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Clayson v. Zebe Respondent's Brief Dckt. 38471

IN THE SUPREME COURT OF THE STATE OF IDAHO

GAYLEN CLAYSON, Plaintiff-Counterdefendant/Respondent, vs. DON ZEBE, RICK LAWSON, AND LAZE, LLC., Defendants/Appellants.	**Supreme Court Case No. 38471-2011**

APPELLEE'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
FOR BANNOCK COUNTY
THE HONORABLE JUDGE DUNN, PRESIDING

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STATEMENT OF THE CASE

Gaylen Clayson embarked on reopening the Star Valley Cheese plant. After spending more than four months, full time, living at and working on the plant getting it ready to reopen, he met defendants who were willing to take over his efforts to refurbish and reopen the plant.

He relinquished his interest in the business he and defendants had established to purchase, refurbish and run the plant and he assigned to defendants his interest in the contract he had with his long term business friend to purchase the plant.

In a trial to the court sitting without a jury, defendants unsuccessfully tried to convince the Court that Mr. Clayson turned over his summer's work, the thousands of dollars he spent, and the fruits of his long term relationship with the owner of the plant for no reason at all—without any obligation by defendants to pay him anything. The trial court rejected this illogical conclusion, and, based on Mr. Zebe's admission that he agreed to pay all the out of pocket expenses that Mr. Clayson could substantiate, found a contract implied in fact that if Mr. Clayson gave up his interest in the cheese plant and the company he and the defendants had formed to purchase, refurbish and run the plant, defendants would pay him his provable out of pocket expenses.

The trial court painstakingly reviewed Mr. Clayson's receipts and other documents and entered findings of fact and conclusions of law with respect to those damages in the amount of $97,310.94 that he found Mr. Clayson could prove. This award was an inevitable result of Mr. Zebe's admission that he agreed to pay for anything Mr. Clayson had spent on refurbishing the plant that he was able to prove.

FACTS

1. The Plaintiff Gaylen Clayson has known Morris Farinella, the former owner of the Star Valley Cheese Plant ("Cheese Plant") for many years. See Reporter's Transcript on Appeal Volume I at Pg. 19-20.

2. Mr. Clayson supplied milk to the Cheese Plant over the years while it was being run by Mr. Farinella. He helped Mr. Farinella recruit other dairy farmers to supply milk to the Cheese Plant and, at one point, Mr. Farinella loaned him money to purchase and operate a dairy in Wyoming that supplied milk to the Cheese Plant. See Reporter's Transcript on Appeal Volume I at Pg. 19-26, 29-30.

3. The Cheese Plant has not been able to remain profitable over recent years in part because of emerging environmental concerns over the disposal of whey, a byproduct of cheese production. The expense of whey disposal has resulted in recent years in the bankruptcy of several cheese plants in the area, including the plant in Blackfoot, Idaho, and resulted in a second bankruptcy of the Star Valley Cheese Plant in about 2005. See Reporter's Transcript on Appeal Volume I at Pg. 34, 41-42.

4. In 2007, Mr. Clayson was contacted by Morris Farinella who wanted him to reopen the Cheese Plant. Mr. Farinella knew that Mr. Clayson had the ability to supply the milk, Mr. Farinella and his son Joe Farinella assured Plaintiff they could market the cheese, and Mr. Farinella assured Mr. Clayson that he could clear up the title to the property so that Mr. Clayson could purchase the Cheese Plant. See Reporter's Transcript on Appeal Volume I at Pg. 29-30, 32, 42.

5. At the time of this contact, Mr. Clayson was in southern California on a mission and informed Mr. Farinella that he would not be back until the next summer.

Mr. Farinella indicated that would give him time to work out the title problems with the Cheese Plant. See Reporter's Transcript on Appeal Volume I at Pg. 29-30.

6. Mr. Clayson was interested in reopening the Cheese Plant because he had a business plan to ship the whey back to the farmer who supplied the milk. The farmer could use the whey in feeding his cattle, and the value of the whey would offset the cost of shipping. In this fashion, both the environmental hazard connected with the whey and the cost of shipping milk to the remote location of the Cheese Plant could be offset. See Reporter's Transcript on Appeal Volume I at Pg. 41-42.

