

10-9-2014

Hilliard v. Murphy Land Co., LLC Appellant's Brief Dckt. 42093

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Hilliard v. Murphy Land Co., LLC Appellant's Brief Dckt. 42093" (2014). *Idaho Supreme Court Records & Briefs*. 5138.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/5138

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES HILIARD AND BARBARA HILLIARD,)

Plaintiffs-Cross Defendants-Appellants)

vs.)

MURPHY LAND COMPANY, LLC,)

Defendant-Cross Respondent-Respondent.)

Supreme Court No. 42093

APPELLANTS BRIEF

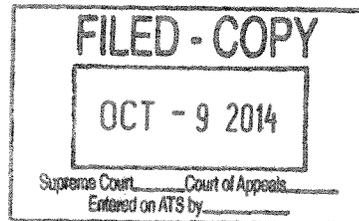
Appeal from the District Court, Third Judicial District of the State of Idaho, Owyhee County

THE HONORABLE MOLLY J. HUSKEY, DISTRICT JUDGE

M. KARL SHURTLIFF
816 West Bannock, Suite 200
PO Box 1652
LLP
Boise, Idaho 83701-1652
karlshurtliff@gmail.com
Telephone (208) 343-2900

STEVEN S. SCHOSSBERGER
MATTHEW P. GORDON
HAWLEY TROXELL ENNIS & HAWLEY,
877 Main Street, Suite 1000
Boise, Idaho 83701
sschossberger@hwaleytroxell.com
Telephone (208) 388-4975
Attorneys for Respondent

WELDON S. WOOD
17 Alverno Court
Redwood City, California 94061
weldon@weldonwood.com
Telephone: (650) 743-1079
Attorneys for Appellants



IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES HILIARD AND BARBARA HILLIARD,)
)
 Plaintiffs-Cross Defendants-Appellants)
)
 vs.)
)
 MURPHY LAND COMPANY, LLC,)
)
 Defendant-Cross Respondent-Respondent.)
 _____)

Supreme Court No. 42093

APPELLANTS BRIEF

Appeal from the District Court, Third Judicial District of the State of Idaho, Owyhee
County

THE HONORABLE MOLLY J. HUSKEY, DISTRICT JUDGE

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES1

STATEMENT OF THE CASE

 A. NATURE OF THE CASE4

 B. COURSE OF THE PROCEEDINGS BELOW4

 C. STATEMENT OF THE FACTS6

STANDARD OF REVIEW9

ISSUES PRESENTED ON APPEAL11

ATTORNEY FEES ON APPEAL11

ARGUMENT

 A. Did the District Court improperly weigh the evidence and asses credibility of
witness? 12

 B. The District Court failed to construe disputed facts in favor of the non-moving
party. 16

 C. The District Court failed to support its Summary Judgment grant with Findings
of Fact and Conclusion of Law, particulary regarging its exercise of the Ritchie power. 19

CONCLUSION21

CERTIFICATE OF SERVICE 22

TABLE OF CASES AND AUTHORITIES

Ada County v. Fuhrman, 140 Idaho 230, 232, 91 P.3d 1134, 1136 (2004).....11

Anderson v. City of Pocatello, 112 Idaho 176, 731 P.2d 171 (1986).....21

Argyle v. Slemaker, 107 Idaho 668, 692; P.2d 1283 (Ct. App. 1983).....10

Blackmon v. Zufelt, 108 Idaho 469, 471; 700 P.2d 91, 93 (Ct. App. 1983).....10,20

Bonz v. Sudweeks, 119 Idaho 539, 541 808 P.2d 876, 878 (1991).....12

Brewer v. Washington RSA No. 8 Ltd. Partnership, 145 Idaho 735, at 735-36, 184 P.3d 860, 863 (2008).....10

Casey v. Nampa & Meridian Irrig. Dist.,85 Idaho 299, 305; 379 P.2d 409, 412 (1963).....18

Chavez v. Barrus, 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008).....11

Cox v. Mulligan, 142 Idaho 356, 359, 128 P.3d 893, 896 (2005).....11

Davis v. First Interstate Bank N.A., 115 Idaho 169, 170; 765 P.2d 681, 681 (1988).....18

