5-6-2013

April Beguesse, Inc. v. Rammell Clerk's Record v. 3 Dckt. 40212

Vol 3 of 4

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

LAW CLERK

VOLUME III OF III

APRIL BEGUESSE, INC., an Idaho Corporation,

COPY

Plaintiff / Counterdefendant / Respondent

vs.

KENNETH RAMMEL, an individual, CHRISTA BEGUESS, INC., an Idaho Corporation,

Defendants / Counterclaimants / Appellants

Appealed from the District Court of the Seventh *Judicial*

District of the State of Idaho, in and for Bonneville *County*

Hon. Joel E. Tingey, *District Judge*

David Alexander, RACINE OLSON NYE BUDGE BAILEY

PO Box 1391, Pocatello, ID 83204-1391

Attorney for Appellant

Jeffrey Brunson, BEARD ST. CLAIR GAFFNEY PA

2105 Coronado Street, Idaho Falls, ID 83404-7495

Attorney for Respondent

FILED - COPY

MAY - 6 2013

Supreme Court Court of Appeals

Entered on ATS by:

Filed this _____ *day of* _____, *20*____.

Clerk

By _____ *Deputy*

41212

IN THE SUPREME COURT OF THE STATE OF IDAHO

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff/Counterdefendant/Respondent, vs. KENNETH RAMMEL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, Defendants/Counterclaimants/Appellants. and, THE ESTATE OF CHRISTA BEGUESSE RAMMELL, by it qualified personal representative, Kenneth Rammell, Defendant/Counterclaimant.	)	Case No. CV-2009-2767 Docket No. 40212 VOLUME III of III

* * * * * * * * * * * * * *

CLERK'S RECORD ON APPEAL

* * * * * * * * * * * * * *

Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
in and for the County of Bonneville

HONORABLE JOEL E. TINGEY, District Judge.

* * * * * * * * * * * * * *

Attorney for Appellant

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

April Beguesse, Inc. An Idaho Corporation,

Plaintiff,

vs.

Kenneth Rammell, an individual, Christa , Beguesse, Inc., an Idaho Corporation. Estate of Christa Beguesse Rammell, by its qualified personal representative, Kenneth Rammell.

Defendants.

Case No. CV-09-2767

AFFIDAVIT OF COUNSEL

STATE OF IDAHO)
ss
County of Bannock)

DAVID E. ALEXANDER, being first duly sworn upon oath, and based upon his own personal knowledge, deposes and says as follows:

1. I am counsel of record for the Defendants herein and participated in the entire trial of this matter.

2. That during Plaintiff's counsel's closing arguments, he made improper arguments which invited the jury to decide the case contrary to the law, evidence and the pleading.

3. In particular, during his closing argument, Plaintiff focused on matters previously rejected by this Court. Namely, that Mr. Rammell only contributed $500 to become a 50% member of CBI, that the jury should find fraud regarding the will, and that April had a right to a guaranteed contract with the Rutter Group.

4. Opposing counsel also made arguments to the jury not based on evidence presented at trial, in that the Defendants defrauded ABI because if April died ABI would be worth nothing.

5. Opposing counsel further inflamed the jury by arguing irrelevant matters.

6. All of which tainted every claim before the jury and urged them to find fraud without any basis in the pleadings, evidence or in the law and, instead, based on passion and prejudice.

7. The Court erred in submitting jury instructions and a verdict form which,

a. permitted the jury to find liability in gross against all of the Defendants for discrete acts of fraud allegedly committed by individual Defendants;

b. permitted the jury to assign damages in gross on discrete fraud claims for each of which the Plaintiff was required by law to plead and prove with clear and convincing evidence the damages resulting therefrom;

c. confused the jury and permitted it to find fraud and breach and award damages on matters not properly submitted to it, including but not limited to claims related to the will of Christa Beguesse Rammell; and

d. confused the jury with respect to the Defendant's Counterclaim.

8. This affidavit is made in support of Defendants' Motion for Judgment Notwithstanding the Verdict or in the alternative, for a New Trial.

FURTHER SAITH THE AFFIANT NAUGHT.

DATED this 28th day of April, 2012.

DAVID E. ALEXANDER

STATE OF IDAHO)
: ss.
County of Bannock)

On this 29th day of April, 2012, before me, a Notary Public for the State of Idaho, personally appeared DAVID E. ALEXANDER, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in this Certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at: Pocatello ID 83201
My Commission Expires: 10/30/2015

(SEAL)

JASON E. FLAIG NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day ~~of March~~ April, 2012, I served a true, correct and copy of the above and foregoing document upon the following person(s) as follows:

Jeffrey D. Brunson
John M. Avondet
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495

[X] U.S. Mail, postage prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[X] Facsimile *(208) 529-9732*

~~For~~ DAVID E. ALEXANDER

W. Marcus W. Nye (ISB#: 1629)
David E. Alexander (ISB#: 4489)
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff, vs. KENNETH RAMMELL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, ESTATE OF CHRISTA BEGUESSE RAMMELL, by its qualified personal representative, Kenneth Rammell. Defendants.	Case No. CV-09-2767 **DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR NEW TRIAL**

COME NOW the Defendants, KENNETH RAMMELL individually, ("Mr. Rammell") and as personal representative of the ESTATE OF CHRISTA BEGUESSE RAMMELL, ("the Estate") and CHRISTA BEGUESSE, INC., an Idaho corporation, ("CBI") by and through their attorney of record, David E. Alexander, and hereby submit their Motion for Judgment Notwithstanding the Verdict pursuant to Rule 50(b) of the Idaho Rules of Civil Procedure, or in the alternative, their Motion for a New Trial, pursuant to Rule 59 of the Idaho Rules of Civil Procedure. This Motion is supported by Defendants' Memorandum in Support of Defendants' Motion for Judgment

Notwithstanding the Verdict or in the alternative, for a New Trial, along with the Affidavit of Counsel filed herein.

Dated this 28th day of April, 2012

RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED

By _____
DAVID E. ALEXANDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2010, I served a true, correct and copy of the above and foregoing document upon the following person(s) as follows:

Jeffrey D. Brunson
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[X] U.S. Mail, postage prepaid
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_____
for DAVID E. ALEXANDER

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff, vs. KENNETH RAMMELL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, ESTATE OF CHRISTA BEGUESSE RAMMELL, by its qualified personal representative, Kenneth Rammell. Defendants.	Case No. CV-09-2767 **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR NEW TRIAL**

COME NOW the Defendants, KENNETH RAMMELL individually, ("Mr. Rammell") and as personal representative of the ESTATE OF CHRISTA BEGUESSE RAMMELL, ("the Estate") and CHRISTA BEGUESSE, INC., an Idaho corporation, ("CBI") by and through their attorney of record, David E. Alexander, and hereby submit their Memorandum in Support of Defendants' Motion for Judgment Notwithstanding the Verdict pursuant to Rule 50(b) of the Idaho Rules of Civil Procedure, or in the alternative, their Motion for a New Trial, pursuant to Rule 59 of the Idaho Rules of Civil Procedure, as follows.

INTRODUCTION

Defendants contend that this Court should enter a judgment n.o.v., or in the alternative, order a new trial based on, but limited to, the following:

1. The damages assessed against Defendants were excessive and appeared to have been given under the influence of passion or prejudice;

2. The evidence was insufficient to justify the verdicts and awards made in favor of the Plaintiff;

3. The verdicts and awards made in favor of the Plaintiff were contrary to the law;

4. The Court erred in submitting jury instructions and a verdict form which,

   a. permitted the jury to find liability in gross against all of the Defendants for discrete acts of fraud allegedly committed by individual Defendants;

   b. permitted the jury to assign damages in gross on discrete fraud claims for each of which the Plaintiff was required by law to plead and prove with clear and convincing evidence the damages resulting therefrom;

   c. confused the jury and permitted it to find fraud and breach and award damages on matters not properly submitted to it, including but not limited to claims related to the will of Christa Beguesse Rammell; and

   d. confused the jury with respect to the Defendant's Counterclaim;

5. The Court erred in denying Defendants' Motion for a Directed Verdict;

6. The Court erred in submitting Plaintiff's fraud claims to the jury;

7. Plaintiff's counsel made improper arguments which invited the jury to decide the case contrary to the law.

STANDARD OF REVIEW

Under Rule 50(b) of the Idaho Rules of Civil Procedure,

> A motion for judgment notwithstanding the verdict shall be served not later than fourteen (14) days after entry of the judgment and may be made whether or not the party moved for a directed verdict . . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative, in conformance with the requirements of Rule 59(a); and a motion to set aside or otherwise nullify a verdict or for a new trial shall be deemed to include this motion as an alternative....

"A motion for judgment n.o.v. based on I.R.C.P. 50(b) is treated as simply a delayed motion for a directed verdict and the standard for both is the same." *Quick v. Crane*, 111 Idaho 759, 763, 727 P.2d 1187, 1191 (1986). A judgment n.o.v. "can be used by the district court to correct its error in denying a directed verdict." *Hudson v. Cobbs*, 118 Idaho 474, 478-479, 797 P.2d 1322, 1327 (1990). The central question on review in a judgment n.o.v. is whether, after viewing the evidence in light most favorable to the non-moving party, "the evidence is of sufficient quantity and probative value that reasonable minds could reach the same conclusion as did the jury." *Smith v. Praegitzer*, 113 Idaho 887, 890, 749 P.2d 1012, 1015 (Idaho Ct. App. 1988). "A judgment n.o.v. should be granted when there is no substantial competent evidence to support the verdict of the jury" (*Brand S Corp. v. King*, 102 Idaho 731, 732-733, 639 P.2d 429, 430 (1981)) and when there is "but one conclusion as to the verdict that reasonable minds could have reached" (*Beco Constr. Co. v. Harper Contr.*, 130 Idaho 4, 8, 936 P.2d 202, 206 (Idaho Ct. App. 1997)(citing *Quick*, 111 Idaho at 764, 727 P.2d at 1192). Rule 50(b) is intended to give "the trial court the last opportunity to order the judgment that the law requires." *Quick*, 111 Idaho at 764, 727 P.2d at 1192.

"If an alternative motion for new trial is made with the j.n.o.v. motion, the trial court must rule on both motions separately." *Beco Constr. Co. v. Harper Contr.*, 130 Idaho 4, 8, 936 P.2d 202, 206 (Idaho Ct. App. 1997). The standard of review on a motion for a new trial is different than that

for a motion for a judgment n.o.v. Under Rule 59(a) of the Idaho Rules of Civil Procedure,

> A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:
>
> 1. Irregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.
>
> 2. Misconduct of the jury.
>
> 3. Accident or surprise, which ordinary prudence could not have guarded against.
>
> 4. Newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial.
>
> 5. Excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice.
>
> 6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.
>
> 7. Error in law, occurring at the trial. Any motion for a new trial based upon any of the grounds set forth in subdivisions 1, 2, 3 or 4 must be accompanied by an affidavit stating in detail the facts relied upon in support of such motion for a new trial. Any motion based on subdivisions 6 or 7 must set forth the factual grounds therefor with particularity. On a motion for new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

When determining whether to grant a new trial, the court is not bound by the substantial evidence standard as it is in the judgment n.o.v. context. *Brand S Corp.*, 102 Idaho at 733, 639 P.2d at 431. Additionally, the court is "not required to view the evidence in a light most favorable" to the non-moving party. *Nations v. Bonner Bldg. Supply*, 113 Idaho 568, 572, 746 P.2d 1027, 1031 (Idaho Ct. App. 1987) (emphasis added). Rather, "unlike a motion for a directed verdict or judgment n.o.v., the trial court has broad discretion to weigh the evidence and the credibility of witnesses, and it may

set aside the verdict based upon its independent evaluation of the evidence, even though there is substantial evidence to support the verdict." *Litchfield v. Nelson*, 122 Idaho 416, 422, 835 P.2d 651, 657 (Idaho Ct. App. 1992). Plaintiff's claims fail whether analyzed under the judgment n.o.v. standard or the new trial standard.

ANALYSIS

I. ALL OF ABI'S CLAIMS MUST FAIL AGAINST ALL DEFENDANTS

A. ABI's Claims Are Not Ripe and It Failed to Demonstrate Any Damages

ABI's claims must fail because it did not present any substantial evidence of damages. Without any damages, ABI's claims are not ripe. Even if they are ripe, absent any showing of damages, all of ABI's claims must fail against all Defendants.

