5-21-2008

Gray v. Tri-Way Constr. Servs. Appellant's Brief Dckt. 34666

IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT GRAY,

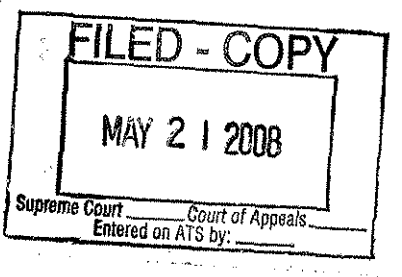
Plaintiff/Appellant,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington corporation; RAY ALLARD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

the Tri-Way Parties/Respondents.

Docket No. 34666



APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District, in and for the county of Ada.

HONORABLE CHERI C. COPSEY

ERIK F. STIDHAM

TRACY CRANE

ATTORNEY FOR APPELLANT

BOISE, IDAHO

JASON G. MURRAY

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

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I. STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff/Appellant Robert Gray ("Gray") sued the Defendants/Respondents Tri-Way Construction Services, Inc. ("Tri-Way") and Tri-Way's owners: Ray Allard ("Allard"), Gary Peterson, and Kathy Peterson (collectively the "Tri-Way Parties") based on their failure to pay Gray agreed upon compensation, 50% of the net profits for certain construction projects.[1]

In 2004, Gray entered into negotiations with the Tri-Way Parties regarding starting up and running a division of Tri-Way in Arizona. After several months of negotiations, in late April or early May of 2004, Gray, Allard, and Gary Peterson agreed upon the terms of Gray's compensation. As agreed by the parties, Gray had his attorney and accountant draft an employment agreement that reflected, among other things, the previously agreed to compensation for Gray. On May 19, 2004, Gray emailed the agreement to Tri-Way. On May 21, 2004, Gray met Allard, Gary Peterson and Kathy Peterson to go over the terms of Gray's employment and to sign necessary paperwork relating to his employment ("May 21 Meeting"). The employment agreement on hand at the May 21 Meeting reflected that Gray was to receive a monthly salary of $4,000 through 2004, a monthly salary of $10,000 starting in 2005, and 50% of the net profits, before taxes for all projects that Gray managed.

At the May 21 Meeting, Kathy Peterson objected to Gray receiving $10,000 per month in 2005. In response, the parties agreed to a modification: Gray's monthly salary would escalate to

[1] Gray's Complaint also alleged claims based on the Tri-Way Parties/Respondents failure to abide by a certain shareholder agreement. Gray is not appealing the dismissal of claims related to the shareholder agreement. Gray is not appealing the District Court's attorneys' fees award.

$8,000 (instead of $10,000) commencing on December 1, 2004 (instead of the previously agreed escalation date of January 2005). As for the payment of 50% of net profits, Kathy Peterson stated that the net profits should be calculated on a calendar year basis. The parties agreed to this method of calculation. The parties also agreed that the draft of the employment agreement would be revised by Tri-Way's attorney to reflect the modifications and to add a non-compete provision.

After starting up the Arizona Division of Tri-Way in June of 2004, Gray obtained and managed two significant projects which promptly generated $1.2 million in revenue. In early June of 2004, a written agreement that had been revised by Tri-Way's attorney was circulated. The revised agreements reflected compensation terms in accordance with the agreements reached at the May 21 Meeting.

In September of 2004, three months into Gray's employment, Gary Peterson, acting on behalf of Tri-Way, sought to modify the terms of Gray's compensation relating to net profits. Peterson's proposed modification called for Gray's share to be calculated after taxes and called for a portion of Gray's share to stay with Tri-Way as retained earnings. After a period of discussion and after an attempt by Gray to buy out the Petersons' share of Tri-Way, Gray left Tri-Way in October of 2004. The parties never signed a written employment agreement.

Gray sued to recover the promised compensation. The Tri-Way Parties asserted counterclaims. The District Court granted the Tri-Way Parties motion for summary judgment. Now Gray appeals the summary judgment ruling.

B. Course of Proceedings.

On December 2, 2004, Gray filed a complaint and demand for jury trial against Tri-Way alleging claims of breach of contract, statutory claim for wages, promissory estoppel, equitable estoppel, and fraud. (CR 8).[2] On July 13, 2005, Tri-Way filed its Answer. (CR 18). On February 10, 2006, Gray filed his First Amended Complaint, adding Allard, Gary Peterson, and Kathy Peterson as parties and adding claims. (CR 24). On March 13, 2006, the Tri-Way Parties/Respondents filed an Answer and Counterclaim. (CR 39).

On August 2, 2006, the Tri-Way Parties filed a motion for summary judgment against Gray's claims. (CR 52). On August 2, 2006, Gray filed for summary judgment against the Tri-Way Parties' counterclaims. (CR 55). The Tri-Way Parties did not oppose summary judgment as to their claims for tortious interference, defamation, and quasi-estoppel. (CR 99-100).

On September 25, 2006, the District Court heard oral argument regarding summary judgment. (CR 65). During the summary judgment hearing, the District Court, sua sponte, ordered additional briefing regarding whether the statute of frauds barred Gray's claims. (CR 81). The District Court ordered the briefing despite the fact that the Tri-Way Parties had not raised the statute of frauds in any pleadings and had not raised the issue at summary judgment. (CR 81). By November 27, 2006, the parties completed their briefing regarding the statue of frauds. (CR 69).

[2] Clerk's Record on Appeal ("CR"). An "Exhibit" is a document identified in the Certificate of Exhibits at CR 179-180. "Ex." refers to an exhibit attached to an "Exhibit" identified in the Certificate of Exhibits.

On June 5, 2007, the District Court issued an order granting summary judgment for Tri-Way ("June 5 Order"). (CR 81). On June 14, 2007, the District Court granted summary judgment as to the Tri-Way Parties' counterclaims for tortious interference with prospective advantage, defamation, and quasi-estoppel. (CR 99).

On July 3, 2007, Gray moved for clarification of the June 5 Order, given the order failed to discuss five of Gray's claims. (CR 201). On August 7, 2007, the District Court issued an "Order clarifying June 5 Order and Correcting Order" ("August 7 Order"). (CR 105). The August 7 Order was silent as to Gray's claims for constructive fraud and quasi-estoppel. (CR 105).