D. Dobbs, Remedies § 3.7 at 186 (1973).....18

Edmunds v. Kraner, 142 Idaho 867, 873, 136 P.3d 338, 334 (2006).....13

Finholt v. Cresto, 143 Idaho 894, 897, 155 P.3d 695, 698 (2007).....9

Hines v. Hines, 129 Idaho 847, 934 P.2d 20 (1997).....14

I.C. §§ 12-120 and 12-121.....11

Idaho Rule of Civil Procedure 1(a).....13

Idaho Rule of Civil Procedure P. 56(c).....9

<u>Kline v. Clinton</u> , 103 Idaho 116, 645 P.2d 350 (1982).....	12,19
<u>Land O'Lakes, Inc. v. Bray</u> , 138 Idaho 817; 69 P.3d 1078 (Ct. App. 2003).....	17
<u>Merrill v. Duffy Reed Constr. Co.</u> , 82 Idaho 410, 414; 353 P.2d 647, 659 (1960).....	12
<u>McDonald v. Safeway Stores</u> , 109 Idaho 305; 707 P.2d 416 (1985).....	13
<u>Nield v. Pocatello Health Services</u> , _____ Idaho _____; _____ P.3d _____ (2014, Docket No. 388-23-2011, 2014 Opinion No. 20).....	14
<u>Ritchie</u> , 103 Idaho 515, 650 P.2d 657 (1982).....	20
<u>Riverside Development Co. v. Ritchie</u> , 103 Idaho 515, 650 P.2d 657 (1982).....	10
<u>Smith v. Idaho State Univ. Fed. Credit Union</u> , 103 Idaho 245, 247; 646 P.2d 1016, 1018 (Ct. App. 1982).....	10,16
<u>Watson v. Weick</u> , 141 Idaho 500, 504, 112 P.3d 788, 792 (2005).....	9

STATEMENT OF THE CASE

A. Nature of the Case

This case involves issues relating to the sale of real property, and the associated contracts and addenda. Appellants, James and Barbara Hilliard (“Hilliards”) sued for declaratory and injunctive relief, asking for disbursement of the sum of \$3,000,00.00 in sales proceeds held by Guaranty Title, Inc. Respondent Murphy Land Company, LLC (“Murphy”) counterclaimed, asking that the funds held be disbursed to it as damages for the time it did not have possession of the subject property.

This appeal specifically seeks the review of an order for summary judgment entered by the Third District Court in favor of Murphy.

B. Course of the Proceedings Below

In December of 2010 the Hilliards sold real property located in Owyhee County to Murphy Land Company. Pending deletions of certain exceptions to the title insurance policy it was agreed that three million dollars (\$3,000,000.00) of the purchase price would be held in escrow by the title insurance company (Guaranty Title).

Subsequently, the exceptions to the title policy were deleted. The parties were unable to agree as to the disposition of the escrowed monies. The Hilliards filed a complaint seeking disbursement to them of the escrowed funds. Murphy Land Company filed an answer to the complaint and a counterclaim urging that it should receive the escrowed funds.

Murphy Land Company thereafter filed a Motion for Summary Judgment supported by the affidavit of one of the owners of Murphy Land Company (Frank Tiegs) seeking the court's award of the escrowed monies to it. The Hilliards responded to the Motion for Summary Judgment, supported in part by four (4) affidavits. Murphy objected to aspects of the Hilliards pro-offered affidavits and moved to strike and disregard portions of each of them.

The Court heard Murphy's motion for summary judgment and heard argument on Murphy's motion to strike and disregard affidavit testimony pro-offered by the Hilliards on the same day.

After oral argument, the Court granted in significant part Murphy's motion to strike and disregard the affidavit testimony pro-offered by the Hilliards. In addition, the Court accepted without more the affidavit testimony of Frank Tiegs on the part of Murphy as to the extent of the "damages". Notwithstanding, that Mr. Tiegs opined in his affidavit that Murphy's damages were in excess of three million dollars (\$3,000,000.00) the Court granted summary judgment in that amount as the amount sought by Murphy's attorneys.

Thereafter, the Hilliards filed a motion to alter or amend the judgment. The motion was resisted by Murphy and after briefing and argument, the Court denied the motion and subsequently awarded Murphy attorney fees and costs.

This appeal follows.

