6-10-2011

Clayson v. Zebe Appellant's Brief Dckt. 38471

Gary L. Cooper - Idaho State Bar #1814
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Second Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182

Counsel for Appellants

IN THE SUPREME COURT OF THE STATE OF IDAHO

GAYLEN CLAYSON, Plaintiff-Counterdefendant-Respondent, vs. DON ZEBE, RICK LAWSON, AND LAZE, LLC., Defendants-Counterclaimants-Appellants.	Supreme Court Docket No. 38471-2011 Bannock County Case No. 2009-2212

APPELLANTS' BRIEF ON APPEAL

Appeal from the District Court of the Sixth Judicial District in and for the County of Bannock

Honorable Stephen S. Dunn, District Judge, Presiding

For Plaintiff-Respondent:

Blake S. Atkin
7579 North Westside Hwy
Clifton, ID 83228

Atkins Law Offices
837 South 500 West, Ste 200
Bountiful, UT 84010

For Defendants-Appellants:

Gary L. Cooper
Cooper & Larsen
P. O. Box 4229
Pocatello, ID 83205

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

This case arose from a failed attempt to form a partnership between a dairy farmer, a milk hauler, a real estate agent and an accountant for the purpose of purchasing and operating a cheese factory and restaurant in Thayne, Wyoming. The dairy farmer, Gaylen Clayson, filed suit against the real estate agent, Don Zebe, and the accountant, Rick Lawson[1], for breach of contract or, in the alternative, unjust enrichment. Clayson later amended his Complaint to include claims for duress, extortion, slander and defamation. Zebe and Lawson counterclaimed for conversion, replevin and misrepresentation. The counterclaim was voluntarily dismissed prior to the case going to trial.

On motion for summary judgment, the trial court held that no partnership was formed, no express contract to pay Clayson for his alleged partnership interest existed and Clayson's claims for duress, extortion, slander and defamation were not supported by the evidence. The trial court, however, concluded that issues of fact existed which precluded summary judgment on the equitable claims as to whether Zebe and Lawson had an obligation to reimburse Clayson for refurbishment expenses to the factory and restaurant under either an implied-in-fact contract or by way of unjust enrichment.

The case was tried over three days to the trial court sitting without a jury. The trial court found in favor of Clayson holding that the conduct of the parties created a contract-in-

---

[1]Laze, LLC was also named as a Defendant. Because, it is wholly owned by Zebe and Lawson identifying it separately does not add much to the discussion of the case or issues on appeal. Therefore, unless the context requires it reference to Zebe and Lawson will include Laze, LLC.

fact and an implied-in-law contract requiring Zebe and Lawson to reimburse Clayson for refurbishment expenses in the amount of $97,310.94. Finding that both parties prevailed in part and that there was no commercial transaction, but only an equitable claim, the trial court denied attorney fees and costs to any party.

STATEMENT OF FACTS

Clayson has been a dairy farmer for 38 years. (Tr. Vol. I, p. 9, LL 9 - 15) In June of 2008, Clayson met with Morris Farinella who was 85 and owned the cheese plant and restaurant in Thayne, Wyoming. (Tr. Vol. I, p. 30, LL 12 - 21) The cheese plant had been shut down for about 2 ½ years and was in bankruptcy. (Tr. Vol. I, p. 45) The restaurant was open. (Tr. Vol. I, p. 29, LL 3 - 5) Morris Farinella was trying to sell the cheese plant and restaurant with the help of a Wyoming real estate agent through the bankruptcy court. (Tr. Vol. I, p. 27 L 20 - p. 28, L 11) Clayson had expressed an interest in purchasing the cheese plant and restaurant. (Tr. Vol. I, LL 16 - 22)

Morris Farinella asked Clayson to help operate the restaurant. (Tr. Vol. I, p. 30, L 22 - p. 31, L. 6) On July 1, 2008, Clayson took over operation of the restaurant. (Tr. Vol. I, p. 32, LL 5 - 8) It was not until August 28, 2008, that Clayson had anything in writing authorizing him to operate the restaurant and it only authorized him to run the restaurant, take care of the worker's compensation insurance for the restaurant employees and take care of the cleanliness of the plant. (Exhibit 5A; Tr. Vol. I, p. 237, L 17 - p. 240, L 6) The money from operating the restaurant was deposited into an account which had been established for

the restaurant and occasionally Clayson put some of his own money into the account. (Tr. Vol. I, p. 77)