7. In late June 2008, Mr. Clayson met Mr. Farinella at the Cheese Plant. At that meeting, Mr. Farinella promised Mr. Clayson that "the Cheese Plant is yours," that he should do whatever was necessary to get the Cheese Plant ready to reopen, and that Mr. Farinella would work things out so that he could buy the Cheese Plant. He even offered to finance the purchase of the Cheese Plant by Mr. Clayson. See Record on Appeal Volume III at Pg. 556; See Reporter's Transcript on Appeal at Pg. 32.

8. During that meeting, it was also agreed that Mr. Clayson would take over the operations of the restaurant located on the premises. Mr. Farinella told him that he had to "cash flow" the restaurant and that it was his operation and he should run it as his own. See Reporter's Transcript on Appeal Volume I at Pg. 32.

9. On July 1, 2008, Mr. Clayson physically moved into the Cheese Plant. He lived on site, managed the restaurant, and worked and supervised the work of others whom he hired to help him refurbish the Cheese Plant and make it ready for reopening. See Record on Appeal Volume IV at Pg. 729. He also interfaced with potential lenders, notably the United States Department of Agriculture, and other people in the milk

industry who would be instrumental in the successful operation of a cheese plant in Wyoming. Mr. Clayson spent 10 to 12 hours a day, 6 days a week from July 1, 2008, through October 8, 2008, hiring and supervising workers on the Cheese Plant, working on cleaning and refurbishing the Cheese Plant, resurfacing the floors, plastering and painting walls, cleaning out unnecessary and scrap equipment, and cleaning and painting the plant, lining up contacts to supply milk to the Cheese Plant and to take excess milk when needed, discussing financing with the United States Department of Agriculture, giving tours of the Cheese Plant to interested parties and working toward reopening the Cheese Plant. See Reporter's Transcript on Appeal Volume I at Pg. 53-54.

10. In mid-August 2008, Mr. Clayson hired Dairy Systems Company, Inc. ("Dairy Systems"), a company with whom he had dealt for over 20 years, to upgrade the electrical work at the Cheese Plant. See Reporter's Transcript on Appeal Volume I at Pg. 11-12.

11. Over the years, as Dairy Systems has performed work for Mr. Clayson they have billed him monthly. Mr. Clayson would review the bills and if he had concerns or questions he and Dairy Systems would discuss the bill and either he would be convinced that the charges were appropriate or the bill would be modified. He expected to be billed by Dairy Systems in the same manner for the work they performed on the Cheese Plant. See Reporter's Transcript on Appeal Volume I at Pg. 13-14.

12. In early September 2008, Mr. Clayson received a bill from Dairy Systems for the work they had performed in August. Mr. Clayson had been onsite watching the work being performed by Dairy Systems during the month of August. Upon receiving the bill, Mr. Clayson reviewed that bill and had no concerns and voiced no objections to

the Dairy Systems billings. See Exhibit G; See Reporter's Transcript on Appeal Volume Iat Pg. 172-176.

13. In early October 2008, Mr. Clayson received the bill for the work done in September. Again, Mr. Clayson had been on site watching the work being performed by Dairy Systems during the month of September. Upon a review of the bill, Mr. Clayson had no concerns about the September billing and voiced no objections. See Exhibit G; See Reporter's Transcript on Appeal Volume I at Pg. 172-176. On September 16, 2008 he paid Dairy Systems $50,000 toward their bill.[1] See Exhibit F; See Reporter's Transcript on Appeal Volume I at Pg. 172-176.

14. On October 2, 2008, Mr. Clayson, Mr. Zebe and Mr. Lawson formed a limited liability company, SVC, LLC, to purchase, refurbish and operate the Cheese Plant. That LLC is the entity that operates the Cheese Plant for Mr. Zebe and Mr. Lawson to this day. On that same day, Mssrs. Lawson and Zebe had their names added as members of an LLC in Idaho known as Milk Marketing Management, LLC. Before their joining the company, Milk Marketing Management, LLC, had been owned by Gaylen Clayson and Jeff Randall. After entry of Mr. Lawson and Mr. Zebe into the company, the parties planned to use Milk Marketing Management, LLC, to secure the milk supply for the Cheese Plant. See Reporter's Transcript on Appeal Volume I at Pg. 271.

