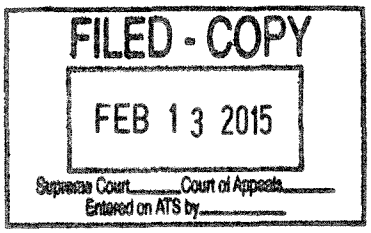
2-13-2015

McKay v. Walker Appellant's Brief Dckt. 42434

IN THE SUPREME COURT OF THE STATE OF IDAHO

Patricia McKay Plaintiff/Appellant, v. Thomas G. Walker and Cosho Humphrey, LLP, a limited liability partnership, Defendants/Respondents.	)	Docket No. 42434



APPELLANT BRIEF

Appeal from the District Court of the Fourth Judicial District of

The State of Idaho, in and for the County of Ada

Honorable Jason D. Scott

ATTORNEY FOR APPELLANT

Allen B. Ellis
Ellis Law, PLLC
12639 W. Explorer Dr. Ste 140
Boise, Idaho 83713

ATTORNEYS FOR RESPONDENTS

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LL
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

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STATEMENT OF THE CASE

Nature of the case: In this legal malpractice action arising out of divorce proceedings, plaintiff wife alleges that defendant attorneys negligently recommended that plaintiff enter into a Property Settlement Agreement ("PSA"). More, specifically, plaintiff alleges that (1) attorneys failed to provide security for her husband's financial obligation in the PSA , and (2) advised her that such security was in place. The available security was a mortgage instrument due to payoff to husband as mortgagee in a lump sum six months hence. According to the PSA:

> Darwin shall pay Patricia $800,000 in cash, by wire transfer or certified check, within five (5) days of payment by the Status Corporation, or its assigns . . . In the event of breach, Darwin may also be able to foreclose a mortgage on that portion of that land referred to prior to the sale to Status Corporation as "Albrethsen Farm".

R. p. 374.

Plaintiff's ex-husband received the mortgage proceeds without paying her the amount due under the PSA (R. p. 374). Although the PSA did not give her an express security interest in the mortgage, defendants had advised plaintiff multiple times that upon recordation of the judgment (with its incorporated PSA) the judgment would become a lien "on all of [the ex-husband's] real and personal property" (R. pp. 298, 523).

Defendants immediately recorded the judgment, but it is undisputed that the mortgage payout to the ex-husband was not encumbered by any lien rights in favor of plaintiff. Plaintiff's ex-husband ultimately paid her a portion of the $800,000 due under the PSA, but there remains a substantial shortfall. This shortfall constitutes the damages prayed for in the Complaint (R. p. 10).

Course of proceedings and disposition:

Plaintiff alleged in the Complaint:

> In November, 2007, defendant Walker and other agents of defendant Cosho Humphrey negligently recommended that the plaintiff enter into a Property Settlement Agreement ("PSA") with her then-husband Darwin McKay which contemplated that plaintiff would receive a portion of the proceeds from the 2008 closing of the Status Corporation transaction as follows:
>
> As a further proximate result of defendants' negligence, in November 2008, following entry of the Judgment and Decree of Divorce, Lawyers Title Insurance Company paid Darwin $1,288,019.10, to the exclusion of plaintiff, on the McKay community's interest as mortgagee in the Status Corporation mortgage. Notwithstanding the terms of the PSA, Darwin has refused to pay plaintiff any portion of those funds as required by that agreement.

R. pp. 11,12

After the Complaint was filed, written discovery was undertaken and the plaintiff Patricia McKay was deposed as well as plaintiff's expert, attorney Bryan D. Smith. Thereafter, defendants filed a summary judgment motion and two motions for reconsideration.

(1) Summary judgment: **denied** (the Honorable Ronald Wilper): Among the grounds alleged, defendants asserted that plaintiff failed to establish that she had "some chance for success" in the underlying action had the PSA not been consummated. (R. p. 580). Rejecting this argument, the district court ruled that there were "genuine issues of material fact" which precluded summary adjudication (R. p.581).

Also, the district rejected the argument that defendants are not responsible for the actions of plaintiff's ex-husband. The Court opined that the form of the PSA (no legal description or instrument number included) coupled with the defendants' reference to the PSA as a security instrument raised

issues of fact concerning defendants' negligence (R. p. 580).

