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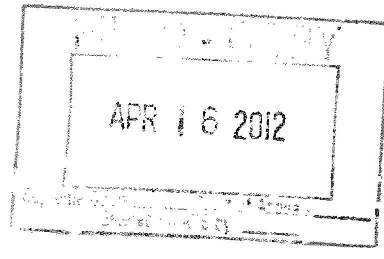
IN THE SUPREME COURT OF THE
STATE OF IDAHO

ECHO VANDERWAL and JLZ ENTERPRISES, INC., an Ohio corporation registered in Idaho, Plaintiffs/Respondents, vs. ALBAR, INC., an Idaho corporation; Appellant, and ELMER B. SUDAU; T. OWEN MULLER and MARITA STEWART dba LAKE COUNTRY REAL ESTATE, Defendants.	)	DOCKET NO. 38085-2010 Bonner County Case No. CV-2007-1489 (No. CV-2007-1841 Consolidated) APPELLANT'S BRIEF
ALBAR, INC., an Idaho corporation, Plaintiff/Appellant, vs. JLZ ENTERPRISES, INC., an Ohio corporation, and JAMES O. STEAMBARGE, a single man, Defendants/Respondents.	)	

APPELLANT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner

THE HONORABLE STEVE VERBY, DISTRICT JUDGE, PRESIDING

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a breach of contract and judicial foreclosure case. The Appellant ALBAR, INC., an Idaho corporation (herein "ALBAR") is a Defendant on the claims in Bonner County Case CV-2007-1489 for breach of contract and is the Plaintiff on the claims in Bonner County Case CV-2007-1841 for judicial foreclosure of a note and deed of trust. The Appellant ALBAR appeals against the Respondents ECHO VANDERWAL and JLZ ENTERPRISES, INC., an Ohio corporation registered in Idaho (herein "JLZ"), and JAMES O. STEAMBARGE, a single man, from the Judgment And Decree Of Sale, entered in the above entitled action on July 27, 2010, and from the Order Disallowing Attorney's Fees And Costs entered in the above entitled action on November 5, 2010, and from the Memorandum Decision and Order re: Albar's Motion For Relief From Judgment, entered in the above entitled action on September 30, 2011, the Honorable Steve Verby, District Judge, presiding.

II. COURSE OF THE PROCEEDINGS

On or about August 31, 2007, ECHO VANDERWAL and JLZ ENTERPRISES, INC., an Ohio corporation registered in Idaho (herein "JLZ") as the buyer of real property commenced an action against ALBAR as the seller of the real property and others involved in the real estate transaction. The action included several claims based upon the real estate transaction and subsequent cleanup efforts for the Idaho Department of Environmental Quality regulated petroleum leak site, on the property, which is known gas the Dock-N-Shop in Priest River,

Idaho. R. Pgs. 12-25.

On or about November 2, 2007, ALBAR commenced an action against JLZ ENTERPRISES, INC. and JAMES O. STEAMBARGE for judicial foreclosure and for priority adjudication of its Seller's note and deed of trust, secured by the Dock-N-Shop property. R. Pgs. 246-251.

On or about November 26, 2008, the actions were consolidated. R. Pgs. 57-59.

The claims by JLZ against MARITA STEWART dba LAKE COUNTRY REAL ESTATE were dismissed prior to trial. R. Pgs. 87-90. JLZ and ALBAR entered certain stipulations involving the respective claims and admitting certain matters, which resulted in a resolution of all claims except for JLZ's causes of action for breach of contract and mutual mistake, and for offset damages, if any, against the sums due by JLZ to ALBAR on the judicial foreclosure. R. Pgs. 103-122.

Commencing on or about June 22, 2009 and proceeding through June 25, 2009, the matter came for trial. Closing arguments were made on June 30, 2009. The Court announced its decision on the record in open sessions on July 2, 2009 and September 3, 2009.

A motion for reconsideration by JLZ was heard on January 6, 2010 and the Court entered its Order Re: Plaintiffs' Motion For Reconsideration And For Clarification on or about May 11, 2010. R. Pgs. 167-180. Alternative forms of judgment were presented for entry and briefing upon interest was ordered. R. Pgs. 181-195.

On July 27, 2010, the Court entered its Order on Proposed Judgments and its Judgment and Decree Of Sale. R. Pgs. 200-207.

ALBAR sought an award of attorney fees and costs. R. Pgs. 208-229. The request was denied.

ALBAR timely filed its Notice of Appeal and Amended Notice of Appeal, respectively. R. Pgs. 230-239.

While the appeal was pending, on or about November 30, 2010, ALBAR filed its Motion For Relief From Judgment. Supp. R. Motion Filed November 30, 2010. The matter came for hearing on June 8, 2011 followed by briefing. Supp. R. Briefs and Memoranda Filed July 22, 2011 and August 3, 2011. On or about September 30, 2011, the Court entered it's Memorandum Decision And Order re: Albar's Motion For Relief From Judgment denying the relief sought. Supp. R. Memorandum Decision Filed September 30, 2011. ALBAR timely filed its Second Amended Notice Of Appeal.

III. CONCISE STATEMENT OF FACTS

ALBAR owned and operated a commercial convenience store, fuel sales, and marina business known as the Dock-N-Shop upon 2 parcels of real property located in Priest River, Idaho, upon the Pend Oreille River. On Memorial Day Weekend in May 2003, a petroleum fuel tank leak or release occurred from an underground storage tank ("UST") on the real property. ALBAR'S three (3) petroleum underground storage tanks and fuel system met all applicable regulatory provisions and ALBAR was insured through the State of Idaho Petroleum Storage Tank Fund ("PSTF") at the time of the fuel release in 2003.

Immediately following the fuel release, personnel from ALBAR, the Idaho Department of Environmental Quality ("IDEQ"), the U.S. Environmental Protection Agency ("EPA"), the Idaho Petroleum

Storage Tank Fund ("PSTF"), Kleinfelder, an environmental engineering firm, and certain subcontractor equipment operators met on scene and began immediate containment efforts, including the construction of wall and barrier to prevent the release of petroleum from traveling into the waters of the United States, specifically the Pend Oreille River.

Immediately following and as part of the containment efforts, soils were removed and disposed at an approved facility. Over the next several months monitoring and remediation systems were installed to address soil contamination and groundwater contamination and a Consent Order was entered into in the late summer 2003 between ALBAR through its insurer the Idaho Petroleum Storage Tank Fund, and the Fund's contractor Kleinfelder, and the IDEQ (Plaintiff's Exhibit 4). The remediation project covered the Dock-N-Shop property, as well as immediately adjacent real property.

Prior to and at the time of the release, the Dock-n-Shop business and real property were zoned commercial, with a commercial venture being operated on the property. Commercial Soil and Groundwater remediation clean up levels were established by the IDEQ and Kleinfelder with specific Site Specific Target Levels (SSTLs) based upon Idaho RBCA Guidelines. The remediation project continued.

In 2005, JLZ ENTERPRISES, INC. ("JLZ"), operated by ECHO VANDERWAL purchased three contiguous parcels adjoining the Dock-N-Shop parcel to the west, which included a portion of a parcel that had been impacted by the fuel leak. (See Plaintiffs Exhibit 6).

After closing on the three parcels to the East of the Dock-n-

Shop, on June 14, 2005, ECHO T. VANDERWAL/JLZ ENTERPRISES, INC. AND/OR ASSIGNS submitted an offer to ALBAR for the purchase of the Dock-n-Shop business and property by an RE-23 Commercial/ Investment Real Estate Purchase And Sale Agreement with RE-17 Financing Addendum #1 and RE-11 Addendum/Amendment #2 attached (Plaintiff's Exhibit 2). The offer was signed Echo VanderWal, with the signature physically placed upon the documents by Marita Stewart. At the time of the offer Echo VanderWal was residing in and physically located in Ohio.

On June 16, 2005, by RE-13 Counter Offer #1 (Plaintiff's Exhibit 2), ALBAR countered, which was accepted on June 16, 2005 signed Echo VanderWal with the signature physically placed upon the document by Marita Stewart. At the time of the counter-offer and the acceptance Echo VanderWal was still in Ohio.

At the time of the offer, counter-offer, and acceptance, the property was listed with Marita Stewart, Broker of Lake Country Real Estate and agent Owen Mullen. At the time, Marita Stewart and Owen Mullen had also been the agent for JLZ in the purchase of the 3 parcels to the East of the Dock-n-Shop, and represented JLZ in the offer and counter-offer with ALBAR.

