

12-5-2011

# Berry v. McFarland Appellant's Reply Brief Dckt. 37951

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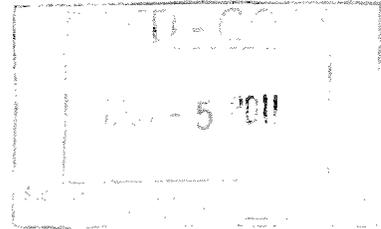
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IN THE SUPREME COURT OF THE  
STATE OF IDAHO

KARLETTA GRACE BERRY, a widow, )  
KARLETTA GRACE BERRY, Personal )  
Representative of the Estate of )  
Jerry Lee Roy Berry, CAPTAIN'S ) Supreme Court Docket No.  
WHEEL RESORT, INC., an Idaho ) 37951-2010  
Corporation, )  
 )  
Plaintiffs/Appellants, )  
 )  
v. ) Kootenai County District  
 ) Court No. CV-2007-2409  
 )  
MICHAEL B. MCFARLAND, MICHAEL )  
B. MCFARLAND, P.A., and KAREN )  
ZIMMERMAN, )  
 )  
Defendants/Respondents. )  
\_\_\_\_\_ )



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APPELLANTS' REPLY BRIEF

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

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THE HONORABLE CHARLES W. HOSACK DISTRICT JUDGE, PRESIDING

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RESPONSE TO RESPONDENTS' STATEMENT OF FACTS

- (1) McFarland and Zimmerman did not review profit and loss Statements and treated the purchase of stock as the purchase of real estate.

On page 5 of Respondents' Brief. Mr. McFarland is correct when he states that:

On Page 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"

Berry's attorney made an error in the Appellants' Brief, and did intend to emphasize that McFarland and Zimmerman did not review financial statements or profit and loss statements of the Captain's Wheel Resort, or anything like that. Pages 7 and 26 of the Appellants' Brief at the relevant portion should have read that:

Berry and McFarland did not 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.

McFarland and Zimmerman did not review financial statements of the Captain's Wheel Resort, Inc. before purchasing stock in the Captain's Wheel Resort, Inc.

This is because McFarland and Zimmerman were treating the purchase of stock in the Captain's Wheel Resort, Inc. as the purchase of real estate. (Rr. P. 804 L.4-10).

McFarland and Zimmerman thought that in two or three years they could sell the Captain's Wheel Resort, Inc. real property and everyone would make some money. (Tr. P. 803, L. 15-24).

McFarland proposed to sell the Captain's Wheel Resort, Inc. real property just shortly after Jerry Berry died through Treaty Rock Realty, where Zimmerman was a licensed real estate broker. McFarland and Zimmerman's proposed corporate Resolution (Plaintiff's Exhibit 34) sought to list the real property with Treaty Rock Realty at the price of \$2,200,000.00 and acknowledges that the corporation's business and real property are "all of the assets of the corporation".

In this case, upon selling the Captain Wheel Resort, Inc. Real Property, the proceeds from sale would have first been applied to corporate debts and encumbrances and then  $\frac{1}{2}$  of the balance would have been distributed to Berry and the other one half would have been distributed to McFarland and Zimmerman.

The damage award in this case was consistent with the facts of this case and the law regarding breach of fiduciary duty.

REPLY TO RESPONDENTS' ARGUMENT

1. A transaction between a lawyer and his client is not an arms length bona fide purchase and sale agreement between competent parties

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.

The attorney client relationship is a fiduciary relationship, just as the investment banker managing trust property for the beneficiaries of a trust is a fiduciary relationship.

2. Berry's Complaint clearly sought damages for the difference between the price Defendants paid for ½ of the stock in the Captain's Wheel Resort, Inc. and the fair market value

McFarland and Zimmerman contend on page 6 of the Respondents' Brief that Berry's Complaint did not contain a request for relief seeking damages for the difference between

the fair value of the stock purchased by McFarland and Zimmerman and the amount they actually paid for the stock.

Idaho is a notice pleading state. Notice pleading only requires a pleading "which sets forth a claim for relief ... a short and plain statement of the claim showing that the pleader is entitled to relief" in addition to alleging jurisdiction of the court and a demand for judgment. I.R.C.P. 8(a). Hoyle v. Utica Mut. Ins. Co. 137 Idaho 367, 376, 48 P.3d 1256, 1265 (Idaho,2002).

Paragraph 26 of Berry's Complaint states:

26. On both August 9, 2003 and July 4, 2006 (the date the Stock Purchase and Sale Agreement was signed), the net value of the corporate assets exceeded one million dollars. The Defendants bought into the corporation at far below fair market value and received a benefit of the bargain to the detriment of Michael B. McFarland's and/or Michael B. McFarland, P.A.'s Clients.

(R. P. 14)

Paragraph Nos. 45, 47 and 48 of Berry's Complaint state:

45. The Defendant Michael B. McFarland derived a benefit to the detriment of his clients by entering into the Stock Purchase and Sale Agreement.

47. The Stock Purchase and Sale Agreement is overreaching in the Defendants' favor as the Defendants provided inadequate consideration and placed the risk of loss and taxes on the client.

48. Entering into the Stock Purchase and Sale Agreement with Jerry Berry constitutes breach of a fiduciary duty by Michael B. McFarland and/or Michael B. McFarland, P.A..

(R. P. 18-19) .

Paragraph No. 51(b) and 51(e) of Berry's Complaint state that Berry is entitled to:

b. Recover compensatory damages

...

e. Disgorgement of profits earned by the defendants as a result of the transaction.

(R. P. 19)

Likewise the Relief sought in Berry's Complaint included relief such as "recover compensatory damages in excess of ten thousand dollars" and "disgorgement of profits earned by the defendants as a result of the transaction". (R. P. 25) .

Berry's Complaint clearly sought to recover the damages that were awarded by the Jury and entered in the Judgment.

#### 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 1 day of December, 2011.



\_\_\_\_\_  
REX A. FINNEY

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Attorney For Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_\_ day of December, 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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