

CONTRIBUTORY NEGLIGENCE AND OTHER AFFIRMATIVE DEFENSES TO ATTORNEY MALPRACTICE

I. INTRODUCTION

"A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice."¹ In spite of this directive from the American Bar Association, state bar associations and courts, contributory negligence specifically pleaded and proved is recognized as a defense to an action for attorney malpractice based on negligence.² Failure to mitigate damages and assumption of the risk have also been recognized as defenses to a charge of attorney malpractice.³ These defenses are often raised in cases where allegations of failure to investigate form the basis of the complaint. The scope of this comment is limited to such cases.

This comment is designed to trace the origin and development of contributory negligence in American law in connection with allegations of failure to investigate. Another purpose of this comment is to raise the question; to what extent if any, under the modern rules of professional responsibility⁴ and rules of civil procedure especially Rule 11,⁵ an attorney is justified in relying on information furnished by the client

1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102 (1982) [hereinafter cited as MCPR].

2. *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 362 N.W.2d 118, 132 (Wis. 1985); see also *Bowman v. Doherty*, 686 P.2d 112, 120 (Kan. 1984); *Daskalos v. Kell*, 280 Or. 531, 571 P.2d 141, 144 (Or. 1977); *McDow v. Dixon*, 138 Ga. App. 338, 226 S.E.2d 145, 147 (1976); *Hansen v. Wrightman*, 14 Wash. App. 78, 538 P.2d 1238, 1245 (1975); *Theobald v. Byers*, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961).

3. *Mali v. Odom*, 367 S.E.2d 166, 169 (S.C. App. 1988) (assumption of the risk); *Jakobleff v. Sweeny*, 468 N.Y.S. 2d 895, 897 (A.D. 2 Dept.) (failure to mitigate damages).

4. MODEL CODE OF PROFESSIONAL CONDUCT (1983) [hereinafter MCPC]; MCPR; state rules of professional conduct based upon the foregoing.

5. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief *formed after reasonable inquiry it is well grounded in fact* . . .

FED. R. CIV. P. 11 (emphasis added); see also state rules of civil procedure which have substantially adopted the federal rules.

without conducting an independent investigation? Failure to investigate can result not only in liability to one's client, but also in liability to third parties for professional malpractice,⁶ negligent misrepresentation⁷ and even malicious prosecution.⁸

6. *E.g.*, *Flaherty v. Weinberg*, 303 Md. 115, 492 A.2d 618 (Md. 1985).

A majority of American courts evidently continue to adhere to the view expressed in a 105-year-old Supreme Court decision holding that absent fraud, collusion, or privity of contract, an attorney is not liable to a third party for professional malpractice. *National Savings Bank v. Ward*, 100 U.S. 195, 25 L.Ed. 621 (1880) (6-3 decision).

[However] a growing number of jurisdictions have made inroads into this requirement in attorney malpractice cases by employing one of two basic conceptual models: (1) the balancing of factors theory, or (2) the third party beneficiary theory.

Under this policy-based approach, the court balances the following factors in determining whether to impose a duty on attorneys not in privity with third parties: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm

The second conceptual model used in malpractice cases involving attorney liability to third parties is the third party beneficiary contract theory. In general terms, a third party beneficiary contract arises when two parties enter into an agreement with the intent to confer a direct benefit on a third party, allowing the third party to sue on the contract despite the lack of privity.

Id. at 620-622.

7. *E.g.*, *Greycas Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987) (attorney failed to investigate existence of U.C.C. liens). "Legal malpractice based on a false misrepresentation, and negligent misrepresentation by a lawyer, are such similar legal concepts, however, that we have great difficulty . . . in holding them apart in our minds." *Id.* at 1564. *Greycas* emphasizes the importance of conducting an independent investigation. The attorney suffered an \$833,760 judgment when he failed to conduct a search for U.C.C. liens. *Id.* at 1561. Relying on the word of his brother-in-law, who was also an attorney, he certified to a lender that certain farm machinery was unencumbered. When the brother-in-law defaulted on the \$1,367,966.50 debt the lender sued for attorney malpractice. *Id.* at 1562. Not only did the court on review affirm the money judgment, it also forwarded a copy of the opinion to the Illinois disciplinary committee. *Id.* at 1568.

8. *E.g.*, *Hunt v. Dresie*, 740 P.2d 1046 (Kan. 1987).