Finally, rejecting the assertion that the conduct of plaintiff's ex-husband was a superseding cause of her damages, the Court opined that the ex-husband's breaching conduct was the very evil sought to be avoided by the security which defendants had advised plaintiff was in place (R. p. 579).

(2) Motion for reconsideration: **denied** (the Honorable Ronald Wilper): Here defendants argued that the Court "unreasonably inferred that Mrs. McKay was referring to the Albrethsen property instead of the Home Farm property when she emailed Mr. Walker on October 23, 2007" (R. p. 857). That email inquired whether a lien could placed on "Status Corp. closure so that the $800,000 are paid to me by them?" (R. p. 298). Defendant Walker replied in the affirmative (R. p. 298).

The payoff on the Albrethsen mortgage by Status Corporation was to occur on the same date as the sale of property to Status referred to as the "Home Farm". The Court opined that plaintiff's reference to "closure" could refer to either transaction. This ambiguity created a genuine issue of fact which made summary judgment improper (R. p. 860)

(3) Second motion for reconsideration: **granted** (the Honorable Jason Scott):

(a) **No breach of duty** (defendants did record the PSA): The Court opined that security interests in a domestic property settlement agreement can be created consensually or by operation of law (R. pp. 968, 969). In general terms, the Court concluded that defendants cannot be faulted for failing to obtain a consensual security interest or, alternatively, for failing to create a security interest by operation of law.

Respecting a consensual security interest, the Court concluded that the defendants cannot be faulted for failing to extract such security agreement from plaintiff's ex-husband (R. p. 969).

As to a security interest by operation of law, the fact that the defendants recorded the judgment in several counties, "they ensured that McKay obtained a judgment lien on her husband's real property". However, opined the Court, under Idaho law, "the definition of "real property" in section 55-101 is simply not broad enough to encompass a mortgage" (R. p. 969). That is, according to the District Court, the "mortgage on the Albrethsen property was personal property". (*Id*). As such, failure to make a public record for the ex-husband's ownership of the mortgage, was not a breach of duty.

(b) **No proximate causation I** (real property not available as security): In finding the absence of proximate causation, the district court concluded:

> Consequently, even assuming *arguendo* that Walker and Cosho Humphrey breached a duty to McKay by not including the Albrethsen's property legal description and her ex-husband's mortgage instrument number in the PSA, McKay's claims would be unfit for trial without evidence of a causal relationship between that breach and the damages she claims.

R. p 972

The District Court concluded (as it did in connection with the breach-of-duty issue) that because the Albrethsen mortgage was not an interest in real property, defendants did not cause plaintiff any damage. That is, opined the Court, no amount of "slick drafting" could have created a security interest (R. p. 971). The District Court did observe that the recorded judgment constituted a non-consensual judgment lien on real property owned by the ex-husband (R. 969). But even if the instrument number and real property description had been included in the judgment, opined the Court, "the evidence therefore does not support the conclusion that . . . McKay would have shared in the proceeds her husband received . . ." (R. p. 973).

(c) **No proximate causation II** (no evidence that ex-husband would have agreed to a

security interest or that trial would have resulted in a better outcome): Here the Court concluded that there is no evidence that plaintiff's ex-husband would have granted plaintiff a security interest had that been a non-negotiable point with plaintiff. Also, the Court opined that, had she eschewed the proposed PSA, "the Handwritten Agreement" would have blocked her path back to divorce court" (R. p. 974)

In short, the district court concluded that plaintiff "has not offered evidence that either option [further negotiation or trial] would have led to a better outcome than her actual outcome" (R. p.974)

Disposition: Based upon its Memorandum Decision and Order (R. pp. 957 - 976), the District Court entered judgment against plaintiff (R. p. 977), granting defendants' second motion for reconsideration.