Clayson had no ownership interest in the restaurant or the cheese plant on July 1, 2008 and never thereafter had an ownership interest in the restaurant or cheese plant. (Tr. Vol. I, p. 215, L 21 - p. 216, L 4; 248, LL 21 - 24) Clayson believed he would be able to put something together to buy the restaurant and cheese plant so that he would have a place to sell his milk. (Tr. Vol. I, pp. 216 - 218) Clayson told Morris Farinella that if the cheese plant was not up and running by October 2008 he could not be a part of it. (Tr. Vol. I, p. 40, LL 5 - 21)

The milk hauler, Jeff Randall introduced Clayson to Zebe. Clayson, Zebe and Lawson all agree that the initial introduction was for the purpose of having Zebe write a business plan for Clayson, not finance the acquisition of the plant and restaurant. (Tr. Vol. I, p. 231, LL 18 - 23; Tr. Vol. II, p. 351, L 20 - p. 352, L 10; Tr. Vol. II, p. 413, LL 2 - 9)

Clayson spent time from July 1, 2008 to October 8, 2008, at the restaurant and cheese plant. He managed the restaurant, opened and closed the restaurant, worked around the plant, incurred expenses to refurbish the plant and restaurant and supervised others in working around the plant. (Tr. Vol. I, pp. 43 - 64) All of the work Clayson performed at the plant and restaurant was performed before he left on October 8, 2008. (Tr. Vol. I, p. 247, LL 12 - 16) All the expenses for which Clayson sought reimbursement were not approved in advance by Zebe or Lawson. (Tr. Vol. I, p. 232, L 5 - p. 237, L 13) In fact, Clayson stipulated that

none of the expenses were incurred and none of his labor was performed at the request of Zebe and Lawson. (Tr. Vol. II, p. 358, LL 1 - 10)

Although the exact timing was disputed, Zebe and Lawson became interested in acquiring the plant and restaurant at approximately the same time Clayson told them he was out of money and unable to continue operating the restaurant. (Tr. Vol. I, Tr. Vol. II, p. 416, LL 2 - 25) On October 2, 2008, Rick Lawson prepared paperwork to form SVC, LLC which included Clayson, Lawson and Zebe as members. (Exhibit J) Although Clayson was briefly a member of SVC, LLC his name was removed from the LLC shortly after he turned the restaurant over to Zebe and Lawson on October 8, 2008. (Tr. Vol. I, p. 252, L 4 - p. 253, L 10; Tr. Vol. II, p. 418, L 18 - p. 420, L 25)

Despite the removal of his name from SVC, LLC, Clayson was involved in making an offer to purchase the cheese plant and restaurant. Clayson and Randall signed a Purchase and Sale Agreement on October 17, 2008 in which they agreed to buy the Star Valley Cheese Plant from its owner, Morris Farinella, in its "present condition" for $800,000 (Exhibit D). The testimony about Clayson's involvement in the execution of that agreement was disputed. Clayson testified that he signed the agreement because he had the relationship with Farinella and because Zebe and Lawson told him they were not going to spend any money until they got ownership and they were making no effort to purchase the cheese plant and restaurant. (Tr. Vol. I, p. 217, L 5 - p. 220, L 20) Zebe testified that he decided to make an offer at the prompting of Jeff Randall in a phone conversation on October 16, 2008. (Tr. Vol. II, p. 374,

L 5 - p. 379, L 5) Randall testified that he made the decision on October 16, 2008 to make an offer of $800,000 to get the ball rolling because if the cheese plant opened he felt he would benefit from revenue earned from trucking milk to the plant. (Tr. Vol. II, p. 469, L 12 - p. 472, L 10)