We further reject the statement . . . that an attorney may act on the assumption that the facts related by his client are honestly given and are

In complaints alleging failure to investigate the inquiry is whether, under the facts, the attorney has breached a duty to investigate the factual basis of the client's case.⁹ When the attorney pleads contributory negligence the question becomes whether the client has assumed a duty to provide full and accurate information upon which the attorney was justified in relying.¹⁰ The standard of care by which the attorney's actions are judged is that "degree of skill, care, diligence and knowledge as is ordinarily possessed by members of the legal profession in good standing in similar communities."¹¹

II. HISTORY OF THE DEFENSE

Contributory negligence, as a defense to attorney malpractice, has enjoyed a long tradition in American law. One of the earliest expressions of the concept that client conduct can be relevant on the issue of attorney malpractice is *Salisbury v. Gourgas*.¹² Although technically not a contributory negligence case because the attorney failed to affirmatively plead the defense, *Salisbury* has been recognized as authority on

substantially correct and that it is not his duty to go elsewhere for information respecting the honesty of the claim or the good faith of his client. . . .

. . . .

Where an attorney has reason to believe personal animosity exists between his client and the proposed defendant, he should carefully investigate the facts and satisfy himself that the client is not attempting to use his services merely as an instrument of vengeance. One of the services an attorney provides his client is learned objectivity in evaluating claims and counselling on the course of action to be taken.

Id. at 1053; 1054 (citations omitted). *Contra* *Friedman v. Dozor*, 412 Mich. 1, 312 N.W.2d 585, 589 (1981) (court refused to find that an attorney owes an actionable duty to an adverse party).

9. See *Hansen v. Wrightman*, 538 P.2d 1238, 1245 (Wash. App. 1975).

Under certain circumstances it may be the duty of the lawyer to investigate the facts applicable to a transaction and report the results to the client. . . . If the attorney should have inquired concerning the facts and did not, the client cannot be said to have been negligent in failing to disclose said facts. . . . However, an attorney need not inquire into matters that do not pertain to the discharge of the duties that he has undertaken. . . . Likewise, an attorney need not make inquiry where the responsibility for the matter is assumed by the client.

10. *Id.*

11. *Sheets v. Letnes, Marshall & Fiedler, LTD.*, 311 N.W.2d 175, 180 (N.D. 1981); see also *Spalding v. Davis*, 674 S.W.2d 710, 714 (Tenn. 1984); *Bowman v. Doherty*, 686 P.2d 112, 120 (Kan. 1984).

12. *Salisbury v. Gourgas*, 51 Mass. (10 Met) 442 (1845).

the issue.¹³ The attorney in *Salisbury* was charged with malpractice for allowing a default judgment to be taken against his client in an action for trover.¹⁴ From a jury verdict for the defendant (attorney) in the malpractice action, the plaintiff (ex-client) appealed.

One issue, on appeal, was the admissibility of testimony regarding statements made by the attorney in open court at the time of default.¹⁵ In conducting his defense, the attorney was allowed to call the court reporter who testified over objection, as follows:

[W]hen that action was reached in the order of the docket, (it having been marked for trial,) the defendant stated to the court that he had been employed before the September court to make defence [sic] to the action; that it had been continued; that he afterwards saw Salisbury, (the plaintiff,) and told him he must call upon him (the defendant) about the 1st of December, and make up a list of witnesses, and instruct him in a defence [sic]; that the plaintiff had not called, and that he had not since seen him; that he (the defendant) had no means of defence [sic], and no defence [sic] to make.¹⁶

Overruling the plaintiff's hearsay objection, the trial judge instructed the jury that the evidence was not admitted to show the truth of the facts stated, but merely to show the circumstances surrounding the alleged act of negligence.¹⁷

The court on review held that the evidence was properly admitted in light of the limiting instruction.¹⁸ The court stated:

[T]he declarations bore on a particular point, to wit, the denial of the charge of negligence in court, and to that point they were admissible, and the distinction attempted to be enforced between the declarations accompanying the transaction and those which were a recital of past transactions is not applicable. The whole statement constituted one transaction, so far as related to the simple charge of negligence in court.¹⁹

13. *E.g.*, *Hanson v. Wrightman*, 538 P.2d 1238, 1245 (Wash. App. 1975); Annotation, *Attorneys-Negligence-Liability*, 45 A.L.R.2d 5 (1956).

14. 51 Mass. (10 Met) at 442.

15. *Id.* at 443.