"The traditional ripeness doctrine requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication." *Noh v. Cenarrusa (in Re Action to Determine Constitutionality of Indian Gaming Initiative)*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). "A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot." *Wylie v. State*, 253 P.3d 700, 705 (Idaho 2011)(citing *Idaho Schools for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281-82, 912 P.2d 644, 649-50 (1996)).

In *Noh v. Cenarrusa*, the Idaho Supreme Court held that "there [was] not a real controversy at this point because Proposition One is simply a proposal. It has not become a law. There is no present need for adjudication. If Proposition One does not pass, there will not be a need for an adjudication as to its validity. This case does not meet the elements of the traditional ripeness test."

Noh, 137 Idaho at 801, 53 P.3d at 1220.

In the fraud context, "fraud alone, without damage, is not actionable, nor is damage without fraud, but when the two concur, an action lies. The party seeking damages or relief on the ground of a false representation must show that he has been damaged or prejudiced because of it." *Cooper v. Wesco Builders*, 76 Idaho 278, 284, 281 P.2d 669, 672-673 (1955) (*citing* 32 A.L.R.2d 226, Fraud, § 23; 37 C.J.S., Fraud, § 103, pp. 408-409) (internal citations omitted); *see also* 37 Am Jur 2d Fraud and Deceit § 272. Additionally, "there is no damage where the position of the complaining party is no worse than it would be had the alleged fraud not been committed." *Id.* (*citing* 23 Am.Jur. 994, Fraud and Deceit, § 175). Finally, "damages must also be certain, . . . such as can clearly be defined and ascertained." *Id.* (*citing* 23 Am.Jur. 995, Fraud and Deceit, § 176).

The law pertaining to damages as outline above applies with the same force in the breach of contract and warranty context. The burden is "upon a plaintiff in a breach of contract case to prove not only that it was injured, but that its injury was the result of the defendant's breach; both amount and causation must be proven with reasonable certainty." *Watkins Co., LLC v. Storms*, 2012 Ida. LEXIS 63 (March 2, 2012) (*citing Griffith v. Clear Lakes Trout Co.*, 143 Idaho 733, 740, 152 P.3d 604, 611 (2007) (internal citations omitted).

Here, April contended at trial that ABI had been damaged because she could not sell the business. There was absolutely no proof at trial that April could not sell the business. April admitted that she has never actually attempted to sell the business. In fact, the only evidence at trial was that Linda Diamond-Raznick told April that she could sell ABI with Ms. Diamond-Raznick's permission, just as April's mother and CBI had done in with April. Thus, like the claimant in *Noh v. Cenarrusa,* ABI's claim for damages is purely speculative and is not ripe as ABI has not suffered any damages.

Furthermore, April failed to demonstrate any reason ABI is worse off now than it would be had the alleged fraud and breaches not been committed. April claimed that business was only worth $250,000 when she bought in 2003, notwithstanding that ABI has made approximately $3 million in gross revenues since 2003. April vaguely contended that she understood the Defendants to represent that the business owned files worth more than a million dollars. April failed to testify of any actual misrepresentations made by any Defendant as to the value of the business to ABI. Even if it can be somehow construed that the Defendants did testify concerning the business's worth, it is well settled that representations as to value of property are by their nature opinions, not statements of fact, and therefore cannot be considered warranties nor actionable representations of fact. *See Gordon v. Butler*, 105 U.S. 553, 556 (1886); *Byers v. Federal Land Co.*, 3 F.2d 9, 11 (8th Cir. 1924); *Fisher v. Davidhizar*, 2011 Utah App. 270, 263 P.3d 440, 447 (2011); and 37 Am Jur 2d Fraud and Deceit § 173 (2012).

As a result, all of ABI's remaining claims against all Defendants must fail because the matter is not ripe and there is no substantial competent evidence to support the verdict of the jury as a matter of law. This Court should enter judgment n.o.v. against ABI on all counts pursuant to I.R.C.P. 50(b).

In the alternative, this Court, when weighing the evidence and the credibility of witnesses, must set aside the verdict based upon its independent evaluation and order a new trial pursuant to I.R.C.P. 59(a)(1), (5), (6) and (7). The jury's award of damages is excessive and appeared to have been given under the influence of passion or prejudice. There is insufficient evidence to justify the verdict and such was against and in error of the law.

B. The Statue of Limitations Bars ABI's Fraud and Breach Claims

ABI's fraud and breach of contract and warranty claims against all Defendants must fail because they are barred by the statute of limitations. As to fraud claims,

> A three-year statute of limitation for fraud is established by I.C. § 5-218(4). The statute does not begin to run until the plaintiff knew or reasonably should have known of the facts constituting the fraud. *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991). Application of I.C. § 5-218(4) does not depend on when the plaintiff should have been aware that something was wrong; as used in the statute, "discovery" means the point in time when the plaintiff had actual or constructive knowledge of the facts constituting the fraud. *McCoy*, 120 Idaho at 773, 820 P.2d at 368. Actual knowledge will be inferred if the allegedly aggrieved party could have discovered the fraud by the exercise of due diligence.

McCorkle v. Northwestern Mut. Life Ins. Co., 141 Idaho 550, 554-555, 112 P.3d 838, 842-843 (Idaho Ct. App. 2005).

As to breach of an oral contract and oral warranty claims, according Idaho Code § 5-217, an action upon an oral contract, obligation or liability must be brought within four years. According to Idaho Code § 28-2-725,

> (1) An action for breach of any contract for sale must be commenced within four (4) years after the cause of action has accrued. . . .
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made . . . .[1]

Whether under Idaho Code § 5-217 or § 28-2-725, "the statute of limitations begins to run at the time the cause of action accrues." (Memorandum Decision, dated November 2, 2010, page 14).

ABI filed suit on May 8, 2009. In order to survive against the statute of limitations, ABI must prove that April did not discover the alleged facts constituting fraud at least until Mary 8, 2006

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[1] See page 14 of the Court's Memorandum Decision, dated November 2, 2010 for applicability of Idaho Code § 28-2-725.

and at least until May 8, 2005 on the breach of contract and warrant claims.

i. All Claims Regarding Library of Files Are Barred

April's story fails the smell test. April admitted that she knew that niether ABI nor CBI ever owned the copyrights to the library of files. Thus, April and ABI always knew it did not own the library of files it later claims she thought she owned. As a matter of law, the statute of limitations bars Plaintiff's fraud and breach of contract claims regarding the library of files.

ii. All Claims Regarding PageMaker Are Barred

She further testified that her mother told people at the Exchange Group that she had not invented the software sometime in 2003, which fact was confirmed by Steven Hall during the trial. (ABI depo 84-85). April also admitted that she discovered that the proprietary software she had been promised turned out to be a manipulated version of Adobe PageMaker when she installed a new version of PageMaker approximately four or five years prior to her December 17, 2009 Rule 30(b)(6) deposition. (ABI depo 22, 83-84). By her own admissions, April discovered or should have discovered the facts constituting the alleged fraud well before May 8, 2006. ABI's fraud claims fail.

Likewise, ABI's breach of contract and warranty claims must also fail. According to Idaho Code § 28-2-725 and § 5-217, this is true regardless of when ABI or April's actually discovered that CBI never owned proprietary software. Her cause of action accrued when the breach allegedly occurred in 200, when the business was sold to ABI.

As a matter of law, the statute of limitations bars Plaintiff's fraud and breach of contract claims regarding the proprietary files.

iii. All Other Claims, If Any, Are Barred

April testified that she had worked for CBI in highschool, in college and throughout her life,

including in 2001 and 2002, prior taking over the company in 2003. She testified that she was involved in all details of the company's operations and acted as president of CBI for all of 2003 and thereafter. April has over 35 years of experience working in the printing and typesetting industry.

Overall, the evidence overwhelmingly suggests that April know or should have known through reasonable investigations, that ABI did not own the library of files or propriety PageMaker software or any other basis for her fraud and breach claims, well before Mary 8, 2006 and May 8, 2005. All of ABI's remaining fraud and breach of contract and warranty claims against all Defendants are barred by the statute of limitations under Idaho Code §§ 5-218(4) and 28-2-725, respectively. There simply is no substantial and competent evidence to rule otherwise. This Court should enter judgment n.o.v. against ABI on all counts pursuant to I.R.C.P. 50(b). In the alternative, this Court, when weighing the evidence and the credibility of witnesses, must set aside the verdict based up on its independent evaluation and order a new trial pursuant to I.R.C.P. 59(a)(1), (5), (6) and (7). The jury's failure to bar ABI's claims by virtue of the statute of limitations is not justified by the evidence to justify the verdict and was against and in error of the law.

C. Opposing Counsel's Inappropriate Arguments

Plaintiff's closing argument focused on matters previously rejected by this Court. Namely, that Mr. Rammell only contributed $500 to become a 50% member of CBI, that the jury should find fraud regarding the will, and that April had a right to a guaranteed contract with the Rutter Group. Opposing counsel also made arguments to the jury not based on evidence presented at trial, in that the Defendants defrauded ABI because if April died ABI would be worth nothing. Opposing counsel further inflamed the jury by arguing irrelevant matters. All of which tainted every claim before the jury and urged them to find fraud without any basis in the pleadings, evidence or in the law and,

instead, based on passion and prejudice.

II. ABI'S FRAUD CLAIMS MUST FAIL AGAINST ALL DEFENDANTS

"The correctness of jury instructions 'is a question of law over which this Court exercises free review, and the standard of review of whether a jury instruction should or should not have been given, is whether there is evidence at trial to support the instruction.'" *Craig Johnson Constr., L.L.C. v. Floyd Town Architects, P.A.*, 142 Idaho 797, 800, 134 P.3d 648, 651 (2006). "Where prejudicial errors of law have occurred, however, the district court has a duty to grant a new trial under Rule 59(a)(7), even though the verdict is supported by substantial and competent evidence." *Id.* at 801, at 652.

A. Improper Verdict Form

It is impossible to determine, when reviewing the verdict form, what specific acts of fraud the jury found that Mr. Rammell, CBI or the Estate committed. Without knowing who committed what fraud, the jury could have reach of verdict based on evidence that was not substantial or competent. There award could have been the product of irrelevant evidence and evidence supporting claims that were later dismissed, including the guaranteed contract, Mr. Rammell being a 50% shareholder of the CBI, and the existence of a will, all combined with the confusing limiting instruction made pursuant to Idaho Code § 9-202 and Rule 601(b) of the Idaho Rules of Evidence. Furthermore, if the Court throws out one fraud claim based on this motion, it must set a new trial on all remaining fraud claims because there is no way of telling what grounds the jury based it is verdict on.

B. Improper Jury Instructions

The jury was allowed to consider fraud on the basis of "misrepresentations as to the terms

of the contract." One cannot, while negotiating a contract, "misrepresent" the terms of the contract. A term is either agreed to or it is not. The instructions, by simply giving the jury a blanket fraud instruction, permitted the jury to find fraud on this ground. Furthermore, the jury instructions were confusing to the jury and permitted them to find fraud with regard to one alleged misstatement but award damages for others.

C. The Amount of Damages Award by Jury Are Not Supported by Evidence

The evidence presented at trial did not support the damages awarded by the jury. For fraud, the jury awarded as damages a number that finds no support in any evidence of damages. Rather, the amount awarded is exactly one-half of the value of the community property as it appears in the notes of attorney Stephen Martin. This indicates that the jury awarded damages for fraud related to the will, which was not proper. The jury in essence turned this trial into a retrial of the will challenge in probate court.

Overall, this Court should enter judgment n.o.v. against ABI on all counts of fraud pursuant to I.R.C.P. 50(b). In the alternative, this Court, when weighing the evidence and the credibility of witnesses, must set aside the verdict based up on its independent evaluation and order a new trial pursuant to I.R.C.P. 59(a)(1), (5), (6) and (7). It is clear that the jury reached its verdict based on confusion, prejudice and passion.

III. ABI'S FRAUD CLAIMS MUST FAIL AGAINST THE ESTATE FOR A LACK OF SUBSTANTIAL AND COMPETENT EVIDENCE

ABI's fraud claims against the Estate must fail because there was no evidence to sustain a finding of fraud against the Estate. The only evidence of statements of fact made by Christa to the Plaintiff came from the Plaintiff. Pursuant to the Court's ruling on Defendant's objection pursuant to Idaho Code § 9-202 and Rule 601(b) of the Idaho Rules of Evidence, and the Court's limiting

instruction, the Plaintiff's testimony cannot be used to establish fraud against the Estate.