The following day, October 17, 2008, Randall drove with Clayson to the Star Valley restaurant and met with Zebe. (Tr. Vol. II, p. 470, L 7 - p. 471, L 4) Both Randall and Zebe recalled that Zebe called the realtor to tell him he was going to make an offer, but the realtor and Zebe got into an argument and Zebe told Randall he had changed his mind and was not going to make the offer. (Tr. Vol. II, p. 374, L 12 - p. 378, L 3; p. 471, L 5 - p. 472, L 23) Randall persisted and Zebe agreed to have Randall make the offer of $800,000 for him but instructed him to have the words "and/or assigns" included so that Randall could assign the PSA to Zebe. (Tr. Vol. II, p. 377, LL 13 - 22) Randall stated that he did not know where the realtor lived and Clayson offered to show him. (Tr. Vol. II, p. 377, L. 23 - p. 378, L 3)

Randall testified that neither he nor Clayson had the money to perform and Randall's intent was to make the offer on behalf of Zebe and assign it to Zebe. (Tr. Vol. I, p. 220, LL 16 - 24; Tr. Vol. II, 469, LL 22 - 25; p. 474, LL 2- 6; p. 476, LL 9 - 22) Zebe paid the $10,000 earnest money called for in the PSA which was executed by Randall and Clayson on October 17, 2008. (Tr. Vol. II, p. 427, L 23 - p. 428, L 7; p. 475, L 25 - p. 476, L 8)

Later on October 17, 2008, Randall and Clayson returned to the Star Valley restaurant and presented Zebe with the PSA which had been executed. (Tr. Vol. II, p. 478, L 25 - 479,

L. 11) Zebe was upset because he did not see the "and/or assigns" language in the document and because Clayson's name was on the document. (Tr. Vol. II, p. 378, L. 16 - P. 379, L 5; p. 479, LL 12 - 23) The PSA did, in fact, have the "and/or assigns" language, but it was on the third page at line 117. (Exhibit D; Tr. Vol. II, p. 479, L 24 - P. 480, L 15) Randall told Zebe that it did not make any difference whether Clayson's name was on the PSA because they were going to assign it to Zebe anyway. (Tr. Vol. II, p. 480, LL 16 - 22)

The PSA provided that the buyer was purchasing the "cheese plant. equipment, restaurant . . . with all improvements thereon, easements and other appurtenances and all fixtures of a permanent nature currently on the premises except as hereinafter provided, in their present condition, ordinary wear and tear excepted . . ." (Exhibit D; Tr. Vol. I, p. 249, L 5 - p. 251, L 5) Clayson admitted this included all the improvements he made to the cheese plant and restaurant while it was owned by Morris Farinella. (Tr. Vol. I, p. 250, L 17 - p. 251, L10)

Whatever involvement Clayson had in executing the PSA, his interest in it was relinquished when he later executed an assignment. Both Randall and Clayson admit that on November 4, 2008, they assigned all their right title and interest in the October 17, 2008 PSA to SVC, LLC whose only members at that time were Zebe and Lawson. (Exhibit N; Tr. Vol. I, p. 252, LL 10 - 25; Tr. Vol. II, p. 481, L 3 - p. 484, L 1) Clayson knew he was not a member of SVC, LLC when he signed the assignment. (Tr. Vol. I, p. 253, LL 19 - 22)

Zebe and Lawson eventually acquired title to the cheese plant and restaurant. The transaction in which Zebe and Lawson purchased the restaurant and plant from Morris Farinella (or his company) closed on February 24, 2009. Zebe and Lawson paid $800,000 for the cheese plant and restaurant. (Tr. Vol. I, p. 296, L 24 - p. 297, L 15; Tr. Vol. II, 385, L 16 - p. 386, L 3)

After Zebe and Lawson purchased the restaurant and plant, Dairy Systems which performed work on the cheese plant at the request of Clayson sued Zebe and Lawson in Wyoming for its charges to renovate the cheese plant. That case is still pending. (Tr. Vol. I, p. 240, L 7 - p. 247, L 11)

ISSUES PRESENTED ON APPEAL

1. Do the facts support the trial court's conclusion that an implied-in-fact contract existed requiring Zebe and Lawson to reimburse Clayson?