15. Mr. Zebe does not lightly enter into business with others, and did not enter into this business relationship with Mr. Clayson without first thoroughly checking out the

[1] At about the same time Mr. Clayson delivered two additional $50,000 checks to Dairy Systems to be applied toward the bill and to purchase a MCC, a large ticket item that needed to be ordered several weeks in advance of when it would be needed. Mr. Clayson told Dairy Systems that the two additional $50,000 checks would be funded by Mr. Lawson and Mr. Zebe. The checks were never funded.

cheese industry and Mr. Clayson. Logically then, even though the paperwork for SVC, LLC and Milk Market Management, LLC, was not filed until October 2, 2008, the agreement of the parties to, as Mr. Randall put it, work together to purchase, refurbish and reopen the Cheese Plant, occurred sometime before October 2, 2008. See Reporter's Transcript on Appeal Volume I at Pg. 269.

16. On October 8, 2008, Mr. Clayson's name was voluntarily removed from the SVC, LLC, records, but Mr. Clayson remained involved as is evidenced by the fact that when it came time to make an offer on the Cheese Plant, Mr. Randall talked first to Mr. Clayson, and only called Mr. Zebe on the phone as he and Mr. Clayson were on the way to Wyoming to make the offer. See Record on Appeal Volume IV at Pg. 732., See Reporter's Transcript on Appeal Volume II at Pg. 469-471.

17. On October 17, 2008, Mr. Clayson and Jeff Randall went to Wyoming to the home of the broker, Val Pendleton, and made an offer to purchase the Cheese Plant for $800,000. On their way to Wyoming to make that offer they called Don Zebe to tell him what they were doing and he agreed that it was a good move. See Reporter's Transcript on Appeal Volume II at Pg. 469-473.

18. True to the promise he had made to Gaylen Clayson in July that "the Cheese Plant is yours," and that he would work out the paperwork so Mr. Clayson could buy it, Mr. Farinella accepted the offer. See Reporter's Transcript on Appeal Volume II at Pg. 396.

19. On November 4, 2008, Gaylen Clayson and Jeff Randall assigned the contract to purchase the Cheese Plant to Don Zebe and Rick Lawson and the company of which they were the principles, SVC, LLC. See Record on Appeal Volume I at Pg. 74.

Mr. Zebe and Mr. Lawson borrowed $2 million from Citizens Community Bank of Idaho, backed by the United States Department of Agriculture to purchase and operate the Cheese Plant. They closed the purchase on February 24, 2009, once they had obtained that funding. See Reporter's Transcript on Appeal Volume I at Pg. 281-282.

20. In addition to being supplied to Mr. Clayson, the Dairy Systems bills were delivered to Mr. Zebe and Mr. Lawson. Neither voiced any objection to the bills until after they had obtained their financing from Citizens Community Bank on February 24, 2009. See Reporter's Transcript on Appeal Volume II at Pg. 313.

21. During the several months that they had the Dairy Systems bills in hand, Mr. Zebe and Mr. Lawson had complete control and access to the Cheese Plant. They employed experts, Bill Sulzer of Statco, and J.P. Electric, to examine the Dairy Systems work to determine what needed to be done to complete the electric retrofit. See Reporter's Transcript on Appeal Volume II at Pg. 314-315. Following the review by Defendants' own experts, Mr. Zebe and Mr. Lawson kept the design originated by Dairy Systems and even put their new Motor Control Center ("MCC") in the same location as designed by Dairy Systems. They also kept, and are using to this day, transformers, breaker panels, and wire pulled by Dairy Systems. See Reporter's Transcript on Appeal Volume II at Pg. 337-338.

22. During discussions with Klark Gailey of Dairy Systems related to a threat by the supplier of the MCC to put a lien on the Cheese Plant, Mr. Zebe did not voice any objection to the Dairy Systems bills. See Reporter's Transcript on Appeal Volume II at Pg. 313.

