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Berry v. McFarland Appellant's Brief Dckt. 37951

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IN THE SUPREME COURT OF THE

STATE OF IDAHO

KARLETTA GRACE BERRY, a widow,)
KARLETTA GRACE BERRY, Personal)
Representative of the Estate of)
Jerry Lee Roy Berry, CAPTAIN'S)
WHEEL RESORT, INC., an Idaho)
Corporation,)

Plaintiffs/Appellants,)

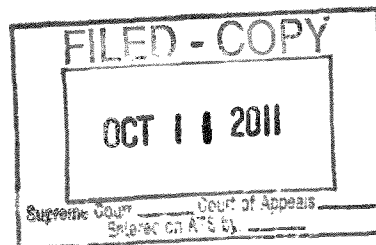
v.)

MICHAEL B. MCFARLAND, MICHAEL)
B. MCFARLAND, P.A., and KAREN)
ZIMMERMAN,)

Defendants/Respondents.)

Supreme Court Docket No.
37951-2010

Kootenai County District
Court No. CV-2007-2409



APPELLANTS' BRIEF

Appeal from the District Court of the First Judicial District of
the State of Idaho, in and for the County of Kootenai

THE HONORABLE CHARLES W. HOSACK DISTRICT JUDGE, PRESIDING

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ATTORNEY FOR APPELLANTS

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STATEMENT OF CASE

(i) Nature of Case.

This is a case brought by a widow against her deceased husband's attorney and the attorney's real estate broker fiancé for breach of fiduciary duty. The attorney and his fiancé purchased assets from the deceased husband, just prior to his death for less than fair market value. The assets purchased were two hundred (200) shares of stock in a closely held corporation, called the Captain's Wheel Resort, Inc. an Idaho Corporation which owned lake front real property on Lake Pend Oreille in Bayview, Kootenai County, Idaho. The lake front property and improvements were all of the assets of the Captain's Wheel Resort, Inc.

(ii) Course of Proceedings.

The case was assigned to Judge Verby. Just prior to the scheduled trial date, Judge Hosack was assigned the role as trial judge in the case. The case was tried for eight (8) days in a courtroom at the Kootenai County Jail.

The Jury found a breach of duty by Michael McFarland as the attorney for Jerry Berry which was the proximate cause of damage to the plaintiff.

The jury found a breach of fiduciary duty to be the proximate cause of damage to the plaintiff.

The jury determined plaintiff was damaged in the amount of \$380,500.00 which represented the difference between the price the defendants paid for the stock and the actual value of the stock. (R. P. 1115-1116).

On April 16, 2010 Judgment was entered in favor of Karletta Grace Berry and against the defendants the amount of \$380,500.00. (R.P. 1157-1159).

Defendants moved for a new trial citing rule 59(a) without specific reference to which subpart (1-7) they were relying upon. (R. P. 1172-1174).

District Judge Hosack entered the Memorandum Opinion On Post Trial Motions and Order Granting New Trial on June 10, 2011. (R. P. 1238-1249).

This appeal followed. (R. P. 1250-1268).

(iii) Statement of Facts.

The Captain's Wheel Resort, Inc. was incorporated in 1996 with 400 shares of stock issued. Originally, Norman and Susan Nordstrom owned 200 shares and James and Jean Campbell owned the other 200 shares. (Pl. Ex. 3, 4 & 5).

The Captain's Wheel Resort, Inc. owns a resort on around 300 feet of frontage on the shore of Lake Pend Oreille with 20 plus boat slips, a restaurant building which includes an enclosed dining area, a deck, a dance floor area, a bar, pool table, kitchen facilities, outdoor cooking and seating facilities, a liquor license, furniture, fixtures, equipment, and a parking lot across the street. (Tr. P. 116, L. 15-25; P. 117, L. 4-5).

On July 9, 1997 Jerry Lee Roy Berry and Karletta Grace Berry were married. (Tr. P. 445, L. 1-2) (Pl. Ex. 1). Karletta

is the Personal Representative of Jerry Berry's Estate and the sole heir. (Pl. Ex 2) (Tr. P. 445 L. 16-18; P. 447 L. 9-12).

Jerry and Karletta Berry purchased the Nordstroms' 200 shares of stock in the Captain's Wheel Resort, Inc in June, 2000. (Plaintiff's Ex. 6). At that time Jerry and Karletta Berry owned 200 shares of stock in the Captain's Wheel Resort, Inc and James and Jean Campbell owned 200 shares of stock in the corporation.

In about 1999 or 2000, Jerry Berry, started a speculation home project in the State of Washington which failed. As a result one or more judgments were entered against Jerry Berry in the State of Washington. (Tr. P. 446-447).

Michael B. McFarland is an Idaho attorney that practices mainly bankruptcy law at his law firm, Michael B. McFarland, P.A. in Coeur d'Alene, Idaho. (Tr. P. 74-76).

Michael McFarland and Karen Zimmerman reside together and have been engaged since approximately January 1, 2000. (Tr. P. 120, L. 4-25; P. 121, L. 1).

Karen Zimmerman is a licensed real estate broker within the State of Idaho. (Tr. P. 406 L. 12-25). At the relevant time in question, Karen was the broker for Treaty Rock Realty in Post Falls, Idaho.

McFarland and Zimmerman were regulars at the Captain's Wheel Resort, Inc. Jerry Berry became acquainted with McFarland

and Zimmerman at the Captain's Wheel Resort in approximately 2000. (Tr. P. 100, L. 16-19).