2. Does an implied-in-fact contract require proof that the party to be held responsible requested performance?

3. If an implied-in-fact contract does not require proof that the party to be held responsible requested performance, must the party with the burden of proof establish a clear understanding by both parties of the items and the amount to be reimbursed as part of the elements of the implied-in-fact contract to be proved?

4. Do the facts support the trial court's conclusion that Zebe and Lawson were unjustly enriched by Clayson's refurbishments to the cheese plant and restaurant before they purchased it?

5. Can a party be unjustly enriched by improvements to property the party does not own but later purchases from the owner for good and valuable consideration?

ARGUMENT

SUMMARY OF ARGUMENT

The trial court erred when it found both an implied in fact contract and an implied in law contract. The trial court mixed the elements of these two distinct equitable remedies and thereby erroneously found in favor of Clayson. Although the general rule for finding an implied in fact contract requires performance at the request of the party to be held responsible and although the trial court admitted such did not exist, it still found for Clayson because of statements made after the fact by Zebe. The absence of performance at the request of Zebe and Lawson is most consistent with the implied in law contract where the recipient need not have requested the services. However, the recipient is only liable for unjust enrichment under the implied in law remedy. Here there was no unjust enrichment because Zebe and Lawson bought and paid for the restaurant and plant including Clayson's improvements. Only by ignoring the distinctions between the equitable remedies of implied in fact and implied in law contracts could the trial court find in favor of Clayson. The judgment in favor of Clayson should be reversed and the matter remanded to the trial court for entry of judgment in favor of the defendants denying Clayson's claims for reimbursement.

STANDARD OF REVIEW

> Our standard of review is well-established. Findings of fact will not be set aside on appeal unless they are clearly erroneous. *Chen v. Conway*, 121 Idaho 1000, 1004, 829 P.2d 1349, 1353 (1992) (citing I.R.C.P. 52(a)). Where findings of fact are supported by substantial and competent, though conflicting, evidence, they are not clearly erroneous and thus will not be disturbed by this Court. *Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969,

973 (2003). This Court exercises free review over the district court's conclusions of law to determine whether the court correctly stated the applicable law and whether the legal conclusions are sustained by the facts found. *Conley v. Whittlesey*, 133 Idaho 265, 269, 985 P.2d 1127, 1131 (1999).

Kennedy v. Schneider, 2011 Ida. LEXIS 82, 4-5 (Idaho May 26, 2011)

A. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE CONDUCT OF THE PARTIES CREATED A CONTRACT-IN-FACT WHEREBY DEFENDANTS AGREED TO REIMBURSE PLAINTIFF FOR THE EXPENSES SHOWN TO HAVE BEEN INCURRED IN REFURBISHING THE PLANT

In its decision granting Defendants' motion for summary judgment in part , the trial court determined that no express contract existed in which Zebe and Lawson would reimburse Clayson for his expenses in refurbishing the cheese plant and restaurant. (R. Vol. 2, pp. 254 - 258) To recover Clayson had to prove an "implied-in-fact" or an "implied-in-law" contract. (R. Vol. 2, pp. 258 - 262)

In its Memorandum Decision after the trial, the trial court concluded that Clayson proved an implied-in-fact contract. The trial court reasoned that it was "not finding a contract implied in fact based on Defendants' promise to pay Clayson for refurbishing expenses before they were incurred." (R. Vol. 4, p. 738) In fact, Clayson stipulated that none of the expenses were incurred and none of his labor was performed at the request of Zebe and Lawson. (Tr. Vol. II, p. 358, LL 1 - 10) Therefore, in finding an implied in fact contract the trial court departed from the general rule 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."[2] Instead of following the general rule, the trial court concluded "that an implied-in-fact contract exists because Defendants (sic) conduct and statements create an implied agreement to pay Clayson's refurbishment expenses when he transferred operation of the Plant and restaurant to Defendants on October 8, 2008." (R. Vol. 4, p. 738)