On September 12, 2007, the District Court granted an Order allowing the stipulated dismissal of the Tri-Way Parties remaining counterclaims. (CR 122). On October 15, 2007, Gray timely appealed from the Order of Judgment entered on September 12, 2007. (CR 142; CR 125). On December 21, 2007, the District Court entered an Order granting the Tri-Way Parties recovery of costs and attorney fees. (CR 167). On January 18, 2008, Gray timely appealed the award of attorney fees. (CR 175).

II. STATEMENT OF FACTS

A. At the Time of the Transaction, Gray was an Experienced and Highly Compensated Construction Professional.

In 1983, Gray graduated from the University of Idaho with a degree in landscape architecture. (CR 179, Exhibit 2, Ex. A (17:3-12)). After working for architectural firms in California, Gray joined Albertsons in 1987. (Exhibit 2, Ex. A (17:15-18:5)). From 1987 until his departure from Albertsons in 2004, Gray held positions of increasing responsibility within

Albertsons' construction department. (Exhibit 2, Ex. A (20:3-40:13)). During his last five years at Albertsons, Gray served as Regional Construction Director. (Exhibit 2, Ex. A (40:3-13; 43:15-17)). As Regional Construction Director, Gray supervised 10 to 12 construction supervisors and their related support personnel, oversaw construction activities in Utah, Arizona, Northern California, Oregon and Washington, and was accountable for a budget of "roughly $200 million a year." (Exhibit 2, Ex. A (40:7-41:8)). As Regional Construction Director, Gray earned a base salary of $108,000 plus stock options and annual bonus. (Exhibit 2. Ex. A (59:1-60:1)).

B. Tri-Way Construction Services

Tri-Way is a Washington corporation providing construction services. (CR 26 ¶¶ 11-14; CR 40(I)). Tri-Way has offices in Auburn, Washington and Vancouver, Washington. *Id.* At all times relevant to this dispute, Tri-Way has been owned by Gary Peterson, Kathy Peterson, and Ray Allard. (*Id.*).

While working at Albertsons, Gray interacted with Tri-Way on several occasions. (Exhibit 2, Ex. A (61-65)). Moreover, Gray had known Tri-Way's owner Allard since the late 1980's. (Exhibit 2, Ex. A (62:3-14)). Gray and Allard had a longstanding friendship; they were partners in the ownership of a race horse, played golf together, and socialized on a regular basis. (Exhibit 2, Ex. A (62:15-64:8)).

C. The Parties Negotiated and Agreed Upon the Terms of Gray's Compensation

1. In January and February of 2004, Gray and Tri-Way had Numerous Discussions Regarding the Possibility of Gray Joining with Tri-Way.

In January of 2004, Gray began to consider leaving Albertsons. (Exhibit 2, Ex. A (61)). During January of 2004, Gray and Allard had several discussions regarding Gray joining with Tri-Way. In particular, they discussed the prospect of Gray starting up and running a division of Tri-Way in Arizona. (Exhibit 2, Ex. A (68:1-21)).

By February of 2004, the discussions regarding Gray *joining* with Tri-Way had progressed to the point that Gray, Allard and Gary Peterson decided to meet in person in the Tri-Cities area in Washington. (Exhibit 2, Ex. A (68:1-21)). At the February meeting in the Tri-Cities ("Tri-Cities Meeting"), Gray, Allard and Peterson discussed various arrangements by which Gray would relocated to Arizona in order to start up and run a construction services entity affiliated with Tri-Way. (Exhibit 2, Ex. A (70:23-71:6)).

At the Tri-Cities Meeting, Allard, Gary Peterson, and Gray determined that it would be preferable to have Gray run a division of Tri-Way, rather than set up a new corporate entity. (Exhibit 2, Ex. A (73:3-74:13)). Further, Gary Peterson suggested that Gray could eventually purchase Peterson's ownership interest in Tri-Way. (Exhibit 2, Ex. A (73:3-74:13)). After the Tri-Cities Meeting, discussions focused on Gray running a division of Tri-Way and buying out Peterson's interest in Tri-Way. (*Id.*)

2. Gray's Discussions with Tri-Way Continued in March and April of 2004.

During discussions, including but not limited to discussions taking place in March 2004 and in April 2004, and in telephone conversations, Gray, Allard and Gary Peterson, discussed and agreed to the terms of Gray's compensation. (Exhibit 2, Ex. A (76:4-15; 81:4-24; 93:7-96:16); Exhibit 4 (¶¶ 13, 14, 18)). Specifically, the three agreed that Gray would get paid $4,000 per month during the 2004, $10,000 per month during 2005, and would receive 50% of the net profits, before taxes, generated by projects managed by Gray. (Exhibit 2, Ex. A (93:7-96:16; 179:19-180:6); Exhibit 4 (¶¶ 13, 14, 18)). With the terms of compensation set, Gray resigned from Albertsons in early May of 2004. (Exhibit 2, Ex. A (93:7-13)).

3. Tri-Way and Gray Reiterated Terms of Profit Sharing During the May 21 Meeting.

Allard, Gary Peterson, Kathy Peterson, and Gray agreed to meet in Vancouver on May 21, 2004. (Exhibit 2, Ex. A (108:6-17)). Prior to the May 21 Meeting, Gray forwarded copies of a written agreement ("May Agreement"), prepared by his attorney, which reflected the previously agreed upon terms of Gray's compensation. (Exhibit 2, Ex. A (Gray Depos. Ex. 6)). The parties had taken the May Agreement to the May 21 Meeting. (*Id.*)

In relevant part, the May Agreement states:

> **Section 2.1. Position.** Employee will be responsible for establishing an office or division of the Employer to be located in the Phoenix, Arizona area. The Arizona division or office, may also conduct business for the Employer in Nevada, Utah, Arizona and New Mexico. For purposes of this Agreement, the Arizona division shall also include all projects of the Employer which the Employee is managing.
>
> * * *

> **Section 4.1. Initial Base Salary.** The Employee shall be paid a salary of Four Thousand Dollars ($4,000.00) per month for the remainder of 2004. For 2005, the Employee salary shall be the sum of Ten Thousand Dollars ($10,000.00) per month.
>
> * * *
>
> **Section 4.3. Incentive of Bonus Pay.** The Employee shall receive an annual bonus of fifty percent (50%) of the net profit, before taxes, of the Employer, such net profit to be calculated only for the Arizona division of the Employer. The net profit of the Arizona division of the Employer shall be calculated using standard, normal and reasonable accounting and allocation factors commonly used in the construction industry, as determined by the Employer in conjunction with its independent accountant or certified public accountant. Bonus payments, if any, shall be made at least annually, but may be made on a more frequent basis as determined by the Employer.