Jerry Berry became aware that McFarland was an attorney that practiced bankruptcy law. Jerry told McFarland and Zimmerman that he had some bad business experiences over in Spokane, Washington and that there were some outstanding judgments against him. (Tr. P. 137, L. 11-25). While at the Captain's Wheel Resort, Jerry told McFarland that he wanted to talk to McFarland to learn about bankruptcy and find out if that was an option. McFarland does not give legal advice when he is in a social setting, so he told Jerry to come on down to his office and we'll talk about it. (Tr. P. 117, L. 11-25; P. 118, L. 1-5).

As a result, Jerry Berry came into McFarland's law office for a meeting some time around the year 2000 or 2001. (Tr. P. 137, L. 1-10). Jerry Berry came into the meeting to explore bankruptcy relief. At the time of the meeting Jerry had stock in the Captain's Wheel Resort, Inc. and it was not exempt property. (Tr. P. 196, L. 1-5). McFarland and Berry talked about the fact that it was not registered, it was not publicly traded, that there is no public record of the ownership of the stock. (Tr. P. 196, L. 5-9). McFarland explained that, "if a judgment creditor, number one, could not be exempt in bankruptcy, number two, if a creditor were to conduct a debtor's exam, it would

certainly be discoverable, and since no such exam had been conducted, he did not feel that it was at risk at the moment, as I recall, but he did talk about getting it into a trust or some other device, so that if ultimately there were to be some type of a creditor's exam or something were to happen to him, it would be - he would be able to protect that." (Tr. P. 196, L. 10-20). McFarland's testified in deposition that the reason Jerry sought his advice (which was played to the jury as impeachment) was that his "understanding was that he was looking to protect the, uh, stock in the Captain's Wheel from attachment by one or more creditors". (Tr. P. 199, L. 25; P. 200, L. 1-2). Berry and McFarland talked about whether bankruptcy would give Berry the protection that he wanted, and ultimately determined that it would not because there was not a way to exempt the stock, in the bankruptcy proceeding. (Tr. P. 196, L. 25; P. 197, L. 1-7). Jerry Berry owned 200 shares (1/2 of the outstanding stock at the time) of stock in the Captain's Wheel when he came in for the meeting with McFarland. (Tr. P. 148, L. 12-19). At the time of this meeting, McFarland and Zimmerman did not own any stock in the Captain's Wheel Resort, Inc. (Tr. P. 149, L. 6-11). The other 200 shares of stock in the Captain's Wheel Resort, Inc. were owned by James and Jean Campbell. (Tr. P. 149, L. 6-15).

To determine if stock in a corporation such as the Captain's Wheel has equity, McFarland would look at what the corporation has in the way of assets and what it owes in terms of its liabilities, figure out what its net worth is, and divide that by the number of shares that are issued, and that would give him a pretty good per share value. (Tr. P.153, L. 9-24).

The next meeting between Jerry Berry and McFarland at McFarland's law office was on or about July 25, 2003, when Berry came in to pick up \$40,000.00 from McFarland. The money was a portion of \$100,000.00 to be used to buy the stock from the other 50% owners (Mr. & Mrs. Campbell) of the Captain's Wheel Resort, Inc. stock. McFarland wrote a receipt from his law office and gave it to Berry which provided the \$40,000.00 was an advance on loan to be secured by stock. (Tr. Vol. I, P. 161 - 165) (Def. Ex. A). A portion of this \$40,000.00 was Karen Zimmerman's money. (Tr. P. 409, L. 16-23; P 414, L. 8-20).

On August 4, 2003 an additional \$60,000.00 was provided by McFarland to Berry, so Berry could purchase the Campbell's 50% stock in the Captain's Wheel. (Tr. P. 164, L. 2-7). In order to get this \$60,000.00, Karen Zimmerman took out a loan with interest only payments on her mom's home. (Ex. 24) (Tr. P. 410, L. 14-25). Present at the time the money was transferred were, Jerry Berry, McFarland and Delores Meredith. Delores Meredith was McFarland's secretary at the time and she prepared a receipt for the

\$60,000.00 and had Jerry Berry sign the receipt. (Tr. P. 680-682). (Def. Ex. B). Jerry Berry paid Karen the interest only payments and the cost to get the loan up until July 4, 2006 when the Stock Purchase and Sale Agreement was entered into. (Tr. P. 180, L. 19-25; P. 183, L. 1-4; P. 413, L. 1-5; P. 417, L. 5-23; P. 418, L. 2-25; P. 419, L. 1-11; Tr. P. 452, L. 20-25; P. 453, L. 1-9).

At the time that McFarland and Zimmerman gave Jerry Berry the \$100,000.00 they thought that the Captain Wheel Resort, inc. real property would sell within a couple of years. (Tr. P. 417, L. 24-25; P. 418 L.1). At the time Zimmerman and McFarland were thinking of the Captain's Wheel Resort, Inc. as real estate. They thought that in two or three years they could sell the land and everyone would make some money. (Tr. P. 803, L. 15-24). McFarland and Zimmerman considered the assets and liabilities of the Captain's Wheel Resort, Inc., and did review financial statements for the Captain's Wheel Resort operations before putting up the \$100,000.00 because they were just treating it like real estate. (Tr. P. 804, L. 1-20.).

McFarland felt that purchasing the Campbell's stock for the amount of \$100,000.00 was really just a fraction of the value the stock was worth. (Tr. Vol. I, P. 164, L. 1-13).

Even though Jerry Berry had judgment creditors he had sought McFarland's legal advice with regard to, McFarland was not

concerned that Berry's judgment creditors might attach McFarland's money when he gave it to Berry. McFarland was not thinking about Berry's creditors at all during this time (Tr. P. 171, L. 19-15). McFarland was thinking about making an investment. (Tr. P. 172, L. 1-2).