The only evidence other than Plaintiff's testimony came from attorney Stephen Martin. That evidence, consisting of Christa's alleged representation as to the market value of her business in 1999 in the event of her death, was not a statement of fact but of opinion as to the market value of the company in the event of liquidation as part of the estate. There was no evidence that the figure represented any individual's valuation of the company as a going concern or a valuation placed on the business by the parties to the contract made five years later. It is not material to prove that the later valuation was fraudulent. Besides, the statement was made to Mr. Martin, not to the Plaintiff.

In any event, it is well settled that representations as to value of property are by their nature opinions, not statements of fact, and therefore cannot be considered warranties nor actionable representations of fact. *Gordon v. Butler*, 105 U.S. 553, 556 (1886); *Byers v. Federal Land Co.*, 3 F.2d 9, 11 (8th Cir. 1924); *Fisher v. Davidhizar*, 2011 Utah App. 270, 263 P.3d 440, 447 (2011). This single piece of evidence fails to meet even one of the elements of fraud. Accordingly, the fraud claims against the Estate must be dismissed for lack of competent evidence.

ABI's fraud claims against the Estate must fail for a lack of substantial and competent evidence. This Court should enter judgment n.o.v. against ABI on its fraud claims pursuant to I.R.C.P. 50(b). In the alternative, this Court, when weighing the evidence and the credibility of witnesses, must set aside the verdict based upon its independent evaluation and order a new trial pursuant to I.R.C.P. 59(a)(1), (5), (6) and (7).

IV. ABI'S FRAUD CLAIMS MUST FAIL AGAINST ALL DEFENDANTS FOR FAILURE TO PROVE ALL OF THE ESSENTIAL ELEMENTS OF FRAUD

ABI has failed to prove any and all the elements of fraud against all Defendants. "To successfully bring an action for fraud, a plaintiff must establish the existence of the following

elements: (1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury." *Mannos v. Moss*, 143 Idaho 927, 931 (2007). All nine elements must be proven by clear and convincing evidence. *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 250 (2010).

Based on this Court's rulings the only remaining allegedly fraudulent representations/omissions made by Mr. Rammell, Christa and CBI to April for the jury to decide, are the following:

- that CBI owned a library of proprietary titles valued at over $1,000,000.
- hat CBI owned proprietary PageMaker software unique to CBI's business.
- that Christa has a will that allowed ABI to stop making payments to CBI upon Christa's death.

First and form most, April's testimony at trial was vague as to who made what representations as to what. Like the verdict form, it is impossible to determine who is liable for which representations. Thus, having failed to show by clear and convincing evidence who specifically represented what, it is contrary to justice to hold any of the Defendants liable for any of the alleged fraudulent representations/omissions.

A. Representations Regarding Ownership of Library of Files and Their Value

ABI has failed to show that it was ignorant of the falsity of the Defendants' representation to ABI that CBI owned a ceratin library of titles and their value. April admitted at trial that she knew prior to purchasing CBI that CBI did not own the copyrights to the titles. She also admitted that, without owning the copyrights, ABI could not sell the titles. Such admissions struck a deadly blow to her fraud claim regarding the ownership of the library of files and should have prevented it from

going to the jury. Such was a reversible error.

April's claim is like a person who, after having raised horses all her life, decides to purchase a horse from another horse dealer, and then later claims that she thought she was buying a unicorn. Unicorns don't exist. Neither did CBI's ownership of any copyrights pertaining to the library of files. April knew that and admitted knowing that prior to purchasing CBI. She worked for mother is years past and spent her life in the typesetting and printing business. Regardless of the files alleged value, the Plaintiff cannot claim the right to sell something she knew she didn't own and couldn't sell. Such is irrational and unactionable and should never have gone to the jury.

ABI knew or should have known that the Defendants' alleged representations were false.

B. Representations Regarding PageMaker

ABI has failed to show that it was ignorant of the falsity of the Defendant's representation to ABI that CBI owned proprietary PageMaker software. On page 11, of its Memorandum Decision and Order, dated November 2, 2010, this Court stated, "Whether the software used in the business was proprietary or available to the public would reasonably have an effect on the purchase price of the business." April repeatedly testified at trial that anyone could buy PageMaker (for $600) off the shelf and that April had used PageMaker throughout her career. ABI knew or should have known that the Defendants' alleged representations were false.

ABI also has failed to show that it relied and/or justifiably relied on the Defendants' representations to ABI regarding the proprietary software.

In particular, April repeatedly testified that Mr. Rammell knew nothing about typesetting. Mr. Rammell agreed. His background was in accounting and his limited involvement in CBI was in preparing financial and tax information approximately one day a month. When ask what was Mr.

Rammell's involvement in CBI, April stated, "Not a thing." When ask which of Mr. Rammell's representations ABI relied on in purchasing CBI, April stated, "Not one iota." Although April later stated that Mr. Rammell had concurred with Christa's alleged representations, it is clear that ABI did not rely on Mr. Rammell's representations regarding PageMaker (or the library of titles or their value). By all accounts, he knew nothing about those things. No reasonable juror could find otherwise.

C. Representations Regarding The Existence of Christa's Will Allowing ABI to Cease Payments to CBI Upon Christa's Death

ABI has failed to show that the Defendants' representation were false regarding the existence of Christa's will that allowed her to stop making payments to CBI upon Christa's death. The Plaintiff simply failed to get any of the terms of the will into evidence during trial to show whether it allowed her to stop making payments or not. Plaintiff's fraud claim in this regard fails as a matter of law. The issue never should have gone to the jury. Doing so allowed opposing counsel to urge the jury to to "rewrite" Christa's will. Such was a reversible error.

Overall, all of ABI's fraud claims against all Defendants must fail for a lack of substantial and competent evidence. This Court should enter judgment n.o.v. against ABI on its fraud claims pursuant to I.R.C.P. 50(b). In the alternative, this Court, when weighing the evidence and the credibility of witnesses, must set aside the verdict based upon its independent evaluation and order a new trial pursuant to I.R.C.P. 59(a)(1), (5), (6) and (7).

V. ABI'S FRAUD AND BREACH CLAIMS REGARDING THE LIBRARY OF FILES MUST FAIL AGAINST ALL DEFENDANTS

A. Claim Precluded by Prior Summary Judgment

In 2010, the Court granted summary judgment for the Defendants on Plaintiff's claim that

she was defrauded into believing she would have a "guaranteed contract" with the customer. The "guaranteed contract," as the Plaintiff described her understanding of it in her Rule 30(b)(6) deposition, was that ownership of the library of proprietary files gave her control over the customer's choice of who to use for typesetting services. She testified she understood that there was no written or verbal contract with the Rutter Group. She testified she understood that Rutter and CBI "were locked kind of into each other because Christa owned these files (the working typesetting files) and if the Rutter Group wanted them back they would have to pay Christa for them." (ABI depo 53-54) April understood that there was no enforceable written contract between CBI and the Rutter Group which required Rutter to do business with CBI; it was just that Christa owned those files and Rutter had no better choice. (ABI depo 56) She understood it was not a contract, but an "understanding" between Rutter and CBI. (ABI depo 97) She admitted that CBI never told her that The Rutter Group was obligated to do business with her. (ABI depo 51) She explained in detail in her deposition:

> Q. ... What I would like to know now is to the best of your memory right now what was represented to you about a guaranteed contract? How was that described to you?
>
> A. It was described to me that –
>
> Q. By whom?
>
> A. Christa and Ken both. We were around the kitchen table. **That the Rutter Group library was owned by Christa Beguesse, Incorporated. And because of that there was a binding – a contractual obligation for the Rutter Group to continue to use Christa and vice versa. It would be vastly too much money and time for them to ever try to reinvent that type of wheel. It was 30 years in the making. And, again, for the meager fee of $12,000 a month I could buy these files. And then, like I said, turn around and sell them either back to the Rutter Group or to a third party.**
>
> Q. That was your guaranteed contract?
>
> **A. I was under the assumption that that was my guaranteed contract, yes.**

Q. Am I understanding you correctly that you agree there was not a contract and that the Rutter Group -- there was a situation where the Rutter Group had no reasonable alternative but to deal with your mother and therefore with you?

MR. BRUNSON: I object to the form of the question.

THE WITNESS: **We used, your verbiage, in the form of contract. What you just said we would say contract.**

Q. (BY MR. ALEXANDER) Okay. So is it fair to say, then, that you understood that the Rutter Group could, if it wanted to, simply take this business in-house or take it to another vendor, but that it would be prohibitively expensive for them to do so?

A. Yes.

(ABI depo 80-81)

April Beguesse also testified in an affidavit that she knew that the customer possessed a complete copy of those files, because CBI and later ABI always sent the customer a disc containing a complete copy of the PageMaker-format files with each update for use in preparing the CD-ROM version of the books. (April Beguesse Affidavit in Opposition to Defendants' Motion for Summary Judgment)

As noted above, the Court granted summary judgment on this claim, finding it undisputed that Plaintiff knew there was no "guaranteed contract." However, at trial, the identical claim, couched in different words but based on the same evidence and the same legal theory, was permitted to go to the jury.

The Plaintiff argues that she did not receive "ownership" of the library of files. Her testimony was that by "ownership," she meant the ability to control her customer's choice of who to use for typesetting. Because she could not control who the customer would use, she believed she was unable to sell the business, and therefore believed she was damaged.

This is the identical claim as that on which the Court previously granted summary judgment. Having heard the evidence, judgment for the Defendant is warranted on the law of this case, which is that Plaintiff was aware at the time she entered the contract that she would have no ability to control her customer's typesetting choices. Judgment n.o.v. on Plaintiff's claims of fraud and breach of contract/breach of warranty based on the "library of files" issue should be granted in favor of the Defendants.

B. No Legal Basis for Claim of Fraud or Breach Regarding "Library of Files"

Judgment n.o.v. is also warranted on the grounds that the fraud and breach claims based on "ownership" of the library of files is without a legal basis. The jury found a breach of contract and warranty and may have found fraud regarding the alleged library of files. There was no legal basis for either claim under the evidence presented at trial, and neither should have been sent to the jury. The Plaintiff claimed she believed she was buying a legal right incident to "ownership" of the files that does not and cannot exist. There is no way that a seller's representation of "ownership" can be construed to mean possession of rights that cannot legally exist. Thus, her fraud claim is premised on her misunderstanding of the law, or at best a layman's misrepresentation of the law. It is well settled that fraud cannot be predicated on misrepresentations of law or as to matters of law, *Glass v. Southern Wrecker Sales*, 990 F. Supp. 1344 (M.D. Ala. 1998), *aff'd*, 163 F.3d 1361 (11th Cir. 1998) (applying Alabama law).

Before a claim can be sent to the jury to determine the fact question whether fraud was committed, it is necessary to answer the precedent legal question whether the facts, if proven, even state a claim for fraud. In this case, it was necessary for the Court to determine the meaning of

"ownership" with respect to the files in question, to determine whether "ownership" of the property involved in the transaction includes the rights the Plaintiff claims she did not receive.

The Plaintiff's claim was that she was promised "ownership" of the files, and that she could later sell them to a third party "like Christa sold them to me." She claims she did not receive "ownership" of the files because she could not sell them to a third party to do typesetting work for the Rutter Group without the Rutter Group's permission. She concluded from this that, because Plaintiff is unable to direct how the Rutter Group will use the files or who the Rutter Group may work with, she cannot sell her business. The damages she claims result exclusively from this supposed (and completely unproven) inability to sell the business.

A relevant fact established by the evidence is that Plaintiff was aware at the time she agreed to purchase the business that CBI's practice was to provide the Rutter Group with a complete copy of the files in question in PageMaker format. She was aware that CBI did not have exclusive possession of these files, as the customer had a copy. She was also aware that the files had no value except for purposes of doing typesetting work for the Rutter Group.

Plaintiff's claim thus defines "ownership" of the files to include the right to sell the files to a third-party typesetter and require the Rutter Group to use that third party's services, or to require the Rutter Group to purchase the files from the Plaintiff even though Rutter already possesses the files. It is the Defendants' supposed failure to deliver these alleged incidents of ownership that constitutes the fraud claimed in this case.