(Exhibit 2, Ex. A (Gray Depos. Exhibit 6)).

At the May 21 Meeting, Gray met with Allard, Gary Peterson, and Kathy Peterson. The parties discussed adding a non-compete provision to a final written agreement. Gray indicated that he did not object to a non-compete provision, but that Tri-Way should have its attorney draft such a provision for Gray's review. (Exhibit 2, Ex. A (104:12-105:9)). Allard and Peterson stated that Tri-Way's counsel would make the agreed upon changes to the employment agreement. (Exhibit 2, Ex. B (213-214) ("The June 4 version of the agreement was prepared by defendants' counsel.")).

Allard, Gary Peterson, and Kathy Peterson represented to Gray that they had agreement on all material terms, subject to the reduction of his post-December base salary to $8,000 per month, regarding his employment with Tri-Way, including the terms of Gray's bonus.[3] (Exhibit

[3] The parties had agreed that he would receive profit sharing compensation, based upon 50% of the Arizona net profits. (Exhibit 4, (¶¶ 12-13); (Exhibit 2, Ex. A (84:24-86:9)).

4, (¶¶ 11-15); Exhibit 7, (¶¶ 2-4); Exhibit 2, Ex. A, (84:15-85:25; 86:1-12, 98:14-99:23; 100:25-104:11; 106:1-11; 187:19-188:7; 216:25-217:18)).

Gray "penciled in changes" onto the employment agreement at the May 21 Meeting. (Exhibit 2, Ex. A (106:18-107:7)). The document with Gray's "penciled in changes" was then forwarded to Tri-Way's attorney who then incorporated a non-compete into the agreement. That was then forwarded on to Gray who signed the agreement. (*Id.*) As a result of the May 21 Meeting, Gray went to work for Tri-Way based on the compensation terms of the agreement that he had in his hands pursuant to the handwritten changes upon which the group had agreed. (Exhibit 2, Ex. A (106:1-107:1)).

D. The Terms of Gray's Compensation and Profit Sharing are Set Prior to His Employment on June 1.

Allard and Peterson assured Gray that an agreement was in place. (Exhibit 4 (¶¶12-14, 18)[4] They indicated that a revised version of the employment agreement would be signed. *Id.*

E. In June, Gray Begins Working on Behalf of Tri-Way.

1. Gray Brought in and Managed Two Projects for the Arizona Division.

During the first week in June of 2004, Gray went to Phoenix and began working as the General Manager of the Arizona Division of Tri-Way. (Exhibit 2, Ex. A, (108:21-23; 246:14-17); Exhibit 2, Ex. B (286:14-23, 289:19-24, 303:4-11)). Soon after joining Tri-Way, Gray brought in and managed two significant projects to Tri-Way that resulted in significant revenue for Tri-Way. (Exhibit 2, Ex. B (62:10-63:7; 286:14-23)).

[4] While disputing a specific agreement, Allard and Peterson admit that they never told Gray that he would not receive any profit sharing for his efforts on behalf of Tri-Way. (Exhibit 8, Ex. 6 (152:1-12). Peterson never told Gray "anything like" Tri-Way is "never going to give you 50% of the profits." (Exhibit 2, Ex. B (213:7-12)).

According to Gary Peterson, the gross revenues for Gray's projects were $960,000 and $215,000. (Exhibit 2, Ex. B (81:5-81:11)). Further, based upon Tri-Way's net income statement, the Arizona division for Tri-Way generated $966,074 in net revenue and $271,792.48 in net profits from June 2004 to September 30, 2004. (Exhibit 8, Ex. F (Deposition Ex. 2 to Kathy Peterson)).

2. Tri-Way's Attorney Modified the Employment Agreement in Accordance with the Agreement Reached During the May 21 Meeting.

As promised, in early June 2004, Tri-Way's attorney did revise twice, a written agreement to reflect the additional terms that had been agreed upon at the May 21 Meeting. The employment agreement, as revised by Tri-Way's attorney, was circulated to Gray shortly after Gray began working at Tri-Way in early June. (Exhibit 2, Ex. B (213-214). The version of the written agreement prepared by Tri-Way's attorney (Hoefel) incorporated the modification that had been agreed upon at the May 21 meeting. (Exhibit 2, Ex. A (190:25-191:25; 120:25-122:11)).

In relevant part the written agreement as revised by Tri-Way's attorney on June 4 and June 10, 2004, made no modification to Section 2.1 and modified Sections 4.1 and 4.3 as follows:

> **Section 4.1. Initial Base Salary.** *The Employee shall be paid a salary of Four Thousand Dollars ($4,000.00) per month for the remainder of 2004. From December 1, 2004, through June 1, 2005, the Employee salary shall be the sum of Eight Thousand Dollars ($8,000.00) per month.*
>
> **Section 4.3. Incentive or Bonus Pay.** The Employee shall receive an annual bonus of fifty percent (50%) of the net profit, *pro-rated beginning June 1, 2004,* before taxes of the Employer, such net profit to be calculated only for the Arizona division of the Employer, *on a calendar year basis.* The net profit of the Arizona

> division of the Employer shall be calculated using standard, normal and reasonable accounting and allocation factors commonly used in the construction industry, as determined by the Employer in conjunction with its independent accountant or certified public accountant. Bonus payments, if any, shall be made at least annually, but may be made on a more frequent basis as determined by the Employer.

(Exhibit 2, Ex. A (Gray depos. Ex. 8, 9) (italics in original).

F. In September of 2004, Tri-Way Indicates that It is Unwilling to Live Up to Its Agreement Regarding Gray's Compensation.

In September 2004, three months into Gray's employment and after receiving significant revenue from Gray's projects, Gary Peterson wanted to modify Gray's profit sharing arrangement. (Exhibit 2, Ex. A (86:1-12; 124:12-126:24; 216:1-3, 216:15-217:18, 229:9-231:1); Exhibit 4 (¶ 16)).

