emphasis added). The district court found that Roberta Shore did not have alternative remedies which were both viable and equivalent because "she was faced with the prospect of incurring additional expenses and attorney fees to pursue what she knew to be a judgment proof individual from her own personal knowledge arising out of her fifteen year marriage and the finances associated with the dissolution of that marriage." (R. pg. 610). Thus, to the extent Bokides is relying upon *O'Neil v. Vasseur*, the facts of this case, as found by the district court, are distinguishable because Roberta Shore did not have alternative remedies which were viable and equivalent.

Moreover, the case of *O'Neil v. Vasseur* involved a situation in which an attorney failed to pursue a claim on behalf of the plaintiffs. The plaintiffs then pursued the claim on their own behalf and the court found that they properly mitigated their damages. In this case, unlike *O'Neil v. Vasseur*, the malpractice of Bokides does not arise from his failure to pursue a claim on behalf of Roberta Shore. This is not a situation where the legal malpractice arises from Bokides' failure to pursue William Shore. In other words, it is not analogous to *O'Neil v. Vasseur* because the claim which gives rise to the malpractice is different from the claim which Bokides now suggests Roberta Shore failed to pursue. In *O'Neil v. Vasseur*, the "viable and equivalent" remedy was to pursue the claim which the attorney failed to pursue. In this case, Bokides' malpractice is based upon his failure to notify McCormick and Agricredit to remove Roberta Shore from the guarantees. Bokides is not suggesting and there is no evidence to support the argument that Roberta Shore failed to mitigate her damages because she failed to notify McCormick and Agricredit because, as the district court correctly found, she did not learn that the notification did not occur until after the eight

tractors/loaders were floored. Instead, Bokides is suggesting that Roberta Shore should bring a separate legal action against William Shore. Notwithstanding the fact that such a separate action would be futile based upon the testimony and evidence, bringing a separate action against William Shore, is not the equivalent of Bokides notifying McCormick and Agricredit to remove her from the guarantees.

Bokides also cites to *Theobald v. Byers*, 193 Cal.App 2d 147 (Cal. Ct. App. 1961) and *Lewis v. Superior Court*, 77 Cal.App. 3d 844 (Cal. Ct. App. 1978), "for the proposition that in legal malpractice actions, if there is a potential source of recovery for the plaintiff, then the recovery against the defendant attorney is reduced or eliminated by the amount potentially recoverable." While *Lewis v. Superior Court* held that "[u]pon the trial of the matter defendant **may** seek establish that plaintiff has a collectible interest in the pension," it still requires the defendant to meet his burden of showing that a failure to mitigate damages. The same is true in this case where Bokides "may seek to establish that" Roberta Shore has an alternative remedy which is viable and equivalent at trial, but Bokides was unsuccessful in meeting his burden.

Over Roberta Shore's objection, the district court allowed Bokides to amend his answer to pursue the affirmative defense of failure to mitigate but found that Roberta Shore's action were the exercise of ordinary, due care. The district court properly relied upon *Whitehouse v. Lange*, 128 Idaho 129, 136, 910 P.2d 801,808 (Ct.App. 1996), and found that:

> **Bokides did not present sufficient evidence** at trial that Roberta's pursuit of William would have lead to a collectible judgment that would have satisfied or decreased her liability to McCormick. **Rather the evidence at trial and this Court's findings of fact support the opposite conclusion** that it would only have added to the already disastrous financial status of William and placed Roberta in line with a handful of other creditors attempting to collect money and judgments against him.

(R. pg. 611) (emphasis added). Bokides simply did not meet his burden.

2. The District Court Did Not Err in Holding that Roberta Shore's Actions were Taken in the Exercise of Reasonable, Ordinary, Due Care.

Bokides makes a number of unsupported assertions which do not change or alter the findings and conclusions of the district court. First, Bokides makes the unsupported assertion that there was an impression that Roberta Shore and William Shore colluded to have Bokides pay the judgment obtained by McCormick. Such an assertion is not supported by the evidence but also makes no sense given the fact that it was the actions/inactions of Bokides that would have prevented Roberta Shore from being sued in the first place, i.e., he was the one that agreed to send the notification.