After McFarland provided Jerry with the \$100,000.00 to acquire the Campbell's stock in the Captain's Wheel Resort, Jerry Berry acquired the Campbell's stock through a Stock Purchase and Sale Agreement (Pl. Ex. 20).

After Jerry Acquired the Campbell's stock in the Wheel McFarland and Zimmerman did not pay for their food and drink at the Wheel. (Tr. P. 202, L. 2-11; P. 205, L. 12-20).

On April 28, 2004, Paul Daugherty, Attorney for the Captain's Wheel Resort, Inc. at the time, sent a letter to Jerry Berry asking for an update on the Captain Wheel Resort, Inc. (Pl. Ex. 21). Jerry Berry wrote a letter back to Attorney Daugherty indicating that he had purchase the Campbell's shares in 2003 and that since that time there had been no change (Plaintiff's Ex. 22).

As a result of Jerry Berry's treatment for pancreatic cancer, Jerry Berry was in the hospital from June 17 through June 21, 2006 for chemo toxicity and was in very bad shape. (Tr. P. 526, L. 18-25) (Tr. P. 460-461).

On June 21, 2006 McFarland brought 2 proposed stock purchase and sale agreements (Pl. Ex. 23 & Ex. 24) to Karletta Berry's home and told her to have Jerry pick one and sign it. (Tr. P. 461, L. 7-20) (Tr. P. 527, L. 1-7). One version of the stock purchase and sale agreement provided that McFarland and Zimmerman were receiving 200 shares of stock for \$100,000.00. (Pl. Ex. 23). The second version provided that Berry was transferring 400 shares of stock to McFarland and Zimmerman with fifty percent (50%) of the stock to be held by McFarland and Zimmerman as trustees for the benefit of Karletta Berry and in the event of her demise, her son Dale. (Pl. Ex. 24) (Tr. P. 97, L. 17-23).

On July 4, 2006 Jerry Berry went to McFarland's home and brought a third agreement which characterized the \$100,000.00 as a loan. (Pl. Ex 25). At that meeting Jerry Berry, McFarland and Zimmerman reviewed the three agreements and signed the stock purchase and sale agreement transferring 50% of the stock to McFarland and Zimmerman. (Pl. Ex. 23) (Tr. P. 463, L. 10-18). The language of the stock purchase and sale agreement read as if it was "executed August 9, 2003" but McFarland admits that it was not signed until July 4, 2006 (P. 125, L. 14-25). McFarland described the Stock Purchase and Sale Agreement in his Affidavit, Plaintiff's Exhibit 77, as "the stock purchase agreement was Jerry's idea and it was designed to swap equity in the corporation for the debt owed to us." (Pl. Ex. 77) (Tr. P.188, L. 15-24).

On October 15, 2006 at 2:30 a special meeting of the shareholder's was held at McFarland's property located at 10714 McFarland Road, Athol, Idaho. (Pl. Ex 27 & 28). Mr. McFarland had the minutes of the meeting typed up before the meeting took place. (Pl. Ex. 29) (Tr. P. 210, L. 5-22). (Tr. P. 470, L. 1-17). At the shareholders meeting McFarland and Zimmerman were added as directors along with Jerry Berry and Karletta Berry. (Pl. Ex 29). In Captain's Wheel Minutes of Special Meeting prepared by McFarland, McFarland referred to Paul Daugharty as the Captain's Wheel Resort, Inc.'s "former attorney". (See Pl. Ex. 29).

At 3:00 pm on October 15, 2011 a special meeting of the Directors of the Captain's Wheel Resort, Inc. was held. (See Pl. Ex 30 and Ex. 31). McFarland had prepared minutes before the meeting, with a few blanks to be filled in. (See Pl. Ex 32 and Def. Ex. MM). McFarland also brought some fill in the blank Bylaws to this meeting and filled in the blanks (See Pl. Ex 33) because he was not aware of the existence of the true Bylaws which Campbell and Nordstrom had executed at or near the time of incorporation. (See Pl. Ex. 5) (Tr. P. 213-214).

Jerry died November 4, 2006. (Tr. P. 87, L. 10-14) (Tr. P. 474, L. 14-16). Jerry Berry kept Michael B. McFarland, P.A. business card in his wallet up until his death. (Tr. P. 505, L. 1-4). As a result of Jerry Berry's death the Captain's Wheel

Resort, Inc. had 3 directors, Karletta Berry, Michael McFarland and Karen Zimmerman. This allowed McFarland and Zimmerman to control the votes at future corporate director meetings. (Tr. P. 274, L. 12-25).

Just shortly after Jerry died, McFarland had the locks at the Captain's Wheel changed and Karletta was not given a key. (Tr. P. 482, L. 9-25)

On November 12, 2006 there was a memorial, wake, party at the Captain's Wheel which both McFarland and Karletta Berry attended. On November 13, 2006 when Karletta Berry arrived home around 4:00 pm. McFarland was waiting on her porch. McFarland stated that he had some papers for her to sign. (Tr. P. 474, L. 19-25; P. 475, L. 1-25) These papers were two separate documents which were each entitled resolution in lieu of special meeting of board of directors of Captain's Wheel Resort, Inc. (Tr. P. 229-231). The first resolution is Plaintiff's Exhibit 34 and the second is Plaintiff's Exhibit 35. The resolutions proposed to: (a) appoint McFarland President (b) appoint Zimmerman Treasurer, (c) add Zimmerman and McFarland onto the bank accounts, and (d) list the "corporations business and real property (which constitute all of the assets of the corporation) for sale with Treaty Rock Realty, Inc, a licensed real estate firm, at an initial asking price of two-million two-hundred thousand dollars (\$2,200,000.00)." (See Pl. Ex 35). Karen

Zimmerman was the broker at Treaty Rock at that time. It was Karen Zimmerman's idea to list with Treaty Rock. (Tr. P. 424, L. 19-23). McFarland also wanted to sell with Treaty Rock Realty where Karen Zimmerman was the broker or associate broker. (Tr. P. 241, L. 12-23).