JLZ's offer to ALBAR to purchase the Dock-N-Shop and the executed purchase and sale agreement provided for inspections of the property by JLZ, and an "as-is" condition clause at closing. The purchase and sale agreement included a clause in the counter-offer #1 as item 3. that "Seller has all responsibility and liability for recent gasoline spill on property and adjoining property." ALBAR rejected a term in the proposed Addendum #1 by JLZ that provided that "2. Offer is contingent upon EPA giving

closure to gasoline spill on site."

After the Purchase And Sale Agreement (Plaintiff's Exhibit 2) was entered into, Echo VanderWal went to the real property only once prior to closing for a meeting. Present were Echo VanderWal, her children and family members, Marita Stewart, Owen Mullen, and Al Sudau on behalf of ALBAR.

JLZ in the offer by paragraphs 23, 24, and 25 and paragraph 3 of the Addendum #2 and paragraph of 4 of the Counter Offer #1, accepted the condition of the property, subject to a 45 day inspection period, and chose to have inspections. The offer by JLZ indicated a contingency for a conditional use permit for condominiums on the "ajoining [sic - adjoining] property." The counter-offer, item 2, indicates likewise a conditional use permit for the "adjoining property."

JLZ, prior to closing with ALBAR, on August 4 or 5, 2005, submitted a Conditional Use Permit to the City of Priest River for a "Mixed Use Development Of Residential And Retail" (Plaintiff's Exhibit 7").

Item 3 of the counter offer provides "Seller has all responsibility and liability for recent gasoline spill on property and adjoining property."

Prior to closing, VanderWal/JLZ proposed seller financing of a portion of the $539,000 purchase price with $250,000 carried on a note and deed of trust (which provided for non-removal of the building) by the Seller ALBAR (Defendant's Exhibit I).

Prior to closing, Echo VanderWal/JLZ made no indication to ALBAR of not continuing the operations of the Dock-n-Shop as an ongoing commercial concern, consisting of a convenience store,

fuel sales, and marina. RE-11 Addendum #3 (Plaintiffs Exhibit 2) dated August 29, 2005 signed by both ALBAR and JLZ, similarly provides for continued commercial operation by ALBAR including aid in the transfer of all licenses for operations to JLZ prior to and after closing.

Closing between ALBAR and JLZ occurred on or about September 15, 2005. The existing PSTF insurance policy for the remaining two (2) USTs was transferred from ALBAR to JLZ (Defendant's Exhibit J & Defendant's Exhibit K).

At closing ALBAR took back the note secured by a deed of trust upon the property. ALBAR was the holder of a Deed of Trust Note (herein "Note"), dated September 6, 2005 in the original principal sum of TWO HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS ($250,000.00). The maturity date of the note was modified by an extension dated August 24, 2006 (Defendant's Exhibits A and B). ALBAR was the beneficiary of a Deed of Trust Including Due-On-Sale Rider (Defendant's Exhibit C) securing said Note, recorded September 16, 2005 as Instrument No. 687257, records of Bonner County, Idaho, concerning real property within Bonner County, Idaho, described as follows:

PARCEL I:

The Easterly most 197.5 feet of the following described tract:
Commencing at a point on the South line of the right of way of the Great Northern Railroad Company, 375 feet West of the East line of Lot 6, Section 25, Township 56 North, Range 5 West, Boise Meridian;
thence South on a line at right angles with the said right of way to the North Bank of the Pend Oreille River;
thence West along the said North Bank to a point where the same in intersected by the line of a parcel of land sold to the Village of Priest River, by Deed, dated April 28, 1956, and now used as a right of way and

approach for the bridge across the said river;
thence North along the East line to the South line of the right of way of the Great Northern Railroad Company;
thence East along said right of way to the true point of beginning.

Excepting therefrom the following described tract:

Beginning at a point on the South line of the Burlington Northern Railroad Company right of way, 375.0 feet West of the East line of Government Lot 6, Section 25, Township 56 North, Range 5 West, Boise Meridian, Bonner County, Idaho;
thence South 1°20′48″ East along an existing fence to the North Bank of the Pend Oreille River;
thence Northwesterly along the North Bank of the Pend Oreille River a distance of approximately 202 feet to a point which is South from a point on the South right of way line of the Burlington Northern Railroad Company a distance of 197.5 feet West of the Point of Beginning;
thence North 4.0 feet;
thence Southeasterly parallel with the North Bank of the Pend Oreille River to a point which is South from a point on the South of the right of way line of the Burlington Northern Railroad Company a distance of 100.0 feet from the Point of Beginning;
thence North to said Point;
thence East along said right of way line a distance of 100.0 feet to the Point of Beginning.

PARCEL II:

That portion of the Burlington Northern and Santa Fee Railway Company's (formerly Great Northern Railway Company) 300.00 Station Ground property at Priest River, Idaho, being 200.00 feet wide on the Northerly side and 100.0 feet wide on the Southerly side of said Railway Company's Main Track centerline, as now located and constructed upon, over and across Government Lot 6 of Section 25, Township 56 North, Range 5 West, B.M., Bonner County, Idaho, described as follows, to-wit:

Beginning at the intersection with the Easterly line of that certain easement from Great Northern Railway Company to Bonner County, Idaho, for roadway purposes of the Southerly extension of Wisconsin Street dated April 15, 1958 with the Southerly line of said State Ground property; thence Easterly along said Southerly line 371.0 feet; thence Northerly at right angles to said Southerly line 50.0 feet; thence Westerly parallel with said Main Track centerline 10.0 feet; thence Northerly at right angles to said Main Track centerline 30.0 feet; thence Westerly parallel with and 20.0 feet Southerly, as measured at right angles from said Main

> Track centerline 360 feet more or less, to the Easterly line of said easement for the Southerly extension of Wisconsin Street; thence Southerly along said Easterly line to the True Point of Beginning.

JLZ is the maker of said Note in favor of ALBAR and the grantor of the Deed of Trust in favor of ALBAR.

After purchasing the ALBAR property, JLZ also purchased additional parcels adjoining the Dock-N-Shop to the east.

Immediately after closing with ALBAR, Echo VanderWal/JLZ closed the store, gave away the inventory and contents of the business and ceased operations of the Dock-n-Shop, which was the first time ALBAR had any notice of such intention.

Prior to closing Echo VanderWal did not contact the IDEQ, PSTF, or Kleinfelder regarding the remediation of the Dock-n-Shop property. Following the closing of the transaction and the closing of the Dock-n-Shop business by JLZ, Echo VanderWal returned to Ohio (with a two week trip to Africa in the last two weeks of October 2005) until a Christmas time trip to Idaho in December 2005 and/or January 2006 consisting of one to two weeks, and then she returned to Ohio.

In January 2006, JLZ had a development team meeting regarding the Priest River real property, including the three parcels to the East, the Dock-n-Shop property, and the adjoining parcels to the West that had been acquired or were under contract for purchase. Since the closing on the Dock-n-Shop, Echo VanderWal still had not contacted the IDEQ, PSTF, or Kleinfelder regarding the ongoing fuel release remediation of the Dock-n-Shop property.

At some point after the January 2006 development team meeting, Echo VanderWal requested Steve Klatt to make contacts

regarding the remediation, extending the note, and removal of the building from the Dock-n-Shop site. Echo VanderWal was in Ohio at the time. Steve Klatt on behalf of JLZ began conversing and corresponding with Al Sudau on behalf of ALBAR. By April 2006, Steve Klatt had prepared a table of issues and the respective parties' concerns as developed from the discussions (Defendant's Exhibit AA), which were the soil remediation, extending the note, and removal of the building.

The discussions and contacts between Steve Klatt and Al Sudau were cordial and a good relationship existed. (See also Defendant's Exhibit BB). Steve Klatt was also in contact with DEQ, PSTF, and Kleinfelder during the late spring and early summer 2006 and prepared a Memorandum dated June 25, 2006 (Defendant's Exhibit L) and he prepared correspondence with Echo VanderWal (Defendant's Exhibit N).

Steve Klatt in discussions with IDEQ, PSTF, and Kleinfelder was proposing on behalf of JLZ the removal of the building and was indicating the potential for future residential use of the property. In the end of July, 2006, a potential meeting was discussed and scheduled to review the proposed course by JLZ. (Plaintiff's Exhibit O and Defendants Exhibits O, CC, DD, EE, FF, GG). Al Sudau was concerned with the removal of the building and had ongoing discussions with Steve Klatt regarding the requested removal compared to the note and deed of trust provisions for maintaining the property and the structures, which were security for the debt. (Plaintiff's Exhibit 10 and Defendant's Exhibits HH).