Bokides then argues that because Roberta Shore and William Shore did not file any opposition to the summary judgment motion of McCormick, it suggests they did not have any motivation to avoid Bokides paying the entire amount. Again, there is no evidence in the record to support such assertions, but the fact of the matter was that Roberta Shore did not have a meritorious defense to McCormick's summary judgment motion given that she had not been removed from her personal guarantee of the tractors/loaders financed by McCormick.

Bokides also argues that Roberta Shore failed to mitigate her damages because she did not retain independent counsel to represent her. Bokides fails to mention the testimony and evidence presented at trial that at the time McCormick initiated the lawsuit against her, she was advised of a potential conflict and a written waiver of that conflict was obtained from both Roberta Shore and William Shore. (Tr. pg. 21, lns. 16-20). Prior to bringing a third party action against Bokides, Roberta Shore independently determined not to make a claim against William Shore based upon her personal knowledge of his assets, liabilities, including pending actions, and net worth. (Tr. pg. 21-22,

lns. 16-23; pgs. 27-28, lns. 23-2). Thus, the same determination that the district court held was an exercise of due care to not pursue an independent action against William Shore, was made before Roberta Shore initiated a third party claim against Bokides. Moreover, Roberta Shore testified that she asked Bokides if he thought it was okay for her to retain the same counsel as William Shore and Bokides told her "he didn't see any reason not to, that that would be fine." (Tr. pg. 21, lns. 1-15). Thus, the very decision that Bokides is now second guessing was approved by Bokides according to the testimony of Roberta Shore.

Bokides' assertion that Rule 1.7 of the Idaho Rules of Professional Conduct would prevent Roberta Shore from making a claim against William Shore is misplaced because Roberta Shore had already made a knowing and intelligent decision not to pursue a claim against William Shore.[1] Those actions were found to be an exercise of ordinary, due care and should not be disturbed on appeal. Moreover, Roberta Shore testified that she understood that she could always hire a different lawyer if and when she believed it would be productive to pursue William Shore. (Tr. pg. 61, lns. 3-22; pgs. 97-98, lns. 22-3). Roberta Shore was not "legally handicapped from taking any steps to pursue any claims against" William Shore as suggested by Bokides because, as she testified, she "knew at any time, I could go hire any lawyer I want to hire to do whatever I want to do." (Tr. pg. 59, lns. 14-22; pg. 61, lns. 13-22).

---

[1] Bokides asserts that William Shore had a "clear, unequivocal obligation to both defend and indemnify Roberta from any and all indebtedness from Bear River." *Appellate's Brief*, pg. 21. However, William Shore's obligations to Roberta Shore under the divorce decree were not as clear and unequivocal as Bokides contends. William Shore had an obligation to indemnify and defend for Bear River indebtedness. While the underlying transactions related to the financing/flooring of Bear River equipment, Roberta Shore was sued by McCormick based upon her "personal guaranty." Thus, the testimony and evidence at trial was that part of Roberta Shore's decision included the expenses of pursuing William Shore, whether the claim was viable, and then whether she would simply obtain an uncollectable judgment.

Bokides plays "Monday Morning Quarterback" and suggests a number of actions Roberta Shore "could have" taken. However, speculating as to these steps is nothing more than second guessing the trier of fact's decision. Again, the district court considered the testimony of Roberta Shore and found her testimony credible as to her personal knowledge of the finances during her fifteen year marriage and dissolution of that marriage and that she made a knowing and intelligent decision. Speculation and second guessing actions Roberta Shore could have taken does not change the fact that the trier of fact's decision was supported by substantial evidence.