By November 16, 2006 McFarland became tired of waiting for Karletta to sign the resolutions so he called a special meeting to pass the resolutions on November 18, with just two days notice. (See Pl. Ex. 36). Karletta Berry did object to lack of proper notice (See P. Ex. 38) and the November 18 meeting did not proceed because of lack of proper notice under the true corporate Bylaws (Pl. Ex. 5) (Tr. P. 241, L. 24-25; P. 242, L. 1-7).

After becoming aware of the true corporate Bylaws (Pls' Ex 5) and on or about November 29, 2006 McFarland became concerned about the "coin toss provision in the event of deadlock". (See Pl. Ex 43 second paragraph).

Eventually a meeting of the three surviving Directors did occur on November 29, 2006 (Pl. Ex 46). The minutes of the meeting reflect that upon a majority vote (McFarland and Zimmerman voting one way and Karletta Berry voting the opposite) McFarland was elected President and Zimmerman was elected Treasurer. McFarland and Zimmerman also passed a resolution that "the President of the corporation is authorized to list the

corporation's business and real property (which constitute all of the assets of the corporation) for sale with Treaty Rock Realty, Inc., a licensed real estate firm, at an initial asking price of two-million two-hundred thousand dollars (\$2,200,000)." (Pl Ex. 46) (Tr. P. 255-256).

The largest corporate debt, which was a lien against the real property, the CIT small business loan was paid current on 11/29/06. (See Df. Ex CCC, Transcript of 11/29/06 meeting).

McFarland has been in charge of the Captain's Wheel Resort, inc. and operations since November 30, 2006 until the day it closed on January 4, 2010. (Tr P. 218, L. 22-25) (Tr. P. 258, L. 16-18; P. 262, L. 9-12). Despite being in charge, McFarland let Monnie Cripe and Marie Streeter basically run the business without any normal controls such as checking tills to be long or short, meal costing or other normal protocol. (Tr. P. 259-262 ; P. 1046-1047).

By November 29, 2006 McFarland and Zimmerman excluded Karletta from management or involvement with operations of the Captain's Wheel Resort, Inc.

Pursuant to Jerry Berry's wishes, his widow Karletta was suppose to receive \$200.00 per week from the Captain's Wheel Resort. In December 2006 Michael McFarland informed the management to stop paying Karletta this \$200.00.

In December 2006 Michael McFarland informed the management that Karletta could not sign for her guests meals. At the same time McFarland retained that privilege. (Tr. P. 480-481).

After being served with a Notice of Meeting setting a meeting to remove Karletta as a Director, Karletta filed this case on February 14, 2007.

Despite the lawsuit, on February 15, 2007 McFarland and Zimmerman held a Directors meeting and removed Karletta as a Director for cause and took Karletta off the bank account. (See Pls' Exs. 55 & 56) The grounds for cause were questionable at best.

On February 17, 2007, (without input from Karletta) McFarland and Zimmerman decided issued one (1) share of stock to Monnie and one (1) share of stock to Marie (Plaintiffs Exs. 60 & 61). Threat of deadlock of shareholders was eliminated and a coin toss would not be required.

McFarland and Zimmerman have not held any annual meetings for the shareholders' or directors since issuing the stock to Monnie and Marie. (Tr. P. 275, L. 8-25).

The debts of the Captain's Wheel Resort, Inc as of July 4, 2006 were, the CIT Loan of \$242,000.00, the business line of credit of \$5,000.00, 15,000.00 owing on the parking lot. Tr. P. 467, L. 1-17.) (See also Def. Ex. ccc). In addition the Captain's Wheel owed Jerry Berry the sum of \$77,000.00 (Pl. Ex.

32) (Tr. P. 210; L. 23-25, P. 211, L. 1-6; P. 473, L. 11-20; P. 254-255).

On July 4, 2006 the assets of the Captain's Wheel Resort, Inc. were the real property and improvements valued at \$1,300,000.00. (Tr. P. 367-405) (Plaintiff's Exhibit 89).

In response to the question do you know the value of the Captain's Wheel's assets as of July 4, 2006, or have an opinion, McFarland testified that he was aware of three offers. In 2005, an offer was made for one point two. In Jan 2006 an offer was made for one point five, and in 2006 at Jerry's birthday an offer was made at two point two. (Tr. P. 272, L. 10-24).

Karletta Grace Berry testified that her 200 shares of stock in the Captain's wheel were worth \$500,000.00. (Tr. P. 496-499).

Toby McLaughlin is an attorney in the State of Idaho. McLaughlin's testimony begins on Page 322 at Line 14 of the trial transcript. McLaughlin had provided representation for Karletta Berry at three corporate meetings related to the Captain's Wheel which McFarland called to order. The meetings occurred November 18, 2006, November 29, 2006 and February 15, 2007. (Tr. P. 323-324). Prior to the start of the first meeting on November 18, 2006 McLaughlin and McFarland had discussions regarding the stock purchase and sale agreement signed by Jerry Berry, McFarland and Karen Zimmerman. (Tr. P. 326-327) During those discussions