23. On February 19, 2009, Mr. Zebe wrote an email to Klark Gailey telling him that the funding was in the bank and inviting him to confirm that fact with the broker, Val Pendleton. See Exhibit V. Mr. Zebe admitted sending this email, but offered no explanation. See Record on Appeal Volume II at Pg. 390-392. Without some explanation, this email, which does not voice any objection to the Dairy Systems bills he had then had for at least four months, can only be interpreted as a communication to a creditor that the funding is in and he is soon to be paid.

24. Mr. Zebe and Mr. Lawson represented to lenders from whom they were successful in borrowing $2 million, that they had already paid for the costs of refurbishing the plant, and had paid $225,000 to Dairy Systems. See Exhibit I at 6. They also told Morris Farinella that upon closing they were prepared to absorb most of the debts incurred by Gaylen Clayson, including specifically the $245K owed to Dairy Systems. Exhibit S. See Reporter's Transcript on Appeal Volume II at Pg. 317.

25. After the funding had been obtained and liens on the property could no longer interfere with financing, Mr. Zebe wrote an email to Klark Gailey in which he acknowledged that even from his point of view, Dairy Systems was owed more than the $50,000 that Gaylen Clayson had paid them. Mr. Zebe, however, insisted that he would deduct from amounts owed to Dairy Systems the $50,000 that Gaylen Clayson had paid. Exhibits W and X. See Reporter's Transcript on Appeal Volume II at Pg. 335.

26. That Defendants agreed to pay at least some of Mr. Clayson's costs incurred in refurbishing the Cheese Plant cannot be doubted. See Exhibit I.

27. Mr. Zebe testified that he had stipulated and stipulated that they would pay any expenses incurred by Mr. Clayson that were supported by cancelled checks or

invoices and with the additional stipulation that they be for things that the Defendants could use. See Record on Appeal Volume I at Pg. 117; See Reporter's Transcript on Appeal Volume I at Pg. 276-277. Defendants also represented to the bank that they had already paid those costs. See Exhibit I at Pg. 6.

28. Defendants offered no evidence that any expenses incurred by Mr. Clayson were for things that Defendants could not use. What evidence is in the record indicates that most, if not all, of Mr. Clayson's efforts were useful to the Defendants. In the Business Plan that Mr. Zebe prepared, Exhibit I at 6, he lists for the banks, the work that had been done to that point in getting the Cheese Plant ready to reopen. That list included cosmetic and physical renovations, an electrical retrofit of the plant, resurfacing floors, plastering of walls, cleaning, removal of old equipment, maintenance, repairs and painting. If the work done was significant enough to merit a mention to the lenders, it can hardly be argued that it somehow could not be used by Defendants. See Exhibit I at Pg. 6.

29. Mr. Clayson prepared a hand written summary of his expenses that was introduced at the trial as the first page of Exhibit F. That handwritten summary, which was delivered to defendants at the time they were discussing Mr. Clayson's withdrawal from the business, was prepared by Mr. Clayson at the Star Valley Cheese Plant offices from invoices that were kept in the ordinary course of business of the Cheese Plant by April McMurdo, the company's secretary. Mr. Clayson turned the office and all its contents, including the file containing those invoices, over to the Defendants when he left in October 2008. Defendants did not produce that file or any documents relating to the

cost of refurbishing the Cheese Plant. See Reporter's Transcript on Appeal Volume I at Pg. 63-65.

30. The trial court after a thorough review of the documentation submitted by Mr. Clayson arrived at an amount of $97,310.94 that he found was substantially supported. See Record on Appeal Volume IV at Pg. 743.

31. The trial court found a contract implied in fact. The Court pointed out that "The Court is not finding a contract implied in fact based on Defendants' promise to pay Clayson for refurbishment expenses before they were incurred. The Court finds that an implied-in-fact contract exists because Defendants 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. See Conclusions of Law at Pg. 12.