On October 8, 2008 Clayson did not own the Plant and neither did Zebe and Lawson. (Tr. Vol. I, p. 248, L 21 - p. 349, L 3; Tr. Vol. II, p. 385, LL 16 - 23) That fact makes it unlikely that Zebe and Lawson would agree to reimburse Clayson for expenses he incurred and work he performed on a property none of them owned[3]. However, the trial court ignored the unlikely nature of such an agreement and concluded that there was an implied in fact agreement to reimburse Clayson because Zebe made statements after October 8, 2008 in which he stated he was going to pay Clayson something, used Clayson's payment to Dairy Systems in negotiations with Dairy Systems and submitted a business plan to support a bank

---

[2] *Gray v. Tri-Way Constr. Servs.*, 147 Idaho 378, 387 (Idaho 2009)

[3] Idaho's betterment statutes permit an improver to recover the cost of improvements only if the improvements were made under color of title and in good faith. *Fouser v. Paige*, 101 Idaho 294, 297 (Idaho 1980) (An improver can recover if the improvements were made under color of title and in good faith.) See also *Bach v. Miller*, 144 Idaho 142, 146 (Idaho 2007) Here Clayson never attempted to recover under Idaho's betterment statutes because he never claimed to have been the owner of the property. (Tr. Vol. I, p. 215, L 21 - p. 216, L 4; 248, LL 21 - 24) *Fouser v. Paige*, 101 Idaho 294, 297 (Idaho 1980) (color of title has reference to something which has the appearance or gives the semblance of title but is not such in fact)

loan to purchase the Plant which touted the improvements Clayson made[4]. (R. Vol. 4, pp. 734 - 736)

The trial court did not cite any case law for its conclusion that "after the fact" statements can establish an "implied-in-fact" contract to reimburse Clayson. Because the vast majority of Idaho decision on "implied-in-fact" contracts follow the general rule, Idaho authority on this issue is sparse[5].

If the trial court's reasoning is correct that it is not necessary to establish that Zebe and Lawson requested Clayson to do the refurbishment to prove an implied-in-fact contract, then the Idaho case law requires, at a minimum, that Clayson prove that "the conduct of the parties implies an agreement from which an obligation in contract exists." *Continental Forest Prods. v. Chandler Supply Co.*, 95 Idaho 739, 743 (Idaho 1974) See also *Willnerd v. Sybase, Inc.*, 2010 U.S. Dist. LEXIS 114544 (D. Idaho Oct. 26, 2010) (In order to assert breach of an implied-in-fact contract, a plaintiff must demonstrate that both parties to the contract are aware of the contract's existence) Clayson also has the burden of proving all the elements of

---

[4]As will be discussed below, such reasoning is more consistent with an unjust enrichment theory than it is with an implied-in-fact contract theory.

[5]While there are earlier Idaho cases which make reference to quantum meruit and/or implied contracts, one of the earliest Idaho cases *explaining* the "implied-in-fact contract" theory of recovery stated: "An implied contract is one, the existence and terms of which are manifested by the conduct of the parties, ***with the request of one party, and performance by the other party often being inferred*** from the circumstances attending the performance." *Clements v. Jungert*, 90 Idaho 143, 153 (Idaho 1965) All subsequent "implied-in-fact contract" decisions suggest that the factual basis for finding an implied in fact contract requires performance at the request of the party to be held responsible as the necessary requirement.

a contract. As explained in *GEM Indus. v. Sun Trust Bank*, 700 F. Supp. 2d 915, 922 (N.D. Ohio 2010):

> The existence of an implied-in-fact contract, as with an express contract, "hinge[s] upon proof of all the elements of a contract." *Stepp v. Freeman*, 119 Ohio App. 3d 68, 74, 694 N.E.2d 510 (1992). The difference is that mutual assent to the essential elements of an implied-in-fact contract is shown not by an express offer and acceptance, but by the "surrounding circumstances, including the conduct and declarations of the parties[.]" *Id.* Those circumstances must "make it inferable that the contract exists as a matter of tacit understanding." *Id.*

The basic elements of a contract are subject matter, consideration, mutual assent by all the parties to all the terms, and an agreement that is expressed plainly and explicitly enough to show what the parties have agreed. *State v. Korn*, 224 P.3d 480, 482 (Idaho 2009)

> Contract formation requires mutual assent. *Thompson v. Pike*, 122 Idaho 690, 696, 838 P.2d 293, 299 (1992). "A distinct understanding common to both parties is necessary in order for a contract to exist." *Id.* Whether mutual assent exists is a question of fact. *Id.*