However, there is no legal basis for a claim of ownership that includes such rights. Those alleged rights are not and cannot be incidents of "ownership" of the files she purchased, for the following reasons, and Plaintiff's belief to the contrary was unreasonable under the circumstances.

As an analogy, if the Plaintiff claimed fraud because she expected "ownership" of the files to include the copyrights to the Rutter publications, the claim would never have reached the jury regardless of the facts shown, because ownership of a copy provides no legal basis for claiming ownership of the copyright:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. *Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object*; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202. Thus, as a matter of law, no person could reasonably expect to receive "ownership" of the copyrights in the Rutter Group publications under the circumstances present here. That belief would be unreasonable as a matter of law, and no fraud could be found. To find fraud under those circumstance would require evidence that the Defendants were knowledgeable of copyright law and schemed to take advantage of Plaintiff' ignorance.

Similarly, in the case as tried in this Court, the rights the Plaintiff expected to receive cannot legally exist. The fault for Plaintiff's disappointment lies in the Plaintiff's ignorance of the law, not fraud. Fraud under these circumstances can only be proven by evidence not presented here.

The following paragraphs will demonstrate that the control of the customer that Plaintiff testified she expected to receive is not an incident of ownership of these files.

The files in question are electronic copies in PageMaker format of the customer's publications. The customer, by assignment from the authors, owns the copyright. The files on Plaintiff's servers are legally created copies. They do not themselves infringe the copyright, per statute, because they are legally created. As such they may be lawfully owned, possessed and

transferred; but they may not be used to infringe the copyright, any more than one's ownership of a copy of the latest bestseller gives one the right to photocopy it for a friend. Since files in PageMaker format can only be used to prepare additional copies for publication, they have little value except for that purpose. Since they can only be used lawfully for that purpose with the permission of the copyright owner, the files have value only to a party with a business relationship with the customer.

The Plaintiff asserts she believed she would receive "ownership" of the files. "Ownership" means the "collection of rights to use and enjoy property." *Black's Law Dictionary, Fifth Ed.* "Property" has often described as a "bundle of rights." Different kinds of property have different rights associated with them. Ownership of rural acreage carries different rights that ownership of a New York City condominium unit, ownership of an automobile, or ownership of a copy of a copyrighted work. In this case, to understand the Plaintiff's claims, it is necessary to identify which rights come along with "ownership" of the copies at issue.

Ownership of a copy of a publication implies the right to read it, the right to pass possession of the copy to another (17 U.S.C. § 109(a)), but not the right to republish it, because that is an incident of ownership of the *copyright* (17 U.S.C. § 106), not of a copy. The particular copies at issue in this case are in a format usable only by typesetting software. They can only be used to make more copies, which, to be lawful, can only be done with the permission of the copyright owner. (17 U.S.C. § 106) Therefore, the rights represented by "ownership" of these files only include the right to use them for typesetting purposes with the permission of the copyright owner.

Since the Plaintiff does not own the copyright, the files naturally and obviously (and admittedly) have no significant value apart from the copyright owner's permission to use them to

typeset new editions. If the copyright owner withdraws its typesetting work from the Plaintiff – a risk of which the Plaintiff was aware when she entered the agreement, as this Court previously ruled – it thereby also withdraws its permission to use the files for their intended purpose. The files would then have no significant value to the Plaintiff. (Thus, the hypothetical damage resulting to the Plaintiff in this case is in fact the result of a known business risk, not fraud.)

The Plaintiff would normally still have the right, as an incident of ownership of a copy, to pass possession of her copies to another, for whatever price she could obtain. This is the "first sale" doctrine in copyright law, 17 U.S.C. § 109(a), which holds that the owner of a lawful copy may transfer it to a third party. However, as noted, the files in this case would have no value without the copyright owner's permission to use them, except perhaps to a potential copyright infringer who intended to make unlawful copies. Thus, in this case there is no significant lawful value to the owner's right to pass the files to another.

Furthermore, the copyright owner, to protect itself from this potential infringement, would naturally insist as a condition of business that the files be destroyed or turned over to the copyright owner when it withdraws its typesetting work from the Plaintiff. This is as testified to by Linda Diamond Raznick. Since the files have no value without the typesetting, this would not damage the Plaintiff.

Given the Plaintiff's knowledge that she did not have exclusive possession of the PageMaker format files, and her knowledge that she had no agreement with the Rutter Group requiring it to use her services, is there any way the Plaintiff could reasonably conclude that her "ownership" of the files could give her the right to control Rutter's use of its copyright, or require Rutter to use her

services? If not, can Plaintiff's legal mistake support a fraud claim? Can the Plaintiff justifiably rely on her own mistake of law?

The answer is no. This Court would never permit a fraud claim to go forward if the Plaintiff claimed she thought "ownership" of the files gave her the copyrights. Yet in this case the Plaintiff is claiming essentially the same thing: that she thought "ownership" of the files gave her "control over who Rutter could do business with," to quote the Plaintiff's testimony from trial. There is no such right in the bundle of rights associated with ownership of a non-exclusive electronic copy in PageMaker format of the Rutter publications. Such a claimed right is inconsistent with the customer's ownership of the copyright, which grants the customer the sole right to make and sell copies of the work. (17 U.S.C. § 106) The right Plaintiff claimed she was to receive is thus contrary to law. Ownership of a copy implies or creates no rights to control the use of the copyright (17 U.S.C. § 202). Since such a right could not exist under the law, Plaintiff's fraud claim must fail.

VI. ABI'S BREACH CLAIMS AGAINST CBI MUST FAIL

To establish a breach of contract claim a plaintiff must demonstrate that (1) a contract existed between plaintiff and defendant; (2) the defendant breached the contract; (3) the plaintiff has been damaged on account of the breach; and (4) the amount of the damages. IDJI 6.10.1. Further, the breach must be material. IDJI 6.11 defines a "material breach of contract," as that term is used in these instructions, means a breach that defeats a fundamental purpose of the contract.

A. Plaintiff's Irrational Testimony Regarding the Terms of the Agreement

Plaintiff's testimony regarding the terms of the contract were vague and irrational. Plaintiff's breach claims are inseparably connected and identical to its fraud claims. Thus, the same arguments raised above regarding ABI's fraud claims apply in the context of its breach claims (and hereby

incorporated by reference as if set forth in full). In particular, even though Plaintiff has a lower burden of proof concerning the breach causes of action (preponderance verses clear and convincing), it is against the clear weight of evidence for the jury to have conclude that CBI owned a library of proprietary titles, that CBI owned proprietary PageMaker software and/or that Christa has a will that allowed ABI to stop making payments to CBI upon Christa's death.

B. Recovery Under Both Fraud and Breach Claims is Precluded

Plaintiff should not be allowed to recover under two separate legal theories. As the Court noted on page 21 of its Memorandum Decision, dated November 2, 2010, "If Plaintiff is successful on the fraud claim, the contract may be considered void and there would be breach." The jury found all three Defendants liable for fraud, therefore, Plaintiff's breach claims should be rejected as there is deemed to have been no valid contract.

C. Improper Verdict Form

Question 8 of the Verdict Form fails to specify whether the breach was related to the library of files or some other term of the agreement. Thus the jury could have awarded damages for CBI's alleged breach based on a term previously rejected by the Court (guaranteed contract, Mr. Rammell was 50% owner of CBI, etc.) and which were not fundamental to the purpose of the contract.

D. Damages Awarded by Jury For Breach Not Supported by Evidence

The $190.013.00 awarded to ABI on Question 8 is no supported by any evidence presented to the jury. Nothing at trial supports that award, nothing.

Overall, all of ABI's breach of contract and warrant claims against all Defendants must fail for a lack of substantial and competent evidence. This Court should enter judgment n.o.v. against ABI on its breach claims pursuant to I.R.C.P. 50(b). In the alternative, this Court, when weighing

the evidence and the credibility of witnesses, must set aside the verdict based upon its independent evaluation and order a new trial pursuant to I.R.C.P. 59(a)(1), (5), (6) and (7).

ORAL ARGUMENT is hereby requested, in which evidence and testimony may be presented.

Dated this 28th day of April, 2012

RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED

By _____
DAVID E. ALEXANDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2010, I served a true, correct and copy of the above and foregoing document upon the following person(s) as follows:

Jeffrey D. Brunson
John M. Avondet
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495

[X] U.S. Mail, postage prepaid
[ ] Hand Delivery
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[X] Facsimile *(208) 529-9732*

FOR DAVID E. ALEXANDER

W. Marcus W. Nye (ISB#: 1629)
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

April Beguesse, Inc. An Idaho Corporation, Plaintiff, vs. Kenneth Rammell, an individual, Christa , Beguesse, Inc., an Idaho Corporation. Estate of Christa Beguesse Rammell, by its qualified personal representative, Kenneth Rammell. Defendants.	Case No. CV-09-2767 **SUPPLEMENTAL AFFIDAVIT OF COUNSEL**

STATE OF IDAHO)
ss
County of Bonneville)

AARON CRARY, being first duly sworn upon oath, and based upon his own personal knowledge, deposes and says as follows:

1. I am a licensed attorney in Idaho and work for Racine Olson Nye Budge & Bailey, Chartered, counsel of record for the Defendants.

2. Attached hereto as Defendants' Exhibit "A" is a true and correct copy of an excerpt from the transcript of the jury trial (which is opposing counsel's closing and rebuttal arguments which occurred on April 13, 2012).

FURTHER SAITH THE AFFIANT NAUGHT.

DATED this 1 day of May, 2012.

AARON CRARY

STATE OF IDAHO)
: ss.
County of Bonneville)

Subscribed and Sworn to before me on this 1st day of May, 2012.

(SEAL)

DAWN M. PORTER NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
Residing at: Idaho Falls, Idaho
My Commission Expires: March 24, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1 day of May, 2012, I served a true, correct and copy of the above and foregoing document upon the following person(s) as follows:

Jeffrey D. Brunson
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AARON CRARY

Exhibit "A"

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation,
Plaintiff/Counterdefendant,

vs. * CASE NO. CV-09-2767

KENNETH RAMMELL, an individual, CHRISTA BEGUESSE, INC., an Idaho corporation, THE ESTATE OF CHRISTA BEGUESSE RAMMELL, by its qualified personal representative, Kenneth Rammell,
Defendants/Counterclaimants.

****

EXCERPT FROM JURY TRIAL
APRIL 13, 2012

****

HONORABLE JOEL E. TINGEY PRESIDING

****

JACK L. FULLER, CSR
Official Court Reporter
605 N. Capital
Idaho Falls, Idaho 83402
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CLOSING ARGUMENT BY THE PLAINTIFF

APRIL 13, 2012

MR. BRUNSON: May it please the Court, opposing counsel, ladies and gentlemen of the jury. We have very much appreciated your time this week as we've been able to present to you our case. Hard work pays off, and I think the best analogy of hard work paying off is in the sports realm. I like sports very much. In fact, I particularly like college football. And in the recent years, just this last year actually, there is an example in the sports realm that applies to some of the issues we're talking about here.

College football program, mid-sized college football program, brings in the top quarterback recruit in the country. He is number one on all the recruiting boards. He is the man. In fact, when he comes to the school, he has a press conference and he has his publicist there and he's going to be the quarterback to take over the future. Now, there's another quarterback involved. And he's a little older, he's a little bit undersized, he's a little bit of a scrapper, and he's there first. And this new quarterback comes in and is awarded the starting position because of who he is and because of his great accomplishments in high school. And he plays a little bit. But ultimately this other

quarterback who's working hard, who's volunteering to be on special teams --

Now, some of the guys on the jury, I'm sure, and a lot of the women as well, I don't -- I know there's a lot of football fans. But special teams, for those who don't watch football, is the part where they kick the ball off and the two teams run at each other full speed and it's kind of kamikaze and they go at each other and there's a lot of injuries with people who play special teams and things like that.

But this other quarterback, because he's a scrapper, he's doing the work, he's wanting to get involved, so he volunteers to be on special teams even. And there comes a time to a point in the season where the undersized, the scrapper, quarterback takes over and wins the team. He got there because of the hard work. Now, the other quarterback still has a sense of entitlement. He wants to play. But because he got benched, instead of working hard and instead of helping out, instead of getting his teammates behind him, he transfers.

April Beguesse works hard for her business. You heard her testimony about that. You heard the amount of time and effort and energy she puts in on a daily basis. She knows everything about the business.