McFarland explained why there were three agreements regarding the \$100,000.00 transaction between Jerry Berry, McFarland and Zimmerman. McFarland explained that back in 2003 he provided \$100,000.00 to Berry and that in 2006 the three of them met and discussed various proposals of how to deal with the \$100,000.00. The three documents discussed were (1) treating the \$100,000.00 as a loan, (2) one where McFarland and Zimmerman would receive 100% of the shares of stock in the Captain's wheel while holding 50% in trust, and (3) the stock purchase and sale agreement which transferred 50% of the shares in the Captain's wheel to McFarland and Zimmerman. (Tr. P. 328, L. 2-20). McFarland told McLaughlin, that the reason for the version in which all of the shares were going to be transferred to McFarland and Zimmerman was to avoid judgment creditors who were seeking to enforce the judgments against Mr. Berry. (Tr. P. 238, L. 21-25; P. 329, L. 1). McFarland indicated that judgments were entered against Berry in the State of Washington. (Tr. P. 329, L. 4-11). McFarland told McLaughlin that he believed that he had a letter from one of the creditors in his file (Tr. P. 328, L. 19-21). McFarland also indicated he was the attorney for the Captain's Wheel Resort, Inc, but that he had stepped down as the corporate attorney because he did not feel it was proper to be the corporate attorney while also acting as a director of the corporation. (Tr. P. 330, L. 4-10). McFarland also indicated that the value of the real property was

some where between \$1.2 and \$1.5 million. (Tr. P. 332, L. 10-25). (See Also Plaintiff's Exhibit 37, Nov. 22, 2006 Memo from Toby McLaughlin).

Paul Daugharty is an attorney in the State of Idaho. Mr. Daugharty's testimony begins on page 356 at Line 8. Mr. Daugharty was the former attorney for the Captain's wheel Resort Inc. (Tr. P. 358-359). In February 2006 Mr. Daugharty turned the Captain's Wheel corporate book over to McFarland.

Jerry Berry had discussed the potential for a bankruptcy with Mr. Daugharty, but Mr. Daugharty advised Jerry that he did not do bankruptcy work and Jerry would need to consult with a bankruptcy attorney. (Tr. P. 364, L. 4-13). In April 2001, Paul Daugharty's office, at the request of Jerry Berry, forwarded Mike McFarland a copy of the CIT small business loan documents that Jerry had signed when Jerry became a purchaser of the Captain's Wheel. (Tr. P. 364, L. 14-25) McFarland testified at the trial that the first time he reviewed any information regarding the CIT small business loan would have been after October or November of 2006. (Tr. P. 152, L. 11-22).

Theresa Louise Clifton was a waitress at the Captain's Wheel Resort. She was instructed by Jerry Berry to take very good care of McFarland and Zimmerman because they were his attorneys and they have done a good job for him. (Tr. P. 437, L. 12-17) (P. 440, L. 7-25)

Sharilyn Ann Cano is Jerry Berry's adult daughter from a marriage Jerry had prior to his marriage to Karletta Berry. (Tr. P. 879, L. 17-18). Sharilyn came up to visit her dad, Jerry Berry, in September of 2006 before he passed away from cancer. In September 2006, Mr. McFarland came to the Captain's Wheel restaurant and Jerry Berry introduced Mr. McFarland to Sharilyn as Jerry's attorney. (Tr. P. 893, L. 10-25) (Tr. P. 896, L. 2-5). Knowing of his impending death, Jerry told Sharilyn that Karletta would have the Wheel and through his attorney everything had been taken care of. (Tr. P. 883-884).

ISSUES PRESENTED ON APPEAL

1. Did the District court abuse its discretion when it ordered a new trial?

ARGUMENT

I. Standard of Review on issue of New Trial

A motion for new trial calls the trial judge to weigh the evidence and determine (1) whether the verdict is against his or her view of the clear weight of the evidence; and (2) whether a new trial would produce a different result Schwan's Sales Enterprises, Inc. v. Idaho Transp. Dept. 142 Idaho 826, 832-834, 136 P.3d 297, 303 - 305 (Idaho,2006).

When an exercise of discretion is reviewed on appeal, the Court inquires: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within

the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by exercise of reason. Warren v. Sharp, 139 Idaho 599, 602, 83 P.3d 773, 776 (Idaho,2003).

II. The District Court Did Not Act Within The Boundaries Of Its Discretion And Failed To Act Consistently With Legal Standards

The District Court acted outside its discretion and inconsistent with legal standards.

No citation to authority should be required for a court to understand that the law provides when an attorney buys his client's property for less than the fair value, the attorney is liable to the client for the difference between the fair value and the actual amount paid.

The court exceeded the boundaries of its discretion and without regard to long time legal standards regarding the attorney client relationship when in referencing the Restatement of Trusts it wrote:

"While the jury did find a breach of fiduciary duty, the relationship here is not that of an investment banker managing trust property for beneficiaries of a trust. Instead there is an arms length bona fide purchase and sale agreement between competent parties." (R. P. 1241).

The relationship between Jerry Berry and Michael McFarland was an attorney client relationship. Even, Michael B. McFarland admitted the relationship did exist after his third day on the

witness stand at trial in the following excerpt (Tr. P. 313, L. 4-16):

- Q. And is that because you're taking the position you were never Jerry Berry's lawyer?
- A. I'm not taking the position that I was never Jerry Berry's lawyer. I suppose while he was in my office getting bankruptcy information it would be possible, at least while he was in the office, the he would be considered a client to the extent that he at least gave me any confidential information, but if I was never engaged by him, he never paid me a retainer, he never hired me, he never filled out any paperwork, then that would make him a former client.

The relationship between an attorney and client is a fiduciary relationship of the highest character, binding the attorney with the strictest accountability and fidelity to his client's interests. In re Carter, 86 P.2d 162. Gray v. Tri-Way Const. Services, Inc., 210 P.3d 63, 71 (Idaho, 2009).