C. Statement of the Facts

James and Barbara Hilliard are husband and wife. For many years they owned a farm in Owyhee County, Idaho called Crystal Springs Farm. That farm was comprised of almost 4,000 acres. Approximately 3,000 acres are farmable. After they purchased the farm they leased to various farmers who grew row crops, such as potatoes and sugar beets, on their leased portions of that land. Also for many years the Hilliards orally leased the remaining portions of the farmable land to John W. Clark who raised hay and grain crops thereon. During the 2009 and 2010 growing seasons the Hilliards leased row crop portions of that farm to Lance Funk, d.b.a. Lance Funk Farms, LLC. Also, during the 2009 growing season, the Hilliards leased the remaining, non-row crop, portions of the farm to Jay P. Clark.

In January 2010 Jay P. Clark, who also represented the Hilliards as their lawyer in several other matters, obtained a written lease from the Hilliards titled “Crop Share Lease 2010” for Crystal Springs Farm which purported to give him a one-year lease, but was renewable at his sole option for a period of (10) years. On January 25, 2010 Jay P. Clark, without the Hilliards’ knowledge or consent, recorded that lease in Owyhee County, Idaho.

On June 4, 2010, John W. Clark recorded a “Memorandum of Ownership Interest in Real Property” in Owyhee County wherein he claimed, under a purported oral agreement, to have a ten percent (10%) ownership interest in Crystal Springs Farm. That filing created a second cloud on the Hilliards’ title to Crystal Springs Farm.

During the fall of 2010 the Hilliards retained Robert F. Bennett to act as their realtor to sell Crystal Springs Farm. A short time later, they learned of the clouds on their title to that farm. Thereafter, prospective purchasers were informed of those clouds.

When Mr. Bennett learned that Lance Funk, d.b.a. Lance Funk Farms, had leased the row crop portions of Crystal Springs Farm from the Hilliards during the two prior growing seasons, Mr. Bennett asked Mr. Funk whether he would be interested in purchasing that property.

On November 5, 2010 James and Barbara Hilliard as Sellers and Lance Funk or Assignees as Buyer (Murphy Land Company, LLC of which Lance Funk is one of the principals become the assignee of Lance Funk, buyer) entered into a preprinted form agreement titled "RE-23 COMMERCIAL INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT" which provided for a \$9,500,000 purchase price. The closing date for that transaction was to be December 28, 2010.

On November 18, 2010 Pioneer Title Co. wrote to Guaranty Title enclosing it's commitment for the "Real Estate Purchase and Sale Agreement" of November 5, 2010. That commitment included Exceptions 32 and 33 which were for the clouds on the Hilliards' title to Crystal Springs Farm created by Jay P. Clark and John W. Clark.

In mid-December, 2010 the Hilliards caused Jay P. Clark to be served with a Notice to Quit, but he ignored that notice and continued in possession of the Farm. However, he did sub-lease a portion thereof to an entity controlled by the principals of Murphy Land

Company, LLC.

On December 28, 2010 the Hilliards and Lance Funk extended the closing date for the sale one day to December 29, 2010, but the transaction did not close on that day.

On December 30, 2010 the Hilliards were unavailable to close the transaction and so they gave their son, James W. Hilliard, a power of attorney to sign a document titled "RE-11 ADDENDUM NO. 4" which required the Hilliards to deposit \$3,000,000 of the purchase price with Guaranty Title, Inc. as Trustee. Those funds were to be held in trust pending an endorsement to Buyer's policy of title insurance deleting Exceptions Nos. 32 and 33 shown on the commitment for title insurance. Those funds were to be "available to the extent determined by a court of competent jurisdiction of the purchaser's damage, if any, for loss or delay of possession of real estate purchased herein."

On February 16, 2011 the Hilliards sued Jay P. Clark and John W. Clark In Owyhee County to clear title to Crystal Springs Farm. On March 32, 2012 District Judge Culet entered an Order declaring Jay P. Clark's "Crop Share Lease 2010" to be null and void and he expunged John W. Clark's "Memorandum of Ownership Interest in Real Property" from the records of Owyhee County.

On March 29, 2012 First American Title Company deleted from the title insurance policy it had issued to Murphy Land Company, LLC the exceptions pertaining to the clouds Jay P. Clark and John W. Clark had placed on the Hilliards' title to Crystal Springs Farm.

On May 2, 2012 Murphy Land Company, LLC obtained full possession of Crystal

Springs Farm.

As set forth above this litigation follows.