It's with her when she wakes up in the morning and it's probably with her when she wakes up in the middle of the night. And when she goes to bed at night, she has made her business better. She's a successful businessperson. Any increases in her business are due to her own efforts. Don't punish her for doing well in this case.

Let's talk a little bit about Mr. Rammell, one of the Defendants in this case. All the testimony that's come in is, is that Mr. Rammell had no part at all in building the business we're talking about here. He didn't contribute anything to the business other than his testimony that he paid $500. If you remember, when I asked him, it was just a question I asked. I didn't know what he was going to say. But I asked him if he could even name one former client of CBI. He couldn't do that. He's expecting -- he has a sense of entitlement. He's expecting a handout in this case.

One of my favorite recent movies is called *The Social Network*. It's a Facebook movie. I'm sure a lot of you have seen it. In that movie there are several different parties -- and this is probably why I like it, because I'm a lawyer. But there are several different parties vying to claim ownership and to claim money actually from Mark Zuckerberg, the founder of Facebook. And one of these particular groups that is

trying to claim -- make claims against Facebook is these two gentlemen named the Winklevoss twins. And any of you that have seen the movie are familiar with them. They're these big athletic rowers and -- actually Olympic rowers who went to Harvard. They're actually real people. The movie is fiction, but it's based loosely on what actually happened. But anyway, these Winklevoss twins make this claim to fame, Facebook. And this is what Mark Zuckerberg says in the movie. This is a quote. He says, "You know, you really don't need a forensic team to get to the bottom of this. If you guys were the inventors of Facebook, you would have invented Facebook."

And again, here, just comparing it to the cast of characters we have here, April is the one working for the business. She's the one doing the work. She's the one growing the business. Mr. Rammell has done nothing. He has contributed nothing to the business, but yet he wants to be paid hundreds of thousands of dollars.

Now, in this case what was promised and agreed to is in dispute. You've heard two different versions of the facts in this case. April's testimony was clear on this issue. She said she was promised ownership of the library of files valued between 1 and

1.3 million dollars, she said she was also promised proprietary software created by Christa Beguesse Rammell, and she was also told that the payments would cease upon death. Those were all representations made to her and they were all part of the deal that was made between ABI and CBI.

Now, in this case the Defendants are trying to argue that possession is the same thing as ownership. And the easiest example I can use with this is a car lease. You can go down and lease a car and you get to use the car, but you don't own it. And at the end of the lease, guess what. You have to give the car back. That's not the case here. Here it was represented to April Beguesse that she owned certain files, and she doesn't own them. And all the evidence that's come in on that point has established that she does not own them. Rutter Group, in this case Linda Diamond, has testified that they can demand for those files back at any time and April would get no compensation for them.

Now, you just heard the Judge go through some jury instructions and it is a mouthful of legal terms and it is quite confusing. And bear with me a little bit here, but I -- it is important to go through these with you. And I'll try to do so in a manner that's -- one, doesn't insult your intelligence and,

two, is helpful. And so I'm not going to go through all because it's a packet and you can read them, but there's a few I do want to go through with you. And they relate to our claims in the case, the legal claims that'll be brought to you.

The first one is Jury Instruction Number 21. The Judge issued an instruction in this case that says, "Statements made by Christa Beguesse may not be considered as evidence supporting a claim against the estate of Christa Beguesse. Such evidence, however, may be used for any other purpose." And what is meant by that is, April has testified Christa said to her certain things. And although those -- that testimony, based on this instruction, can't be used against our claim against the estate, because we have a claim against the estate of Christa Beguesse, it can be used against the corporation, CBI. And that's merely the point I wanted to make with that instruction.

Instruction -- you have several instructions dealing with our fraud claim. Instructions -- Instruction Number 29 is the main instruction dealing with the fraud claim. And it goes through 10 requirements, and all the facts that support these 10 requirements for fraud are present here. And I want to go through those with you just briefly because I'm going

to talk more in depth in a minute about each of these things, but I just want to kind of lay the groundwork with you. So please bear with me.

The first requirement is that the Defendants stated a fact to the plaintiff. Here, as I've just indicated, we've identified three critical facts that they stated -- one, that the ownership of the library of files was valued at 1 to 1.3 million dollars, that we would be getting ownership; two, proprietary software created by Christa; and three, the payments would cease on death.

The second requirement of that is that those statements be false. Well, in this case the testimony that's come in -- and it's testimony through the Rutter Group, who's the customer -- that statement about ownership of files was false. The Rutter Group has testified that they own all those files. And not only that. Mr. Rammell, when he was asked about this, if you recall -- and I even brought out his deposition on this point -- he testified if the Rutter Group claims ownership, he wouldn't dispute it or argue about it. So clearly in this case April doesn't own those files. There's been no evidence presented to suggest that she does.

As to the proprietary software, you've heard

testimony from April that it was just a program that could be purchased off the shelf, PageMaker. So the statement regarding proprietary software, that she had come up with this thing on her own, was false.

As to the payments ceasing on death, we're being sued by them to pay them for those payments.

The third requirement is, the statement was material so it was important. The statements were important. The statement regarding -- all those statements are what brought April out to Idaho to do the deal. You heard that testimony.

The fourth requirement is, the Defendants either knew the statement was false or were unaware whether the statement was true at the time the statement was made. Now, this was established also at trial. And there was lots of different pieces of evidence that could apply to this particular requirement. But one critical one was the testimony we heard from Steve Martin, the Idaho Falls attorney who actually represented Mr. Rammell and Christa Beguesse. And he testified that they placed a $40,000 value on their business in 1999. Now, that was shortly before this deal was done.

And then you heard additional testimony from Mr. Rammell clarifying that. He said, "The reason we

did that is because we didn't really own anything other than some equipment valued at about $3500 and we had about that much cash in the bank." And that establishes that they knew at that time that they didn't own a library of files valued at between 1 and 1.3 million dollars.

Now, the fifth requirement, the Plaintiff did not know that the statement was false. April testified that she didn't know that. She also testified that she was relying on that, which is the seventh requirement. I'm getting ahead of myself a little bit.

The sixth requirement actually is that the Defendants intended the Plaintiffs to rely on it. Well, they wanted her to come out and do this deal, as Mr. Rammell testified at some length. This was part of their retirement. April acted reasonably in this case. That's for you to determine. But that's what the evidence shows.

And then we get into damages. And I'll talk about damages in a little bit. But that's our fraud claim. And all those elements that I just went through have been established in this case, and many of them are not even in dispute.

There's another instruction related to fraud and that is 34.1 and it's dealing with a topic called

the statute of limitations. Some of you may have heard of that before. And what the statute of limitations is, is it says in the legal world you have to bring your claims within a reasonable time essentially. And with a fraud claim, as 34.1 goes through, the time to bring your claim is within three years from the time you discover the fraud.

And you heard testimony in this case from April Beguesse; and she said, "I've worked -- the transition occurred in 2004, and I continued to work with my mother and Linda." And she testified she had no idea that she didn't own those files until she had -- after she had a conversation with Mr. Rammell shortly after her mom had passed, and that conversation prompted her to call Linda Diamond. And you'll recall the testimony that April gave about her conversation with Linda Diamond where she testified that's the first she ever learned that the Rutter Group owned those files. And that happened in late 2008, early 2009. Well, we filed the lawsuit in this matter in 2009, so clearly we're within the three years.

She acted reasonably. There was no reason for her to be inquiring as to that ownership issue because she was building her business. She wasn't seeking to sell it. There was no reason for her to have

that conversation with Linda at any time other -- until she became aware after her conversation with Mr. Rammell that something wasn't right, and she acted promptly when she -- after she found that out. Now, that's the fraud claim.

We also have what's called a breach of contract claim, and it's very similar to our fraud claim insofar as the facts that apply. It's the same three things. And I'm not going to go back through those because I've already said it twice. But it's those things -- three elements that exist in our fraud claim. And the -- but the statute of limitations issues -- and the requirements for breach of contract are a little bit different. Let me touch on that just really briefly.

If you look at your Instruction Number -- bear with me -- 24 and 25, those are the two primarily dealing with the contract. And on Number 24 it just deals -- just describes what a contract is. No one in the case is disputing that there was a contract between ABI and CBI. That's not in dispute. So really 24 is helpful, but there's really no dispute that there is a contract.

Number 25 gives you a little bit more instruction because it talks about what the Court has done already in this case. And if you read just the

first line of Instruction Number 25, it says, "The terms of the oral agreement between Christa Beguesse, Inc., and April Beguesse, Inc., are in dispute." And so what was actually agreed is in dispute. But also what was actually agreed was oral. And that's why we had to listen to everyone's testimony. That's why we couldn't just look at the written document and say, "Well, that's the deal." The Court has determined -- and it's not disputed in this case -- that there was an oral agreement. And so we have to -- we're going to have to weigh everybody's testimony here and figure out who you think is telling the truth about the deal.

And, in fact, if you go further down in Instruction Number 25, the last line, it says, "The Court previously ruled that Exhibit 2 in this case," which was the lease agreement that had the blank attachments and nothing in there, "is not an enforceable contract." So those are the breach of contract instructions.

Now, as to the statute of limitations issue I was talking about with fraud, well, in a breach of contract guess what. The rules are a little bit different than they are in fraud. In fact, for each of our claims the statute of limitations requirements are a little bit different. And so you're going to have to

carefully look at these instructions. The one that applies to our breach of contract claim and actually our breach of warranty claim regarding the library of files, regarding the promise to sell us a library of files valued at 1 million to 1.3 million, as to that specific claim, 34.2 is the one that applies. And what you'll see as you read that, it says, "The statute of limitations for Plaintiff's alleged breach of contract regarding a library of files is four years and begins to run from the time ABI knew of the Rutter Group's claim of ownership interest in the library of files." And here the only testimony you heard about when ABI knew the ownership interest was, again, that same conversation I just talked to you about a minute ago between April Beguesse and Linda Diamond; and the lawsuit was filed within that four years.

Now, as to our claim regarding proprietary software, there's actually a separate statute of limitations on that one. That one is Number 35, and it goes through some detailed requirements. I'll just draw your attention to it now. I don't want to go through all of that with you.

Okay. We also have a breach of warranty claim. And breach of warranty is very similar to breach of contract. And the instruction that applies to our

breach of warranty claim is Instruction Number 28. And I'll just refer you to that. But it states, "A warranty is a -- an express warranty is a warranty created by words or actions of the seller." And so the same three representations we're dealing with here we're dealing with under our breach of warranty. Let me rephrase that. Actually, the payments ceasing on death, that's not part of our breach of warranty claim. It's just the library of files and it's just the software on that one. That's Instruction Number 28.

Okay. I think I've bored everyone with my discussion on the law. And so I think what -- as I stated, what the parties have agreed to is in dispute. What happened here is in dispute. And it's up to you, the jury -- I don't get to do it. Opposing counsel doesn't get to do it. It's up to you, the jury, to decide the credibility of witnesses.

And one thing I struggle with in this case is, no one wants to disrespect their elders; and I certainly didn't want to do that through the course of the trial. And then in addition to Mr. Rammell's kind of overt attempts, I thought, in this case to kind of make you feel sorry for him, that also was a little awkward, I thought, because he brought up his poor health and he brought up his supposed poverty. Don't

let that testimony sway your deliberations. And I'm not aware of any adage or proverb that suggests that being older makes you somehow more honest. Because it is up to you to weigh the credibility of the witnesses.

So let's talk about that. Let's talk about the credibility of the witnesses in this case. Specifically let's talk about Mr. Rammell and what we did -- what we heard from him at the trial of this matter. Mr. Rammell testified that he was a 50 percent owner in the business of CBI, and then he also went on to testify that he had provided tax information for the tax returns and that he was the one that had generated that information. He also testified that he had even signed some of the tax returns.

And then we actually looked at the document, which is Exhibit 27a, which you'll have. So this is Exhibit 27a. And you saw this at the trial. And if you look on here, you'll see that shareholder percentage of stock ownership is a hundred percent; and the only shareholder listed is Christa Beguesse. And so clearly that was not consistent with his previous testimony.

We also heard Mr. Rammell -- Mr. Rammell admitted to telling April that after there was a -- they had a conversation that -- and you remember hearing the testimony about this -- that Mr. Rammell told April that

the only will that existed was a 2007 holographic will. And we didn't talk a lot about holographic wills; but what a holographic will is, it's a will done in your own handwriting. And Mr. Rammell told -- and you heard him testify to this, that he told April that that was the only will that existed.

