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# Zivkovic v. State Appellant's Reply Brief Dckt. 37287

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## STATEMENT OF THE CASE

### A. NATURE OF THE CASE

The Plaintiff-Appellant (hereafter “Beaudoin”), has appealed the *Memorandum Opinion and Order on Defendant’s Motion for Summary Judgment* entered by the District Court on May 7, 2010. Said court granted the Defendant-Respondent’s (hereafter “Davidson”) motion for summary judgment.

### B. COURSE OF PROCEEDINGS AND STATEMENT OF RELEVANT FACTS

Beaudoin contends that Davidson is liable to her for the damages that she suffered as a result of Davidson’s administration of the trust that her mother set up. The short version of the factual history of this case is that after Beaudoin’s sister passed away, Davidson (the trustee of the trust set up by Beaudoin’s mom) contacted Beaudoin and told her that she was entitled to receive her sister’s share of the trust. Beaudoin’s mom had passed away several years before and Beaudoin had already taken her share out of the trust. While Davidson claims there is some dispute as to whether or not Beaudoin mentioned any doubt to Davidson during this initial contact about her entitlement to her sister’s share and Beaudoin’s knowledge of the terms of the trust, there is absolutely no dispute that Beaudoin subsequently talked with her D.A. Davidson & Co. financial advisor about retiring due to her receipt of her sister’s share of the trust. There is no dispute that Beaudoin’s financial advisor recommended that a meeting be set up with a trust officer of Davidson. There is no dispute that a meeting occurred with Beaudoin, her husband, her financial advisor, and J. Todd Edmonds, a Vice

President, Trust Officer and Branch Manager of Davidson. There is no dispute that at this meeting it was decided that Beaudoin could retire due to her receipt of her sister's share of the trust. There is no dispute that Davidson actually transferred her sister's share of the Trust into Beaudoin's account with D.A. Davidson & Co. There is no dispute that Beaudoin subsequently retired from her occupation, that she made monetary gifts to her children, that she made non refundable vacation arrangements, and that she took distributions from her D.A. Davidson account. There is also no dispute that Beaudoin only did this because she was told that she was to receive her sister's share of the trust, which in fact she actually did receive from Davidson. Finally, there is also no dispute that after Beaudoin had already done these things that Davidson, in the process of acting on final distributions, reviewed the trust document and determined that Beaudoin's children, and not Beaudoin, were supposed to receive her sister's share and subsequently withdrew the money that represented her sister's share which they had previously transferred into Beaudoin's account.

Beaudoin and Margaret Van Dyke were the only children of Geraldine Schneider. *See* R. 7. In February of 1982, Mrs. Schneider established the Geraldine M. Schneider Revocable Living Trust (hereafter "Trust"). *See* R. 6. Mrs. Schneider subsequently amended the Trust and the second amendment to the Trust dated May 9, 1996 is the trust document at issue in this case. *Id.* A true and complete copy of the Second Amended Trust is attached as Exhibit A to the Complaint and Demand for Jury Trial. *See* R. 12-26. The Trust provides that the upon the death of Mrs. Schneider, the assets of the Trust were to be divided into two equal shares - one share for Beaudoin and the other

share for Margaret. *Id.* According to the Trust, Beaudoin had no restrictions with regards to her share while Margaret was only entitled to receive income from the principal of her share. *Id.* According to the Trust, upon the death of Margaret, her share was to pass to Beaudoin's children and if no children were surviving at the time of Margaret's death then Beaudoin was to receive Margaret's share. *Id.*

Sometime in 1995 or 1996, Davidson was appointed and contracted to become the Trustee of the Trust. *See* R. 6. Davidson is a full-service trust company. *Id.*

Margaret passed away on March 30, 2007. *See* R. 7. Margaret did not have any children. *Id.* Beaudoin has two children - Brooks and Brianna.

Shortly after Margaret's passing, Jan Shelby, an agent of Davidson, notified Beaudoin that she personally was to receive Margaret Mary VanDyke's share of the Trust. *See* R. 155. At this time, Beaudoin informed Jan that it was her understanding that her children, and not her personally, were to receive Margaret's share of the Trust Estate, to which Jan responded that Beaudoin personally, and not her children, were to receive Margaret's share of the Trust. *Id.* Davidson admits that one of its employees concluded in error that Beaudoin's sister's share of the Trust assets was to pass to Beaudoin and so informed Beaudoin. *See* R. 32.

Scott Baldwin, with D.A. Davidson & Co., was Beaudoin's financial advisor. *See* R. 154. Beaudoin talked to him after her sister's death, sometime in the first week of April 2007. *Id.* She told him that Davidson had told her that she was the beneficiary and he said that he had already heard

that. *Id.* At that time, Beudoin talked to him about whether the money she had in her portfolio combined with the money she would receive from the Trust would be enough for her to retire and take a monthly distribution. *Id.* Scott suggested a meeting with J. Todd Edmonds. *Id.* J. Todd Edmonds is a Vice President, Trust Officer and Branch Manager of Davidson. *See* R. 110.