A meeting was held at IDEQ in Coeur d'Alene on August 16,

2006 regarding JLZ's proposed course for the remediation. In late August 2006, Echo VanderWal/JLZ requested an extension of the note and ALBAR agreed (Defendant's Exhibit B). At the end of August 2006, Echo VanderWal came to Idaho from Ohio and removed the building upon the Dock-n-Shop property over the objections from ALBAR (Defendant's Exhibit II).

On August 29, 2009 ALBAR re-structured the dissemination of information and the contacts regarding remediation, so that ALBAR was included (Defendants Exhibit's JJ, KK, LL, MM, NN, OO, PP, QQ).

In late September or early October, 2006, Echo VanderWal went to Africa and upon her return moved from Ohio to Idaho. Echo VanderWal was in Idaho from November 2006 until March/April or April/May 2007 when she was in Africa for 2 months, and then in Idaho until December 2007, at which point she was on the East Coast or in Africa except for during December 2008 and January 2009 when she was in Idaho and except for during the trial in this matter.

Through the fall of 2006 the PSTF funded remediation process on behalf of ALBAR continued, with the submittal of a Confirmation Sampling Work Plan as the site was close to closure under the existing Corrective Action Plan (Defendant's Exhibit VV) as well as additional boring and sampling under the location of the former building during low water.

In early December 2006 contract was made regarding JLZ enrolling the property in the IDEQ Voluntary Remediation Program (Defendant's Exhibit P). In December 2006, Echo VanderWal, in an emotional state, telephoned Al Sudau concerned over what

information Owen Mullen had in regards to the remediation of the Dock-n-Shop property. Al Sudau reviewed that Mullen had been directed to gather all the information from IDEQ, PSTF, and Kleinfelder that was wanted by JLZ. Echo VanderWal called a second time that same date, expressing concern that she was financially going under and couldn't build her new house or buy Christmas gifts for her children.

In January 2007 Echo VanderWal on behalf of JLZ instructed her attorney to send a demand letter regarding the sharing of and access to information (Plaintiff's Exhibit 15). ALBAR thereafter instituted a written contact policy for all remediation and contact, and Steve Klatt, Kleinfelder, and IDEQ were uncertain as to the basis for the demand letter by JLZ or the assertions of withholding information (Plaintiff's Exhibit 16 and Defendant's Exhibits YY, and ZZ). ALBAR attempted to make sure the public information was available through contact with IDEQ and contact with ALBAR. Steve Klatt acknowledged progress (Defendant's Exhibits ZZ, AAA, BBB, CCC, DDD, EEE, and FFF).

In late January 2007, the analytical results from the samplings under the former building were back, which identified four isolated soil contaminations, which information was conveyed to Steve Klatt (Defendant's Exhibits NNN). Kleinfelder also continued discussion with Steve Klatt regarding JLZ removing the other two USTs as part of a residential remediation level and the delay by Echo VanderWal in responding (Defendant's Exhibits OOO and PPP).

In February 2007 and beyond, efforts continued to get a response from Echo VanderWal/JLZ for the removal of the two UST's

as part of a dig and haul process for under the former building, as well as attempts to get a response for moving forward with a dig and haul and injection plan modification to the existing remediation (Defendant's Exhibits Q, QQQ, RRR, SSS, TTT, UUU, VVV, WWW, XXX, YYY, ZZZ, AAAA, BBBB, CCCC, DDDD, EEEE, FFFF, GGGG, HHHH, IIII, JJJJ, KKKK, LLLL, MMMM, NNNN, OOOO, and PPPP)

In February 16, 2007, while the Kleinfelder efforts were underway, JLZ engaged its own environmental engineer Golder & Associates, who reported that per the IDEQ, Soil remediation was nearly complete, with additional limited soil removal needed to meet a residential scenario and that in regards to Groundwater remediation that Kleinfelder felt the standards had been met, but that IDEQ would likely require a Deed Restriction, which would not impact residential use because of the municipal water supply available to serve the property (Plaintiff's Exhibit 18 and Defendant's Exhibits Exhibit R).

Echo VanderWal continued here secretive approach, engaging an environmental engineer and delaying responses and information to ALBAR and for the remediation (Defendant's Exhibits S, T, U, V, W, and X).

In the spring of 2007, a prospective buyer was in contact with Steve Klatt (Defendant's Exhibits Y). In the end of June and into July 2007, a modification to the remediation was not moving forward to the satisfaction of JLZ and Echo VanderWal/JLZ moved forward Golder's involvement, including site visits with Golder and Kleinfelder personal, as well as Steve Klatt.

By e-mail dated July 5, 2007, ALBAR again offered to allow JLZ to prepare a plan and funding for remediation and that ALBAR

would pay that sum for an indemnification for clean up (Defendant's Exhibits BBBBB). Also by July 2007, commercial clean up levels were consistently met (Defendants Exhibit CCCCC and HHHHH).

JLZ failed to make the payment due July 16, 2007 to ALBAR on the promissory note. JLZ failed to make any of the monthly payments due after July 16, 2007, and failed to pay upon the maturity date of the note on September 16, 2007.

By the beginning of August 2007, JLZ proceeded with removal of the two USTs without notice to ALBAR (Defendant's Exhibit GGGGG and JJJJJ). Even in late August 2007, the IDEQ was considering seeking residential level cleanups, solely based upon the actions of JLZ (Defendant's Exhibits NNNNN and QQQQQ).

Into the fall of 2007 Groundwater thresholds for commercial sites were met again, making four in a row (Defendant's Exhibits RRRRR and SSSSS) with only the four isolated Soil locations under the former building being present (Defendant's Exhibit TTTTT).

In the fall of 2007, JLZ sought enrollment of the Dock-n-Shop property into the IDEQ Voluntary Remediation Program and Pilot Project Funds (Defendant's Exhibit WWWWW attached Exhibit B, Exhibit XXXXX and Defendant's Exhibit FFFFFF). The enrollment created liability for JLZ for remediation where none previously existed and provided for reimbursement of up to 70% of costs or $150,000.00, whichever was greater.

ALBAR through its PSTF insurance asserted to IDEQ that the actions of JLZ in submitting its own remediation plan in the face of the existing plan was problematic (Defendant's Exhibits WWWWW, UUUUU, VVVVV) and submitted comments in regards to the JLZ plan,

not objecting to the clean up efforts proposed, but rather identifying issues for resolution as part of the process (Defendant's Exhibits YYYYY, ZZZZZ, AAAAAA).

The IDEQ entered into an agreement with JLZ for the Voluntary Remediation Plan and Pilot Project Funding and terminated the IDEQ consent order with ALBAR, effective April 10, 2008 (Defendant's Exhibits BBBBBB, CCCCCC, and DDDDDD as to the portions admitted).

JLZ proceeded with its own clean up efforts, and had entered the monitoring phase by the time of trial in June 2009. At trial, JLZ had failed to perform the most recent required monitoring of the remediation work, and had not received an approved clean up status for the site, nor any Certificate of Completion or Covenant Not To Sue regarding the Dock-n-Shop site from the IDEQ.

From the conclusion of the trial in June 2009, time elapsed until the Court to announce its decision, followed by proceedings on motions to reconsider and motions for attorney fees. On July 27, 2010, the Judgment And Decree of Sale was entered by the Court, followed by the Appellant ALBAR filing this appeal.

Unbeknownst to ALBAR, following trial, IDEQ paid for the necessary quarterly monitoring for the JLZ remediation work (Supplemental Exhibit "F"). The necessary monitoring was completed and in June, 2010, JLZ obtained a Certificate of Completion and a Covenant Not To Sue from the IDEQ for the Dock-N-Shop property. (Supplemental Exhibits "A" and "B").

Coincidentally with the entry of the judgment, on July 27, 2010, JLZ applied for reimbursement from the Idaho Department of Environmental Quality ("IDEQ") for clean up and remediation costs. (Supplemental Exhibit "C"). The reimbursement sought included

significant sums as awarded by the Court as offset damages in the action against ALBAR.

On September 7, 2010, the IDEQ required additional information from JLZ for reimbursement. (Supplemental Exhibit "D"). On or about March 1, 2011, JLZ submitted is revised application for reimbursement through the IDEQ pilot program of its clean up costs. (Supplemental Exhibit "E").

On or about March 21, 2011, DEQ approved reimbursement to JLZ for clean up costs in the net reimbursable sum of $145,021.95 (Supplemental Exhibits "F" and "G"). The total qualifying remediation costs were $217,950.31, with the program being capped at $150,000.00 for reimbursement. The IDEQ also deducted from the available $150,000.00, the sum of $4,978.00 that the DEQ had directly disbursed to obtain the last monitoring and reports necessary for the site clearance. The net amount approved and received on March 29, 2011 by JLZ from the IDEQ reimbursement program was $145,021.95.