16. *Id.*

17. *Id.*

18. *Id.* at 446.

19. *Id.* at 447. The same defense raised by the attorney in *Salisbury* was raised by an attorney in *Parten v. Swann*, 183 Ga. App. 364, 358 S.E.2d 906, 907 (1987). The attorney was absolved of liability, however, not because "he had had no defenses" to

From this misplaced peppercorn, the affirmative defense of contributory negligence to an action for attorney malpractice alleging failure to investigate appears to have grown. This growth, however, should not be surprising considering that the essential elements of an action for attorney malpractice are the same as those for an ordinary action in negligence.²⁰ To the extent that the defense is premised on client conduct not within the control of the attorney, the defense seems indisputable. Competent handling of a particular case, however, will usually require that an attorney not rely solely on the client's rendition of facts.

A.B.A. Model Rule 1.1²¹ charges an attorney to represent a client competently. The comments to the rule explain:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.²²

"This competency extends to [an attorney's] ability to perform both in the courtroom and in the underlying skills necessary leading up to the courthouse door."²³ If a lawyer "is not competent to perform the work, he should not undertake to do so."²⁴ A breach of the Code of Professional Responsibility, however, does not serve as an independent basis of liability in a civil action to recover damages.²⁵ Ordinarily, expert testimony is required to establish the standard of care by which the professional conduct of an attorney is measured.²⁶

make but because the plaintiff in that case had suffered no harm as a result of his negligence. *Id.*

20. The essential elements required to state a cause of action for attorney malpractice are: (1) duty, (2) breach, (3) causation and (4) damages. See *e.g.*, *Burke v. Roberson*, 417 N.W.2d 209, 211 (Iowa 1987); *Herston v. Whitesell*, 374 So.2d 267, 268 (Ala. 1979).

21. MCPC Rule 1.1.

22. MCPC Rule 1.1 Comment (1982).

23. *Williams v. State*, 405 N.W.2d 615, 622 (N.D. 1987) note 10.

24. *Id.*

25. *Terry Cove North, Inc. v. Marr & Friedlander, P.C.*, 521 So. 2d 22, 24 (Ala. 1988); *Roberts v. Langdale*, 185 Ga. App. 122, 363 S.E.2d 591, 593 (1987); *cf Phillips v. Carson*, 731 P.2d 820, 833 (Kan. 1987) (the court found that "extensive breaches of Code of Professional Responsibility proximately caused injury" to client).

26. *E.g.*, *Bowman v. Doherty*, 686 P.2d 112, 120 (Kan. 1984).

III. DUTY TO INVESTIGATE

Courts have not been in agreement as to the extent of a lawyer's duty to investigate and prepare a client's case. Holdings on the subject encompass both extremes of the spectrum of an attorney's duty to investigate. Courts in the same jurisdiction have rendered decisions ranging from an attorney should not be liable for ignorance of facts which a client neglects to tell him²⁷ to an attorney has the "responsibility to investigate and prepare every phase of a [client's] case."²⁸ On one extreme of the spectrum is *Rapuzzi v. Stetson*.²⁹ The underlying cause of action in *Rapuzzi* involved an installment contract for the sale of stock between two businessmen.³⁰ When Flint (the buyer) defaulted, Bean (the seller) brought suit to recover the remaining unpaid contract price.³¹ After retaining one group of attorneys, who filed the initial and first amended answers, Flint dismissed those attorneys and retained the attorneys who were made defendants in the malpractice action.³²

At a hearing in the case *sub judice*, the evidence and testimony revealed:

[T]hat no transfer stamps were attached to said agreement . . . , or to said certificate of stock or to the transfer upon the stock book or any memorandum, whereupon defendants moved to strike out the testimony of Bean and to dismiss the complaint upon the ground that . . . Bean had no cause of action. The referee denied the motion to which defendants took exception. The referee then allowed Bean, under the objection of defendants to affix and cancel stamps aggregating 86 cents the amount of the statutory tax.³³

The referee subsequently held Flint liable for the contract price. On the issue of Bean's failure to affix the transfer stamps, the referee ruled that "the failure to affix the stamps was not available to the defendant as a legal defense by reason of failure to plead it in his answer"³⁴

Flint subsequently assigned all of his rights against his attorneys to a

27. *Rapuzzi v. Stetson*, 160 A.D. 150, 155-56, 145 N.Y.S. 455, 459-60 (N.Y. App. Div. 1914).