On Scott Baldwin's suggestion, a meeting was set up with Beudoin, her husband Barry Beudoin, Scott, and J. Todd Edmonds to discuss what Beudoin should and could do as a result of the distribution. *See* R. 160. At this meeting, sometime during the last week of April, 2007, Beudoin mentioned that she would like to stop working and take a monthly distribution. *Id.* It was agreed at the meeting that it would be fine for Beudoin to retire at the end of the month and that she would begin receiving monthly distributions in June. *Id.*

Davidson then proceeded to transfer approximately \$360,000 to an account in Beudoin's name. *See* R. 160. Subsequently Davidson contacted Beudoin and informed her that the distribution pursuant to the terms of the Trust was to go to her children and not her personally. *See* R. 7.

As a result of Davidson's representation and subsequent distribution of funds Beudoin retired from her occupation as a beautician. *See* R. 7. Beudoin got rid of all of her necessary business supplies and inventory and referred her clients to other beauticians in the area. *Id.* A notice of retirement was published in the local newspaper and a retirement party was given for Beudoin in which she received numerous gifts from well wishers. *Id.* Furthermore, Beudoin planned a trip

with her family as a result of this distribution that could not be canceled. *Id.* Beaudoin made monetary gifts to her children and also took distributions from her D.A. Davidson account only because she was told that she was to receive her sister's share of the Trust. *See R. 159.*

Beaudoin did not have a copy of the Trust document until after Davidson contacted her and told her that she was not entitled to her sister's share. *See R. 155.*

Beaudoin did not read the Trust document all the way through until the event described above had already occurred. *See R. 156.*

Beaudoin did not recall receiving a copy of the Trust document with Larry LeMaster's letter in March of 2000. *See R. 157.*

#### **ISSUES PRESENTED ON APPEAL**

1. Whether the District Court erred in holding that as a matter of law a fiduciary duty did not exist between Beaudoin and Davidson.
2. Whether the District Court erred in holding that Davidson did not assume a fiduciary duty towards Beaudoin based on its conduct and actions.

#### **ARGUMENT**

##### **A. STANDARD OF REVIEW**

Summary judgment is appropriate only when there is no genuine issue of material fact and only after the pleadings, depositions, admissions, and affidavits show that there is no genuine issue as to any material fact. I.R.C.P. 56(c). The burden of proving the absence of an issue of material

fact rests at all times upon the moving party. *Blickenstaff v. Clegg*, 140 Idaho 572, 577, 97 P.3d 439, 444 (2004) (citations omitted). To meet this burden the moving party must challenge in its motion, and establish through evidence, that no issue of material fact exists for an element of the nonmoving party's case. *Id.* The facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982); *Moss v. Mid-America Fire & Marine Ins. Co.*, 103 Idaho 298, 647 P.2d 754 (1982). If reasonable persons could reach different findings or draw conflicting inferences from the evidence, the motion must be denied. *Wade Baker & Sons Farms v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 136 Idaho 922, 42 P.3d 715 (2002).

B. THE DISTRICT COURT ERRED IN HOLDING THAT AS A MATTER OF LAW A FIDUCIARY DUTY DID NOT EXIST BETWEEN BEAUDOIN AND DAVIDSON.

To establish a claim for breach of fiduciary duty, plaintiff must establish that defendant owed plaintiff a fiduciary duty and that the fiduciary duty was breached. *See Mitchell v. Barendregt*, 120 Idaho 837, 820 P.2d 707 (1991). Whether a fiduciary relationship exists is a question of law. *Hayden Lake Protection Dist. v. Alcorn*, 141 Idaho 388, 401, 111 P.3d 73, 86 (2005). "Before a fiduciary duty can be breached, there must exist a fiduciary relationship. A fiduciary relation exists between two parties when one is under a duty to act or to give advice for the benefit of the other

upon a matter within the scope of the relation.” *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 946, 854 P.2d 280, 289 (Ct. App. 1993).

The District Court held that Beaudoin failed to establish that a fiduciary relation existed between herself and Davidson with regard to the Trust upon Margaret’s death. *See* R. 208. In support of that holding the court stated:

Prior to Margaret’s death, Beaudoin had exhausted her share of the Schneider Trust in 2006, thus, her status as a beneficiary ended at that time. Further, any remote contingent interest she may have held in Margaret’s share ceased upon Margaret’s death, when Brooks and Brianna’s status as beneficiaries became fixed.

*See* R. 208.

So while the District Court recognizes that a fiduciary duty did exist with regards to Beaudoin, the District Court’s position is that this fiduciary duty ended upon Margaret’s death because any contingent interest Beaudoin still had as a beneficiary ceased because her children’s status as beneficiaries became fixed upon Margaret’s death.