STATEMENT OF FACTS

Formation of divorce settlement and plaintiff's expectations: On October 20, 2007, the plaintiff and her husband, Darwin McKay, undertook to mediate the issues raised by their divorce litigation. At the conclusion of mediation, the mediator, the Honorable Duff McKee, prepared a handwritten settlement agreement ("Handwritten Agreement") (R. p. 269) which both parties executed. This agreement provided in part:

> If Status (Union Development) real estate transaction is completed in March of 2008, Husband will pay Wife $800,000 out of proceeds . . . If the deal falls, Husband will pay Wife $500,000 within 6 months.
>
> . . . Parties, through counsel, to incorporate these terms into a comprehensive property settlement agreement.

R. p. 270.

Unlike the Handwritten Agreement, the subsequent PSA referenced the Albrethsen mortgage as the source of funds for the ex-husband's $800,000 payment: "Darwin may also be able to foreclose"

the Status mortgage on the "Albrethsen Farm" in the event Status "breached" its agreement to purchase the "Home Farm" (R. p. 374). See full text at page 2 above.

In her affidavit in this case, plaintiff referenced her expectations of security by the Albrethsen mortgage at the time of settlement as informed by the advice of defendant Walker:

> I held this belief at the time of settlement based upon the statement of my attorney Thomas Walker, that the recorded judgment of divorce would be a lien on the mortgage held by Mr. McKay on the Status Corporation obligation of approximately $1.4 million.

R. p. 552

Prior to settlement, defendants confirmed to plaintiff that the Albrethsen mortgage constituted security for her ex-husband's $800,000 obligation. In an October 23, 2007, email, prior to executing the PSA, Mr. Walker advised plaintiff:

> Our plan is to record the judgment and decree of divorce, which then becomes a lien on all of Darwin's real and personal property. We don't want to emphasize this aspect of the settlement. So we don't want to say anything until the judge signs the Judgment and Decree.

R. p. 298

Thereafter, on December 15, 2008, Mr. Walker again advised plaintiff by letter:

> We subsequently recorded the judgment in each county that you thought Darwin owned real and personal property. By virtue of Idaho Code § 10-1011, (sic) your judgment becomes a lien on Darwin's real and personal property.
>
> . . . Thus, the mortgage that Lawyers Title accepted from Darwin should be subject to the lien of the judgment.

R. pp. 522

In her affidavit opposing summary judgment, plaintiff testified that, barring the acquisition of security, she would have proceeded to trial had she known that recordation of the PSA would not

subject the Albrethsen mortgage "to the lien of the judgment". (R. p. 552)

Disbursement of mortgage proceeds: Although not relevant to the issues presented, a title defect brought Lawyer's Title Insurance Corporation into the picture. In approximately December 2008, the ex-husband received $1.2 million as mortgagee of the Albrethsen mortgage.

As described by Mr. Walker in the December 2008, letter to plaintiff:

> Regarding the assignment to Lawyer's Title Insurance Corporation, I was able to determine that Darwin made a claim against a title insurance policy issued by Lawyer's Title with regard to the Status Corporation transaction. I could not find out the exact amount of the insurance claim payment but my perception is that it was more than the $800,000 that Darwin owes you.

R. p. 523

In its Memorandum Decision, the Honorable Jason Scott described the Lawyer's Title payout to the ex-husband Darwin arising from the obligation of the Albrethsen mortgagee as follows:

> Status Corporation failed to pay the mortgage on the Albrethsen property. As a result, McKay's ex-husband sued Status Corporation. In August 2008, he received a judgment for more than 1.2 million against Status Corporation based on the mortgage loan. Status Corporation did not pay McKay's ex-husband the judgment amount. Instead, because a title company had mistakenly insured the first-priority position of multiple Albrethsen property lienholders, including McKay's ex-husband, it paid him the judgment amount in return for an assignment of the judgment.

R. p. 960.

As noted above, the ex-husband Darwin failed to remit the $800,000 to plaintiff wife as required by the PSA. She now claims this failed payment as damages proximately caused by defendants malpractice.

Evidence of malpractice: According to plaintiff's expert, Bryan D. Smith, defendants' conduct

fell below the standard of care for an Idaho attorney, including the following: (1) Failing to include the legal description of the Albrethsen Farm in the PSA as well as the instrument number of the mortgage; (2) Failing to record a summary of the PSA as authorized by Idaho Code § 32-918; and (3) Advising plaintiff that the divorce judgment constituted a lien on the mortgage proceeds.