28. *Giaramita v. Flow Master Machine Corp.*, 234 N.Y.S.2d 817, 818 (N.Y. App. Div. 1962).

29. 160 A.D. 150, 145 N.Y.S. 455 (N.Y. App. Div. 1914).

30. *Id.* at 456.

31. *Id.*

32. *Id.* at 457.

33. *Id.*

34. *Id.* at 458.

third party.³⁵ The assignee brought suit against Flint's attorneys alleging that "the failure by them to plead the nonaffixing of stock transfer stamps" in the second amended answer and the failure to object to the introduction of the stock certificate into evidence at trial constituted negligence.³⁶ The trial court granted defendant (attorneys) motion for nonsuit from which plaintiff appealed.³⁷

The plaintiff's argument was not well received by the court on appeal. Noting that Flint was the president of the company whose equity was being transferred, the court expressed its disdain over the action as follows:

[T]here is no allegation in the complaints charging defendants with a lack of zeal or ability in conducting the defense of the action, or complaining of the manner in which they discharged their duty to Flint as his attorneys, other than of their alleged neglect to plead the nonpayment of stock transfer tax; and their failure to object upon that ground to the admission into evidence of the stock certificate

. . . Flint does not claim to have stated at any time to defendants that the transfer tax had not been paid, although he says he delivered to them the two verified answers and stated to them the facts upon which he relied his defense. The testimony of one of the defendants that Flint never stated to them that the transfer tax had not been paid is entirely uncontradicted . . . *Flint assumed the duty of stating to defendants the facts constituting his defense, and the defendants had the right to rely upon his having fully and fairly done so as to the matters in which he had taken part. Ignorance of the fact that the transfer tax had not been paid . . . was attributable to the ignorance negligence of Flint rather than to the negligence of his attorneys.*³⁸

At the other end of the spectrum is the decision of *Giariamita v. Flow Master Corp.*³⁹ In *Giariamita* the attorney was being sued for failing to investigate the financial status of the defendant corporation in a personal injury action.⁴⁰ The court on review summed up the case and commented on the attorney's conduct as follows:

35. *Id.*

36. *Id.*

37. *Id.* at 459.

38. *Id.* at 460 (emphasis added).

39. 234 N.Y.S.2d 817 (N.Y. App. Div. 1962).

40. *Id.* at 818.

Plaintiff's claim that they were fraudulently induced into the settlement by defendant's attorney; that they were informed by defendant's attorney " * * * that the defendant corporation was out of business, had gone into bankruptcy, and that the indemnification was limited to \$10,000.00." Plaintiffs further contend that after the case was settled they discovered that the defendant corporation was active. . . . Plaintiff's attorney further contends that plaintiffs were prejudiced in that they would not have settled the case if they had known the true condition of the defendant corporation.

. . . Evidently during the five years that this case was on the calendar awaiting trial, plaintiff's attorney did not make an independent investigation of the financial status of the defendant corporation. *The responsibility to investigate and prepare every phase of plaintiff's case is upon their attorney.* On being informed of a limited insurance coverage and knowing the possibility of an excess judgment against the defendant corporation, it was the plaintiff attorney's responsibility to investigate and determine the true financial status of the defendant corporation.⁴¹

Because of the brevity and tone of the decision, it is difficult to determine whether the court really meant that an attorney has the responsibility to investigate every phase of a client's case or whether the court was merely disgusted at the attorney's total lack of diligence.

Subsequent cases, however, have not adhered to the extreme expressed in *Giarimita*. In the same jurisdiction, for example, the court in *Parksville Mobile Modular, Inc. v. Fabricant*⁴² noted the existence of precedent at both extremes of the spectrum of an attorney's duty to investigate.⁴³ The court decided "[t]he issue is one of reasonableness."⁴⁴

In *Parksville* the defendant attorneys were appealing from a jury award of \$120,000.00 to the plaintiff.⁴⁵ The "[d]efendant's alleged malpractice arose out of their representation of plaintiff's . . . [in defending an action] to enforce a covenant not to compete in the sale of mobile homes."⁴⁶ Early in the litigation, a preliminary injunction was issued against the respondent on appeal.⁴⁷ The respondent subsequently dis-

41. *Id.* (emphasis added).

42. 422 N.Y.S.2d 710 (N.Y. App. Div. 1979).

43. *Id.* at 715.

44. *Id.*

45. *Id.* at 712.

46. *Id.* at 713.