SUMMARY OF ARGUMENT

The Trial Court found an implied–in-fact contract that defendants promised Gaylen Clayson that if he would relinquish whatever interest he had in his right to purchase the cheese plant and in the business entity he and they had set up to purchase, refurbish and run the cheese plant, they would reimburse him for the expenses he could prove he had paid in cleaning up and refurbishing the plant.

The implied-in-fact contract was proven by evidence that Gaylen Clayson lived and worked full time at the Cheese plant from July 1, 2008 to October 8, 2008 cleaning, refurbishing, repairing and preparing the plant to reopen. The evidence also showed that Mr. Clayson had a long term relationship with the owner of the plant, Morris Farinella.

Because of that relationship Mr. Farinella told Gaylen that he should do anything he wanted in preparing the plant to reopen as long as he did so at his own expense telling Mr. Clayson "the plant is yours" and that Mr. Farinella would make arrangements to clear the title and see to it that Mr. Clayson got to buy the Plant. Mr. Farinella kept that promise to Mr. Clayson and in November 2008 signed a purchase and sell agreement that allowed Mr. Clayson to buy the plant.

Mr. Clayson relinquished his interest in the entity on October 8, 2008. On November 12, 2008 Mr. Clayson assigned his interest in the contract to purchase the plant to the defendants. Defendants represented to the Bank that they had paid for the improvements Mr. Clayson had made to the plant. Mr. Zebe even admitted that the defendants agreed to pay Mr. Clayson for any costs he had incurred in refurbishing the plant so long as the costs could be documented, but at the time of trial defendants had not reimbursed Mr. Clayson for his substantial out of pocket expenses that the trial court found were adequately proven in the amount of $97,310.94.

These facts create the dual inference that a promise was made to reimburse Mr. Clayson's provable costs in exchange for Mr. Clayson relinquishing his interest in the purchase contract and the business entity set up by him and the defendants to buy, refurbish and run the cheese plant in exchange for that promise.

Defendants' argument on appeal is a classic straw man. Rather than analyzing the implied-in-fact contract the court found, defendants posit a different implied-in-fact contract, and then proceed to knock it down. It would be logically impossible for Mr. Clayson to have incurred the refurbishment expenses based on a promise by defendants since he incurred most of them before he met the defendants. But that is not the implied-

in-fact contract the court found. What the Court found was that Mr. Clayson relinquished his interest in the right to purchase the cheese plant and his interest in the business entity he and defendants had established in exchange for defendants' promise to pay his provable expenses. When one considers the implied-in-fact contract the Court found rather than defendants' straw man, not only is the conclusion the Court reached logical it is compelling. It makes absolutely no sense to suggest that Mr. Clayson transferred the fruits of his summer's work and the contract realized as a result of that work and a long term relationship with Mr. Farinella for no payment at all. When one considers Mr. Zebe's admission that defendants agreed to pay Mr. Clayson for all the expenses he could prove, the trial court really had no choice but to find the implied-in -fact contract to reimburse those expenses that Mr. Clayson proved at trial.

Defendants' arguments against the Trial Court's unjust enrichment finding suffers a similar flaw. Because defendants had to perform the contract Mr. Clayson assigned to them as part of his relinquishment of the contract and the business, defendants make the absurd argument that the business and the assignment to them had no value. Every day in this country, people purchase from others the opportunity that others have created. That they then have to go forward and complete the transaction does not detract from the value of the opportunity that they received. It made perfectly good logical sense for the Court to examine what Mr. Clayson had contributed to make this business opportunity viable in determining the value Mr. Clayson conferred on defendants when he let them take over the business on October 8, 2008 and then assigned the right to purchase the plant to them in November of that year.

ISSUES ON APPEAL

Issue No. 1. Were the trial court's findings of an implied-in-fact contract supported by substantial evidence where the evidence showed that plaintiff worked throughout the summer and fall cleaning and refurbishing the cheese plant that his long time business friend promised to sell to him, he transferred his interest in that contract to purchase the plant to the defendants and relinquished his interest in the entity set up to refurbish, purchase, and run the cheese plant, where defendants admitted they agreed to pay him his provable costs and represented to the bank they had paid those costs?