Gray v. Tri-Way Constr. Servs., 147 Idaho 378, 384 (Idaho 2009)

> "In order to constitute a contract, there must be a distinct understanding common to both parties. The minds of the parties must meet as to all of its terms, and, if any portion of the proposed terms is unsettled and unprovided for, there is no contract. (9 *Cyc.* 245.) An offer to enter into a contractual relation must be so complete that upon acceptance an agreement is formed which contains all of the terms necessary to determine whether the contract has been performed or not. (1 *Page on Contracts*, § 27; 9 *Cyc.* 248.) An acceptance of an offer, to be effectual, must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer. (1 *Page on Contracts*, § 45; 9 *Cyc.* 267.) An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter proposition, which must in turn be accepted by the offerer in order to constitute a binding contract. (9 *Cyc.* 290.) After an offer has been rejected by making a counter proposal,

it cannot be later accepted without a renewed consent of the offerer. (9 *Cyc.* 290.)"

Brothers v. Arave, 67 Idaho 171, 175-176 (Idaho 1946)

Before trial, the trial court found on motion for summary judgment that no express contract existed between the parties to reimburse Clayson. (R. Vol. 2, pp. 254 - 258) The testimony at trial did not change that conclusion.

Clayson's own testimony proved that there was no plain or explicit understanding about what was agreed. Clayson claimed all sorts of personal expenses unrelated to refurbishment of the plant or restaurant which were disallowed. (Tr. Vol. I, p. 76, L 5 - p. 157, L 24; Tr. Vol. II, p. 305, L 1 - p. 312, L 2) In total, Clayson claimed Zebe and Lawson agreed to reimburse him approximately $130,000 for bills he paid. (Tr. Vol. I, pp. 201 - 204) The bills listed on the first page of Exhibit "F" do not total anything close to $130,000[6]. The bills Clayson could actually substantiate with a check or credit card was a different amount, i.e. $97,310.24 which includes the $50,000 check to Dairy Systems. (R. Vol. 4, p. 740) What was the "after the fact" contract? Was there an agreement to reimburse Clayson's personal expenses? Was the agreement only to reimburse refurbishment expenses? Was the agreement that Clayson would be reimbursed $130,000? Was it $97,310.24? Was it $47,310.24? Was it $50,000? Was it $69,600. Clayson himself did not know what the agreement was. (Tr. Vol. I, p. 203, L 6 - p. 202 L 11) Zebe and Lawson denied the existence

[6]The total is $69,600

of any such agreement. (Tr. Vol. II, p. 380, LL 13 - 18; p. 429, L 12 - p. 432, L 10) Zebe's January 14, 2009 email (Exhibit S) does not save this claim because it contains a different number, "245k", which Zebe testified was a reference to the Dairy Systems bill, not the bills which Clayson is now seeking to recover under a theory of implied-in-fact contract. (Tr. Vol. II, pp. 313 - 317) While that e-mail may be significant in Dairy System's lawsuit in Wyoming, it does not support an implied-in-fact agreement between Clayson and/or Zebe and/or Lawson.

Clayson failed to carry his burden of proving an implied-in-fact contract. Clayson did not prove that he incurred the debts because Zebe and Lawson encouraged him to or asked him to incur the debts such that an inference was created that Zebe and Lawson intended to reimburse Clayson for the debts they asked him to incur. Even if, as the trial court suggests, the conduct of the parties shows an intent to reimburse Clayson for something, the conduct of the parties and the circumstances do not support an inference that the parties ever came to agreement as to what expenses Clayson would be reimbursed or the amount Clayson would be reimbursed. The absence of agreement on such critical issues is fatal to even an "after the fact" implied-in-fact contract. Clayson did not prove the terms of the agreement. *Fox v. Mt. W. Elec.*, 137 Idaho 703, 708 (Idaho 2002) (implied-in-fact contract is grounded in the parties' agreement and tacit understanding) Clayson did not prove that both parties were even aware of the existence of the implied-in-fact contract. *Willnerd*, supra. The implied-in-fact contract found by the trial court is not supported by the facts and

circumstances, is speculative and the trial court erred in finding an implied-in-fact agreement to reimburse Clayson.

B. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT ZEBE AND LAWSON WERE UNJUSTLY ENRICHED AND THEREFORE REQUIRED TO REIMBURSE CLAYSON FOR THE EXPENSES SHOWN TO HAVE BEEN INCURRED IN REFURBISHING THE PLANT UNDER THE THEORY OF CONTRACT IMPLIED IN LAW

> To recover on a contract implied in law, the claimant must show that the services were rendered with the reasonable expectation that the person who benefited from them would pay for them. *Nagele v. Miller*, 73 Idaho 441, 444, 253 P.2d 233, 235 (1953). The recipient may not have requested the services, but if the recipient knowingly and voluntarily accepts the benefits under circumstances where it would be unjust if the recipient did not pay for them, the courts will impose an obligation to pay. *Gillette v. Storm Circle Ranch*, 101 Idaho 663, 666, 619 P.2d 1116, 1119 (1980); *Weber v. Eastern Idaho Packing Corp.*, 94 Idaho 694, 697, 496 P.2d 693, 696 (1972), overruled on other grounds by *Pierson v. Sewell*, 97 Idaho 38, 45, 539 P.2d 590, 597 (1975); *Shurrum v. Watts*, 80 Idaho 44, 51, 324 P.2d 380, 384 (1958); *Reddy v. Johnston*, 77 Idaho 402, 406, 293 P.2d 945, 947 (1956); *Nagele*, 73 Idaho at 444, 253 P.2d at 235.

Barth v. Canyon County, 128 Idaho 707, 710 (Idaho 1996)

Because it is undisputed that Zebe and Lawson did not request the services and expenses which Clayson provided[7], if Clayson was to recover from Zebe and Lawson it had to have been under the theory of a contract implied in law which is not a contract at all.

> "A contract implied in law . . . '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 . . . .'" *Id.* The measure of recovery on an unjust enrichment claim "is not the actual amount of the enrichment, but the amount of enrichment which, as between two parties it

---

[7]Tr. Vol. II, p. 358, LL 1 - 10

> would be unjust for one party to retain." *Beco Constr. Co., Inc. v. Bannock Paving Co., Inc.*, 118 Idaho 463, 466, 797 P.2d 863, 866 (1990). The plaintiff has the burden of proving that the defendant received a benefit and of proving the amount of the benefit which the defendants unjustly retained. *Blaser v. Cameron*, 121 Idaho 1012, 1017, 829 P.2d 1361, 1366 (Ct. App. 1992).

Gray v. Tri-Way Constr. Servs., 147 Idaho 378, 388-389 (Idaho 2009)

It was improper in this case for the trial court to find Zebe and Lawson were unjustly enriched because they received nothing from Clayson. Clayson made the improvements while neither he nor Zebe and Lawson were owners of the property. (Tr. Vol. I, p. 248, L 21 - p., 250, L 25) The owner, Morris Farinella, was the only person who received any benefit from what Clayson did. Zebe and Lawson did not receive the property for free. They paid $800,000 to buy it from Morris Farinella. (Tr. Vol. I, p. 296, L 24 - p. 297, L 15; Tr. Vol. II, 385, L 16 - p. 386, L 3)

> The prima facie case for unjust enrichment is "(1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff of the value thereof." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88, 982 P.2d 917, 923 (1999) (quoting *Curtis v. Becker*, 130 Idaho 378, 382, 941 P.2d 350, 354 (Ct. App. 1997)). Inequity exists if a transaction is inherently unfair. *King v. Lang*, 136 Idaho 905, 910, 42 P.3d 698, 703 (2002). Yet the doctrine "does not operate to rescue a party from the consequences of a bargain which turns out to be a bad one." *George v. Tanner*, 108 Idaho 40, 43, 696 P.2d 891, 894 (1985).