Albar sought relief from the judgment for the sums received by JLZ. On September 30, 2011, the District Court entered its Memorandum Decision And Order Re: Albar's Motion For Relief From Judgment, denying any relief for the offset damages awarded against ALBAR for the sums received by JLZ from the IDEQ for remediation costs.

ISSUES ON APPEAL

The Appellant ALBAR'S statement of the issues on appeal is as follows:

(a) Did the District Court err in concluding that ALBAR, INC. breached its contract with JLZ ENTERPRISES, INC. for remediation?

(b) Did the District Court err in determining and awarding damages to JLZ ENTERPRISES, INC. for breach of contract?

(c) Did the District Court err in not awarding attorney fees and costs to ALBAR, INC.?

(d) Did the District Court err in not granting relief to Albar for funds received by JLZ from the DEQ for remediation?

ATTORNEY FEES ON APPEAL

The Appellant ALBAR seeks an award attorney fees on appeal against the Respondent JLZ ENTERPRISES, INC., pursuant to the Note and the Deed of Trust, the Real Estate Purchase And Sale Agreement, Idaho Code §§ 12-120 and 12-121, Idaho Code § 6-402, the Idaho Rules of Civil Procedure, and/or the Idaho Appellate Rules.

ARGUMENT ON APPEAL

I. ALBAR, INC. DID NOT BREACH ITS CONTRACT WITH JLZ ENTERPRISES, INC. FOR REMEDIATION

The central issues in this case is the interpretation of the accepted Purchase And Sale Agreement provision in Counter-offer #1, paragraph 3, which provides "Seller has all responsibility and liability for recent gasoline spill on property and adjoining property." (Plaintiff's Exhibit 2). The Respondent JLZ asserted a breach of contract by Appellant ALBAR in not timely completing remediation of the contamination from the fuel leak in 2003. JLZ asserted damages resulted from such a breach. ALBAR disputed any breach of contract and/or the damages requested.

In Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285, 148 Idaho 630, 633, (2010), reh'g denied (Mar. 17, 2010) the Idaho Supreme Court held in regards to the interpretation of a contract, as follows:

> When interpreting a contract, this Court begins with the document's language. *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). "In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *C & G, Inc. v. Rule,* 135 Idaho 763, 765, 25 P.3d 76, 78 (2001). Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review. *Opportunity, L.L.C. v. Ossewarde,* 136 Idaho 602, 605-06, 38 P.3d 1258, 1261-62 (2002). A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical. *Swanson v. Beco Constr. Co.,* 145 Idaho 59, 62, 175 P.3d 748, 751 (2007). Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact. *Bakker v. Thunder Spring-Wareham, L.L.C.,* 141 Idaho 185, 190, 108 P.3d 332, 337 (2005) (quotation omitted).

The District Court, in announcing its decision, made several conclusions of law regarding the agreement between ALBAR and JLZ,

which are set forth in the Court Trial and Judge's Decision Transcript, pages 1078 through 1088. The District Court relied upon several factors in making that determination. The relevant positions of the parties as to the interpretation of the contractual term must be measured against the provisions of the contract and the conduct at the time of the relevant facts and circumstances.

In J.R. Simplot Co. v. Bosen, 144 Idaho 611, 614 (2006), the Idaho Supreme Court explained as follows:

> If the provisions of a contract are ambiguous, the interpretation of those provisions is a question of fact which focuses upon the intent of the parties. *Bream v. Benscoter,* 139 Idaho 364, 79 P.3d 723 (2003). The determination of the parties' intent is to be determined by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings. *Ramco v. H-K Contractors, Inc.,* 118 Idaho 108, 794 P.2d 1381 (1990); *International Eng'g Co., Inc. v. Daum Indus., Inc.,* 102 Idaho 363, 630 P.2d 155 (1981). A party's subjective, undisclosed intent is immaterial to the interpretation of a contract. As explained in 17 Am.Jur.2d, Contracts, § 347 (2004):
>
>> A party's subjective, undisclosed intent is immaterial to the interpretation of a contract, as under the objective law of contract interpretation, the court will give force and effect to the words of the contract without regard to what the parties to the contract thought it meant or what they actually intended for it to mean. The court will not attempt to ascertain the actual mental processes of the parties in entering into the particular contract; rather the law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest.

A. The Purchase And Sale Agreement Did Not Require Remediation Be Completed To JLZ's Satisfaction.

The Purchase And Sale Agreement ("PSA") does not provide for ALBAR to remediate or obtain DEQ approval of a clean up of the site to the satisfaction of JLZ. At closing and following

closing, ALBAR remained the party in agreement with the IDEQ under the Consent Order. Paragraph 3 of Counter-Offer #1 only provides for ALBAR to have responsibility and liability for the petroleum leak. JLZ's plans for the property are not the subject of the agreement, and at the time of the sale, the business on the property was an ongoing concern, which is contrary to JLZ's assertion breach because the property was not "cleared for development." The PSA did not require a parcel cleared for development, and to the contrary, JLZ bought the property and business as is, subject to an existing Consent Order and an existing ongoing remediation.

In Johnson v. Lambros, 143 Idaho 468 (Idaho App. 2006), the Idaho Court of Appeals interpreted a purchase and sale agreement with addenda provision that the Seller clear title. The Court of Appeals explained in regard to a party having an obligation beyond the control of the party, such as to obtain marketable title, that the condition precedent gives rise to an implied duty of good faith to attempt to perform the condition. The PSA between JLZ and ALBAR did not require ALBAR to obtain a specific remediation. ALBAR met its good faith duty compared to the sale of the property and ongoing business. JLZ did not bargain for, and ALBAR is not liable, for any set period of remediation (whether within a reasonable time or not), nor any specific remediation result.

B. The Conduct of JLZ Does Not Create Liability for ALBAR

Albar asserts that the relevant documents and conduct for the Court to use to interpret the contract, all occurred prior to or at closing on September 15, 2005. Those are:

1. Albar had a long operating commercial convenience store, fuel sales, and marina business, known as the Dock-n-Shop.

2. In 2003 a fuel release occurred and a remediation system was in place that had prevented fuel from reaching the Priest River and that allowed the continued operations of the Dock-n-Shop. A Consent Order was in place and a commercial remediation plan was established for the property and approved, or at least allowed to proceed, by the Idaho Department of Environmental Quality (IDEQ).

3. Investigation and remediation under the Dock-N-Shop building would have required structural damage and changes to the building and ongoing commercial operations. Such a course was not required by IDEQ, regardless of JLZ asserted interpretation of the non-specific 2004 IDEQ correspondence.

4. JLZ's June 14, 2005 offer for the property and Albar's June 16, 2005 counter-offer, which resulted in an accepted Purchase And Sale Agreement ("PSA") on June 16, 2005, is the contract at issue here.

5. All of the language of the PSA provides for CUP residential or hotel/rental development of the adjoining property, not the Dock-n-Shop property.

6. The PSA also provided for JLZ to accept the property in it's as is condition, and that JLZ chose to have inspections and investigations of that condition.

7. Paragraph 3 of the Counter Offer #1 in the PSA is the sole provision upon which JLZ asserts its breach of contract. It provides: "Seller has all responsibility and liability for recent gasoline spill on property and adjoining property." The spill

occurred in May 2003, with the PSA being entered into in June 2005, which would define the term "recent" as over two years.

8. The as-is provision and the JLZ inspection and investigation provisions, are not obviated by the provision in paragraph 3 of the Counter Offer. Those terms can and should be interpreted for a consistent result, given the facts and circumstances at that time.

9. The rejected Addendum #2 which JLZ proposed provided for closure of the gasoline spill remediation on the site.

10. Paragraph 3 of the Counter Offer #1 in the PSA does not provide for any express requirement for a specific final remediation, let alone a time frame for remediation. The remediation plan in existence at the time of closing between ALBAR and JLZ was for a commercial operation.

11. Prior to closing, JLZ continued its later shown apparent charade of an intention of operating the business, and Addendum #3 dated August 29, 2005 provides for Albar to aid in the transfer of the licenses to operate prior to and after closing.

12. Also, prior to closing, JLZ apparently had enough information to determine that institutional lending would not be available because of environmental concerns and JLZ proposed that Albar carry part of the purchase price, with a pledge of the property, including the building and other improvements.

13. It is readily apparent that Albar directed all inquiries as to the status of the fuel spill and remediation to the regulatory authorities IDEQ, the insurer PSTF, and the contractor handing the remediation Kleinfelder, and authorized release of all information.