Issue No. 2. Did substantial evidence support the trial court's finding of a contract-implied-in-law where the owner of the cheese plant told plaintiff to do whatever he wanted to get the plant ready to reopen, the owner testified he had a higher offer for the plant but decided to sell it to the plaintiff, the local guy, and plaintiff worked throughout the summer and fall cleaning and refurbishing the cheese plant that his long time business friend promised to sell to him, then he transferred his interest in that contract to purchase the plant to the defendants and relinquished his interest in the entity set up to refurbish, purchase, and run the cheese plant, and defendants admitted that they were willing to but had not reimbursed him for the out of pocket expenses he could prove?

Issue No. 2: Is Mr. Clayson entitled to attorney fees on appeal under Idaho Code Section 12-120(3), or 12-121 where this transaction was indisputably a commercial transaction

and where this appeal is not supported by a logical argument that the Trial Court's findings were not supported by substantial evidence?

THE TRIAL COURT'S FINDING OF AN IMPLIED-IN-FACT CONTRACT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

In order to establish an implied-in-fact contract, the court must find that the evidence supports the dual inference that the plaintiff performed at the request of the defendants. Fox v. Mountain West Elec., Inc., 137 Idaho 703, 708, 52 P. 3d 848, 853 (2002). In this case the evidence compelled such findings.

Mr. Clayson had a long term relationship with the owner of the Star Valley cheese plant. The plant had been closed for several years and the owner approached Mr. Clayson and asked him if he were interested in reopening the plant. The owner told Mr. Clayson that he could do whatever he wanted to get the plant ready to reopen as long as it didn't cost the owner or bankruptcy court anything. He promised Mr. Clayson he would clear title to the plant and make it possible for Mr. Clayson to buy the plant. The owner would keep that promise when in November he signed a contract with Mr. Clayson to sell the plant.

Mr. Clayson, relying on the promise of the owner worked all summer and fall and spent substantial funds to refurbish the plant and get it ready to reopen. Mr. Clayson and defendants formed an LLC as the entity they would use together to purchase, refurbish, and run the plant.

Mr. Clayson relinquished his interest in that LLC to the defendants. He also assigned to the defendants his interest in the contract to purchase the cheese plant. Those

facts alone raise the substantial question why plaintiff would walk away from his summer's work and expenditure of close to $100,000 dollars had he not been made some promise by defendants.

It was not difficult for the court to discern what that promise was. Defendant Zebe admitted that he had agreed to pay for all the refurbishment costs Mr. Clayson had incurred so long as they could be documented. Defendants had made similar acknowledgments to other parties and even represented to the Bank that they had already paid Mr. Clayson's refurbishment costs. The court went to great effort to analyze Mr. Clayson's documentation to determine that the $97,310.94 was adequately documented to meet the terms of the contract to which Mr. Zebe admitted.

Defendants cannot argue that the trial court's finding of a contract implied in fact is not supported by the evidence so they set up a straw man. They argue that Clayson could not have performed his refurbishment work at their request because he performed most of it before he met defendants. It is surprising that defendants again make this fallacious argument on appeal, because the trial court pointed out to them the flaw in their reasoning: "The Court is not finding a contract implied in fact based on Defendants' promise to pay Clayson for refurbishment expenses before they were incurred. The Court finds that an implied-in-fact contract exists because Defendants 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. See Conclusions of Law at Pg. 12.

THE TRIAL COURT'S FINDING OF A CONTRACT-IMPLIED-IN LAW IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Like their arguments relating to the implied-in-fact contract, appellants argue against a contract that was not the implied-in-law contract that the court found. Not surprisingly, appellants find their straw man wanting. When this Court analyzes the implied-in-law contract found by the trial court, the court's conclusion that an implied-in-law contract should be imposed in this case is compelling.

An implied-in-law contract has three elements. (1) A benefit conferred on defendant by plaintiff. (2) appreciation by 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.