Well, as Mr. Martin later testified in the trial, there actually was a 1999 will; and Mr. Rammell admitted that there was a 1999 will. Again, another instance of a contradiction by Mr. Rammell.

When I asked Mr. Rammell -- I had him up on the stand. He wasn't up there very long, I didn't think. But when I asked him if he'd performed a valuation of the business before selling it to ABI, he at first tried to claim he did. And then I had to -- I -- remember, I published the deposition and then I read it to him; and his deposition testimony contradicted his testimony at trial.

I asked Mr. Rammell about documents demonstrating CBI's intellectual property. He started to claim that there was such documents. Again I pulled out his deposition testimony, I read it to him, and again his testimony contradicted.

Now, these depositions are done under oath, just like they were sworn in here when they -- before

they testified. And perhaps the biggest contradiction comes from his -- the deposition itself. And I took some time in the trial to point out that we started his deposition in the afternoon of one day and then continued it the second day.

And on the first day Mr. Rammell testified -- and you heard this, and I read it into the record -- Mr. Rammell testified he didn't know who owned the files. That was his testimony. And then he said he would not argue with the Rutter Group or Linda Diamond as to who owned them. And he said, "I have no way to valuate -- evaluate the value of those files." So he could not have told April what the value was. That was his testimony the first day.

On the second day and, as I pointed out, I think, when I was even asking him the questions, after he had a chance to talk to his attorney, he said -- he said -- he then took the position, "Well, wait. CBI owns the files," and that they were, in fact, part of the value of the company; and then he admitted to telling that to April Beguesse. That's a big difference from just one day to the next.

Now, you heard other testimony from Mr. Rammell in this trial. You heard his testimony that he was running out of money. And that kind of perplexed

me a little bit. And in this trial the -- another exhibit that was admitted was Exhibit 45. Now, you won't have this big huge blow-up with you. But, if you recall, this is from Steve Martin and this is the exhibit that came into evidence that establishes the different values they gave on things. And I had Steve Martin go through these. And you can see the business there for 40,000. But the total value of the estate was 900,000. And that was never really put into dispute, and that was in 1999. So the total value of the estate in 1999 was $900,000.

And then I at some length went through the CBI tax returns with Mr. Rammell. I think you'd recall me doing that. And as we did that, he testified to the revenue of CBI; and he testified that he received between two hundred -- CBI received between 240,000 to 284,000 dollars a year of revenue from 2000 to 2003. And then he also testified about the business income; and that business income from 2000 to 2003 was $461,000. And then it's undisputed in this case that from 2004 to 2008 ABI paid $750,000 to CBI.

Now, I added that up. I added up the claimed business income, which was 461,000; I added up the $900,000 in the estate; and then I added that to the $750,000; and that comes to a total of $2.1 million.

And here he was testifying that he was out of money. He didn't offer any explanation as to where the money went. He just expects everyone to believe him that he's out of money.

Now, consider the testimony of Renee Heller. Renee Heller was just a housekeeper. Renee Heller worked for Mr. Rammell and Christa Beguesse Rammell for 12 years. That's what she testified to. Now, this was one of the times in trial, if you'll recall, that I had another attorney in our office, Lindsay Lofgran, come up to the stand; and she read Ms. Heller, a portion of her testimony from a different hearing. And at that time Ms. Heller offered that testimony, she was under oath, sworn under oath to tell the truth.

And this is what she testified. And this is a quote. She said -- she was referring that Mr. Rammell was referring to April Beguesse, and this is what he said. He said -- she said, "He told me that he was going to get that bitch. He was going to destroy her."

Then we heard testimony from Rick Trulson. That was yesterday morning, and that didn't last very long. I think everyone was a little surprised. Wow, he was on and off quick. I think he might have been here a minute or 90 seconds. It may have been the shortest, but it might be the most compelling testimony we heard

all trial. And he came into court and he also swore an oath. He swore an oath to tell the truth. And he testified he knew Mr. Rammell, he testified he had personal interactions with Mr. Rammell, and he testified he had business dealings with Mr. Rammell, and then he offered this opinion. He said, "Mr. Rammell is a pathological liar."

You, the jury, get to determine the credibility of witnesses. But in this case we didn't hear from any other witnesses to come in and say, "Well, Mr. Rammell has a tendency to tell the truth." Or we didn't hear that from Mr. Rammell himself. He didn't try to say, "Well, Trulson has it wrong. I tell the truth." We didn't hear any evidence to dispute that. Alls we heard from someone who's under oath was that he is a pathological liar. That's not my words. That's someone who came here under oath, who's had business dealings with him.

Now, throughout the trial we heard different testimony from different people. One of the key witnesses in this case -- and it was unfortunate she couldn't be here -- was Linda Diamond. And again, we did the same thing where we put Ms. Lofgran on the stand and had her read parts of her deposition, and we did the question and answer thing. And I know that sometimes as

jurors that can be hard to follow because we're just reading along and it's sometimes hard to catch everything. But she said a lot of important things in her testimony, a lot of things that prove our case.

She said Thomson Reuters owns the files on ABI's computers. Now, no one's disputing who owns the books in this case. No one's disputing who owns the books. What we're talking about is the library of electronic files. And she also testified clearly that ABI cannot sell those files to a third party. She testified that Mr. Rammell had no involvement with CBI. She testified that -- significantly she testified this, that ABI was what she termed a vendor at will. And what she said she meant by that is that the Rutter Group could go wherever they want for typesetting services; and that, again, is because the Rutter Group owns those files. She stated that the Rutter Group could leave at any time for any purpose.

Now, they're going to argue and suggest, well, there's a great relationship there and Linda's not going to want to go anywhere. Well, Linda doesn't have final say. The Rutter Group is owned by Thomson Reuters, which is one of the largest publish companies in the world. She's got bosses she has to answer to. She doesn't have final say. And the fact that Linda's

pleased with April, again, that's April's work. That's April's hard work. She's the one that's been working to establish that relationship. We even heard from Mr. Rammell. He didn't dispute that Thomson Reuters was the one who really dictated their relationship.

She also testified about a conversation she had with Mr. Rammell in December of 2008; and that testimony, again, is significant. She testified that Mr. Rammell came out. This was again -- Christa Beguesse had passed in November of 2008. Mr. Rammell went out to Linda -- to speak with Linda Diamond in California.

And this is what Linda said of the conversation. Quote, she said that there was some agreement between April and Christa and that April owed him money and was not paying him the money -- owed Christa the money and had stopped paying the money when she died. Given your close relationship with Christa, maybe you could call April and tell her, quote, out of the goodness of her heart she should continue making those payments to him.

She then testified, "And I said I can't do that and Christa would not want me to do that and she would probably be rolling over in her grave right now if she knew you were trying to get me involved in this."

Now, Linda Diamond was under oath when she said that. And this testimony is significant for several reasons. Ken told her the money was owed to Christa. Ken knows he's not owed the money. Ken told her to have April pay out of the goodness of her heart. Ken knows he's not owed any money.

Linda says, "Christa would not have wanted me to do that. Christa would not have wanted the payments to continue because payments were supposed to cease on death. Christa would be rolling over in her grave right now if she knew what Ken was up to." That was the testimony.

Now, Ken Rammell, he offered some additional testimony in this case. He admitted he wasn't involved in the business. He testified that he could have -- there could have been a separate oral agreement between Christa and April that he did not know about. He testified that CBI was making revenues in the $250,000 range in 1999 and had been for quite some time; but he still only valued that company at $40,000.

Now, Mr. Rammell tried to distance himself a little bit from that $40,000 value he and Christa Beguesse Rammell gave to Steve Martin. And, as he testified, he didn't just testify that he gave that value to Steve Martin; he testified that he and Christa

Beguesse Rammell gave that value to Steve Martin in September of 1999.

Now, let's think about the circumstances of this meeting with Steve Martin. April Beguesse wasn't in Idaho Falls. There wasn't litigation pending. Sides weren't posturing to argue, well, it's really worth this or it's really not worth this. They were being asked what that business was worth straight up from their attorney. And that was a confidential communication. That was between them and their attorney. Now, they waived that confidential communication in this case; but at the time it was confidential. And that was their true assessment of the value of the company in 1999, $40,000, the same company they turned around and sold to April; and it's not disputed that this was a purchase price for $1,152,000.

Now, Mr. -- they tried to explain their way out of this. Mr. Rammell tried to say, "Well, that was actually just the book value." And then, if you remember, Mr. Alexander asked Steve Martin some questions on cross; and I think they tried to explain what book value was. By "book value" they meant the cash that was in the bank account. And so Mr. Alexander tried to get Steve Martin to admit that the IRS only considers book value in determining what estate tax

would need to be paid, and so that really it would be okay to give book value in that type of situation because that's what the IRS looks at. And then Steve Martin actually got a little animated; and he was like, "Oh, no, no, no. They look up fair market value and what the business is actually worth."

Now, let's take Mr. Rammell's background for a second. Mr. Rammell is an accountant. Mr. Rammell testified he was an accountant from the 1950's until he retired in the mid 90's. 40 years as an accountant. He knew what value he was giving at that time.

Mr. Rammell went on to say that they had no one to give the business to at that time. That's why -- that's the way he tried to explain it. He said they had no one to give the business to at that time, so it wasn't worth anything at all.

He said if Christa died, then there would be no value. Now, let's take a step back here and think about the situation ABI, April, has testified she's in now. She has testified that her customer has told her that she can't sell those library files; and you heard the customer say no, she can't do that. She's testified that she doesn't own anything because of the claim her customers made to ownership of those files and, as a result, it's not worth anything because she can't sell

it. That's April's testimony. Well, that's consistent with the explanation Mr. Rammell's trying to give. When Mr. Rammell and Christa gave that value of $40,000, their business was generating big money, $250,000 a year.

This case, what the business earns in this case is not the true measure of value. What the true measure of value is is the assets the business has. That's how they -- Mr. Rammell himself valued it and that's how ABI has valued it and that's what the business is worth because we've heard testimony in this case that the customer, the Rutter Group, could go anywhere at any time for any purpose. They could just leave. That's the only customer of this business. There is a huge risk there of that happening.

Now, Mr. Rammell also testified that he only considered two factors in considering the price to charge ABI, what they wanted to get out of the business and what April could afford to pay. He said, "That's the only two factors I considered."

He also testified if the Rutter Group chooses to go elsewhere, the business wouldn't be worth anything. He testified that the Rutter Group could choose to go elsewhere at any time.

He testified that -- and this was

significant too. He testified ABI was still required to pay even if they lost the customer. He wants to be paid no matter what.

A value is what you can sell something for. Mr. Rammell and Christa understood this; and that is why they only gave a $40,000 value when the business was making so much money.

April has a job, but she doesn't have ownership of anything other than the $3500 in equipment that no one disputes is the value. We're talking about some old copiers and computers and things like that. But April wasn't buying a job. She had a job. She's taking on all the risk of the customer leaving. And I think a way to think about this is, what would ABI have if April dies tomorrow? Think about that for a second. What would ABI have if April dies? Based on the evidence in this case, ABI would have some old copiers, an old copier and some old computers. It's not worth anything, just like it wasn't worth anything for CBI back in 1999.

April has built a business. She manages the customer. She makes the improvements. She does the work. She is operating under risk of losing her only customer. Don't punish her for being successful.

Now, as a Plaintiff we get to ask for some

damages in this case. And it's always an awkward thing dealing with this subject. But I think based on the evidence in this case, there's been a few scenarios. Can you guys see that okay?

UNIDENTIFIED JUROR: No.

MR. BRUNSON: Yeah, that's what I was trying to mess around with. I'm not a computer expert. Let me see if I can get it a little bit blown up here. Let's try this first. Tell me if this helps. Does that help at all? No? That probably didn't. Hang on. There. I'll do it really big, and we'll just go one scenario at a time. How is that? Is that better? Yeah? You guys in the back, in the corner? All right.

All right. The first scenario of damages in this case is based on April's testimony about value. No one disputed in this case that she paid $708,000. Now, there's an Exhibit 1 that was admitted; and you can see the history of payments if you look at Exhibit 1. It's some QuickBook entries; and it totals up the payments, it totals up the checks. There are several pages of that document. But Mr. Rammell doesn't dispute that.