Indep. Sch. Dist. v. Harris Family Ltd. P'ship, 249 P.3d 382, 389 (Idaho 2011)

Clayson did not confer a benefit on Zebe and Lawson. He conferred a benefit on the owner of the property, Morris Farinella. Zebe and Lawson did not appreciate any benefit from Clayson because they did not receive the improvements until after they paid a

substantial purchase price to Morris Farinella. There was nothing inequitable about Zebe and Lawson retaining whatever benefit Clayson bestowed on the property because Zebe and Lawson bought and paid for the property, including the improvements. Clayson did not contribute to the purchase price and assigned all of his rights in the PSA with Farinella to Zebe and Lawson because he did not have the money to complete the transaction. The trial court did not find that the assignment was inequitable or unfair. There is simply no factual basis to support the trial court's conclusion that Zebe and Lawson were unjustly enriched. The trial court erred in finding an implied-in-law contract which required Zebe and Lawson to reimburse Clayson after they bought and paid for the property and improvements.

ATTORNEY FEES ON APPEAL

It is well established under Idaho law that claims for breach of contract and unjust enrichment can be considered commercial transactions for purposes of attorney fee awards under I. C. §12-120(3). *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 921 (Idaho 2008) Plaintiff's Complaint and Amended Complaint alleged breach of contract and unjust enrichment. The case went to trial on equitable issues which included unjust enrichment. The trial court's decision in favor of Clayson included unjust enrichment as one of the bases for the decision.

If Zebe and Lawson prevail on this appeal they will have prevailed against Clayson's attempts to enforce an express or implied agreement to reimburse him for expenses he incurred in improving a plant and restaurant which he claimed was part of a commercial

transaction between himself and Zebe and Lawson. Although denied by Zebe and Lawson, the gravamen of all of the claims alleged by Clayson was the alleged commercial transaction between the parties. As the prevailing party on appeal, Zebe and Lawson should be entitled to an award of a reasonable attorney fee under Idaho Code § 12-120(3)

CONCLUSION

Because it was stipulated that none of the expenses for which Clayson sought reimbursement were incurred and none of his labor was performed at the request of Zebe and Lawson, the elements of the implied-in-fact remedy were not proven. The trial court overlooked that failure of proof and looked to Zebe's "after the fact" statements to prove the implied-in-fact contract. However, there was no implied or express agreement as to how much Clayson was to be reimbursed or for what he was to be reimbursed. The trial court ignored that failure of proof and concluded that Zebe and Lawson benefitted from Clayson's expenditures. By doing so the trial court incorporated an element of the implied-in-law remedy of unjust enrichment into its implied-in-fact contract analysis. However, the trial court completely failed to analyze whether there had been unjust enrichment. Because neither Clayson nor Zebe and Lawson owned the property which Clayson claimed to have improved, Zebe and Lawson had to buy and pay for the property and the improvements to benefit from the improvements. The fact that Zebe and Lawson bought and paid for the improvements should have negated the claim that Zebe and Lawson were unjustly enriched, but the trial court failed to ever analyze whether the subsequent purchase impacted the unjust

enrichment claim in reaching its decision that Clayson was entitled to be reimbursed $97,310.24 by Zebe and Lawson. Under close analysis it is clear that the trial court improperly mixed and matched the elements of implied-in-fact and implied-in-law contracts to reach its decision.

Zebe and Lawson request this Court to reverse the judgment in favor of Clayson and remand this matter for entry of judgment in favor of Zebe and Lawson finding that Clayson failed to prove an implied-in-fact or implied-in-law contract for reimbursement. Zebe and Lawson request their reasonable attorney fees and costs incurred in prosecuting this appeal.

DATED this 9th day of June, 2011.

COOPER & LARSEN

GARY L. COOPER

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June, 2011, I served two copies of the foregoing Appellants' Brief to:

Blake S. Atkin
7579 North Westside Hwy
Clifton, ID 83228

[✓] U.S. mail
[ ] Email: blake@atkinlawoffices.net
[ ] Hand delivery
[ ] Fax: 801-533-0380

Atkins Law Offices
837 South 500 West, Ste 200
Bountiful, UT 84010

[✓] U.S. mail
[ ] Email: blake@atkinlawoffices.net
[ ] Hand delivery
[ ] Fax: 801-533-0380

GARY L. COOPER