R. pp. 495-496.

ISSUES PRESENTED ON APPEAL

1. Whether the alleged tort of malpractice fails due to the absence of a breach of duty as a matter of law;
2. Whether the alleged tort of malpractice fails due to the absence of proximate causation. as a matter of law.
3. Assuming these issues are not barred as a matter of law, whether genuine issues of material fact exist which preclude the entry of summary judgment.

ARGUMENT

STANDARD OF REVIEW

With respect to appellate review of the herein summary judgment, the Supreme Court adheres to the following standard:

> This Court exercises free review over appeals from a grant of summary judgment and the standard it applies is "the same as the standard used by the trial court in ruling on a motion for summary judgment." *Stonebrook Const., LLC v. Chase Home Fin., LLC*, 152 Idaho 927, 929, 277 P.3d 374, 376 (2012) (quoting *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 394, 224 P.3d 458, 461 (2008)). Summary judgment is therefore proper if "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." I.R.C.P. 56(c). When applying this standard, this

> Court construes disputed facts, and all reasonable inferences that can be drawn from the record, in favor of the non-moving party. Curlee, 148 Idaho at 394, 224 P.3d at 461. Where "the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review." [cases cited]

Grabicki v. City of Lewiston, 154 Idaho 686, 690, 302 P.3d 26 (2013).

THE DISTRICT COURT BASED ITS DECISION ON THE ERRONEOUS LEGAL CONCLUSION THAT THE ALBRETHSEN MORTGAGE WAS PERSONAL PROPERTY AND NOT COULD NOT BE SUBJECT TO THE LIEN OF THE DIVORCE JUDGMENT.

A mortgage on real property *is* an interest in real property and, like all real property, subject to judgment liens under Idaho Code § 10-1110. Multiple Idaho statutes treat mortgages as the equivalent of an interest in real property:

> Idaho Code § 8-506A(d): Any interest of the defendant as mortgagee of a real estate mortgage . . . may be attached. *The sheriff must record with the county recorder where the real property is located a copy of the writ along with a notice in writing, naming the defendant, describing the real property, and identifying the recording information on the real estate mortgage or trust deed,* . . . The recorder shall index the same as an assignment of the defendants' interest in the mortgage or deed of trust, and it shall be constructive notice to the world of the attachment.

(emphasis added).

Absent an instrument number and legal description, the sheriff would be unable to undertake the recording duties described in the statute.

This statute underscores the treatment of a mortgage as an interest as real property. More to the point, in order for plaintiff as judgment creditor to perfect a lien against the ex-husband's mortgagee interest, the judgment must include the legal description of the mortgaged "real property" and identify "the recording information on the real estate mortgage". In that fashion, the plaintiff's interest in the mortgage is put onto the public record as with any real estate holding. Properly drafted, plaintiff's

judgment accomplishes two things: (1) it establishes the ex-husband's status as a judgment debtor; and (2) it identifies his interest in real property against which that judgment can constitute a lien.

The District Court opines that the mortgage proceeds are the husband's separate property. This correct observation is neither here nor there. See Memorandum Decision (R. p. 14, 15). If ownership of an asset prevented money judgment liens from attaching, the collection business would cease to exist, at least as we know it.

According to the testimony of plaintiff's expert Bryan Smith:

> Q. You're calling a mortgage real property?
> A. Yes. It's a property interest.
> Q. Are you calling a mortgage real property?
> A. I'm saying it's an interest in real property.

R. p. 668

And:

> Q. If the property settlement agreement gave the proceeds to Mr. McKay, how could Mr. Walker have represented in good faith to a title company that Mrs. McKay had an interest in those proceeds?
>
> A. Mr Walker had already told – had already concluded that he thought there was a lien that was created by virtue of recording the decree of divorce.