Perhaps the most obvious attempt of Bokides to re-argue the facts presented to the trier of fact relates to Bokides' assertion that he "believes" the finances of William Shore were "most likely understated." *Appellate's Brief*, pg. 26. Bokides then speculates that William Shore's net worth was understated because of William Shore's mistaken assumptions as to his assets and personal liabilities and "**it is likely** that there would be some assets from the bankruptcy estate to satisfy a portion of McCormick's judgment."[2] *Appellate's Brief*, pg. 28. However, the evidence concerning William Shore's net worth was weighed and considered by the district court and the district court made a specific finding as to those assets and liabilities. *See* R. pgs. 604-605. Those findings, along with Roberta Shore's personal knowledge of William Shore's net worth, are supported by substantial and competent evidence and should not be overturned on appeal simply because Bokides speculates that

---

[2] Bokides also speculates that William Shore's net worth may have decreased between the time of McCormick's initial lawsuit, August 2008, and the time of trial, August 2010. Again, the evidence presented to the district court was that Roberta Shore's decision not to pursue William Shore was made prior to her bringing a third party action against Bokides. Thus, it is not as if she waited two years to make her decision as suggested by Bokides. It should also be noted that it took McCormick nearly two years to obtain a judgment against Roberta Shore and William Shore based upon their personal guarantees and Bokides is simply speculating that Roberta Shore could obtain a judgment against William Shore in less time.

they were undervalued.

Finally, Bokides raises a number of "what if" questions relating to the potential satisfaction of the McCormick judgment. First, Bokides did not raise the issue below that the judgment obtained by Roberta Shore against Bokides should be modified depending on the satisfaction of the McCormick judgment. The appellate court will not consider issues raised for the first time on appeal. *Clear Springs Food, Inc. v. Spackman*, 2011 LEXIS 44, 252 P.3D 71 (2011). Second, these "what if" scenarios do not change the fact that McCormick has a judgment against Roberta Shore as a direct and proximate result of the negligence/malpractice of Bokides. This is not disputed by Bokides and he has raised no argument that his failure to send notifications to McCormick was not the proximate cause of the judgment. (Tr. pgs. 188-189, lns. 21-1). As the district court properly concluded, the judgment against Roberta Shore was the proximate result of Bokides' breach and thus she was damaged when the McCormick judgment was entered.[3]

B. The District Court Erred in Not Including the Tractor Floored Prior to the Divorce Decree in the Judgment.

The district court failed to include the tractor floored on October 23, 2006 because it was floored prior to the divorce being completed. The district court found that a reasonable time for Bokides to notify McCormick and Agricredit to relieve Roberta Shore from her personal guarantee obligations was six months or until the divorce decree was entered. However, Roberta Shore suggests that a reasonable time for an ongoing business, with ongoing financing and flooring, is not six months and the district court's decision that the tractor financed prior to the divorce decree was not proximately caused by Bokides' breach should be reversed.

---

[3] The McCormick judgment was entered against Roberta Shore prior to the trial in this matter and prior to the district court's decision.

The district court found that during one of the meetings between Roberta Shore and Bokides, the last of which was May of 2006, Bokides agreed to notify McCormick and Agricredit of her decision to terminate the personal guarantees. It is undisputed that Bokides failed to provide such notification. Approximately six months later the divorce was completed the divorce decree was entered on November 16, 2006. Of the eight tractors/loaders which McCormick sued Roberta Shore on her personal guarantee, only one was financed/floored prior to the divorce decree. This tractor was financed/floored on October 23, 2006 and the sum claimed by McCormick relative to this tractor was $43,331.89.

As to when the notification would occur, the district court found that Roberta Shore did not see why the notification could not occur immediately and that she expected the notification to be done by the time the divorce was completed. (R. pg. 603). Bokides suggested that the notification would not be until the divorce was finalized but the district court held that it did not accept Bokides' version of the events, but instead found Roberta Shore's testimony more credible. (R. pg. 603, footnote 4). Thus, the district court's own findings were that the there was no reason why the notification could not occur immediately and it would be done by the time the divorce was completed. Yet, the district court found that a tractor floored five months after Bokides agreed to send the notification, and less than four weeks before the divorce was completed, was not included in Roberta Shore's damages. In other words, the district court's findings suggest that a reasonable time for Bokides to send the notification was anytime prior to the divorce being completed, November 16, 2006.