A. Mr. Clayson conferred a substantial benefit on defendants

Defendants argue that Mr. Clayson conferred no benefit upon them because they had to pay the purchase price under the contract he assigned them to purchase the Cheese plant. Commerce in this country would soon grind to a halt if the courts were to adopt a rule that the opportunity to enter into a business transaction is not a valuable consideration. Indeed, if all Clayson did was to get out of the way so that his long term business friend, Mr. Farinella, who had turned down a higher offer in favor of Mr. Clayson, would sell the plant to them, he conferred value on the defendants.

Nor was the value of that benefit hard for the court to figure out. Mr. Zebe testified that he agreed to pay for any contributions Mr. Clayson made to reopening the plant that could be verified. The trial court painstakingly reviewed Mr. Clayson's documentation to arrive at the value of the benefit Mr. Clayson conferred on the successors to the opportunity he built up to buy this cheese plant.

B. Defendants appreciated the benefit Mr. Clayson conferred on them

In their application for funding, defendants touted to the bank the efforts made by Clayson to refurbish the cheese plant. They even misrepresented to the bank that they had paid the debts incurred by Mr. Clayson to get the plant ready to open. There can be no doubt that when Mr. Clayson relinquished his interest in the LLC set up to buy, refurbish, and run the plant, defendant appreciated the value being conferred upon them.

C. It would be inequitable for defendants to not now pay for the benefit they received

Mr. Zebe admitted he should pay for the improvements Gaylen could prove. Defendants misrepresented to the bank that the money had already been spent by them or paid to third parties. Thus, defendants by their own words compel a conclusion that it would be inequitable for defendants to not now pay what they claimed to have already paid to get their funding.

MR. CLAYSON IS ENTITLED TO ATTORNEY FEES ON APPEAL

Idaho Code Section 12-120(3) provides that in every commercial transaction the prevailing party shall be awarded their attorney fees. An award of attorney fees is mandatory where a commercial transaction is the gravamen of the litigation. City of McCall v. Buxton, 146 Idaho 656, 201 P.3d 629 (Idaho 2009)(Section 12-120(3) mandates the awarding of a reasonable attorney's fee to the prevailing party in any commercial transaction) This Court has determined that section 12-120(3) also applies to attorney fees on appeal. The trial court denied attorney fees to either party because the plaintiff prevailed on only some of his claims and in an amount smaller than what he pleaded in his complaint. But in the event this court rules as requested by Mr. Clayson,

he will be the only party to this commercial transaction who prevailed at this stage of the litigation and an award of attorney fees under 12-120(3) would appear to be mandatory. The purposes of the legislature in promoting introspection and self policing of lawyers and the litigating public would best be served by an award of attorney fees to Mr. Clayson if he prevails on this appeal.

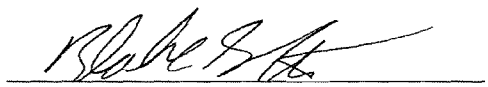
Mr. Clayson is also entitled to an award of attorney fees on this appeal under Idaho Code Section 12-121 and Idaho Appellate Rules, rule 41(a) because this appeal was pursued unreasonably and without foundation. Durrant v. Christensen, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990). As pointed out in the brief, defendants do not raise a substantial challenge to the factual basis underlying the implied-in-fact and implied-in-law contracts the trial court actually found, but instead attacked a contract that was never found by the trial court. They do this in light of the trial court's clear statement that: "The Court is not finding a contract implied in fact based on Defendants' promise to pay Clayson for refurbishment expenses before they were incurred. The Court finds that an implied-in-fact contract exists because Defendants 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. See Conclusions of Law at Pg. 12. That approach would not appear to comply with the appellate court's admonition that appeals that do not present a substantial question are discouraged. U.S. Nat. Bank of Oregon v. Cox, 126 Idaho 733, 889 P.2d 1123 (Idaho App. 1995). An award of fees for this appeal would therefore accomplish this Court's goals in discouraging meritless appellate litigation.

CONCLUSION

Mr. Clayson requests that this appeal be dismissed, the judgment of the trial court be affirmed and that he be awarded his attorney fees on appeal.

Dated this 8th day of July, 2011.

ATKIN LAW OFFICES, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 2011, I served two copies of the foregoing APPELLEE'S BRIEF to:

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