R. p. 677

In characterizing a mortgage as personal property, the District Court conflates the money proceeds generated by the underlying mortgage debt (personal property) with the mortgage itself (real property)

Other Idaho statutes which treat a mortgage as a real property interest:

> Idaho Code § 45-902: MORTGAGE MUST BE IN WRITING. A *mortgag*e, deed of trust or transfer in trust can be created, renewed or

> extended only by writing, executed with the formalities required in the case of a grant or conveyance of *real property.*
>
> Idaho Code § 45-908. Power of attorney to mortgage. *A power of attorney to execute a mortgage*, or deed of trust must be in writing, subscribed, acknowledged, or proved, certified and recorded in like manner as powers of attorney for grants of *real property.*
>
> Idaho Code § 55-811. RECORD AS NOTICE. Every conveyance of *real property* acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and *mortgag(e)es.*
>
> Idaho Code §55-813. Conveyance defined. The term "conveyance" as used in this chapter, embraces every instrument in writing by which any estate or *interest in real property* is created, alienated, *mortgaged* or encumbered, or by which the title to any real property may be affected, except wills.

(emphasis added)

In *Ogden v. Griffith,* 149 Idaho 489, 236 P.3d 1249 (2010), the Supreme Court opined that an analogue to a mortgage, a deed of trust, is an interest in real property: "Because a deed of trust is an interest in real property, it falls under the terms of I.C. § 9-503 [statute of frauds]. *See* Black's Law Dictionary 445 (8th Ed. 2004) ("[D]eed of trust. A deed conveying title to real property to a trustee as security until the grantor repays a loan.)". *Id.,* 149 Idaho at 493.

Black's defines a mortgage as: "A conveyance of title to property that is given as security for the payment of a debt . . . that will become void upon payment". Black's Law Dictionary 1026 (7th Ed. 1999).

The District Court erroneously characterized a mortgage as "personal property" (R. p.963): With respect to the character of a mortgage, the district erroneously concluded that mortgages constitute "personal property":

> . . . Walker and Cosho Humphrey cannot be faulted for the fact that the PSA does not contain an express grant to McKay of a security interest in her husband's mortgage on the Albrethsen property. . . *McKay's ex-husband's mortgage on the Albrethsen property was personal property.* Accordingly, recording the divorce decree, which incorporated the PSA, did not give McKay a judgment lien on the mortgage.

R. p. 969 (emphasis added).

First, citing Idaho Code § 10-1110, the District Court concedes that the McKay judgment, as recorded, becomes judgment lien on "in her husband's real property (R. p. 969). But citing Idaho Code § 55-101, the District Court concluded that a real estate mortgage is not "real property" as defined by Idaho Code § 55-101 and, hence, cannot be encumbered by the judgment lien referenced in Idaho Code § 10-1110 (R. p. 969).

Section 55-101 states: **"Real property defined.** – Real property or real estate consists of: 1. Lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer. 2. That which is affixed to the land. 3. That which is appurtenant to the land". During the twentieth and twenty-first centuries, the term "real property" has evolved beyond only tangible property and the common law rarely addresses the arcane mining terms set forth in that section.

Apart from the above-cited Idaho statutes and common law, the annotations under Idaho Code § 11-1110 confirm the error of classifying a real estate mortgage as a form of personal property. For example, in *Fulton v. Duro,* 108 Idaho 392, 700 P.2d 14 (1985), affirming *Fulton v. Duro,* 107 Idaho 240, 687 P.2d 1367 (Ct.App. 1984), the appellate court held that a buyer's interest in a land sale contract is an interest in real property within the meaning of section § 10-1110. *Id.,* 108 Idaho at 393. That is, the listed forms of real property identified in section 55-101 are somewhat anachronistic and are not exhaustive.

THE DISTRICT COURT'S MORTGAGE-AS-PERSONAL PROPERTY POSTULATION INFORMED (AND SKEWED) HIS ANALYSIS OF THE ELEMENTS OF DUTY AND PROXIMATE CAUSATION.

Gist of malpractice: In addition to erroneously advising plaintiff that the divorce papers, as drafted, would create a lien on all the ex-husband's real property, defendants failed to include in the PSA the mortgage instrument number and legal description of the Albrethsen mortgage. See Idaho Code § 8-506A(d). According to plaintiff's expert, this omission prevented a judgment lien from attaching to the mortgage proceeds (R. p. 496).[1] In the eyes of the District Court, these omissions were benign because as "personal property" the mortgage ran free of any judgment liens.