The district court relied upon *Weinstein v. Prudential Property & Cas. Ins. Co.*, 149 Idaho 299, 318, 233 P.3d 1221, 1240 (2010) which holds that where no time of performance is stated, the

law implies a reasonable time. However, Roberta Shore contends that a reasonable time under these circumstances was not six months later or when the divorce decree was entered. Bear River was continuously in the business of financing, flooring and selling tractors, loaders and other equipment during the divorce proceedings. Because of the continuous, ongoing business and financing, it was important for Roberta Shore to be removed from her personal guarantee as soon as possible. The business was being managed by an individual named Tom Lewis and Roberta Shore had no way of knowing when and how many tractors/loaders were being floored and financed. (Tr. pgs. 32-33, lns. 21-10). The divorce litigation could have taken three months or three years and it was completely arbitrary to select the divorce decree as the implied time of performance. A reasonable time should have been no more than sixty (60) days but in no event as long as six months. Even if Bokides were allowed one-hundred twenty (120) days, Roberta Shore would have no liability to McCormick/Agricredit.

Again, the district court's own findings were that Roberta Shore's testimony was more credible than Bokides and that she did not see why the notification was not immediately provided or at least prior to the divorce being completed. In fact, Roberta Shore testified that she understood that Bokides would provide the notifications as soon as he could, there was no condition as to when he would do it, and that she assumed he would proceed "promptly." (Tr. pgs. 13-15, lns. 19 -11). She testified there "was no reason to hold off on it. Uhm, I didn't see why it should have been done right away, but we didn't discuss it." (Tr. pg. 44, lns. 9-15). The expectation of the witness in which the trier of fact found most credible was that it would be done promptly and right away and not six months later when the divorce was final. In fact, Roberta Shore testified that there was no discussion about waiting until the divorce decree was entered to send the notifications. (Tr. pg. 19, lns. 6-22;

pg. 45, lns. 2-6). Finally, Roberta Shore testified that if Bokides would have provided the notification in a reasonable time, "even as late as September 2006", McCormick would not have sued her. (Tr. pgs. 30-31, lns. 11-6).

For these reasons, Roberta Shore respectfully requests that the district court's decision be reversed as to the one tractor financed prior to the divorce decree. Even if there were no indications of trouble with Bear River, a reasonable time under the law to notify McCormick/Agricredit that Roberta Shore intended to revoke her personal guarantee for flooring lines of Bear River equipment is certainly less than five months. There was no reasonable, rational reason not to remove Roberta Shore from the personal guarantees as soon as possible following the May 2006 agreement to do so which in no event should have taken until October 23, 2006 (the day the only tractor was floored prior to the entry of the divorce decree).

C. Roberta Shore is Entitled to Attorney Fees and Costs on Appeal.

Pursuant to Idaho Appellate Rules 40 and 41, Roberta Shore requests attorney fees and costs be awarded to her on appeal. With regard to attorney fees, Roberta Shore claims attorney fees under I.C. § 12-120(3), which provides:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, **guaranty**, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in **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.

(emphasis added).

The statute goes on to define commercial transaction as follows: "[t]he term 'commercial transaction' is defined to mean all transactions except transactions for personal or household purposes." I.C. § 12-120(3).

In *City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009), the Idaho Supreme Court overruled the decision in *Fuller v. Wolters*, 119 Idaho 415, 425, 807 P.2d 633, 643 (1991) and held that I.C. § 12-120(3) applies to legal malpractice actions. The Court reasoned that the latter part of the statute is not limited to contract actions and only requires that there be a commercial transaction. *Id.* at 665, 201 P.3d at 638. Thus, the fact that although a legal malpractice action may sound in tort, attorney fees are awardable under I.C. § 12-120(3) if the underlying matter involved a commercial transaction.