14. It is also readily apparent that JLZ performed some sort of investigation and inspection as to the fuel spill and remediation, as Echo VanderWal testified institutional lending was not available. JLZ had also previously purchased the adjoining 3 parcels, which included impacts from the fuel release.

15. At closing, the intention of the parties as set forth in the documents making up the PSA must be the yard stick to measure the contractual obligations by the provision in paragraph 3 in the Counter Offer.

16. Albar sold a going commercial concern, with a remediation in place that allowed the ongoing operations, and took back a security interest in the property and buildings.

17. JLZ had investigated the fuel spill and existing remediation, and closed on its purchase. Also, it submitted a CUP application to the City of Priest River for a mixed use residential and retail on adjoining property.

JLZ asserts as part of its urged interpretation for its asserted breach of contract, that certain statements were made by both Al Sudau and Owen Mullen during Echo VanderWal's only visit to the property prior to closing, which was after the PSA was entered into. Echo VanderWal asserts that at the meeting that Al Sudau on behalf of ALBAR and that Owen Mullen each separately stated to her that "the soils were remediated and clear and that only two monitoring session were need." Al Sudau asserts on behalf of ALBAR that at the meeting at the property with Echo VanderWal, no such statement was made by him, and that he did not hear Owen Mullen make such a statement. No other corroborating witness was offered by Echo VanderWal as to the asserted

statements by Al Sudau on behalf of ALBAR or the asserted statements by Owen Mullen.

The credibility of Echo VanderWal and her ability to recall and her ability to separate her emotions from her recollection, cast great doubt upon these assertions. Also, at the time of purchasing the three parcels to the East, and then entering into the Purchase And Sale Agreement with ALBAR, Echo VanderWal testified she had a long relationship with Marita Stewart and trusted Marita Stewart and Owen Mullen, both of Lake Country Real Estate, which was JLZ's long time broker.

If any such statements were made, the evidence supports a finding and conclusion that Al Sudau and ALBAR were not aware of such matters. The back and forth between the offer and counter-offer, show that Albar was not willing to condition the purchase and sale upon the provision in Addendum #1 that "2. Offer is contingent upon EPA giving closure to gasoline spill on site." If such statements were made and/or if JLZ understood or believed statements of those type to be accurate, JLZ did nothing to include such obligations or contingencies in the accepted PSA, and further undertook its own 45 inspection period.

Any purported statement or representation asserted by or on behalf of JLZ may not be attributed to the Seller ALBAR and may not be used to interpret provision 3 of Counter Offer #1 by the operation of Idaho Code § 54-2093(1) as such would have been a wrongful act, error, omission, or misrepresentation, of which ALBAR and Al Sudau had no actual knowledge of, nor should have reasonably known of.

Similarly, any purported assertion of interpretation based

upon the listing materials or the Seller's Property Disclosure Form, is not available, given the merger/integration clause of the PSA. Additionally, Ms. VanderWal's testimony as to when and if she reviewed the document, failed to establish any relevant time frame.

From the time of contracting by the PSA and to closing, JLZ was on notice of the existing fuel release, the existing remediation plan which was IDEQ approved and regulated and PSTF financed. JLZ was on notice of all reasonable information that a reasonable investigation at the time of purchase would have revealed. JLZ only contracted for ALBAR to remain responsible and liable for the ramifications of the fuel release.

In Hunter v. Shields, 131 Idaho 148, 153 (1998) the Idaho Supreme Court reiterated that:

> This Court has stated that when one is purchasing land, the rule of *caveat emptor* applies and that "whatever is notice enough to excite the attention of a man of ordinary prudence and prompt him to further inquiry, amounts to notice of all such facts as a reasonable investigation would disclose." *Hill v. Federal Land Bank,* 59 Idaho 136, 141, 80 P.2d 789, 791 (1938). *See also, Farrell v. Brown,* 111 Idaho 1027, 1033, 729 P.2d 1090, 1096 (Ct.App.1986).

By the agreement, JLZ choose to have inspections and JLZ's consultants were involved prior to closing on September 16, 2005. In Anderson v. Rex Hayes Family Trust, 145 Idaho 741, 743 (Idaho 2008), the Idaho Supreme Court held that: "One who purchases property is put on notice of title disputes that a reasonable investigation would reveal. *Duff v. Seubert,* 110 Idaho 865, 870, 719 P.2d 1125, 1130 (1985)."

JLZ contracted to purchase and then closed on the purchase of the real property with a pre-existing fuel spill remediation plan

in existence and in operation with positive progress. JLZ was on notice of the extent of the contamination and the manner of remediation. JLZ did not bargain for anything different. Any harm or damage to JLZ were based solely upon the actions of JLZ.

C. The Post Closing Conduct Does Not Result In Liability By ALBAR

If the conduct after closing is relevant to the interpretation of the PSA (and the respective obligations of the parties), after closing, it is readily apparent that JLZ had not informed itself sufficiently as to environmental concerns and processes regarding remediation prior to purchasing the first three parcels to the west, then closing on the Dock-N-Shop property, and then its later efforts and acquisition of adjoining properties to the east.

The lack of investigation and planning by Echo VanderWal/JLZ, an absentee landowner prone to emotional shutdown and/or emotional outbursts, does not result in the liability for Albar as sought. The evidence shows that only due to JLZ not continuing the commercial operations, did the IDEQ seek discussions to move the goalposts for remediation from commercial to residential standards.

The evidence shows that JLZ did not understand that purchasing the two UST resulted in her liability and responsibility for those USTs. Although not provided for in any reasonable interpretation of the intention at the time of contracting and closing, JLZ asserts that removal of the building and removal the USTs was Albar's responsibility. The PSA terms

are contrary to such an interpretation. In fact, JLZ had pledged those improvements to Albar as security for the unpaid purchase price. Further, there is no showing that such removal was required to obtain IDEQ clearance for the ALBAR remediation pursuant to the ALBAR Consent Order.

Paragraph 3 of the Counter Offer #1 does not provide for any express requirement for a final remediation, let alone a time frame for remediation. JLZ's actions in ceasing operations of the ongoing commercial business and its statement of possible plans for the property, brought about discussion, although no actual agreement or modification of the remediation, by IDEQ for residential standards as opposed to commercial levels.

JLZ was the only one that required or wanted the Dock-n-Shop building and/or the two USTs removed. Such a course was not required for remediation of the site as an ongoing commercial operation.

JLZ did not present any evidence of any Notice of Violation being issued by the IDEQ to ALBAR nor any enforcement action by IDEQ against ALBAR as to the remediation being conducted. It was the conduct of JLZ by voluntarily taking on the liability and responsibility for remediation, which resulted in the Consent Order between the IDEQ and ALBAR being terminated.

The only witness to testify in the action that had been at the IDEQ during the Albar remediation plan formulation was Paula Lyon. JLZ did not bring forth any witness from IDEQ to support the contentions and positions it urged regarding what was necessary for IDEQ clearance.

D. JLZ's Enrollment In The Voluntary Cleanup Program Relieved ALBAR of Its Consent Order Obligations

By JLZ's conduct, the Dock-N-Shop real property was enrolled into the IDEQ Voluntary Cleanup program, and the Consent Order between ALBAR and the IDEQ was terminated and ALBAR was released from liability. JLZ waived or released any obligation of ALBAR, assumed the risk, prevented performance by ALBAR, and/or was estopped to assert any breach for damages that in any way relate to JLZ's Voluntary Clean efforts, which precluded any further efforts by ALBAR.

In actuality, JLZ urged an interpretation of the contact contrary to the terms of the face of the contract. By the post-closing conduct by JLZ, the actual obligations of Albar under the contract could not be met. The conduct of JLZ directly impaired and impeded Albar's contractual obligations to JLZ regarding the ongoing remediation. Specifically: JLZ ceased operating the commercial business and ceased using the two USTs. JLZ, contrary to the contract and the CUP application, made proposed residential uses on the Dock-N-Shop property to IDEQ, which were not the as is condition of the property.

Echo VanderWal of JLZ at some point in time convinced herself that no matter what it wanted done on the property, whether as to specifics for the remediation or as to a timeline, that Albar had to do it. The conduct and actions of JLZ cannot withstand the scrutiny of reasonableness, required by the law.

Albar made several reasonable proposals to JLZ as the dispute arose and the issues went forward regarding remediation. The evidence shows that JLZ took only one consistent position: ALBAR

MUST DO WHAT JLZ WANTS. JLZ made no proposals for resolution given the changed circumstances of its uses of the property after closing and after acquiring additional properties.