Treating the mortgage as personal property was a death knell for the tort of malpractice: As noted above, the District Court's view of a mortgage as personal property rendered the defendants' actions without fault and without adverse consequences to plaintiff: "McKay's ex-husband's mortgage on the Albrethsen property was personal property. Accordingly, recording the divorce decree, which incorporated the PSA, did not give Ms. McKay a judgment lien on the mortgage" (R. p 969).

Viewing the Albrethsen mortgage as personal property resulted, inevitably, in the conclusion that there could be no breach of duty or proximate causation. If the mortgage were personal property, it would be futile to include in the PSA a legal description of the real property or instrument number of the mortgage. Hence, the failure to do so would not be a breach of duty. By the same token, failure to include this information would not be the proximate cause of plaintiff's financial loss because its inclusion would not have liened the mortgage given its status as "personal property".

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[1]Plaintiffs' expert has opined that this additional information would have enabled defendants to record an extract of judgment as further protection against the unencumbered payout of mortgage proceeds to plaintiff's husband. See Idaho Code § 32-918. (R. p. 495)

The District Court did acknowledge that the recorded judgment, irrespective of the husband's consent, imposed a judgment lien on all of the ex-husband's real property in the counties of recordation.

> Walker and Cosho Humphrey recorded the divorce decree in several counties. . . . (Walker Aff. filed Jan. 6, 2011, para 20). By doing so, they insured that McKay obtained a judgment lien in her ex-husband's real property in the counties of recordation, see I.C. § 10-1110, despite that her ex-husband never agreed to grant her a security interest in his real property.

R. p. 969 (emphasis in original).

As reflected in the affidavit of plaintiff's expert, the deficiency in defendant's work was the failure to set forth in the PSA the legal description of the Albrethsen Farm property and the instrument number of the recorded mortgage as to which the ex-husband was the mortgagee (R. p. 495). These omissions, not the mortgage's perceived status as personal property, prevented plaintiff's judgment lien from attaching to the Albrethsen mortgage.

As observed by the District Court, a judgment lien was created to protect plaintiff "despite that her ex-husband never agreed to grant her a security interest in his real property" (R. p. 969). Consistent with the District Court's confirmation of the non-consensual nature of a judgment lien, defendant Walker admonished his client to proceed with stealth as respects the imminent judgment lien.

> Our plan is to record the judgment and decree of divorce, which then becomes a lien on all of Darwin's real and personal property. We don't want to emphasize this aspect of the settlement. So we don't want to say anything until the judge signs the Judgment and Decree.

R. p. 298.

The problem with the "plan" was that the Albrethsen mortgage was not liened because the requisite mortgage was not in the judgment. I.C. §8-506A(d).

PROXIMATE CAUSATION EXISTS RESPECTING DEFENDANTS' ERRONEOUS ADVICE THAT HUSBAND'S OBLIGATION TO PLAINTIFF WAS SECURED.

The District Court concluded that the element of proximate causation is absent with respect to the allegation that the defendants misled plaintiff into "believing the PSA granted her a security interest in the mortgage" (R. p. 973). In its analysis, the Court posed the helpful hypothetical which addressed plaintiff's options "had she tried to walk away from the deal", i.e., had the absence of security been disclosed prior to her execution of the PSA.

First, the District Court accurately observed that there is no evidence that the ex-husband would have granted her a consensual security interest "had she pressed the issue" (R. p. 974). That is, had the absence of security been disclosed, it was not possible to obtain a security interest by agreement.

Secondly, as to a security interest by operation of law (judgment lien), the District Court concluded that the Handwritten Agreement (R. p. 269) "would have blocked her path back to divorce court" (R. p. 974), i.e., "it did not provide for security of any kind". *Id.* Whether "blocked" or not, the existence of the Handwritten Agreement is not a dispositive fact on the issue of proximate causation.

First, plaintiff's expectations of security existed at the time of the mediated settlement (and Handwritten Agreement) and was based upon the advice of defendant Walker. As stated in her affidavit:

> I held this belief at the time of settlement based upon the statement of my attorney Thomas Walker that the recorded judgment would be a lien on the mortgage held by Mr. McKay on the Status Corporation obligation of approximately $1.4 million.

