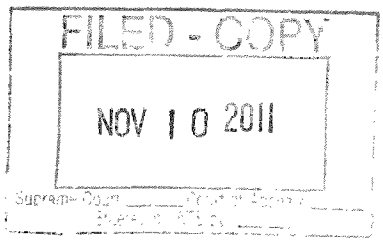
11-10-2011

Berry v. McFarland Respondent's Brief Dckt. 37951

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,	)	Supreme Court Docket No. 37951-2010
Plaintiffs/Appellants,	)	
v.	)	Kootenai County District Court No. CV 2007-2409
MICHAEL B. MCFARLAND, MICHAEL B. MCFARLAND, P.A., and KAREN ZIMMERMAN,	)	
Defendants/Respondents.	)	



RESPONDENTS' BRIEF

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

Honorable Charles W. Hosack, District Judge, Presiding

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STATEMENT OF THE CASE

(a.) Nature of the Case

This is a case brought by Karletta Berry [Berry], a widow, alleging that Respondent Michael B. McFarland [McFarland] was her late husband's attorney, that he and his fiancee, Karen Zimmerman [Zimmerman] purchased assets from her deceased husband for less than fair market value, and that such purchase was a breach of fiduciary duty. The complaint sought rescission of the Purchase and Sale Agreement, compensatory damages, constructive trust, quiet title, disgorgement of profits and to set aside "all actions taken by McFarland and Zimmerman as corporate officers, directors and shareholders."

(b.) Course of Proceedings

McFarland and Zimmerman agree with the first paragraph of Berry's description. The jury, on the special verdict form, found that there was a "breach of duty regarding the Sttock [sic] Purchase Agreement by defendant Michael McFarland as the attorney for the plaintiff which was the proximate cause of damages to the plaintiff" and that there was a breach of fiduciary duty regarding the Stock Purchase Agreement owed by defendants to plaintiffs, "even though there was no attorney-client relationship between them, which was the proximate cause of damages to plaintiffs."

McFarland and Zimmerman agree with the remainder of Berry's description of the course of proceedings.

(c.) Statement of Facts

McFarland and Zimmerman disagree with Berry's Statement of Facts as follows:

On page 3 of Berry's Brief, it states "Jerry and Karletta Berry purchased the Nordstroms' 200 shares of stock in the Captain's Wheel Resort, Inc in June, 2000." As shown by Plaintiff's Exhibit

6, Jerry Berry alone purchased that stock. Karletta Berry was not added as a shareholder until October, 2006, after the Purchase and Sale Agreement between Jerry Berry and McFarland and Zimmerman had been signed. As the District Court stated, "Karlotta [sic] Berry was not an owner and is not a signator to the Stock Purchase Agreement." (R.P. 1245)

On pages 7 and 26, Berry alleges that McFarland and Zimmerman "did review financial statements" before putting up the $100,000. The cited portion of the transcript (Tr. P. 804, L. 1-20) clearly states that they were not reviewed.

On page 10, Berry states that a special meeting was held on October 15, 2011. The meeting was in 2006.

On page 13, Berry states that "McFarland let Monnie Cripe and Marie Streater basically run the business without any normal controls such as checking till to be long or short, meal costing or other normal protocol." There was no testimony or evidence establishing "normal controls" or "normal protocol". This is argument, not a statement of facts.

Likewise, on page 14, Berry's statement that "the grounds for cause were questionable at best" is opinion or argument, not a statement of fact.

On page 16, the testimony of Toby McLauglin (which was disputed by the respondents) is stated as though it is fact.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Respondents have no additional issues on appeal.

ATTORNEY FEES ON APPEAL

Respondents are not seeking attorney fees on appeal.

RESPONDENTS' ARGUMENT

1. Standard of Review

McFarland and Zimmerman do not disagree with Berry's citations of authority regarding the standard of review.