It is important to recognize that at the time of the trial in June 2009, JLZ had not accomplished what it complained of Albar not accomplishing. JLZ did not obtain IDEQ closure regarding the petroleum release until in June 2010, and did not complete it reimbursement until in 2011.

E. ALBAR Did Not Breach The Contract With JLZ

JLZ failed to show a breach of contract by ALBAR of the contractual terms. Paragraph 3 of the Counter Offer #1 does not require remediation to JLZ's sole desire. ALBAR met its implied duty of good faith. The conduct of JLZ was the cause of any damage asserted by JLZ. The District Court erred in finding a breach of contract by ALBAR in favor of JLZ, and such a finding and conclusion should be reversed on appeal.

II. ALBAR, INC. IS NOT RESPONSIBLE FOR REMEDIATION BY JLZ ENTERPRISES, INC. AS DAMAGES

In the event the District Court's findings and conclusions of a breach of contract are upheld, ALBAR is not responsible for damages as awarded by the District Court. JLZ asserted several damages for breach of contract and was awarded damages for expenditures made by JLZ in pursuing its own remediation to its own standards.

In Silver Creek Computers, Inc. v. Petra, Inc., 136 Idaho 879, 884-85 (2002), the Idaho Supreme Court reiterated regarding

damages, as follows:

> Damages recoverable for breach of contract are those that arise naturally from the breach and are reasonably foreseeable. *Appel v. LePage,* 135 Idaho 133, 15 P.3d 1141 (2000). Damages need not have been precisely and specifically foreseeable, but only such as were reasonably foreseeable by the parties at the time they contracted. *Id.; Suitts v. First Sec. Bank of Idaho, N.A.,* 110 Idaho 15, 22, 713 P.2d 1374, 1381 (1985). Consequential damages are not recoverable unless specifically within the contemplation of the parties at time of contracting. *Appel v. LePage,* 135 Idaho 133, 15 P.3d 1141 (2000); *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho,* 115 Idaho 56, 61, 764 P.2d 423, 428 (1988).

JLZ undertook major work on the premises by removing the pre-existing building and portions of the ALBAR remediation system in place. JLZ ceased use of the existing USTs and later removing the USTs. JLZ also enrolled the property into the IDEQ voluntary remediation and pilot project funding programs, undertook its own planned remediation, and voluntarily accepted liability for remediation.

JLZ was on notice at the time of entering into the Purchase And Sale Agreement and at the time of closing the purchase, of the ongoing IDEQ approved and PSTF financed remediation. JLZ was on notice of all reasonable information that a reasonable investigation at the time of purchase would have revealed. JLZ was kept reasonable informed and involved in the remediation by ALBAR and/or its contractors and insurer.

JLZ seeks damages for it having to undertake remediation to get the property "cleared for development" which was not the contracted for bargain. JLZ bought a going concern, with an ongoing remediation. JLZ cannot recover for asserted damages that are beyond the contemplation of the parties to the contract.

In addition, JLZ had a duty to mitigate damages (also known

as the doctrine of avoidable consequences) which will deny recovery for damages which could have been avoided or recovered by reasonable acts, including reasonable expenditures.

The testimony of Echo VanderWal and her assertions and responses, lend little as to credibility for the positions she takes. Echo VanderWal showed by her testimony and the evidence admitted shows, that she has a propensity to react emotionally and with little rational, when faced with almost any matter regarding this property and environmental clean up. The evidence shows that she attempts to transfer all of her errors in decision and judgment as to the environmental status of the property, to ALBAR. Echo VanderWal does not appear to take or accept any responsible for the situations she placed herself in.

The bottom line is that JLZ is claiming contractual obligations and duties that are not a part of the contract and closing documents and that are not a reasonable interpretation of paragraph 3 of the counter offer contained in the PSA. JLZ cannot recover damages beyond the contemplated scope of the parties.

III. ALBAR WAS ENTITLED TO ATTORNEY FEES AND COSTS BEFORE THE DISTRICT COURT

ALBAR, INC. and ELMER B. SUDAU sought an award of costs and attorney fees before the District Court in sums claimed pursuant to IRCP 54(d) and 54(e). ALBAR, INC., an Idaho corporation, and ELMER B. SUDAU are entitled to attorney fees pursuant to the Note and the Deed of Trust, the Real Estate Purchase And Sale Agreement, Idaho Code §§ 12-120 and 12-121, Idaho Code § 6-402, and/or the Idaho Rules of Civil Procedure.

The consolidated actions involved the defense of ALBAR, INC., an Idaho corporation, and ELMER B. SUDAU (CV-2007-1489), on numerous causes of action of fraud, breach of contract, mutual mistake, negligence, and involved the prosecution of a foreclosure action for ALBAR, INC. (CV-2007-1841), all involving JLZ ENTERPRISES, INC., and ECHO VANDERWAL.

On the foreclosure claims (CV-2007-1489) the Defendant JLZ ENTERPRISES denied default and liability in its Answer (dated December 4, 2007); then denied direct Requests For Admission (see Notice of Filing filed September 9, 2008) as to default and liability; then opposed summary judgment (including partial) by affidavit and argument, and then on the eve of trial entered into the Stipulation To Admit as to default and liability. JLZ ENTERPRISES then during and after trial disputed interest as related to the foreclosure.

On the claims of JLZ ENTERPRISES, all claims against SUDAU were dismissed with prejudice, as well as most claims against ALBAR, INC. In addition, the claim of rescission was withdrawn during trial and denied as a remedy. Although JLZ ENTERPRISES did prevail on a claim of breach of contract, said damages were based on a finding of ambiguity in the contract and a District Court imposed reasonable period for remediation. In addition, JLZ ENTERPRISES claimed damages in excess of $2,300,000 million before trial and as an offset in excess of $450,000 at trial. The actual amount awarded as an offset was significantly less, with a net foreclosure judgment in favor of ALBAR, INC.

Taking into consideration the totality of the conduct of JLZ ENTERPRISES, the resolution of the various claims, the damage

claims by JLZ, and the resulting net judgment in favor of ALBAR, INC., results in an award to ALBAR, INC. and to AL SUDAU as the prevailing party (ies) is(are) as being appropriate and reasonable.

IV. ALBAR IS ENTITLED TO RELIEF FROM THE OFFSET DAMAGES AWARDED FOR THE SUMS RECEIVED BY JLZ FROM IDEQ FOR REMEDIATION

ALBAR sought relief from the offset damages awarded to JLZ following trial, based upon the reimbursement received by JLZ from the IDEQ. At the time of trial, JLZ and the Dock-N-Shop property were enrolled in a Voluntary Remediation program with Pilot Project reimbursement funds available for clean up costs. Following the trial, the District Court awarded JLZ offset damages against the sums due ALBAR for cleanup costs at the Dock-n-Shop property incurred by JLZ.

A. The Offset Damages Awarded JLZ Against ALBAR

Following trial and post trial proceedings, the Court entered a Judgment And Decree Of Sale on July 27, 2010, which awarded JLZ ENTERPRISES, INC. damages in the total sum of TWO HUNDRED TWENTY EIGHT THOUSAND FORTY FOUR AND 72/100 DOLLARS ($228,044.72) as an offset to the amounts owned ALBAR, INC. Those damages were in part described in the Court's announcement of decision on September 3, 2009 (Transcript Court Trial & Judge's Decision pages 1091 through 1099). In addition, the damages were itemized in the Court's Order re: Plaintiff's Motion For Reconsideration, entered May 11, 2010. The offset damages awarded were calculated as follows:

a.	Klatt Invoices (Pl. Ex. 21)	$ 6,916.00
b.	Glahe & Assoc Invoices (Pl. Ex. 22)	$ 9,965.00
c.	Rough Electric Invoices (Pl. Ex. 24)	$ 1,271.00
d.	Northwest Fence Invoices (Pl. Ex. 28)	$ 4,102.00
e.	Miscellaneous Invoices (Pl. Ex. 29 & 30)	$ 5,676.00
f.	Golder & Assoc Invoices (Pl. Ex. 31)	$ 67,570.00
g.	Golder & Assoc Invoices (Pl. Ex. 45)	$ 5,552.00
h.	Kootenai Excavators Invoice (Pl. Ex. 44)	$ 45,300.00
i.	Waste Management Invoices (Pl. Ex. 32)	$ 79,493.65
j.	Avista Invoices (Pl. Ex. 25)	$ 2,199.07
	Total Offset Damages	$228,044.72

At the time of trial JLZ had entered into the State of Idaho, Department of Environmental Quality program for Voluntary Remediation, and for reimbursement of the remediation expenses in the Community Reinvestment Pilot Initiative Reimbursement program. JLZ had not completed the necessary monitoring to receive final release of the property and to qualify for reimbursement of expenses in the pilot program at the time of the trial and post-trial proceedings.