However, when Gray put his understanding of Peterson's proposed modification in writing, Peterson disclaimed Gray's understanding of the proposed modification. Gray came to understand that Peterson was attempting to modify the terms in a way that was disadvantageous to Gray and it became clear that Peterson would not live up to terms agreed to on May 21, 2004, and memorialized in the June 4 draft from Tri-Way's counsel.[5]

G. Peterson Rejects the Buy Out Proposal and Gray Quits.

Late in September 2004, Allard, Gray and Peterson met in person, in Auburn, to further discuss Peterson's modification. (Exhibit 2, Ex. A (127:24-129:5)). After Peterson left the meeting, Gray and Allard began discussions immediately buying out Peterson. (Exhibit 2, Ex. A (129:22-130:13)). The conversations between Allard and Gray culminated in early October

[5] (Exhibit 4, ¶¶ 11-13, 15)); Exhibit 2, Ex. A (126:7-128:7, 216:24-217:18).

when Allard and Gray made an offer to buy out Peterson. (Exhibit 2, Ex. A (129:24-131:14)). Peterson countered Allard and Gray's buy out proposal with a demand for more money. (Exhibit 2, Ex. A, (131:7-132:12)). Neither Gray nor Allard could afford Peterson's terms, so Gray sent a letter of resignation. (Exhibit 2, Ex. A (132:13-20; 259:22-260:4)).

H. Gray's Efforts Significantly Enriched Tri-Way.

1. The Arizona Division Generated Significant Profits.

In 2003, Tri-Way did not make a profit. (Exhibit 2, Ex. B (54:12-15)) (loss of $42,000 for 2003). In 2004, Gray's projects were successful, profitable projects for Tri-Way. (Exhibit 2, Ex. B (221:19-24)). In 2004, gross profits (revenues minus cost of goods sold) from the Arizona Division were $336,000 (Exhibit 2, Ex. B (81:5-11; 83:9-12; 96:15-19)). (Gross revenues from the Tooele Project were $960,000 and about $215,000 for the Juanita project.)

Peterson testified that, even after burdening the Arizona Division with a third of all administrative costs and with owners' salaries, the Arizona Division achieved a net profit of $178,000 in 2004. (Exhibit 2, Ex. B (97:6-99:2)). In contrast, the Auburn Division of Tri-Way lost $50,000 and the Vancouver Division had a net profit of only $40,000. (Exhibit 2, Ex. B (99:3-14)). Tri-Way admits that it would not have gotten the revenue if Gray had not joined Tri-Way. (Exhibit 2, Ex. B (220:10-15)).

Tri-Way did not make any profit sharing payments to Gray. All of the profits were kept by Tri-Way, Allard and Peterson. (Exhibit 2, Ex. B, (319:8-319:19) (recognizing that the profits from the Albertsons work Gray brought to the company stayed in Tri-Way); Exhibit 4, (¶ 5)).

2. Value of Gray's Services.

Tri-Way concedes that it thought Gray would be entitled to some profit sharing compensation for his efforts; the only factual dispute between the parties is the form of profit sharing that Gray should receive. (Exhibit 2, Ex. B (116:13-118:15); Exhibit 2, Ex. B (132:14-133:15; 135:1-136:2) (stating that he "was never not in agreement for the 50 percent")) (Exhibit 2, Ex. B (135:1-136:2) (testifying that Tri-Way would have paid gray 50% of profits after tax if a portion were kept in retained earnings).. As Gary Peterson testified:

> Q. In June of 2004, did you, Gary Peterson, believe that Rob Gray was entitled t receive bonuses equal to the net profit of the Phoenix division – 50 percent, excuse me, of the net profits of the Phoenix division?
>
> A. In what form?
>
> Q. In payment.
>
> A. In what form?
>
> Q. In any form.
>
> A. Yes.

(Exhibit 2, Ex. B 116:13-117:5) (Peterson just believed that Gray could not take out all of the money in cash right away.)

Gary Peterson testified further as follows:

> Q. Okay. Well, were you in agreement with Mr. Allard that you should pay him 50 percent?
>
> MR. MURRAY: Objection.
>
> THE WITNESS: I was never not in agreement for the 50 percent.

(Exhibit 2, Ex. B (134:4-15)).

Gray was a Division Manager for Tri-Way. (Exhibit 2, Ex. B (82:4-6)). The only other Division Managers were Allard and Peterson, each of whom received compensation of $120,000 per year. (Exhibit 2, Ex. B (184:18-20)). Tri-Way employees with fewer responsibilities who lacked the ability to generate work were paid more than $4,000 per month. (Exhibit 2, Ex. C (149:5-151:6); Exhibit 2, Ex. B (34:11-35:21, 37:9-18; 37:24-38:15; 51:17-52:1; 65:25-66:19)).

III. ISSUES PRESENTED ON APPEAL

A. Did the District Court err by failing to find an issue of fact as to whether the Tri-Way Parties agreed to pay Gray 50% of net profits, before taxes, from the Arizona Division of Tri-Way?

B. Did the District Court err in ruling that the statute of frauds barred an oral agreement to compensate Gray with a bonus within a year?

C. Did the District Court err in dismissing Grays statutory wage claim based on the absences of any evidence of an agreement?

D. Did the District Court err in dismissing Gray's equitable estoppel claim based on the District Court's contention that there was no evidence of an agreement?

E. Did the District Court err in dismissing Gray's implied-in-law contract/unjust enrichment claim based on an incorrect finding that no evidence had been introduced as to the value of gray's services and as to the amount Tri-Way was enriched? (CR 117)

F. Did Gray establish issues of fact such that dismissal of Gray's constructive fraud claim was improper?

G. Did the District Court err in dismissing Gray's fraud claim based on a lack of evidence of justifiable reliance?

IV. STANDARD OF REVIEW

A district court's grant of summary judgment is subject to a de novo review. *Carnell v. Barker Mgmt.*, 137 Idaho 322, 326, 48 P.3d 651, 655 (2002). When reviewing a district court's grant of summary judgment, the Idaho Supreme Court uses the same standard a district court uses when it rules on a summary judgment motion. *Jordan v. Beeks,* 135 Idaho 586, 589, 21 P.3d 908, 911 (2001). Under the Idaho Rules of Civil Procedure, summary judgment is granted 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." I.R.C.P. 56(c). "All facts and inferences are to be construed most favorably toward the party against whom judgment is sought...." *Jordan,* 135 Idaho at 590, 21 P.3d at 912. If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence, summary judgment must be denied. *Harris v. Dep't of Health & Welfare,* 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992).