If you look, she also testified what she actually received from CBI, which was some office equipment of $3500; the PageMaker program, which was $600; and what I have termed -- and this is my term --

training and customer relationship management. And she placed a value, I think a significant value, of $250,000 on that. She's not trying to shortchange this. She's not trying to nickel and dime this. She said, "Yes, my mother trained me up and she helped me." Even though she had spent a lifetime working in this industry, even though she had worked in the business since she was a teenager, she still placed a value of 250,000 on what she got from her mom. She's not -- we're not disputing that.

And you heard no other expert or no other witness come into this courtroom and say that that's not a reasonable number for what she got as far as the training, the mentoring, what she actually -- the stuff that was in her mom's head. You heard no other testimony about that. She was never challenged on that. Who -- she's the best person to offer that testimony because she knows the business. She's the one doing the work.

Now, so you add all that up and you get -- you add up the PageMaker, you add up the equipment, you add up the 250,000, and you get 254,100. And you take the payments.

So our claims for fraud and breach of contract and breach of warranty, our position is this:

That the value should be determined as of the date the asset or the lack of assets were transferred. The date of the transition was January 1st, 2004. That's when the purchase was completed because that's when ABI -- and it's undisputed in this case -- took over for CBI. So that's the date you look at. You don't look at things that happened after the fact. I mean, it's like buying a stock. You buy stock and it tanks the next day, well, that's too bad. But you look at the date that you purchased it. The date the purchase was completed was January 1st, 2004. Now, she was required to make some payments just to finance it, but the purchase was done on January 1st, 2004, and so that's the date we value things. And on that date the value of what we got was $254,100. That's the value of what we received.

Now, you'll see another jury instruction. And maybe just make a note of this. It's Instruction Number 39 that deals with our breach of warranty claim and value and when you should value it. And that's consistent with what I've just set forth.

Okay. So if you take what was -- what we got and what we paid, $708,000, there was some other payments that were made for contract labor to Christa Beguesse. We're not including those. There was another

40 or 50 thousand dollars, but we're not including those for purposes of our calculation. And you subtract out the -- what we got; and you end up with $453,900. Now, that's one scenario that you, based on the evidence you've heard in this case, could determine ABI's damages.

Another scenario you've heard in this case that we've talked about is Mr. Rammell and Christa's value of the business before they sold it to April, before there was any litigation, before there was any really dispute; and they valued that at $40,000. That was the value they gave the business. And so you can take what we paid for it and what they said to their attorney in confidence, that it was actually worth $668,000.

Now, the third scenario -- and April talked a lot about this when she was being cross-examined by Mr. Alexander -- that she doesn't have these files. She doesn't have these library of files that she was promised. She doesn't have ownership of them. She just doesn't own them. And that was the primary reason she came out to do this deal. Because she doesn't own them, she can't turn around and sell them to anybody. And she testified about that.

Now, that -- there's evidence that supports

that theory. And that value is what we paid; and that's $708,000. Now, there's evidence to support all those theories; and it's up to you to decide what to do.

Now, I want to touch on another jury instruction. This is 40.2. And 40.2, this talks about claims and defenses and things like that because in this case, yeah, we have our claims; but we're also being sued, as you know, for the remaining payments because those payments ceased when Christa passed pursuant to our understanding of the agreement.

And, now, in this case they said we waited too long to file our lawsuit. Well, our position is, as you know, that as soon as we found out that we didn't own the files, within months we literally filed a lawsuit. But if you disagree, then there could potentially be a problem with the statute of limitations. And we went into the statute of limitations. But what I'm getting at here is that we still have these fraud claims and this breach of contract claim and the breach of warranty claim. If we don't have a claim that we can recover on because we waited too long, we do have a claim in response to what they're suing us for. There still are good defenses, and that's what 40.2 talks about. It talks about we can offset any damages that they're trying to get from us

based on their own conduct. So any defenses we have in this case, any claims we have in this case are also defenses.

Now, April testified quite clearly in this case on more than one occasion that both Christa and Ken Rammell told her that payments were to cease upon her mother's death. That was her testimony and I think it was clear and I think it came in more than once and you heard it more than once. Now, that is a complete defense to their claims in this matter because if that was part of the agreement, then those payments were not to continue. So the only way you can award them anything is if you determine that April under oath, sitting here, was lying to you. That's the only way you can award them a dime in this case. You have to make the determination she was lying to you. It's up to you to weigh the credibility of the witnesses here.

Mr. Rammell testified that there's separate -- have been separate deals between April and Christa. He testified that he wasn't privy to all their conversations. So because he testified that he didn't talk about it, April disagrees with that. She testified that Mr. Rammell, in fact, did say those things to her as well but there's other agreements that could have occurred between Christa and her mother.

As I stated at the start of my closing argument, hard work pays off. Don't punish April for working hard.

I appreciate your time; I appreciate your attention; and on behalf of my client, we appreciate your service. Thank you.

REBUTTAL ARGUMENT BY THE PLAINTIFF

MR. BRUNSON: I want to just touch briefly on the verdict form that Mr. Alexander referred to. And I meant to do this as part of my opening presentation, and then I got some momentum and I forgot. So as part of your jury instructions you get a verdict form, and that's what you fill out at the end. And Mr. Alexander just referred to it. And the first question -- you're asked a series of questions regarding the parties' claims and how you're going to determine the issues in the case.

And the first question is, "Are the Plaintiff's claims of fraud barred by the statute of limitations?" Now, what that is asking is, is did we wait too long to file the lawsuit. If your answer to that is "yes," that means we can't recover for fraud. So if you think we're entitled to recover for fraud, then you would need to answer "no" because it's saying our claim -- are the Plaintiff's claims barred. And so

if you say "yes," that means we have no claims.

So that -- with that, I think it's just -- there's some legalese in there, so I thought that was a little confusing maybe. And that's true with the other -- they go through the other claims and ask the same question. That's the first question it asks on all of them. So that's the only comment I have as to the verdict form.

There was a couple of statements in the --

Would you mind -- thank you.

THE BAILIFF: (Turning on overhead TV).

MR. BRUNSON: There was a couple of statements made about the lease agreement, Exhibit 2. And I will be brief. Oh. This is Exhibit 2, and you'll have this with you. But Counsel made this statement: "All the important provisions are in this agreement." You heard the testimony. You've heard the Judge's instructions as to this agreement. But I'd point out, the very first word in the document is "lease." And that is actually not correct. The Court has determined that this was a purchase, so --

And then if you turn to the end -- and we did this before as the evidence came in -- if you see here Exhibit A, it says "business." So this was supposed to be the business that's being transferred.

You scroll down, you look and see, there is nothing listed in this agreement as to what was being transferred for business or equipment. So certainly all the important provisions aren't in the agreement, all the important provisions are missing from the agreement, and that's why we've heard all this oral testimony about what the agreement was.

You've heard some testimony about honoring Christa's legacy. Counsel suggested that that's what they're trying to do. The only -- you didn't hear testimony about that. You heard Counsel's argument about that, that that's what they're trying to do. The only testimony that I remember in the trial -- and you were here as well -- came from Linda Diamond Raznick about Christa's legacy and about how Christa would react to what Ken was trying to do. What Christa said to Linda was that Christa would be rolling over in her grave. So comments about her legacy, the only evidence in about that is, she would be rolling over in her grave based on what he's trying to do.

Now, I want to talk to you just briefly about payments ceasing on death because April Beguesse did testify clearly that both Ken and Christa told her that; and she also said that they told her it was part of her inheritance. And Counsel drew your attention to

this Exhibit B, which you'll also have.

Your Honor, may I approach?

THE COURT: Sure.

MR. BRUNSON: Thank you, Your Honor. I don't want to get too much in your face, but it's kind of hard to see. But I want you to look on this exhibit. You'll see the name "Christy" appear here on this exhibit. Now, April testified that Christy is her older sister; and April also testified that mom and Mr. Rammell told her that this was part of her inheritance. And this document directly references that because she was -- at mom's request she was paying for Christy, and the reason she'd be paying Christy was because this was her inheritance. That's directly consistent with the statement that payments would cease upon death because she's continuing to honor what her mom asked her to do. But she's not legally required to do that. She's doing it. That was the testimony.

I appreciate your time. There's a lot of things Counsel said that I could go back into. I think you've heard the evidence, you've heard the argument from us. Again, on behalf of my client, I appreciate your time and energy. Thank you.

(Closing arguments concluded)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) CASE NO. CV-09-2767
COUNTY OF BONNEVILLE)

I, JACK L. FULLER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, all witnesses named in the foregoing proceedings were duly sworn to testify to the truth, the whole truth, and nothing but the truth;

That said proceedings were reported by me in machine shorthand at the time and place therein named and thereafter reduced to typewriting by me and that the foregoing transcript contains a verbatim record of said proceedings.

I further certify that I am not related to any of the parties nor do I have any interest, financial or otherwise, in the cause of action of which said proceedings were a part.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office this 1st day of May, 2012.

Jack L. Fuller, Idaho CSR #762
CSR Expiration Date: 07-10-12
Notary Expiration Date: 04-04-13

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DISTRICT COURT SEVENTH JUDICIAL DISTRICT BONNEVILLE COUNTY IDAHO

April Beguesse, Inc., an Idaho Corporation, Plaintiff/Counterdefendant, vs. Kenneth Rammell, an individual, Christa Beguesse, Inc., an Idaho corporation, The Estate of Christa Beguesse Rammell, by its qualified personal representative, Kenneth Rammell, Defendants/Counterclaimants.	Case No.: CV-09-2767 PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR JNOV OR NEW TRIAL

The Plaintiff, April Beguesse, Inc. (ABI), by and through its counsel of record, Jeffrey D. Brunson and the firm Beard St. Clair Gaffney PA, respectfully submits the following memorandum of law in opposition to Defendants' motion for JNOV or new trial.

INTRODUCTION

On April 13, 2012, the jury returned its verdict form in this action. The jury found the defendants Christa Beguesse, Inc. (CBI), Kenneth Rammell (Rammell), and the

Estate of Christa Beguesse Rammell (the Estate) (collectively the Defendants) liable for fraud and breach of contract and warranty and awarded ABI damages in the amount of $544,013.00. The jury found ABI not liable under any of the counterclaims brought by the Defendants and awarded the Defendants nothing. As a result, the Defendants filed a motion for JNOV to dismiss ABI's claims or alternatively for a new trial. The Defendants have waived many of the arguments they are now asserting. Any remaining arguments are not supported by the law or facts established in this case. Thus, the Defendants' motion should be denied.

LEGAL STANDARD

A jnov should not be granted if the jury's verdict has ***any*** basis in the facts of the case. The Idaho Supreme Court notes that a jnov should only be granted when reasonable minds could not have reached the verdict that the jury reached. *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 829 P.2d 656 (1992). The moving party admits the truth of the adverse evidence and *every* inference that may be legitimately drawn from it. *See, e.g., Lanham v. Idaho Power Co.*, 130 Idaho 486, 496, 943 P.2d 912, 922 (1997); *Litchfield v. Nelson*, 122 Idaho 416, 835 P.2d 651 (Ct. App. 1992); *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986). The trial court *does not* re-weigh the evidence on a motion for jnov; additionally, the court should not evaluate the credibility of witnesses or compare any of its own factual findings to those of the jury. *Lanham*, 130 Idaho at 496, 943 P.2d at 922. The Court draws *all* inferences in favor of the non-moving party. *Id.*

A trial judge possesses discretion when ruling on a motion for a new trial. *Quick v. Crane*, 111 Idaho 759, 766, 727 P.2d 1187, 1194 (1986). However, the Court should give full respect to the jury's findings. *Id.* at 768, 1196. Exercising its discretion "the

trial court may grant a new trial when it is satisfied the verdict is not supported by, or is contrary to, the evidence, or is convinced the verdict is not in accord with the clear weight of the evidence. . . ." *Blaine v. Byers*, 91 Idaho 665, 671, 429 P.2d 397, 403 (1967). *Cf. Karlson v. Harris*, 140 Idaho 561, 97 P.3d 428 (2004). The Defendants carry the burden of demonstrating to the court that the verdict is not supported by the clear weight of the evidence. *See Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999).

ARGUMENT

I. The Defendants fail to provide proper support for their motion for JNOV or for a new trial pursuant to I.R.C.P. 59(a).