STANDARD OF REVIEW

IV. STANDARD OF REVIEW

When reviewing an order for summary judgment, the standard of review for the Supreme Court of Idaho is the same standard imposed upon the district court in ruling on the motion.¹

The entry of summary judgment is proper only when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.² However, a mere scintilla of evidence or only slight doubt in opposition to the movant's position is not sufficient to create a genuine issue of material fact.³ Specifically, the nonmoving party must submit more than conclusory assertions that an issue of material fact exists to withstand summary judgment.⁴ In making the determination as to whether summary judgment is appropriate, when there is conflicting evidence concerning material issues, all allegations of fact in the record, and all reasonable

¹ Watson v. Weick, 141 Idaho 500, 504, 112 P.3d 788, 792 (2005).

² Idaho R. Civ. P. 56(c).

³ Finholt v. Cresto, 143 Idaho 894, 897, 155 P.3d 695, 698 (2007).

⁴ Id. at 896-97, 155 P.3d at 697-98.

inferences from the record, are construed in the light most favorable to the party opposing the summary judgment motion.⁵ However, when the trier of fact would be the district judge, and not a jury, the judge may grant summary judgment on *undisputed* evidentiary facts, despite conflicting inferences, because the court alone will be responsible for choosing those inferences.⁶ In such cases, where a judge exercises that power, it should make findings to identify the inferences drawn or rejected, and identify the evidentiary facts upon which its decision is based.⁷ Finally, “if the credibility of an affiant furnishing direct evidence is put at issue by other, circumstantial evidence, the credibility issue should not be resolved on summary judgment.”⁸ “Summary judgment is not proper when the relevant pleadings, depositions, and affidavits raise any question of the credibility of witnesses.”⁹

On appeal, this Court exercises free review in determining whether a genuine issue of material fact exists and whether the moving party was and is entitled to judgment as a

⁵ Brewer v. Washington RSA No. 8 Ltd. Partnership 145 Idaho 735, at 735-36, 184 P.3d 860, 863 (2008).

⁶ Argyle v. Slemaker, 107 Idaho 668,670, 691 P.2d 1283, 1285 (Ct. App, 1984) *citing* Riverside Development Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982).

⁷ Blackmon v. Zufelt, 108 Idaho 469, 471; 700 P.2d 91, 93 (Ct. App. 1985); *citing* Argyle v. Slemaker, 107 Idaho 668, 691; P.2d 1283, 1305 (Ct. App. 1984).

⁸ *Id.*

⁹ Smith v. Idaho State Univ. Fed. Credit Union, 103 Idaho 245, 247; 646 P.2d 1016, 1018 (Ct. App. 1982), *citing* Straley v. Idaho Nuclear Corp., 94 Idaho 917, 918; 500 P.2d 218, 219 (1972).

matter of law.¹⁰

ISSUES PRESENTED ON APPEAL

- A. Did the District Court improperly weigh the evidence and assess the credibility of witnesses?
- B. Did the District Court fail to construe disputed facts in favor of the non-moving party?
- C. Did the District Court fail to support its judgment with findings of fact and conclusions of law?

ATTORNEY FEES ON APPEAL

Attorneys fees and costs are specifically provided for in real estate sale agreement, and should be awarded to Hilliards pursuant to the contract between the parties.¹¹

In the alternative, Hilliards should be awarded their attorneys fees and costs pursuant to I.C. §§ 12-120 and 12-121. It is well-established law before this Court “that I.C. §12-120 mandates an award of attorney fees to the prevailing party on appeal as well as at trial.”¹²

Appellants should be awarded their reasonable attorneys fees and costs incurred in this appeal.

¹⁰ Ada County v. Fuhrman, 140 Idaho 230, 232, 91 P.3d 1134, 1136 (2004).

¹¹ R., Supp., pp. 19-30.

¹² Chavez v. Barrus 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008),, *citing Cox v. Mulligan*, 142 Idaho 356, 359, 128 P.3d 893, 896 (2005).

ARGUMENT

A. Did the District Court improperly weigh the evidence and assess credibility of witnesses?

This Court has previously held that motions for summary judgment should be granted with caution.¹³ This is because of the nature of summary judgment, which with absolute finality, curtails the litigation and effectively denies a party the right to have a full trial. Summary judgment is granted only in the narrowest of circumstances where the record before the trial court contains no conflicting facts from which reasonable minds might reach different conclusions.¹⁴ In other words, if there is more than one conclusion which a reasonable person could draw from the facts and record presented to the judge sitting in summary judgment, such a case is not appropriate for summary judgment and all claims and issues should be reserved for resolution by the finder of fact at trial.