R. p. 552.

That is, had the absence of an explicit security provision in the Handwritten Agreement "blocked her path" to obtaining that security, such blockage proximately arose by defendants' assurance of

security. See plaintiff's affidavit and Walker's letters dated October 23, 2007 and December 15, 2008 R. pp. 298, 522). That is, if the Handwritten Agreement did "block her path" to further litigation, such obstruction was the responsibility of defendant attorneys.

Secondly, the existence of the Handwritten Agreement did not foreclose security "by operation of law", the other route to security identified by the District Court (R. p. 969). Both the District Court and defendant Walker explicitly acknowledge that this security device is not dependent on the consent of the debtor (R. pp. 298, 969). Had the PSA included the instrument number of the Albrethsen mortgage and a legal description of the property, a judgment lien would have been imposed on the mortgage. See Smith affidavit (R. p. 495). We must remember that, unlike the Handwritten Agreement, the PSA actually referenced the Albrethsen mortgage, not as security, but as a source of funds to remit to plaintiff the $800,000 payment.

(R. p. 374).

The District Court recognized plaintiff's acquisition of a judgment lien "despite that her ex-husband never agreed to grant her a security interest in his real property" (R. p. 969). Likewise, defendant Walker, recognizing an incipient judgment lien, counseled reticence with respect to the prospective lien on the ex-husband's real property until such time as "the judge signs the Judgment and Decree" (R. p. 298).

That is, neither the Handwritten Agreement nor her husband's resistance to security, prevented the creation of a judgment lien. In the event, the Handwritten Agreement is perceived to block plaintiff's acquisition of security, that agreement was entered into by reason of defendants' advice that plaintiff would be secured. In that event, such advice would be the proximate cause of plaintiff's financial loss.

WHETHER THERE IS A BREACH OF DUTY OR PROXIMATE CAUSATION RAISES FACTUAL QUESTIONS NOT AMENABLE TO SUMMARY ADJUDICATION.

The District Court ruled plaintiff's claim must fail due to the absence, as a matter of law, of the indispensable elements of breach of duty and proximate causation. In the event, these elements had not been ruled to be absent as a matter of law, they would then present factual issues not resolvable by summary judgment.

In the usual case, evidence on these issues must be presented through an expert witness, i.e., an attorney. *Jarman v. Hale,* 112 Idaho 270, 273, 731 P.2d 813 (Ct. App. 1968). That is, the existence, or not, of malpractice is a fact not within the knowledge or experience of lay jurors. *Corey v. Wilson,* 93 Idaho 54, 58, 454 P.2d 951, 955 (1969).

Given the fact-intensive nature of these issues and the evidence admitted from plaintiff's expert, genuine issues of material fact are presented which preclude summary disposition for that reason. Rule 56(c), Idaho Rules of Civil Procedure.

CONCLUSION

By reason of (1) defendants' recommendation to accept the PSA which was incorporated into the judgment and (2) their assurance that plaintiff would have a secured position on the $800,000 judgment debt, plaintiff failed to receive a substantial portion of the $800,000, her partial share of the community estate.

The District Court correctly cited the applicable principle of law: recordation of the divorce decree "ensured that McKay obtained a judgment lien in her ex-husband's real property in the counties of recordation" (R. p. 969) (emphasis in original).

However, the identifying data of the Albrethsen mortgage (real property) was not properly set

forth in the judgment so as to constitute a lien on the mortgage. See Idaho Code 8-506A(d). By characterizing the mortgage as personal property and, therefore, not impacted by recordation, the District Court committed an error of law, immunizing the defendants from allegations of breach of duty and proximate causation.

Plaintiff respectfully requests that summary judgment be vacated and the matter remanded for a trial on the merits.

Submitted this 13th day of February, 2015.

Allen B. Ellis
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 2015, I caused to be served two true and correct copies of the foregoing by the method indicated below, and addressed to the following:

Robert A. Anderson
Yvonne A. Dunbar
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707

_____ U.S. Mail
__X__ Hand Delivery
_____ Overnight Mail
_____ Facsimile at
344-5510

Allen B. Ellis