V. ARGUMENT

A. Based On The Improper Finding That There Are No Facts To Support A Meeting of the Minds; The District Court Improperly Dismissed Four Of Gray's Claims (Breach Of Contract, Statutory Wage Claim, Quantum Meruit, And Equitable Estoppel)

Gray alleges that he had an agreement as to the terms of his compensation: (1) a base salary of $4,000 per month until December of 2004 and then the monthly base salary would be increased to $8,000, and (2) that he was to receive 50% net profits before taxes that he brought to

the company which would be distributed at the end of the calendar term. At a meeting on May 21, these terms were agreed upon by the parties.

While Gray contemplated that the parties continue to work toward a comprehensive written agreement which would include the terms of the compensation and other matters, the terms of his compensation were not dependent upon a written agreement being finalized. To be clear, Gray does not seek to enforce the comprehensive written agreement that was never finalized; he only seeks what was promised to him before he began work at Tri-Way and before he brought $1.2 million dollars in revenue to Tri-Way.

The District Court conducted its entire analysis based on the fundamentally incorrect assumption that Gray was trying to enforce a five year agreement that was never finalized. The proper question is whether Gray introduced facts that there was an agreement as to the terms of his compensation regardless of whether a comprehensive written employment agreement was ever finalized. (*See, e.g.,* CR 90-91).

1. The District Court Was Required To Construe Facts in the Light Most Favorable to Gray

The party opposing summary judgment is entitled to the benefit of every reasonable inference that can be drawn from the evidentiary facts. *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808, P.2d 851 (1991). All controverted facts are liberally construed in favor of the party opposing the summary judgment. *Tusch Enterprises v. Cofin*, 113 Idaho 37, 740 P.2d 1022 (1987).

Whether a sufficient meeting of minds has occurred to form a contract is an issue of fact to be decided by the jury. *See Johnson v. Allied Stores Corp.*, 106 Idaho 363, 368, 679 P.2d 640, 645 (1984) (recognizing that "[w]hen the issue of a contract is in issue and the evidence is conflicting or admits of more than one inference, it is for the jury to decide whether a contract in fact exists," and that "[t]he determination of the existence of a sufficient meeting of the minds to form a contract is a question of fact to be determined by the trier of facts") (internal citations omitted). Further, the law does not impose a standard of absolute certainty relative to every detail of a contract before the contract will be enforced. Instead, the standard for enforceability is one of reasonable certainty.) *General Auto Parts Co., Inc. v. Genuine Parts Co.*, 132 Idaho 849, 979 P.2d 1207, 1215 (1999).

Here, the District Court failed to construe the evidence in the light most favorable to Gray. In turn, the District Court wrongly established a number of facts adverse to Gray.

2. Gray Introduced Evidence Indicating that Tri-Way Agreed to Pay Gray 50% of Net Profits

Evidence indicates that Allard, Gary Peterson, and Kathy Peterson (1) represented to Gray that he would receive 50% of the net profits from projects that he managed and (2) Gary Peterson, Allard, and Kathy Peterson acted in a manner that indicated that they agreed that Gray was to receive 50% of the net profits. (*See, e.g.*, Ex. 4 (¶¶ 12, 13, 14, and 18); *See also* Statement of Facts ("SOF") pp. 6-9.) In an Affidavit filed on August 3, 2006, Gray declared, "[d]uring discussions, including but not limited to discussions taking place in March of 2004, on or about April 17, 2004, on or about June 9, 2004, and in subsequent phone conversations,

Tri-Way, through Ray Allard, Kathy Peterson, and Gary Peterson, represented that I would receive 50% of certain profits . . ." (Ex. 4 (¶ 18). Likewise, Gray repeatedly testified during his deposition and in affidavits that representations were made to him that he would be paid 50% of the net profits. (SOF pp. 6-10)

3. The District Court Ignored Evidence, Failed to Construe Facts in Gray's Favor, and Improperly Applied Caselaw

In considering whether Gray introduced evidence of an agreement, the District Court only references two paragraphs of Gray's Affidavit dated 8/30/06 in its written ruling. (CR 83). The District Court does not directly consider other evidence in the record, most especially Gray's deposition testimony, that Allard, Gary Peterson, and Kathy Peterson affirmatively represented to him that they agreed that he would receive 50% of net profits before taxes. The District Court provides no explanation as to why it fails to reference the other evidence in the record. (CR 83-84, 108).

Further, the District Court improperly construed facts and made inferences in favor of the Tri-Way Parties. (CR 86-87.) For example, Gray's October 26, 2004 email to Peterson should not be construed as some kind of admission that there was never an agreement to pay Gray 50% of the net profits. (*Id.*) Rather, when construed in a light favorable to Gray, the email reflects that fact that Gray was not going to negotiate with Peterson as had been suggested by Allard—Gray's position was that the terms simply needed to be applied. (Exhibit 2, Ex. A (278:3-19))("Gary had the money in his pocket and negotiation wasn't going to help the situation. Either Gary was going to be fair with me or he wasn't"); cf. (CR 111-2).

The District Court relied on *Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 31 P.3d 921 (2001) for the proposition that the agreements reached between Gray and the Tri-Way Parties did not have a meeting of minds due to the fact that no final written agreements were ever signed by the parties. (CR 91). The District Court in *Intermountain Forest Management* concluded that based on the lack of the agent's actual authority and the fact that the defendant indicated its intention not to be bound by the agreement until signed, no contract had been formed. Notably, in *Intermountain Forest Management* there was not any part performance.

The *Intermountain Forest Management* case, however, does apply here.[6] In this case, there was performance. The evidence in the record supports Gray's claim that the parties did intend to contract. Likewise, Gray had no reason to question whether Peterson and Allard had the authority to contract with him on behalf of themselves and Tri-Way. Indeed, based upon his understanding that enforceable agreements had been reached, Gray left Albertsons and joined Tri-Way. (Exhibit 2, Ex. A (93:7-13); (Exhibit 4 (¶¶ 12, 14, 19)). Viewed in the light most favorable to Gray, there is sufficient evidence that the parties intended to contract as to his compensation terms prior to memorializing their agreement.