Idaho's appellate courts have addressed the prohibition against assessing the credibility of witnesses at the summary judgment stage on numerous occasions. The Idaho Supreme Court has unequivocally stated that “[a] motion for summary judgment should be denied if the pleadings, admissions, depositions, and affidavits raise any question of credibility of witness or weight of the evidence.”¹⁵

¹³ Bonz v. Sudweeks, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991);

¹⁴ Kline v. Clinton 103 Idaho 116, 645 P.2d 350 (1982).

¹⁵ Merrill v. Duffy Reed Constr. Co., 82 Idaho 410, 414; 353 P.2d 647, 659 (1960).

The district court initially struck the affidavit of Hilliards' expert, Ken Edmunds, based upon late disclosure, and lack of foundation to support his opinions.¹⁶ In so doing, the district court failed to properly consider the fact that Edmunds was identified as a rebuttal witness, after Murphy identified Frank Tiegs as its expert. Murphy's disclosure deadline was October 25, 2013; Hilliards identified Edmunds on October 29, 2013. Murphy did not file any objection to the disclosure of Edmunds until it filed its Motion to Strike on December 5, 2013, eight days before the hearing on Murphy's Motion for Summary Judgment. The district court abused its discretion when it failed to recognize that even though Edmunds may have been excluded from testifying in Hilliards' case-in-chief, he could have properly testified in Hilliards' rebuttal case.¹⁷ Idaho Rule of Civil Procedure 1(a) states that the "rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding." The relevant inquiry, as the Idaho Supreme Court has stated, should be whether or not the interests of justice are served.¹⁸ At the summary judgment stage, it was an abuse of discretion to exclude Edmunds' testimony, and to fail to consider it on its own merit. Here, the district court clearly looked at "foundational issues." It used them to criticize and exclude the facts

¹⁶ Tr., pp. 30-31.

¹⁷ See, e.g. McDonald v. Safeway Stores, 109 Idaho 305; 707 P.2d 416 (1985).

¹⁸ See Edmunds v. Kraner, 142 Idaho 867, 873, 136 P.3d 338, 334 (2006).

considered and opinions held by Edmund – in essence weighing the evidence.¹⁹ Moreover, in evaluating the Edmunds affidavit, the district court weighed his opinions and credibility against those submitted by Murphy’s expert, Frank Tiegs,²⁰ The district court allowed Tiegs to testify without requiring either supporting documents or foundation, but struck testimony from Edmunds on those bases. Indeed, it held all of Hilliards’ witnesses to a higher standard than it held Tiegs and other Murphy witnesses. In Nield v. Pocatello Health Services,²¹ the Idaho Supreme Court found that the district court had impermissibly relied upon statements contained in one expert’s report in making its determination that another expert’s report was inadequate, utilizing the first expert’s affidavit as a yardstick against which the second expert’s opinions were measured. The Supreme Court found held the district court had abused its discretion, and vacated the summary judgment.²²

The district court’s evaluation of the affidavit of Jay Clark is even more problematic. The court made it clear on the record that it weighed his summary judgment affidavit against his affidavit from another case and found them to be inconsistent, and that it further evaluated Clark’s credibility based upon his actions in the prior case:

“There has been testimony rendered by Mr. Clark, pursuant to those affidavits. And

¹⁹ See Hines v. Hines, 129 Idaho 847, 934 P.2d 20 (1997).

²⁰ See, Tr., pp. 31-34.

²¹ ____ Idaho ____; ____ P.3d. ____ (2014, Docket No. 38823-2011, 2014 Opinion No. 20).