The District Court’s position is incorrect. Margaret’s death in and of itself does not extinguish Beaudoin’s position as a beneficiary. While the Trust was still in existence, Beaudoin was at all times still a beneficiary and any person or entity acting as a trustee owed Beaudoin a fiduciary duty.

The District Court’s conclusion that Beaudoin’s status as a beneficiary terminated at Margaret’s death cannot be correct. What if Beaudoin’s children had both refused to accept anything under the Trust? What if both of Beaudoin’s children were in a fatal accident after Margaret’s death

and before they were given Margaret's share of the Trust? What would then happen to Margaret's share of the Trust? Who would then get Margaret's share of the Trust? According to the District Court's position no one would because there would no longer be any beneficiaries. Obviously such a conclusion is preposterous but it does illustrate the error of the District Court's holding. Clearly in those scenario's Beaudoin would get Margaret's share. Beaudoin's status as a beneficiary and interest in the Trust could not have ended with Margaret's death.

The District Court stated that Beaudoin's status as a beneficiary ended when she exhausted her share of the Trust. Clearly the District Court position has to be wrong. A person cannot have a contingent interest in a trust and not be a beneficiary. Beaudoin remained a beneficiary after she exhausted her share because she still had a contingent interest in her sister's share.

The District Court stated that Beaudoin's status as a beneficiary ended when she exhausted her share of the Trust. If that's the case, then the proper event to determine who are the beneficiaries of Margaret's share is not when Margaret died, it's when Margaret's share was exhausted. As such then Beaudoin remained a beneficiary until Margaret's share was exhausted and until that time Beaudoin was a beneficiary and Davidson owed her fiduciary duties.

The acts committed by Davidson which Beaudoin alleges constitute a breach of fiduciary duties occur after Margaret's death and before Margaret's share of the Trust was exhausted and before the Trust was wound up and closed. During that time Beaudoin was still a beneficiary and Davidson owed her fiduciary duties.

The District Court erred in holding as a matter of law that Beaudoin's status as beneficiary ended when she exhausted her share of the Trust. Beaudoin continued to be a beneficiary of the Trust and was owed a fiduciary duty by Davidson. As such, the District Court's order granting Davidson summary judgment on this issue was in error and should be reversed.

C. THE DISTRICT COURT ERRED IN HOLDING THAT DAVIDSON DID NOT ASSUME A FIDUCIARY DUTY TOWARDS BEAUDOIN BASED ON ITS CONDUCT AND ACTIONS.

Regardless of whether or not Beaudoin was still a beneficiary and whether or not Davidson owed her a fiduciary duty based on her status as a beneficiary, Davidson assumed a fiduciary duty towards Beaudoin when it continued to treat Beaudoin as a beneficiary.

When an affirmative duty generally is not present, a legal duty may arise if one voluntarily undertakes to perform an act, having no prior duty to do so. *Baccus v. Ameripride Services, Inc.* 145 Idaho 346, 350, 179 P.3d 309, 313 (2008).

The facts are not in dispute that after Beaudoin's sister passed away she was told by Davidson that she was to receive her sister's share, that Beaudoin met with Davidson where it was decided that she could retire, and that Davidson actually transferred a portion of Margaret's share into Beaudoin's account. All of these actions were taken voluntarily by Davidson after Margaret passed away. Davidson treated her as a beneficiary after Margaret's death and as such owes Beaudoin a fiduciary duty.

The District Court stated that there was no evidence that Davidson and Beaudoin maintained a fiduciary relationship with regards to the Trust after Beaudoin exhausted her share. *See* R. 209. The evidence in the record does not support that holding and is simply not true. The evidence supports a finding that Davidson affirmatively treated Beaudoin as a beneficiary from the time Margaret passed away until it realized its mistake over two months later. Davidson treated Beaudoin as a beneficiary and as such owed her a fiduciary duty. The District Court's holding is erroneous and given the summary judgment standard should be reversed.

### CONCLUSION

Based on the foregoing, Beaudoin respectfully requests that this Court reverse the District Court's order granting Davidson summary judgment.

DATED this 27th day of December, 2010.

CLARK AND FEENEY

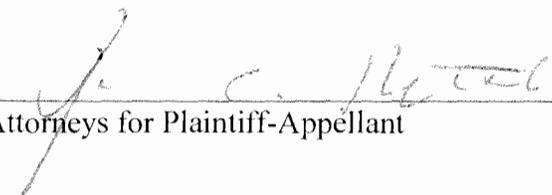
By: 

John Charles Mitchell a member of the firm.  
Attorneys for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 27th day of December, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Keith D. Brown 601 W. Riverside Ave, Suite 1500 Spokane, WA 99201	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy
---	--

By:   
Attorneys for Plaintiff-Appellant