The confidence reposed in the attorney by the client is so carefully guarded by the law that it places the burden of proving the entire fairness of a pecuniary transactions between the attorney and the client upon the attorney. Ainsworth, et al. v. Harding, 22 Idaho 645, 128 P. 92

For a breach or violation of an attorney's professional duties, the client may hold the attorney liable or accountable. Blough v. Wellman, 132 Idaho 424, 426, 974 P.2d 70, 72 (Idaho, 1999). Idaho Rules of Professional Conduct 1.7, 1.8, 1.9.

The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity. Blough v. Wellman, 132 Idaho 424, 426, 974 P.2d 70, 72 (Idaho,1999). Beal v. Mars Larsen Ranch Corp., Inc., 586 P.2d 1378 (Idaho,1978) Benting v. Spanbauer, 58 Idaho 44, 69 P.2d 983 (1937) Lawyers have an overriding duty of zealous representation of a client's interest and an obligation to put their clients' interests ahead of their own. Heinze v. Bauer, 145 Idaho 232, 238, 178 P.3d 597, 603 (Idaho,2008)

Michael McFarland breached his fiduciary duties to Jerry Berry when he converted the \$100,000.00 loan to a purchase of one half of the shares in the corporation.

Upon Jerry Berry's death, McFarland and Zimmerman excluded Karletta Berry from the Captain's Wheel and put Michael McFarland put his and his fiancé's interest ahead of his client's interests.

The District Court seems puzzled when it notes that:

"At the hearing on post trial motions, plaintiffs' counsel argued that the claim for money damages was not even based upon contract, but was a tort claim for breach of fiduciary duty". (R. P. 1241).

The District Court fails to recognize that no jury instruction was given on any claim for breach of contract. No

cause of action was listed for breach of contract in the Complaint. The jury was instructed on breach of fiduciary duty by Instruction No. 8. (R. P. 1097).

A fiduciary relationship is one of confidence imposing great duties and it recognizes the disparity in bargaining power and that negotiations with a fiduciary are not at arms length.

The court ignores the fact that an attorney occupies a fiduciary relationship with his client.

The District Court failed to act within the legal standards when it determined that the difficulty with this case lies in the disconnect between the final judgment and any articulable legal theory supporting the result. (R. P. 1240). The District Court contends that the rule of law that a fiduciary can be liable to a beneficiary of a trust if the fiduciary sells an asset for less than market value is not applicable to this case.

The Court has disregarded the legal standards which are well settled in regard to the attorney client relationship. The attorney client relationship is a fiduciary relationship. The Client may recover from the attorney for breach of the fiduciary obligations. Contrary to the District Court's Memorandum Opinion, a transaction between an attorney and his client in regard to the client's property which the attorney has provided legal advice with regard to is not an "arms length bona fide purchase and sale agreement between competent parties".

Especially when the agreement is entered into under the client's pending death from terminal illness.

III. The District Court Did Not Reach Its Decision By Exercise Of Reason

The District court provides that in equity, the only fair result is to return the parties to the status quo. R. P. 1243. This statement lacks reason and is unwise.

If an attorney enters into an attorney-client relationship with a client in regard to certain property, the attorney is not allowed to buy the opposing title to the property, without holding it in trust for the client. Ainsworth, et al. v. Harding, 22 Idaho 645, 128 P. 92. From the time that Michael McFarland entered into the Stock Purchase and Sale Agreement with Jerry Berry, he held the stock in trust for the benefit of Jerry Berry and his heir, Karletta Berry.

The evidence showed that at the time Jerry Berry died just before Michael McFarland commandeered control of the Captain's Wheel, the business was open and the liabilities were current.

By the time of trial, and under the sole control and direction of Michael B. McFarland, the Captain's Wheel Resort was closed for business and the real property was close to going into foreclosure.

McFarland excluded Karletta Berry from any involvement in the Wheel through his superior knowledge of how to stack the

board of directors prior to Jerry Berry's pending death. Upon Jerry's death, McFarland could control the board of directors with a majority vote against his client's widow.

The only way to return to the status quo would be for McFarland to bring all of the debts of the Captain Wheel Resort, Inc. current and then turn it over to Karletta Berry. Turning over a corporation which has been run into the dirt just before foreclosure and loss of its only asset is not a return to the "status quo" and is an unwise decision. Please refer to the Plaintiff's Exhibit 78 which is the December 30, 2009 fax from JP Whelan referencing the attachment referred to as the memorandum of the current condition of the Captain's Wheel Resort, Inc. (the attachment is a December 26, 2009 fax from Michael McFarland to JP Whelan).

The District Court lacks reason and logic in its Memorandum Opinion. The Jury was not in affect reforming the Stock Purchase Agreement based upon the breach of fiduciary duty, the jury was assessing damages according to the evidence and law regarding breach of fiduciary duty, as instructed.

The District Court's claimed equitable decision would return the stock to plaintiff, who only had eleven dollars (\$11.00) in her purse at the time of trial, (Tr. P. 500, L. 13-24) just in time to have the assets of the corporation lost in foreclosure, and the plaintiff would still owe the attorney that

breached his fiduciary obligation the sum of \$100,000.00 plus interest for approximately seven years. If the Captain's Wheel was still in the same condition it was at the time of the breach of fiduciary duty, then rescission would be an appropriate remedy.

The District Court's Memorandum Opinion should shock the conscious of the reviewing court. The court concedes that McFarland breached his fiduciary duty in holding that rescission is appropriate.

Under the heading INSUFFICIENCY OF EVIDENCE TO SUPPORT DAMAGES AWARD, it is clear that the District Court did not weigh the evidence, it overlooked the evidence. The District Court misstates the evidence when it states there was no evidence of the value as to 50% of the stock in the closely held corporation.