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[6] It is important to note that parties in *Intermountain Forest Management* had not requested a jury trial so the court was allowed to "arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *Id.*, 136 Idaho at 235, 31 P.3d at 923. Here, the parties have requested a jury trial to the Court must resolve conflicting inferences against the Tri-Way Parties as the moving party. *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 176, 76 P.3d 733, 737 (Idaho 2003) ("When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn form the record and reasonable people might reach different conclusions."). The fact that both parties have moved for summary judgment does not diminish the Tri-Way Parties' burden. The court "must evaluate each party's motion o nits own merits." *Idaho Forest Management*, 136 Idaho at 235, 31 P.3d at 923.

Even if the parties expected that they might later memorialize their agreements in a signed writing, there is ample evidence that Gray and Tri-Way intended to be bound by the agreements they reached in May 2004. On May 21, 2004, the parties discussed and agreed upon the substantial terms of the agreement and then the Tri-Way Parties provided Gray with employment paperwork, which Gray filled out. (Exhibit 2, Ex. C (123:17-23); (Exhibit 2, Ex. A (108:6-15). Further, it is undisputed that, despite the lack of a signed agreement, Tri-Way allowed Gray to quit his job with Albertsons, open an Arizona division for Tri-Way, develop a client base, and generally undertake the agreed upon obligations. Also, each of the draft agreements prepared after June 1, 2004, was written to apply retroactively to when Gray started working on June 1, 2004. (Exhibit 2, Ex. A (Gray Depos. Ex. 8, 9)).

Additionally, there is no evidence that, even though they were aware that Gray believed an employment agreement was in place, the Tri-Way Parties actually informed Gray that they rejected the agreement or that the Tri-Way Parties provided Gray with any indication that he should hold off on joining Tri-Way until the parties' agreement had been confirmed in writing. Peterson testified that, at best, Gray "may have been" informed of any problems with or rejection to the Agreement after his employment began. (Exhibit 2, Ex. B (199:14-200:11) (Peterson testified that he "probably" told Gray verbally sometime in June that he rejected the Agreement)). Contrary to Peterson's ambiguous assertion, Gray testified in a sworn affidavit that he never received any notice of the rejection or problems. (Exhibit 4, Ex. 12). In short, the conduct of the parties reflects their intention to be bound by the agreement before it gets memorialized.

B. The Statute of Frauds Does Not Bar Gray's Breach of Contract Claim

1. The Agreement Regarding Compensation Can Be Completed Within One Year

The District Court sua sponte applied the Statute of Frauds to Gray's claim. The statute of Frauds does not bar Gray's claim.

I.C. § 9-505, the Statute of Frauds, provides, in relevant part, as follows:

> In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:
>
> 1. An agreement that by its terms is not to be performed within a year from the making thereof.

By its express terms, I.C. § 9-505 does not apply to contracts that can be completed within a year from the making thereof. In this case, Gray is seeking to enforce an oral agreement that the net profits would be paid to Gray on a calendar year basis, which given that Gray was starting his employment in June would necessarily have meant that the net profits would have been distributed within a year. Throughout the litigation and, on the record, Gray made clear that he is not seeking compensation from Tri-Way for employment going forward; Gray is only seeking to recover under the agreed upon bonus structure for the time that he worked at Tri-Way. Accordingly, the contract claim before the Court is the agreement to share profit at the end of the calendar year, an agreement that by its terms had to be completed within a year of Gray's hiring.

In *Gomez v. Mastec*, 2006 WL 3609 (D.Idaho 2006), an unpublished opinion, Magistrate Boyle confronted a situation similar to the dispute at hand. While not binding on this Court, the *Gomez* opinion is instructive. Gomez sued Mastec, a company involved in the

construction of underground telecommunications networks, for breach of an oral employment agreement. As alleged, the oral employment agreement called for Gomez to be employed for a term of five years and was to be paid an annual salary of $120,000 plus expenses. *Id.* at * 4. Gomez alleged that the oral agreement provided for an "earn out bonus" equal to 7% of the profits of the division in excess of 25% of the profit margin for the division. *Id.* at *4. Gomez did work for Mastec for two years. *Id.* In 2002, Gomez was shown a financial statement that showed that the division had earned revenues such that, under the employment agreement, Gomez was entitled to a bonus of approximately $427,000. *Id.* Gomez was never paid the bonus and was terminated. *Id.* Gomez filed a breach of contract claim against Mastec for failing to pay five year's worth of salary and the earn-out bonus. *Id.* at *4. Defendant Mastec contended that the employment agreement was barred by the statute of frauds.

The Court held that Gomez's claim to a five year employment contract was barred by the statute of frauds since it was not in writing and did not come within the one year exception. *Id.* at * 7. **However**, the Court held that Gomez's contract claim for a bonus for the time he worked was not barred. *Id.* at *8. The Court held that the breach of oral contract claim was not barred by the statute of frauds for the reason "that it would be possible for the conditions of the earn-out bonus to be completed within one year, on a year-to-year basis, during Gomez's actual time of employment. Under these circumstances, the bonus agreement would not be required to be in writing and the statute of frauds would not apply to the bonus during the actual years worked." *Id.* at 8.

Likewise, Gray should be entitled to pursue his breach of contract claim for his share of the $1.2 million that he brought to Tri-Way. The conditions of Gray's profit share bonus were to be completed within one year. In fact, in the case at hand, Gray's employment did end within a year of his joining Tri-Way. Accordingly, Gray's agreement for a bonus need not be in writing.

To support its dismissal of Gray's claim, the District Court relied on the opinion in *Treasure Valley Gastroenterology Specialist v. Woods*, 135 Idaho 485, 20 P.3d 21 (Ct.App 2001). However, the *Treasure Valley* case is inapplicable; there the plaintiff was trying to enforce a provision which related to a number of years. Unlike the plaintiff in *Treasure Valley*, in the case at hand, Gray simply brings a contract claim based upon the agreed upon compensation terms as they relate to his employment of less than one year with Tri-Way.