B. JLZ Obtained Clearance For The Property And Received Reimbursement From IDEQ

If the damages awarded were appropriate, ALBAR is entitled to relief for the sums received by JLZ from the IDEQ. Following the entry of the Judgment And Decree Of Sale on July 27, 2010, ALBAR became aware that JLZ had completed the necessary monitoring to obtain DEQ clearance of the site in June, 2010 (Supplemental Exhibits "A" & "B") and that JLZ had applied for reimbursement through the pilot program of its clean up costs, coincidentally, on July 27, 2010 (Supplemental Exhibit "C").

On or about March 1, 2011, JLZ submitted is revised application for reimbursement through the IDEQ pilot program of its clean up costs in the sum of $326,634.79. (Supplemental

Exhibit "E").

On or about March 21, 2011, the IDEQ approved clean up costs in the sum of $217,950.31 as reimbursable remediation costs as set forth in a table created by the IDEQ (Supplemental Exhibit "G") as follows:

a.	City of Priest River Expenses	$ 216.98
b.	Excavation Expenses	$ 60,051.82
c.	Northwest Fence Co.	$ 1,230.66
d.	Waste Management	$ 83,732.54
e.	Golder & Associates	$ 66,243.21
f.	Prism Environmental (VanMiddlesworth)	$ 6,475.10
	Total DEQ Approved	$217,950.31

The total qualifying remediation costs were $217,950.31, with the program being capped at $150,000.00 for reimbursement. The IDEQ deducted from the available $150,000.00, the sum of $4,978.00 that the IDEQ had directly disbursed to obtain the last monitoring and reports necessary for the site clearance. (Supplemental Exhibits "F" & "G"). The net amount approved and received on March 29, 2011 by JLZ from the IDEQ reimbursement program was $145,021.95.

A comparison of the amounts awarded by the Court for offset damages and the amounts the IDEQ approved as qualifying for reimbursement shows that the common amounts are as follows:

a. Fence Expenses: The Court awarded $4,102.00 and the IDEQ approved $1,230.66. The common figure is $1,230.66.

b. Excavation Expenses: The Court awarded $45,300.00 and the IDEQ approved $60,051.82. The common figure is $45,300.00.

c. Waste Management: The Court awarded $79,493.65 and the IDEQ approved $83,732.54. The common figure is

$79,493.65.

d. Golder & Associations/VanMiddlesworth: The Court awarded $73,122.00 and the IDEQ approved $72,718.31. The common figure is $72,718.31.

The Total Common is: $198,742.62

The reimbursement received by JLZ (based upon the maximum allowed by the program) was $145,021.95, which is less than the common total of the Court's awarded offsets and the IDEQ approved reimbursement. It is undisputed that JLZ received the funds from the IDEQ for remediation reimbursement.

ALBAR is entitled to relief from the judgment by reducing the offset damages awarded to JLZ for the sums received by JLZ from the IDEQ reimbursement program based on the duty to mitigate/doctrine of avoidable consequences, and the general rules of damages being to compensate in a breach of contract action. The appropriate relief for ALBAR is to reduce the offset damages awarded to JLZ by the actual sum it received in reimbursement from the DEQ of $145,021.95.

C. ALBAR's Motion For Relief From Judgment Was Timely And Appropriate

ALBAR's motion for relief from judgment was made pursuant to I.R.C.P. 60(b), which provides (emphasis added) as follows:

> (b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, Grounds for Relief From Judgment on Order. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or

> other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Such motion does not require leave from the Supreme Court, or the district court, as the case may be, as though the judgment has been affirmed or settled upon appeal to that court. This rule does not limit the power of a court to: (i) entertain an independent action to relieve a party from a judgment, order or proceeding, or (ii) to set aside, as provided by law, within one (1) year after judgment was entered, a judgment obtained against a party who was not personally served with summons and complaint either in the state of Idaho or in any other jurisdiction, and who has failed to appear in said action, or (iii) to set aside a judgment for fraud upon the court.

Here the motion for relief included new evidence created after the actual trial proceedings in the case, and following the actual entry of the judgment in the case (which was upon appeal at the time). The actual completion of remediation and the application for and then receipt of reimbursement by JLZ happened subsequent to the District Court's decision.

As set forth in Moffett v. Moffett, 253 P.3d 764, 770 (Idaho Ct. App. 2011)(citations omitted), "I.R.C.P. 60(b) authorizes the presentation of new evidence...." ALBAR is entitled, upon such terms as are just, to relief from the awarded offset damages to JLZ in the Judgment And Decree Of Sale, due to JLZ receiving final clean up and reimbursement from the DEQ, which would qualify under Rule 60(b)(2) as newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); or under Rule 60(b)(5) or it is no longer equitable that the judgment should have prospective

application to the calculations of the amount due for the foreclosure sale upon the security; or 60(b)(6) any other reason justifying relief from the operation of the judgment, as the application of the duty to mitigate damages and the doctrine of avoidable consequences apply to the damages recoverable by JLZ as an offset.

The motion by ALBAR was made within a reasonable time of learning that JLZ had received clearance from the DEQ and that JLZ had applied for reimbursement, and such motion was not more than six (6) months after the judgment was entered. The trial was completed in June, 2009, with the decision, reconsideration, and briefing resulting in the judgment being entered July 27, 2010. JLZ completed final monitoring (based upon funding by IDEQ) and received clearance from DEQ in June 2010, and first applied for reimbursement from DEQ on July 27, 2010. JLZ submitted an amended application for reimbursement in March 2011 and on March 29, 2011 the reimbursement funds were disbursed by the IDEQ to JLZ. ALBAR's motion was filed November 30, 2010 while the application for reimbursement was still pending.

The facts that subsequent to trial JLZ completed final monitoring, received clearance from the IDEQ for the property, applied for reimbursement from the IDEQ pursuant to the pilot rebate program, and received an actual rebate of $145,021.95 for much of the same sums ($198,742.62) as were awarded as offset damages ($228,044.72) against ALBAR for breach of contract, meets the requisite showings under IRCP 60(b).

Under Rule 60(b)(2) the facts are newly discovered evidence which by due diligence could not have been discovered in time to

move for a new trial under Rule 59(b).

Under Rule 60(b)(5) the facts make it no longer equitable that the judgment should have prospective application to the same offset calculations against the amount due to ALBAR for the foreclosure sale upon the security.

Under Rule 60(b)(6) the facts are any other reason justifying relief from the operation of the judgment, as the application of the duty to mitigate damages and the doctrine of avoidable consequences apply to the damages recoverable by JLZ as an offset.

D. The Duty To Mitigate, Also Known As The Doctrine Of Avoidable Consequences, Applies To The Reimbursement JLZ Received

JLZ claimed and was awarded offset damages against ALBAR by the District Court for breach of contract measured as cleanup costs at the Dock-n-Shop property. JLZ at the time of the award of the offset damages was enrolled in a voluntary cleanup and a program for reimbursement, but asserted it could not afford to pay for the limited remaining monitoring to obtain the clearance and to obtain the reimbursement.

Subsequent to trial and the District's Court decision, JLZ obtained a Certificate of Completion and a Covenant Not To Sue for the clean up of the property (Supplement Exhibits "A" & "B"). JLZ for and been approved for and has actually received $145,021.95 in reimbursement for clean up expenses (Supplemental Exhibits "C", "D", "E", "F", "G", "H", "I" & "J"). The reimbursement received includes significant sums which are the same as the sums awarded as offset damages in the action against ALBAR.

As set forth in Margaret H. Wayne Trust v. Lipsky, 123 Idaho 253, 261 (1993), which involved an action for breach of a real estate contract, the Idaho Supreme Court recited that:

> 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, including reasonable expenditures, after actionable conduct has taken place. *O'Neil v. Vasseur,* 118 Idaho 257, 796 P.2d 134 (Ct.App.1990); *Davis v. First Interstate Bank of Idaho, N.A.,* 115 Idaho 169, 765 P.2d 680 (1988).

As set forth in O'Neil v. Vasseur, 118 Idaho 257, 262 (Idaho Ct. App. 1990), which involved a breach of contract action against attorneys in the handling of an action, which was subsequently resolved by the pro se client, the Idaho Court of Appeals has described and applied the doctrine, as follows:

> It is well established that the party entitled to the benefit of a contract has as a duty to use "reasonable exertion" to mitigate his damages. *Wicker v. Hoppock,* 73 U.S. (6 Wall.) 94, 18 L.Ed. 752 (1878). Such a policy protects "persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts." *Industrial Leasing Corp. v. Thomason,* 96 Idaho 574, 577, 532 P.2d 916, 919 (1974); *quoting Wright v. Baumann,* 239 Or. 410, 398 P.2d 119 (1965).