The very formula the jury used to derive the damage figure was provided by the testimony of Michael B. McFarland in the following excerpt contained on page 153 of the Transcript at lines 9-24:

Q. How do you determine if stock in a corporation such as the stock in the Captain's Wheel Resort has equity in the stock?

A. How do I determine that?

Q. Yes.

A. I would look at what the corporation has in the way of assets and what it owes in terms of its liabilities, figure out what its net worth is, and divide that by

the number of shares that are issued, and that would give me a pretty good per share value, rough estimate.

Q. And is it similar to determining if there's say for a simple example, equity in a home? That the value of the home, subtract the debt against the home and the remaining is your equity?

A. Yeah. Its pretty basic.

This is how McFarland determined that Jerry Berry's 200 shares of stock had equity would not be exempt in a bankruptcy during that first meeting in McFarland's law office.

In this case, McFarland, the lawyer, and Zimmerman, the broker, were treating this as a real estate investment and the calculation referenced above is the very method that they used in determining to invest their \$100,000.00. At the time Zimmerman and McFarland were thinking of the Captain's Wheel Resort, Inc. as real estate. They thought that in two or three years they could sell it and everyone would make some money. (Tr. P. 803, L. 15-24). McFarland and Zimmerman considered the assets and liabilities of the Captain's Wheel Resort, Inc., and did review financial statements for the Captain's Wheel Resort operations before putting up the \$100,000.00 because they were just treating it like real estate. (Tr. P. 804, L. 1-20.). As soon as Jerry Berry died, they wanted to sell the real property, pay the debts and realize a gain (See Pl. Ex 35).

Karletta Berry testified regarding the value of her stock at being \$500,000.00 and explained she calculated that figure using the formula McFarland had referenced. Karletta Grace Berry

testified that her 200 shares of stock (which are exactly the same as McFarland and Zimmerman's 200 shares) in the Captain's wheel were worth \$500,000.00. (Tr. P. 496-499).

In Pickering v. El Jay Equipment Co., Inc. 108 Idaho 512, 517, 700 P.2d 134, 139 (Idaho App.,1985) it was stated that:

The measure of damages in an action for breach of fiduciary duty is the same as the measure of damages in an action for breach of trust. (*internal citation omitted*). "If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such breach of trust." RESTATEMENT (SECOND) OF TRUSTS § 205 comment i (1959) (hereinafter referred to as "Restatement"). On the other hand, "if the trustee commits a breach of trust and if a loss is incurred, the trustee may not be chargeable with the amount of the loss if it would have occurred in the absence of a breach of trust." Restatement § 205 comment f.

Under the Restatement (Third) of Trusts, P.I.R. § 205 (1992) titled "Trustee's Liability In Case Of Breach Of Trust" (underlining added):

A trustee who commits a breach of trust is ...(b) chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered.

In addition, the trustee is subject to such liability as necessary to prevent the trustee from benefiting personally from the breach of trust (see § 206).

Under the Restatement (Third) of Trusts, P.I.R. § 206 (1992), titled "Liability For Breach Of Duty Of Loyalty", the rule stated in § 205 is applicable where the trustee in breach

of trust sells trust property to himself individually, or otherwise violates his duty of loyalty.

Comment a to the Restatement (Third) of Trusts, P.I.R. § 206 (1992)§ 206 provides that (underlining added):

The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary. If the trustee commits a breach of his duty of loyalty he is chargeable with any loss or depreciation in value of the trust property resulting from the breach of duty, or any profit made by him through the breach of duty, or any profit which would have accrued to the trust estate if there had been no breach of duty..

Comment b to the Restatement (Third) of Trusts, P.I.R. § 206 (1992)§ 206 provides that (underlining added:

If the trustee in breach of trust sells trust property to himself individually, and the price paid by him was less than the value of the property at the time when the trustee purchased it, the beneficiary can compel him to pay the difference.

In the present case McFarland and Zimmerman loaned \$100,000.00 to Jerry Berry in 2003.

Interest and other charges were paid from the Berry's to McFarland and Zimmerman in the form of cash, goods and services from the time of the loan in 2003 until the loan was swapped for equity in the corporation on July 4, 2006. Unrestricted free food and drink was provided to McFarland and Zimmerman at the Captain's Wheel Resort without charge from inception of the loan.

On July 4, 2006 McFarland and Zimmerman entered into a stock purchase agreement with Jerry to exchange the debt of \$100,000.00 for 200 shares of stock in the Captain's Wheel Resort, Inc.

Starting with the month of July 2006 payments to Zimmerman were discontinued because the loan had been traded for stock.

July 4, 2006 is the date of the breach of duty by McFarland as attorney.

McFarland's own sworn affidavit characterized the 2006 stock purchase agreement as "Jerry's idea and it was designed to swap equity in the corporation for the debt owed to us". (Pl. Ex. 77).

McFarland's testimony at trial when asked "how do you determine if stock in the Captain's Wheel Resort, has equity" confirms that the equity in the Captain's Wheel Resort, Inc. is calculated by subtracting the debts of the corporation; from the value of the assets of the corporation to arrive at the equity figure.

The Resolution (Plaintiff's Exhibit 34) where McFarland sought to list the property with Treaty Rock Realty at the price of \$2,200,000.00 acknowledges that the corporation's business and real property are "all of the assets of the corporation".

Defendants' Exhibit "CCC", the transcript of the November 29, 2006 Special Board Meeting established the corporate debts

at that time to be: (1) the CIT small business loan at \$220,000.00, (2) the Wells Fargo line of credit in the amount of \$4,900.00 and (3) acknowledges the \$500.00 per month for the parking lot across the street.