2. Equitable Estoppel Bars Application of the Statute of Frauds

Even if the statute of frauds did apply to the case at hand, Idaho Courts recognize that, in cases in which there has been part performance, the doctrine of equitable estoppel may bar the statute of frauds defense. *Tew v. Manwaring*, 94 Idaho 50, 53, 480 P.2d 896, 899 (1971); *Frantz v. Parke*, 111 Idaho 1005, 1007-8, 729 P.2d 1068, 1070-1 (Ct. App 1986). For equitable estoppel to apply the performance must be explainable solely by the contract at issue. *Id.*

In the case at hand, there has been part performance by both Gray and Tri-Way. Here the contract at issue is the agreement for Gray's employment. Pursuant to Gray's employment agreement, he relocated to Phoenix, brought $1.2 million in net revenue to Tri-Way, and took actions to establish Tri-Way's Phoenix division. Tri-Way performed pursuant Gray's employment contract. Tri-Way paid Gray's relocation expenses. Tri-Way paid Gray the agreed

upon base salary. Tri-Way calculated the profits for the Phoenix division separately. Tri-Way even tried to pay Gray a bonus (albeit one that was substantially less than what he was entitled to under the agreement). Also, the Tri-Way Parties admit that Gray was to get an increase in his base pay after one year. (The admission of an increase in base pay is in line with the terms of the agreement urged by Gray.) Here, all of the parties' acts of performance are solely explainable by Gray's employment agreement. The parties simply disagree as to how Gray was to be compensated. Accordingly, there has been part performance by the parties and, in turn, the Tri-Way Parties are equitably estopped from asserting the statute of frauds.

C. The District Court Erred In Dismissing Gray's Statutory Wage Claims.

The District Court dismissed Gray's statutory wage claim based on the finding that "Gray introduces no evidence that the parties ever actually agreed to the terms of his bonus." (CR 96-97). As discussed previously, Gray did introduce evidence that the parties agree to the terms of his bonus compensation. The District Court simply failed to construe facts in favor of Gray. According Gray's wage claim should not have been dismissed.

D. Gray Introduces Evidence Related to the Value of His Services; Gray's Quantum Meruit Claim Should Not Have Been Dismissed

1. Any Evidence Tending to Show the Value of Services Is Sufficient

The doctrine of quantum meruit is a remedy for an implied in fact contract and permits a party to recover the reasonable value of services rendered or materials provided on the basis of an implied promise to pay. *Bakker v. Thunder Spring-Wareham, LLC,* 141 Idaho 185, 191, 108 P.3d 332, 338 (2005). "An implied in fact contract is defined as one where the terms and existence of the contract are manifested by the conduct of the parties with the request of one

party and the performance by the other often being inferred from the circumstances attending the performance." *Fox v. Mountain West Elec., Inc.,* 137 Idaho 703, 708, 52 P.3d 848, 853 (2002) (quoting *Farnworth v. Femling,* 125 Idaho 283, 287, 869 P.2d 1378, 1382 (1994)).

Such a contract is grounded in the parties' agreement and tacit understanding. *Id.*, 95 Idaho at 743,518 P.2d at 1205. *Hausam* v. *Schnabl,* 126 Idaho 569, 574, 887 P.2d 1976, 1081 (Ct. App. 1994). "The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other's request and that the requesting party promised payment, then the court may find a contract implied in fact." *Homes by Bell-Hi, Inc. v. Wood,* 110 Idaho 319, 321, 715 P.2d 989, 991 (1986) (citing *Clements v. Jungert,* 90 Idaho 143, 153, 408 P.2d 810, 815 (1965); *Bastian v. Gafford,* 98 Idaho 324, 325, 563 P.2d 48, 49 (1977)).

For a quantum meruit claim, the measure of recovery is the reasonable value of the services rendered or of goods received, regardless of whether the defendant was enriched. *Erickson v. Flynn*, 138 Idaho 434-435, 64 P.3d 959, 963-964 (Ct. App. 2002); *Barry*, 140 Idaho 827, 103 P.3d 440 (Idaho 2004). This is an objective measure and is proven by evidence demonstrating the nature of the work and the customary rate of pay for such work in the community at the time the work was performed. *Baker v. Boren,* 129 Idaho 885, 894, 934 P.2d 951, 960 (Ct. App. 1997); *Peavey v. Pellandini, 97* Idaho at 659, 551 P.2d at 610 (1976).

The District Court held that Gray's quantum meruit claim should be dismissed as there was "no evidence that the customary rate of pay for his work in the community at the time the work was performed included such a bonus." (CR 115). The District Court failed to acknowledge evidence in the record and read the applicable rule too narrowly.

In Idaho, absent an agreement fixing compensation, any evidence tending to show the reasonable value of services is generally admissible. *See Peavey v. Pellandini,* 97 Idaho 655, 551 P.2d 610, 616 (1976) (finding evidence of costs is relevant); 66 Am.Jur.2d, Restitution and Implied Contracts, § 89 at 1031 (1973)).

2. Gray Introduced Evidence Indicating the Value of His Services

Evidence of the value of Gray's services can be found with reference to the benefit achieved by Tri-Way. Here, Tri-Way obtained hundreds of thousands of dollars in net profits in a few months owing to Gray's efforts. Evidence as to a parties enrichment is sufficient to create an issue of fact as to the value of Gray's services.

Also, the parties actions create factual issues as to the value of Gray's services. For example, Tri-Way testified that it always intended to share profits with Gray. The only dispute was regarding the formula to be used. Moreover, Tri-Way went so far as to offer (and then not pay) a $60,000 bonus to Gray. (Exhibit 2, Ex. B (237:20-238:3)). The $60,000 was, according to Gary Peterson, Tri-Way's effort to "make a fair assessment of the value and offered [Gray] that as a bonus for the two project he ran." (*Id.*)

Finally, there is evidence in the record that Gray previously earned more than $100,000 plus bonus and benefits in his previous position. Also, the record indicates that employees filing lesser functions within Tri-Way received significantly more than $4,000 per month.

In short, "[t]he majority rule in quantum meruit recovery is that absent an agreement fixing compensation, any evidence tending to show the reasonable value of services is generally admissible." *Fairbanks North Star Borough v. Tundra Tours*, 719 P.2d 1020, 1029 (Alaska

1986) (citing *Peavey v. Pellandini*, 97 Idaho 655, 551 P.2d 610, 616 (1976) and 77 Am Jur. 2d, Restitution and Implied Contracts, § 89 at 1031 (1973)).