In this case, in the underlying matter, Plaintiff, McCormick, made certain claims, and ultimately obtained a judgment, against Roberta Shore based upon her guaranty. The guaranty related to the flooring lines of tractors and other equipment sold for commercial purposes by Bear River. The judgment against Roberta Shore was based upon a commercial transaction, and the district court awarded attorney fees against Roberta Shore, and in favor of McCormick, in the underlying action, for these reasons (R. pg. 468). The very guaranty that forms the basis of McCormick's cause of action against Roberta Shore is also the basis of the legal malpractice action against Bokides. Accordingly, Roberta Shore's cause of action against Bokides based upon is failure to remove her from said personal guarantees is based upon a commercial transaction. Indeed, Bokides does not dispute that the this action is based upon a commercial transaction as Bokides as also claimed attorney fees on appeal for the same reasons.[4]

Once a cause of action is brought which is covered by I.C. § 12-120(3), the award of attorney fees is mandatory. *Robertson Supply, Inc. v. Nicholls*, 131 Idaho 99, 952 P.2d 914 (Ct.App. 1998).

---

[4] It should be noted that the district court awarded attorney fees to Roberta Shore based upon I.C. § 12-120(3) and Bokides did not appeal any portion of the district court's decision and supplemental judgment pertaining to attorney fees.

The mandatory award of attorney fees in this case is consistent with Idaho precedent holding that I.C. § 12-120(3) is applicable when the underlying debt is based upon an open account, note, bill, contract, or any other commercial transaction covered by I.C. § 12-120(3). *See Durrant v. Quality First Marketing, Inc.*, 127 Idaho 558, 903 P.2d 147 (Ct.App. 1995) (awarding attorney fees to the prevailing party pursuant to I.C. § 12-120(3) in an action to pierce the corporate veil when the underlying action and debt upon which the plaintiff sought to hold the principal individually liable was either an open account, note, bill, contract or commercial transaction covered by I.C. § 12-120(3)); *Alpine Packing Company v. H.H. Keim Company, Limited*, 121 Idaho 762, 828 P.2d 325 (Ct.App. 1991) (holding that attorney fees under I.C. § 12-120(3) were appropriately awardable to the prevailing party when one party sought to disregard a corporate entity to avoid collection on an open account).

VI. CONCLUSION

For the foregoing reasons, Roberta Shore respectfully requests that the district court's decision be affirmed with regard to its decision to Roberta Shore did not fail to mitigate her damages. The district court's decision that her actions were reasonable and with the exercise of due care are supported by substantial evidence.

Roberta Shore also respectfully requests that the district court's decision be reversed with respect to its decision that a reasonable amount of time for Bokides to notify McCormick and Agricredit to remove Roberta Shore from her guarantees was nearly six months later when the divorce was final. Accordingly, Roberta Shore requests reversal of the district court's decision to disallow her claim for damages relating to the tractor which was financed prior to the divorce being completed. Lastly, Roberta Shore respectfully requests her attorney fees and costs incurred in this

appeal.

DATED this 8 day of August, 2011.

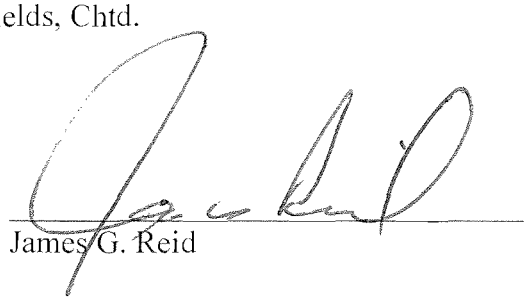
RINGERT LAW CHARTERED

By _____
James G. Reid
Attorneys for Roberta Shore

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of August, 2011, two true and correct copies of the foregoing was served upon :

Bradley J. Williams
Charles Edwards Cather III
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
420 Memorial Drive
P.O. Box 51505
Idaho Falls, Idaho 83405



James G. Reid