2. The District Court Acted within the boundaries of its discretion, and acted consistently with legal standards.

Berry's brief, on page 19, argues that "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 amount paid." The transparency is self-evident. There is no such authority. As the District Judge stated in his Memorandum Opinion and Order, "The difficulty with this case lies in the disconnect between the final judgment and any articulable legal theory supporting the result." (R.P. 1240)

It should be noted that Berry's Complaint, which asserted numerous claims (including rescission of the Purchase and Sale Agreement), did not contain a request for such relief. This theory apparently developed during the trial.

The District Court acted within the boundaries of its discretion when it found a portion of the Restatement of Trusts to be "inapplicable to the facts of this case." (R.P. 1241). The District Court explained its reasoning adequately, stating, "the relationship here is not that of an investment banker managing trust property for the beneficiaries of a trust. Instead, there is an arms length bona

fide purchase and sale agreement between competent parties." " During trial, plaintiffs' counsel conceded that the Stock Purchase and Sale Agreement was valid." (R.P. 1241)

3. The District Court reached its decision by the exercise of reason.

One major problem was the inadequacy of the Special Verdict form submitted to the jury. As the District Court stated, "*The form of the jury verdict submitted to the jury did not provide the jury with the option of restoring the 2003 loan agreement which the jury had found to be the true agreement of the parties. The jury entered a monetary award because the form of the special verdict gave the jury no other option. The Court is firmly convinced that the verdict would have been different, had the jury been aware of the full range of remedies available.*" [emphasis added] (R.P. 1246)

This appears to be a primary basis for the order for a new trial, and was reached by the exercise of reason. Berry's original complaint asked for the remedy of rescission, as opposed to the award of damages. Since there had been no election of remedies at the time the case was submitted to the jury, and Berry's case focused on the argument that the original transaction was a loan, the jury should have had the opportunity to make a finding in that regard.

The District Court, further, in addressing the insufficiency of evidence supporting the damages award, stated, "There was no evidence of value as to 50% of the stock in the closely held corporation as of the July 2006 date." (R.P. 1245) It is certainly reasonable to assert that a 50% (non-controlling) ownership interest in a small, closely-held corporation would be valued differently from 100% ownership, or even controlling, majority ownership.

The Court added, "In 2003, an arms length transaction [the Campbell sale] had established the purchase price of 50% of the stock at $100,000. There was absolutely no evidence of any market for 50% of the stock of the corporation at the price of $480,500 as of any date, much less as of July

2006. A mathematical computation of dividing the appraised value of the real property, less business debts, by 2 is purely speculative as to what 50% of the stock in a closely held corporation would be worth on the open market." (R.P. 1245,1246) This accurately reflects the evidence, and the exercise of reason by the District Court.

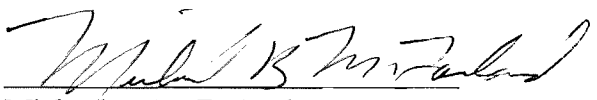
In her brief (page 25), Berry argues that "the very formula the jury used to derive the damage figure was provided by the testimony of Michael B. McFarland", quoted on pages 25 and 26. As in all other testimony, however, that addressed only the total value - not that of a partial, non-controlling interest. Further, neither Berry nor anyone outside the jury knows the "very formula" that was used. Even if the assumption is correct, however, it is still speculative.

The District Court's finding of insufficient evidence to support finding of breach of fiduciary duty was likewise the result of the exercise of reason, clearly explained: "Assuming a breach of fiduciary duty can be the proximate cause of wrongfully causing a 100% owner of the stock in a corporation to enter into a contract of sale for 50% of the stock, there still needs to be a showing of an appropriation by the wrongdoer of a business opportunity reasonably available to the 100% owner to sell one half of his ownership interest to a third party at some materially different price." (R.P. 1246)

CONCLUSION

The Order if the District Court vacating the judgment and ordering a new trial should be affirmed, and the Respondents should be awarded costs on appeal..

Respectfully submitted this 8th day of November, 2011



Michael B. McFarland
Attorney for Respondents

Certificate of Delivery

The undersigned hereby certifies that two (2) true and correct copies of the foregoing Respondents' Brief were served by deposit in the U.S. Mail, postage prepaid, on the 8th day of November, 2011 addressed to the following:

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