E. Gray Introduced Evidence of the Amount That Tri-Way Was Enriched; Gray's Unjust Enrichment Claim Should Not Have Been Dismissed

Unjust enrichment, or restitution, is the measure of recovery under a contract implied in law. *Barry v. Pacific West Const., Inc.*, 140 Idaho 827, 834, 103 P.3d 440,447 (Idaho 2004) (citing *Peavy v. Pellandini,* 97 Idaho 655, 658, 551 P.2d 610, 613 (1976)). A contract implied in law, or quasi-contract, "is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties, and, in some cases, in spite of an agreement between the parties." *Erickson v. Flynn,* 138 Idaho 430, 434-35, 64 P.3d 959,963-64 (Ct.App. 2002

Here, the District Court dismissed the unjust enrichment claim, holding "Gray introduced no evidence of the amount Tri-Way was enriched by bringing in two projects." (CR 117)

The District Court erred. Gary clearly introduced evidence that Tri-Way was enriched. As indicated, it is undisputed that Gray brought two very profitable projects (with respective gross revenues of at least $960,000 and $215,000) to Tri-Way that by far outweighed the $4,000 per month salary he was paid by Tri-Way. (Exhibit 4 Ex. (¶ 14); (Exhibit 2, Ex. B (81:5-11)). The District Court failed to recognize the undisputed evidence that Gray's efforts had significantly enriched Tri-Way ($966,070 in revenue and $271,792.48 in net profit from June through September 30, 2004 for one project alone) and, as such, equity demands that Gray be

entitled to a share in the value of those services. (Exhibit 8, Ex. F (Deposition Exhibit 2 to K. Peterson Dep.)).

F. Gray Introduced Evidence Sufficient To Support His Constructive Fraud Claim

The District Court did not expressly address Gray's claim for constructive fraud. (CR 102-122).

"An action in constructive fraud exists when there has been a breach of a duty arising from a relationship of trust and confidence, as in a fiduciary duty." *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (Idaho 1997) (reversing District Court's denial of motion to amend to include constructive fraud claim, citing *McGhee v. McGhee,* 82 Idaho 367, 371, 353 P.2d 760, 762 (1960). "In its generic sense constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence and resulting in damage to another. Constructive fraud usually arises from a breach of duty where a relation of trust and confidence exists; such relationship may be said to exist whenever trust or confidence is reposed by one person in the integrity and fidelity of another." *McGhee*, 82 Idaho at 371, 353 P.2d at 762.

Gray had a longstanding friendship with Allard. Moreover, the arrangement at issue was one of profit sharing. Further, Gray began working at Tri-Way based upon representations that any subsequent written agreement would accord with the verbal agreements reached at the May 21 Meeting. Once the parties reached an agreement in May 2004 regarding the terms of Gray's employment, Gray placed Tri-Way in a position of trust, believing that they would carry out their

obligations under those agreements and not take steps directly contrary to his interests. Given the nature of the relationship between the parties and the fact of Gray's trust in the Tri-Way Parties to protect his interests, a relationship of trust and confidence is appropriate in this case. Summary judgment should have been denied.

1. Gray Presented Evidence Sufficient To Create An Issue of Fact Regarding Justifiable Reliance.

Gray's claim for fraud is based on affirmative misstatements of facts as well as fraudulent concealment with the intent to induce Gray to begin his employment with Tri-Way. Both are supported by facts in the record and provide a basis for denial of the Tri-Way Parties' motion for summary.

As set forth above, the Tri-Way Parties' attempts to construe the parties' agreement as one that was still in negotiation are not supported in the facts. Moreover, Gray did not, as the Tri-Way Parties contend, acknowledge that the terms "were never agreed upon by the parties." To the contrary, Gray testified that he reached an agreement on the material terms of both the employment agreement and the option to purchase the Petersons' interest in Tri-Way at the May 21, 2004 Meeting. To the extent that the Tri-Way Parties made representations of fact regarding Gray's salary and/or profit sharing compensation without disclosing to Gray that they had no intention of honoring that agreement, the Tri-Way Parties have acted fraudulently. Similarly, to the extent the Tri-Way Parties fraudulently concealed their intention not to honor the agreement according to the terms that they had reached with Gray in order to induce him to begin working

for Tri-Way, they have acted fraudulently. Both sets of facts are supported by the record in this case.

The District Court held that there was not any justifiable reliance as gray could not have reasonably relied on any representation that he would be paid 50% of net profits.

Here, Gray has introduced facts that support a claim for equitable estoppel on the basis that the Tri-Way Parties falsely represented or concealed material facts from Gray regarding their intention to honor the terms of the parties' agreement regarding salary and profit sharing compensation. Gray had no way of knowing that the Tri-Way Parties had no intention of honoring their agreement with Gray until after Gray had already left Albertsons and started work at Tri-Way. Additionally, as indicated, the Tri-Way Parties made the representations affirming the compensation terms and concealed their true intentions with the intent that Gray rely on them. Gray did in fact rely on those representations and was damaged. Consequently, given the disputed and undisputed facts in the record, summary judgment on this claim is inappropriate. The evidence also supports the reasonableness of Gray's reliance on the Tri-Way Parties promises and his impression that the parties had reached a bargain on the terms of his employment, including the amount of his profit sharing compensation. One important such fact is that the Tri-Way Parties never told Gray that they had rejected the terms of his employment agreement. Also of importance is the fact that the Tri-Way Parties allowed Gray to begin working and only later attempted to renegotiate the terms of Gray's agreement with Tri-Way. (*See, e.g.,* Exhibit 4 (¶ 16)).

VI. Request for Attorneys Fees

Plaintiff/Appellant Gray requests attorneys fees pursuant to Idaho Code § 12-120(3) and § 12-121. The gravamen of this dispute is a commercial transaction.

VII. CONCLUSION

Based on the foregoing, Gray requests that this Court reverse the District Court's grant of summary judgment for the Tri-Way Parties. Substantial issues of fact exist which compel allowing this dispute to proceed to trial.

DATED this 21st day of May, 2008.

HOLLAND & HART LLP

By _____
Erik F. Stidham, of the firm
Attorneys for Plaintiff/Appellant Robert Gray

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jason G. Murray, Esq.
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701-0829
Fax: (208) 385-5384

- ☐ U.S. Mail
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)

for HOLLAND & HART LLP

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