47. *Id.*

missed the defendant attorneys as counsel.⁴⁸ After both sides retained new attorneys a two week bench trial ensued.⁴⁹ "[T]he judge rendered his verdict and permanently vacated the preliminary injunction on the merits."⁵⁰ Thereafter the respondent sued the attorneys who had represented him at the hearing on the preliminary injunction for malpractice.⁵¹ Acknowledging the existence of directly opposing precedents on an attorney's duty to investigate his client's case, the court ruled that the issue is governed by the reasonable care standard.⁵²

The court under the facts of the case was able to "find, as a matter of law that the defendants exercised reasonable care."⁵³ The court stated:

The . . . litigation had only been in progress for two and one-half weeks when the judge decided to issue a preliminary injunction. The fact that counsel did not develop as full a record as was ultimately developed after a two-week trial cannot be considered legal malpractice. . . .

In an action for legal malpractice, plaintiff must not only prove lack of reasonable care; plaintiff must also establish that he would have been successful in the underlying action, if his attorney had exercised due care.⁵⁴

Proof that the plaintiff would have been successful in the underlying action is required to prove causation.⁵⁵ In the court's own words; "[a]t trial, plaintiffs alleged numerous instances of lack of due care, but failed to present any evidence that but for these alleged omissions, . . ." they would have prevailed.⁵⁶ The court then found that the plaintiff had failed to make out a *prima facie* case except for a claim not relevant here.⁵⁷ In general, the degree of investigation required can be said to vary depending on the nature of the litigation,⁵⁸ the attorney's previ-

48. *Id.*

49. *Id.* at 715.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 716.

54. *Id.* at 715, 716 (citations omitted).

55. *Id.* at 716; see also *Nilson-Neway & Co. v. Ballou*, 839 F.2d 1171, 1175 (6th Cir. 1988) (contributory negligence bears on element of causation).

56. *Parksville*, 422 N.Y.S.2d at 716 (emphasis added).

57. *Id.* at 717.

58. See *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966) (conflict of interests).

ous dealings with the client,⁵⁹ and the position or sophistication of the client.⁶⁰

Allegations of failure to investigate can arise in situations where a conflict of interest exists initially. For instance, in *Ishmael v. Millington*⁶¹ an attorney, who had been retained to draw up a property settlement in a uncontested divorce action, was being sued for failing to verify the amounts contained in a financial statement provided by the husband which proved to be grossly incorrect.⁶² From a summary judgment for the defendant attorney the plaintiff appealed. The court on review held that the standard of care an attorney owes his client is ordinary care under the circumstances of the case.⁶³ The court then acknowledged, without approving of the practice, that an attorney is permitted to represent dual interests where full consent and disclosure occur.⁶⁴ However, in this case prudence called for investigation and verification or at a minimum that the wife be informed the husband's statement was unverified.⁶⁵ The trial court's grant of summary judgment for the attorney was reversed by the court stating; "a jury might find that the husband's misrepresentations were a realizable likelihood which made the attorney's inaction negligent thus forming a concurrent (and not a superseding) cause of harm", thereby creating a triable issue of fact.⁶⁶

Where the ex-client can be said to possess some special skill or knowledge, however, courts are not as sympathetic to the plaintiff's cause.⁶⁷ In *Fisk v. Newsom*,⁶⁸ the court refused to overrule a summary judgment for the defendant attorney, where the client had been president and director of a closely held corporation. The attorney, relying on financial statements supplied by the client and prepared by the corporation's accountants without audit, prepared and executed papers for the sale of his client's interest in the corporation. Later, when the corporation was placed in receivership, the client was ordered to repay

59. See *Kurtenbach v. Tekippe*, 260 N.W.2d 53 (Iowa 1977) (client had over the years asked for advice when he wanted it).

60. See *Fisk v. Newsome*, 9 Wash. App. 650, 513 P.2d 1035 (1973) (corporation president).

61. 241 Cal. App. 2d 520, 50 Cal Rptr. 592 (1966).

62. *Id.* at 526.

63. *Id.*

64. *Id.*

65. *Id.* at 527.

66. *Id.* at 529.

67. *E.g.*, *Quintel Corp. v. Citibank, N.A.*, 606 F. Supp. 898 (S.D.N.Y. 1985) (multinational businessman and investor).