As explained in 22 Am. Jur. 2d Damages § 28 Compensation as limit of recovery, "The law abhors duplicative recoveries; in other words, a plaintiff who is injured by reason of a defendant's behavior is, for the most part, entitled to be made whole, not to be enriched. The sole object of compensatory damages is to make the injured party whole for losses actually suffered; the plaintiff cannot be made more than whole, make a profit, or receive more than one recovery for the same harm.

Thus, a plaintiff in a civil action for damages cannot, in the absence of punitive or statutory treble damages, recover more than the loss actually suffered. The plaintiff is not entitled to a windfall, and the law will not put him in a better position than he would be in had the wrong not been done or the contract not been broken."

At the time of trial in this matter, ALBAR asserted the duty to mitigate, also known as the doctrine of avoidable consequences, against JLZ for its own conduct of failing to complete the voluntary clean up plan and pilot reimbursement program in which it and the Dock-n-Shop property were enrolled with DEQ. If completed and reimbursement received, that would reduce the damages to JLZ for its claimed breach of contract by ALBAR.

JLZ subsequently completed the clean up and was reimbursed. JLZ is not entitled to a duplicative recovery by offset damages against ALBAR and by reimbursement by the IDEQ for the same sums expended. JLZ is only entitled to be made whole by an award for breach of contract, not to be enriched or to receive a windfall, by the award.

The sole object of compensatory damages is to make JLZ whole for losses actually suffered. JLZ cannot be made more than whole, make a profit, or receive more than one recovery for the same harm (the expenditures for cleanup). JLZ cannot recover more than the loss actually suffered and the law will not put JLZ in a better position than had there been no damages for breach of contract. The loss suffered is reduced by the reimbursement received by the IDEQ.

If JLZ is allowed to receive offset damages and to actually

keep the reimbursement funds from the IDEQ, an abhorred duplicative recovery would result. To prevent such a situation, the offset damages awarded to JLZ against the sums due to ALBAR must be reduced.

E. The Collateral Source Rule Is Inapplicable In Regards To Breach Of Contract Damages

JLZ asserted that the Collateral Source Rule prevents ALBAR from having the offset damages reduced by the reimbursement received from the IDEQ as a collateral source. At common law, the collateral source rule or doctrine is as described in Westfall v. Caterpillar, Inc., 120 Idaho 918, 924, 821 P.2d 973, 979 (1991), as follows:

> As this Court stated in *Brinkman v. Aid Ins. Co.,* 115 Idaho 346, 766 P.2d 1227 (1988):
>
> > Generally, the collateral source doctrine is as follows:
> > Where a plaintiff is compensated for his injuries by some source independent of the *tortfeasor*—insurance, for example—the general rule is that the plaintiff is still permitted to make a full recovery against the tortfeasor himself, even though this gives the plaintiff a double recovery or even a recovery for losses he never had at all.
> > *Brinkman,* 115 Idaho at 352, 766 P.2d at 1233, quoting with approval from D. Dobbs, *Law of Remedies* § 8.10, pp. 581-82 (1973).

As set forth in Daryl Tuttle v. Wayment Farms, Inc., Sudenga Indus., Inc., an Iowa corporation, 22213, 1997 WL 327356 (Idaho Ct. App. June 17, 1997) aff'd sub nom. Tuttle v. Wayment Farms, Inc., 131 Idaho 105, 952 P.2d 1241 (1998), "A collateral source is defined as compensation from a source wholly independent of the tortfeasor, *BLACK'S LAW DICTIONARY,* 262 (6th ed.1990), for example, sickness or health insurance or worker's compensation insurance payments."

In 1990, the legislature adopted Idaho Code § 6-1606. Prohibiting double recoveries from collateral sources, which provides as follows:

> In any action for personal injury or property damage, a judgment may be entered for the claimant only for damages which exceed amounts received by the claimant from collateral sources as compensation for the personal injury or property damage, whether from private, group or governmental sources, and whether contributory or noncontributory. For the purposes of this section, collateral sources shall not include benefits paid under federal programs which by law must seek subrogation, death benefits paid under life insurance contracts, benefits paid by a service corporation organized under chapter 34, title 41, Idaho Code, and benefits paid which are recoverable under subrogation rights created under Idaho law or by contract. Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent the award includes compensation for damages which have been compensated independently from collateral sources. S.L. 1990, ch. 131, § 1.

The collateral source rule at common law does not apply to this breach of contract action. The statutory provisions of Idaho Code § 6-1606 adopted in 1990 do not apply to this breach of contract action. In Idaho, by common law and statutory provision, the collateral source rule applies only to tort claims and recovery from tortfeasors for personal injury or property damage.

22 Am Jur. 2d. Damages § 392 Generally provides that the collateral source rule applies in the circumstances of tort recoveries, because the basis of a recovery in a tort case is not just for compensation. In a breach of contract action the sole basis of recovery is compensation. 22 Am. Jur. 2d Damages § 394. Applicability in breach-of-contract cases provides that "[t]he case for the application of the collateral-source rule is less compelling in breach-of-contract cases than in the case of a tort. The reason is that no one should profit more from the

breach of an obligation than he or she would if the contract were fully performed. Thus, the rule is held inapplicable to breach-of-contract recoveries."

In this action JLZ was awarded compensatory damages for breach of contract against ALBAR as an offset to the amount due ALBAR. This is strictly a breach of contact award, and as such the collateral source rule is inapplicable.

F. Albar Is Entitled To Relief From The Judgment By Reducing The Offset Damages By The Sum Of Reimbursement Received By JLZ

ALBAR is entitled to relief from the amount of offset damages awarded to JLZ in the Judgment And Decree Of Sale entered July 27, 2010. The completion and reimbursement to JLZ is newly discovered evidence created after trial and the entry of judgment. The reimbursement makes it no longer equitable that the amount of net judgment in favor of ALBAR, INC. for foreclosure should be reduced to extent prior to reimbursement. The reimbursement also justifies relief from the operation of the original calculation of offset damages in the judgment. JLZ is only entitled to a single recovery for compensatory damages for breach of contract. JLZ received the sum of $145,021.95 from the IDEQ pilot program to reimburse it for clean up expenditures. Those same expenditures were the basis for the award of breach of contract damages. The net sum of damages after reimbursement is the only property calculation pursuant to the Court's findings and conclusions.

Alternatively, if the offset damages awarded against ALBAR are not reduced by the reimbursement received, ALBAR would be

subrogated to the funds reimbursed and/or would be entitled to equitable reimbursement from the funds received by JLZ from the IDEQ. The Court should reduce the offset damages awarded in this action for the sake of judicial economy, rather that have ALBAR commence a separate action for subrogation and equitable reimbursement.

As set forth above, ALBAR is entitled to the relief sought, specifically a reduction of the offset damages by the sum received by JLZ from the IDEQ.

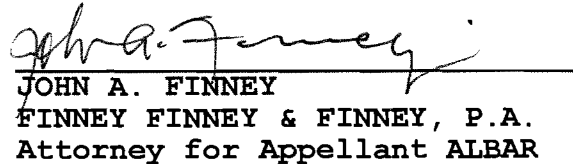
V. ALBAR IS ENTITELD TO ATTORNEY FEES AND COSTS ON APPEAL

ALBAR seeks an award of costs and attorney fees upon appeal pursuant to IAR 40 & 41 District Court. ALBAR is entitled to attorney fees pursuant to the Note and the Deed of Trust, the Real Estate Purchase And Sale Agreement, Idaho Code §§ 12-120 and 12-121, and/or the Idaho Rules of Civil Procedure.

CONCLUSION

Albar is entitled to the relief requested above with the District Court's findings and conclusions of a breach of contract being reversed. If a breach is found, the damages awarded by the District Court should be reversed. If the damages are upheld, Albar should receive relief from the damages awarded, for the sums received for reimbursement to JLZ from the IDEQ for remediation. Lastly, Albar should be awarded its attorney fees and costs, before the District Court and upon appeal.

RESPECTFULLY SUBMITTED this 12th day of April, 2012.



JOHN A. FINNEY
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Attorney for Appellant ALBAR

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2012, two (2) true and correct copies of the foregoing, were served by deposit in the U.S. Mail, postage prepaid, and were addressed to:

Charles R. Dean Jr.
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