²² *Id.*

the Court is entitled to view that testimony in the fashion that it has been given. The Court finds that there is simply conflicting testimony about Mr. Clark’s willingness to allow these individuals on the land, and that is evidenced as – as indicated in the affidavit. . . . But the Court is allowed to assess credibility, and the Court simply finds that based on those two affidavits, as to that very narrow factual issue, the Court did not find Mr. Clark to be credible about his willingness to allow the other individuals to enter the farm and/or to take possession of the farm to engage in farming that –the purpose for which the farm was purchased.”²³

The district court struck portions of Clark’s affidavit because “the reason that he knew the facts . . . is that he was unwilling to vacate the property, despite being told to do so.”²⁴ The court refused to allow Clark’s testimony regarding farming in 2011 and 2012 because “[i]t has been determined that he was wrongfully in possession of that property during that time frame.”²⁵

The Idaho appellate courts have specifically found this sort of analysis to be inappropriate in the summary judgment context:

Difficulties in remembering relevant facts, and the giving of contradictory testimony are factors to be considered in determining a witness’ credibility. Summary judgment is not proper when the relevant

²³ Tr., pp. 123-125 (emphasis added)

²⁴ Tr., p. 38, ll. 15-18.

²⁵ Tr., p. 37, ll. 1-9.

pleadings, depositions, and affidavits raise any question of the credibility of witnesses. . . . In summary judgment proceedings the facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. Applying this rule to a case where, as here, an issue has been raised concerning the credibility of a key witness, we hold that summary judgment is inappropriate.²⁶

The Idaho appellate courts have long held that the proper method to determine a witnesses' credibility is by testimony in court before the trier of fact. The district court impermissibly weighed evidence and made credibility determinations at the summary judgment stage, abusing her discretion, and under these circumstances, summary judgment cannot lie.

B. The District Court Failed to Construe Disputed Facts in Favor of the Non-moving Party.

While acknowledging that Clark had knowledge regarding damages in the action, the Court refused to consider the facts he testified to, including his work preparing the ground for planting for the 2012 season, stating, “[y]es, but the reason that he knew the facts that predicated B is that he was unwilling to vacate the property, despite being told to do so.”²⁷ The district court then went on to say, “the fact that Mr. Clark may have prepared the land does not refute the [sic] paragraph 11. So the Court is going to strike that first

²⁶ Smith v. Idaho State Univ. Fed. Credit Union, 103 Idaho 245, 247; 646 P.2d 1016, 1018 (Ct. App. 1982)

²⁷ Tr., p. 38, ll. 15-18.

sentence.”²⁸ Clearly, the district court misunderstood both its powers to determine admissible evidence, and its duties under the standard for summary judgment. Instead of properly construing disputed facts in favor of Hilliards, it haphazardly struck portions of Hilliards affidavits, and, as argued *supra*, weighed them against the Tiegs Affidavit.

The district court seemed to misunderstand what is meant by drawing inferences favorable to the moving party in a summary judgment setting, where the district court will be in the ultimate finder of fact. In Land O’Lakes, Inc. v. Bray,²⁹ the Idaho Court of Appeals stated:

The legal standard allowing a trial court presented with a summary judgment motion to draw inferences favorable to the movant is to be applied only in the face of *undisputed* facts. When evidence on material issues is in conflict, the evidentiary facts must be viewed in favor of the party opposing the motion.

Contrary to this standard, the district court believed it was “allowed to assess credibility” and then stated “the Court did not find Mr. Clark to be credible.”³⁰ The court relied upon its assessment of Mr. Clark in finding his affidavit did not raise a factual question regarding Murphy’s damages.³¹ The court summarily dismissed Clark’s testimony that he was ready, willing and able to rent the property, which would have

²⁸ Tr., p. 40, ll. 21-24.

²⁹ 138 Idaho 817; 69 P.3d 1078 (Ct. App. 2003).

³⁰ Tr., p. 123, ll. 19-20; p. 124, ll. 19-25

³¹ See Tr., pp. 116-118; Tr. P. Tr., pp. 44-46.

mitigated Murphy's damages,³² balancing that testimony against a prior affidavit by him in a previous case. The duty to mitigate requires a party who is injured by another to take reasonable steps to lessen his or her damages.³³ Hilliards have argued that Murphy could have mitigated its damages by renting the farm from Clark, and Murphy argued that was not a reasonable remedy. However, "the reasonableness of the method selected to minimize damages is an issue to be resolved by the jury [or the trier of fact]."³⁴ . The district court also failed to consider Clark's testimony regarding historic yields and preparation of the ground for the 2012 planting season, all of which would have bearing on Murphy's damages.³⁵ For purposes of summary judgment, these facts must be construed most favorably to Hilliards, which the district court failed to do

The district court failed to hold Murphy to the proper standard regarding damages. While recognizing that there may be factual disputes regarding Murphy's claim,³⁶ the court failed to properly consider those issues. Hilliards argued that Murphy's damage claims are both speculative and inaccurate. Certainly, had the district court not seen fit to disregard

³² Tr., p. 116, ll. 16-20.