68. 9 Wash. App. 650, 513 P.2d 1035 (1973).

any sums already in hand as a result of the sale and the rest of the agreement was deemed void.⁶⁹ The client then sued his former attorney alleging that the attorney's failure to investigate the accuracy of the financial statements constituted negligence.⁷⁰ On appeal the court held that since the client had been president and director of the corporation prior to the sale, he was an agent of the corporation and as such responsible for the financial statement.⁷¹

Another form of client conduct, almost analogous to the prior course of dealings defense in contracts, was held to be contributory negligence in an attorney malpractice action. The Iowa Supreme Court in *Kurtenbach v. Tekippe*,⁷² held that an attorney is relieved of any obligation to investigate, inquire or otherwise advise the client where the client had over the years asked for advice when he wanted it, but asked for none on the occasion in question.⁷³ The *Kurtenbach* holding, however, may be limited to the facts of the case. The attorney and client had been high-school buddies. The client, a licensed securities broker, was facing suit for failure to report sales of certain stocks in corporations the attorney had set up for him.⁷⁴ Moreover, an alternative ground for the court's decision may have been non-reliance by the client, as well as, contributory negligence.⁷⁵

IV. OTHER AFFIRMATIVE DEFENSES

Failure to mitigate damages⁷⁶ and assumption of the risk⁷⁷ have also been recognized as defenses to an action for attorney malpractice. The validity of these defenses which deal with client conduct almost totally outside the control of the attorney would seem unquestionable, however, authority on the subject is sparse.

The defense of failure to mitigate damages was recognized as valid

69. *Id.* at 1038.

70. *Id.*

71. *Id.* (additionally the court stressed the presence of a boilerplate provision incorporated into the contract which stated that the client agrees and covenants that the financial statement was accurate and true).

72. 260 N.W.2d 53 (Iowa 1977).

73. *Id.* at 57.

74. *Id.* at 55.

75. *Id.* at 57; see also *Kuhlman v. Keith*, 409 So. 2d 804, 808 (Ala. 1982) (non-reliance is an affirmative defense).

76. *Jakobleff v. Sweeny*, 468 N.Y.S.2d 895, 897 (N.Y. App. Div. 1983).

77. *Mali v. Odom*, 367 S.E.2d 166, 169 (S.C. App. 1988).

in *Jakobleff v. Sweeny*.⁷⁸ The plaintiff sought to recover medical expenses incurred when a provision in a divorce settlement, requiring the ex-husband to pay the plaintiff's health insurance premiums, was omitted from the final divorce decree. The attorney alleged, as a defense, that the client's failure to obtain medical insurance prior to her illness constituted failure to mitigate damages.⁷⁹ The court on appeal held that once a plaintiff puts damages in issue, the defendant attorneys could raise the defense of failure to mitigate damages.⁸⁰

Assumption of the risk was recognized as a viable defense to attorney malpractice in *Mali v. Odem*.⁸¹ In *Mali* the attorney alleged that where he had advised the clients of restrictive covenants and they elected to purchase the property anyway, the clients had assumed the risk.⁸² The court on review, however, found that the trial judge had properly denied the attorney's motion for a directed verdict.⁸³ The court opined "[o]rdinarily, the question of whether a plaintiff assumed the risk of injury or damage is a question of fact to be determined by the jury."⁸⁴

V. CONCLUSION

"A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty."⁸⁵ The question of whether affirmative defenses should be allowed to actions for attorney malpractice based on failure to investigate is a debatable point. With the extensive use of liberal discovery procedures nowadays it is unclear to what extent, if any, lawyers rely or can rely on their client's allegation of facts to try lawsuits. Moreover, failure to investigate the factual basis of a client's claim may give rise to liability to third parties.⁸⁶ However, contributory negligence, assumption of the risk and failure to miti-

78. 468 N.Y.S.2d 895 (N.Y. App. Div. 1983).

79. *Id.* at 897.

80. *Id.*

81. 367 S.E.2d at 166.

82. *Id.*

83. *Id.* at 169.

84. *Id.*

85. MCPR EC 6-5 (1982).

86. See e.g., *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1563 (7th Cir. 1987) (negligent misrepresentation); *Hunt v. Dresie*, 740 P.2d 1046, 1053 (Kan. 1987) (malicious prosecution); *Flaherty v. Weinberg*, 303 Md. 115, 492 A.2d 618 (Md. 1985) (privity not required in malpractice action).

gate damages are viable defenses which once pleaded and proved still bar recovery, fully or partially depending upon the jurisdiction.

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