On July 4, 2006, the fair market value of the real property owned by the Captain's Wheel Resort, Inc. was \$1,300,000.00.

The Plaintiff's testimony at trial established the debts of the Captain's Wheel Resort, Inc. as of July 4, 2006 were:

- a. \$242,000.00 for the CIT small business loan,
- b. \$ 15,000.00 for the debt on the parking lot, and
- c. \$ 5,000.00 for the Wells Fargo line of credit.
- d. \$ 77,000.00 Debt to Jerry Berry

The total corporate debt was \$339,000.00 on July 4, 2006.

On July 4, 2006 the net value of the stock in the Captain's Wheel Resort is arrived at by taking the fair market value of the corporation's assets and subtracting the corporations debts.

The fair market value of all of the stock in the Captain's Wheel Resort Inc. on July 4, 2006 is calculated as follows (FMV = fair market value):

July 4, 2006 FMV of Assets	\$1,300,000.00
(less) Debts of Corporation	<u>\$339,000.00</u>
Value/equity in 400 shares stock	\$ 961,000.00

200 shares of the stock (1/2 of the outstanding shares) is valued at 1/2 of the value of all of the stock.

The value of 200 shares on July 24, 2006 was \$480,500.00 (\$961,000.00 ÷ 2 = \$480,500.00).

The fair market value of the stock purchased from Berry by the Defendants is \$480,500.00.

McFarland and Zimmerman traded \$100,000.00 in debt for \$480,500.00 in equity in stock on July 4, 2006. This was a breach of fiduciary duty created by the attorney client relationship and with McFarland's inside knowledge that would not have been available if this were an arms length transaction.

At the time of breach of fiduciary duty McFarland and Zimmerman benefited in the amount of \$380,500.00 as a result of purchasing stock from Jerry. The benefit calculation is as follows:

FMV of stock purchased by fiduciary	\$480,500.00
Less price paid	\$100,000.00
Benefit to Fiduciary/Attorney	<u>\$380,500.00</u>

Damages must be proven with reasonable certainty.

Reasonable certainty requires neither absolute assurance nor mathematical exactitude; rather, the evidence need only be sufficient to remove the existence of damages from the realm of speculation. Todd v. Sullivan Const. LLC, 146 Idaho 118, 122, 191 P.3d 196, 200 (Idaho,2008).

In this case Zimmerman was been instrumental to the transaction between herself, McFarland and Jerry Berry and is equally liable for McFarland's breach of duty imposed due to his attorney-client relationship. She put up part of the loan and

the stock is held by Zimmerman and McFarland as joint tenants with rights of survivorship.

In Todd v. Sullivan Const. LLC, 146 Idaho 118, 125, 191 P.3d 196, 203 (Idaho,2008) again approved the rule of law as:

The law seems to be well settled that, where several people actively participate in any manner in the commission of a tort, not only the actual actor or assailant is liable but all others who aid, abet, counsel or encourage the wrongdoer by words, gestures, looks or signs are equally liable with him to the injured person.

Idaho code 6-803(5) provides:

A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where they were acting in concert or when a person was acting as an agent or servant of another party. As used in this section, "acting in concert" means pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.

Generally speaking Plaintiffs are entitled to recover as damages the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by the breach of duty of the defendants.

The Plaintiff is entitled to a Judgment in the amount of the Jury Verdict.

The District Court failed to act consistently with the legal standards and did not reach its decision by exercise of reason when it determined that there was insufficient evidence to support the damage award.

Under the heading INSUFFICIENCY OF EVIDENCE TO SUPPORT FINDING OF BREACH OF FIDUCIARY DUTY, the District Court fails to recognize the applicable law in regard to breach of fiduciary duty.

In Idaho the law regarding an attorney breaching the duty of loyalty to his client has been in existence for a long time. If an attorney enters into an attorney-client relationship with a client in regard to certain property, the attorney is not allowed to buy the opposing title to the property, without holding it in trust for the client. Ainsworth, et al. v. Harding, 22 Idaho 645, 128 P. 92. The confidence reposed in the attorney by the client is so carefully guarded by the law that it places the burden of proving the entire fairness of a pecuniary transactions between the attorney and the client upon the attorney. Ainsworth, et al. v. Harding, 22 Idaho 645, 128 P. 92

The District Court acted outside the applicable legal standards when it provided that the plaintiff had the burden to show an appropriation by the wrongdoer of a business opportunity reasonably available to the plaintiff.

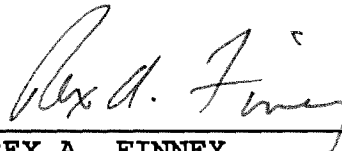
Michael B. McFarland provided bankruptcy advice to Jerry Berry when Jerry Berry sought advice on how to protect his stock in the Captain's Wheel Resort, Inc. from one of more judgment creditors. The next time Jerry Berry meets with McFarland it is

so McFarland can provide money to Jerry Berry to buy out the other owners in the corporation. Three years later when Jerry Berry is about to die, McFarland and his fiancé acquire 200 shares of stock from Jerry to "swap equity in the corporation for debt" owed to McFarland and Zimmerman. (Pl. Ex 77).

CONCLUSION

The District Court's grant of a new trial was an abuse of discretion and should be reversed. The Judgment should be confirmed.

RESPECTFULLY SUBMITTED this 6 day of October, 2011.



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Attorney For Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 6 day of October, 2011, two (2) true and correct copies of the foregoing each, were served by deposit in the U.S. Mail, postage prepaid, and were addressed to:

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