³³ D. Dobbs, Remedies, §3.7. at 186 (1973). *See also Casey v. Nampa & Meridian Irrigation Dist.*, 85 Idaho 299, 305; 379 P.2d 409, 412 (1963)

³⁴ Davis v. First Interstate Bank, N.A., 115 Idaho 169, 170; 765 P.2d 681, 681 (1988).

³⁵ Tr., pp. 36-38.

³⁶ Tr., pp. 114-118.

and/or exclude Hilliards' evidence, there is ample support to conclude that Frank Tiegs' cost and revenue projections are speculative, and that Murphy's damages were much lower than Tiegs estimated. It is interesting to note that while the district court required Hilliards' affiants to have supporting data and foundational documents in order for their testimony to be considered, it did not hold Murphy's expert, Tiegs, to the same standard. Mr. Tiegs qualifies his "projections" throughout his affidavit with language like "I would expect," and "I estimate." Certainly at trial Mr. Tiegs would have been asked to compare his "estimates" with actual yields during the 2013 growing season, when Murphy had possession of the premises for the entire season. Factual questions regarding Murphy's damage claim abound, and it was improper for the district court to grant summary judgment on that issue.

It was not the duty of the trial court sitting in summary judgment to make factual determinations where facts were in conflict. The function of the trial court is not to weigh the evidence or to try the factual issues; the trial court's only duty in determining a summary judgment motion is to determine whether or not there exists any genuine material fact as adduced from the entire record.³⁷

C. The District Court Failed to Support its Summary Judgment Grant With Findings of Fact and Conclusions of Law, Particularly Regarding its Exercise of

³⁷ Kline, 103 Idaho at 121, 645 P.2d at 355.

the Ritchie Power.

Idaho's appellate courts have held that if a judge exercises the power granted to it under Riverside Development Co. v. Ritchie,³⁸ which holds that a judge, sitting without a jury, is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, it should make findings to identify the inferences drawn or rejected, and to identify the evidentiary facts upon which the decision is based.³⁹

In this case, the district court made no such findings. In fact, review of the Courts findings and statements on the record lead to the inescapable conclusion that it failed to understand the limits on discretion, and believed that it not only had the right to draw inferences in favor of Murphy, but to weigh the evidence and determine the credibility of witnesses as well.

The trial court failed to identify what inferences it had drawn or rejected. It also failed to identify the evidentiary facts upon which its decision was based, other than to state that Hilliards had failed to "sufficiently refute" the amount of damages alleged.⁴⁰

CONCLUSION

In determining whether summary judgment is appropriate, the court must look to

³⁸ 103 Idaho 515, 650 P.2d 657 (1982).

³⁹ Blackmon v. Zufelt, 108 Idaho 469, 471; 700 P.2d 91, 93 (Ct. App. 1983), *citing* Argyle v. Slemaker, 107 Idaho 668, 692; P.2d 1283 (Ct. App 1983).

⁴⁰ Tr., p. 117, ll. 20-25.

the totality of the motions, affidavits, depositions, pleadings and attached exhibits, not merely to portions of the record in isolation.⁴¹ The summary judgment issued in this case was issued after the trial court improperly eviscerated the affidavits filed by Hilliards, and was predicated on the district court's determination that one of Hilliards' witness was not credible. The core problem with this case is that was that it was not an appropriate candidate for summary judgment. The district court failed to recognize that there were a number of controverted facts which should have precluded entry of summary judgment, and needed to be resolved at trial.

RESPECTFULLY SUBMITTED this 9 day of October, 2014.


M. KARL SHURTLIFF

WELDON S. WOOD

Attorneys for Appellants

⁴¹ Anderson v. City of Pocatello, 112 Idaho 176, 731 P.2d 171 (1986)

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served two true and correct copies of the foregoing, to the following, by the indicated method on this 9 day of October, 2014, by U.S. mail, hand delivery or facsimile, with the necessary postage affixed thereto.

Steven F. Schossberger
Matthew Gordon
Hawley Troxell Ennis & Hawley LLP
P. O. Box 1617
Boise, ID 83701-1617

U.S. Mail
 Fax
 Hand Delivered



M. KARL SHURTLIFF