In framing their arguments for jnov or a new trial under I.R.C.P. 59(a), the Defendants rely upon several improper sources. The Defendants cite to April Beguesse's deposition several times throughout their brief in support of their motion for jnov or a new trial. However, this deposition, or portions thereof, was never published at trial nor was the testimony ever admitted into evidence. This is one of the many great failings by the Defendants. In fact, counsel for the Defendants initially began to publish April's deposition, but then changed course and withdrew his attempt to publish the deposition. Because the deposition was never published, it was never added to the trial record in this case, and the Defendants cannot now use it as evidence to support their motion for jnov or a new trial. Moreover, even if the deposition is published the testimony is not inherently admitted during trial because it is not (a) admitted as documentary evidence that the jury could have taken into the jury deliberation room and (b) not trial testimony.

The Defendants also submitted an affidavit of David Alexander, counsel for the Defendants, in support of their motion for jnov or a new trial. However, this is an

improper use of an affidavit. Mr. Alexander was not a witness or juror at trial. His affidavit is not the type of affidavit contemplated under I.R.C.P. 59(a), which establishes the ground for which a new trial can be granted:

> A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:
> 1. Irregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.
> 2. Misconduct of the jury.
> 3. Accident or surprise, which ordinary prudence could not have guarded against.
> 4. Newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial.
> 5. Excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice.
> 6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.
> 7. Error in law, occurring at the trial. *Any motion for a new trial based upon any of the grounds set forth in subdivisions 1, 2, 3 or 4 must be accompanied by an affidavit stating in detail the facts relied upon in support of such motion for a new trial.* Any motion based on subdivisions 6 or 7 must set forth the factual grounds therefor with particularity. On a motion for new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

IDAHO R. CIV. P. 59(a) (2012) (emphasis added). Mr. Alexander, as counsel for the Defendants, is not qualified to testify about any alleged irregularities, jury misconduct, accident or surprise, or newly discovered evidence at the trial as contemplated by I.R.C.P. 59(a)(7). Furthermore, Mr. Alexander's affidavit consists of vague conclusions and incorrect statements regarding the trial record, rather than the factual detail required by I.R.C.P. 59(a)(7).

Finally, the Defendants fail to meet the high standards demanded of a party moving for jnov or a new trial. The Defendants consistently fail to show that the jury's verdict had no basis in the facts of the case and that reasonable minds could not have reached the same verdict reached by the jury in this case. Therefore, and by drawing all inferences in favor of ABI, the Defendants fail to meet their burden under the jnov standard. In arguing that a new trial should be granted, the Defendants fail to follow I.R.C.P. 59(a) by supporting their arguments with either the kind of affidavit contemplated under the rule or by setting forth the factual grounds of its argument with particularity. The Defendants also consistently fail to show that the verdict was not supported by the clear weight of the evidence and that a new trial would be appropriate.

Because the Defendants fail to meet their burden under either the jnov standard or the standard for granting a new trial under I.R.C.P. 59(a), the Court should deny the Defendants' motion for jnov or a new trial.

II. ABI's claims are Ripe and ABI properly demonstrated damages.

The Defendants cite to case law to support their argument that ABI's claims are not right. However, the ripeness cases cited by the Defendants are not implicated here. The Defendants cite to *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002), for the proposition that there is no real controversy until a proposed law becomes an actual law. Here it is undisputed that a purchase of a business took place. There was a real and substantial controversy as to what was sold and the value of what was sold. Thus, the ripeness cases cited by the Defendants do not support a finding in this case that ABI's claims are not ripe.

ABI put on evidence of damages as to all of its claims. Most of this evidence came into the trial record without any objection. It is axiomatic that the failure to object during trial constitutes a waiver of the objection. As a result, ABI's claims are ripe.[1] The Defendants pin their entire damages argument on the assertion that ABI failed to prove its damages. (*See* Defs.' Mem. Re: JNOV or New Trial at 5-7.) However, ABI presented testimony at trial regarding the source of ABI's damages. April testified about the representations made to her by the Defendants about CBI owning the library of files. April also testified that she would be unable to sell ABI for the same terms under which she had purchased CBI. April further testified that she paid $708,000 to the Defendants for CBI, based on the Defendants' representations to her, when the business was in reality worth only about $250,000 in 2004. Stephen Martin testified that Rammell and Christa had valued CBI at $40,000 in their 1999 estate planning documents. The disparity between the Defendants' representations to April and the actual value of the business, as set forth in testimony at trial, provide evidence of ABI's damages. Because ABI put on adequate evidence of damages, the Defendants' ripeness argument fails.

The Defendant's conclusory argument that the jury's award is excessive and appeared to have been given under the influence of passion or prejudice should not even be considered by the Court. The affidavit submitted by the Defendants is an affidavit of counsel and is not the type of affidavit contemplated by Rule 59(a). In any regard the facts are not stated with particularity and the Defendants' motion should be denied.

Idaho courts recognize both the "out-of-pocket" rule in measuring damages and the "benefit of the bargain" rule. *Watts v. Krebs*, 131 Idaho 616, 621, 962 P.2d 387, 392

[1] It is somewhat perplexing that on one hand the Defendants argue the claims are not ripe and on the other hand they argue the claims are beyond the statute of limitations. These are plainly inconsistent positions.

(1998). "The underlying principle is that the victim of fraud is entitled to compensation for every wrong which is the natural and proximate result of the fraud. The measure of damages which should be adopted under the facts of a case is the one which will effect such result." *Id.* The benefit of the bargain rule consists of "the difference between the real value of the property purchased and the value which it would have had the representations been true." *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 217, 923 P.2d 456, 462 (1996).

An award of damages will be upheld "where there is sufficient evidence supporting the award." *Griffith v. Clear Lakes Trout Co., Inc.*, 146 Idaho 613, 618, 200 P.3d 1162, 1167 (2009). Damages need only be proven with reasonable certainty. *Id.* "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." *Id.* The amount of damages is for the jury to decide. *Dinneen v. Finch,* 100 Idaho 620, 624, 603 P.2d 575, 579 (1979). "Ultimately, however, it is for the trier of fact to fix the amount after determining the credibility of the witnesses, resolving conflicts in the evidence, and drawing reasonable inferences therefrom." *Griffith*, 146 Idaho at 618, 200 P.3d at 1167. On a motion for jnov, the court can only set aside a jury award if the damage award "shock[s] the conscience" of the trial judge. *Quick v. Crane*, 111 Idaho 759, 769-70, 727 P.2d 1187, 1197-98 (1986).

The Defendants improperly try to impeach the jury verdict. Idaho Rule of Evidence 606(b) absolutely prohibits substantive impeachment of a jury verdict. The Idaho appellate courts have consistently upheld the sacrosanct nature of deliberations and prohibited impeachment of jury verdicts: "A review of the internal

deliberation process of the jury is prohibited unless affected by extraneous prejudicial information or an outside influence." *Andrews v. Idaho Forest Indus.*, 117 Idaho 195, 198, 786 P.2d 586, 589 (Ct. App. 1990) (citing *Lehmkuhl v. Bolland*, 114 Idaho 503, 510, 757 P.2d 1222, 1229 (Ct. App. 1988)). "The reasons for excluding evidence attempting to impeach the verdict include insuring the freedom of deliberations, the stability and finality of verdicts and the protection of jurors." *Lehmkuhl*, 114 Idaho at 509.

The Defendants have not presented any evidence that any outside prejudicial force influenced the jury's deliberative process. Thus, any suggestion that the verdict is anything other than what it purports to be is improper and contrary to Idaho law.

The Defendants' argument that the representations regarding the value of the proprietary files were statements of opinion and therefore not actionable representations is without merit. First, the Defendants do not cite any Idaho law in support of their argument. Second, the cases cited by the Defendants actually support ABI's position. Third, the argument ignores the representation of ownership of proprietary. Even if the statement of value was not actionable fraud, the statement of ownership is.

April Beguesse testified at trial that she was told by her mother and Rammell that she would be getting ownership of a library of files valued between 1-1.3 million dollars and that she would be getting proprietary software unique to CBI's business that Christa Beguesse had created. April also testified at trial that she relied on the representations as to ownership and value. She testified specifically that she relied on Rammell's assessment of value because of his background as an accountant. Linda Raznick's testimony at trial provided via deposition was that Thomson Reuters owned the library of files and that ABI could not sell or market the library of files to a third party.

April testified that because she did not own the files, she was deprived of the benefit of the bargain. April testified that because she did not get proprietary software, unique to CBI's business that Christa had created, she did not get the benefit of the bargain. Based on April's testimony at trial, the value of the files at the time of the deal was represented to be between 1-1.3 million dollars. April testified, without any objection, that the value of what she actually got was $254,100. Rammell testified that the value he and Christa gave their estate planning attorney for CBI was $40,000 and that was because the business was not worth anything without Christa. This evidence establishes that the jury's finding of damages was well within the permissible range.

April's testimony was not speculative. The Defendants offered no testimony at trial to rebut her testimony as to damages. As such the jury's verdict should not be altered and the Defendants' motion should be denied.

III. The statute of limitations does not bar ABI's claims.

The statute of limitations issue was thoroughly briefed and argued on summary judgment. ABI incorporates and restates that argument and evidence as if fully set forth herein. The jury properly determined the statute of limitations issue and the Defendants are doing nothing more than trying to get the Court to re-weigh factual issues properly decided by the jury.

In its summary judgment decision, the Court stated "a factual dispute exists" as to questions of whether ABI's claims were barred by the statute of limitations. (Nov. 2, 2010 Mem. Decision and Order 7.) This issue was a question of fact and was properly submitted to the jury.

a. ABI's claims regarding the library of files are not barred by the statute of limitations.

The Defendants argue that ABI's claims regarding the library of files are barred by the statute of limitations because April testified that she knew neither CBI nor ABI owned the copyrights to the library of files. This is the first of several times in their brief that the Defendants mischaracterize April's testimony regarding ownership of the library of files. April testified that she knew CBI and ABI did not own the copyright to the final published books. April testified, however, that she believed CBI and later ABI owned the library of files used to create and update the printed books. April also testified that her belief that ABI would own the library of files was significant in her decision to purchase CBI. April further testified that she did not learn that ABI did not own the library of files until a phone conversation with Linda Raznick after Christa's death, well within the statute of limitations.

b. ABI's claims regarding the proprietary software are not barred by the statute of limitations.

In arguing that ABI's claims regarding the proprietary software are barred by the statute of limitations, the Defendants improperly cite to April Beguesse's earlier deposition. As argued above, counsel for the Defendants failed to publish the deposition at trial, so it is not a part of the record and cannot be relied upon by the Defendants in their motion for jnov or a new trial. The Defendants failed to elicit the same or substantially similar testimony from April during trial. The Defendants simply failed to properly use April's deposition during trial and cannot now rely upon the deposition to support their motions.

Furthermore, in making this argument, the Defendants again miscast April's testimony. Contrary to what the Defendants argue, April testified that she heard Christa

address members of the Exchange Club and state that she had invented a software operating program. The fact that April did not hear Christa's later clarification of this statement was supported by Stephen Hall's testimony. This evidence indicates that April only became aware of the Defendants' fraud within the time period established by the statute of limitations.

The Defendants' argument that ABI's breach of contract and warranty claims against the Defendants accrued upon ABI's purchase of CBI in 2004 also must fail. The jury correctly determined that the Defendants were equitably estopped from arguing that ABI's breach claims accrued in 2004 because of the Defendants' fraudulent representations. The jury correctly and properly determined that ABI's breach claims against the Defendants were not barred by the statute of limitations.

c. None of ABI's claims are barred by the statute of limitations.

In arguing that all of ABI's other claims against the Defendants should be barred under the statute of limitations, the Defendants rely on their conclusory statement that "[t]here simply is no substantial and competent evidence to rule otherwise." (Defs.' Mem. Re: JNOV or New Trial at 10.) This is not enough. The Defendants have a high burden to meet in order to successfully move for jnov or for a new trial, and they fail to meet their burden under either standard. In drawing all inferences in favor of ABI, as the Court must do on a motion for jnov, it is clear the Defendants have failed to show that the jury's verdict has no basis in the facts of the case. The Defendants have also failed to show that the evidence did not support the jury's determination that none of ABI's claims were barred by the statute of limitations. Therefore, a new trial would not be appropriate under I.R.C.P. 59(a).

IV. Counsel for ABI did not make inappropriate arguments during closing statements to the jury.

The Defendants next argue that counsel for ABI made inappropriate closing arguments. The Defendants claim ABI's counsel did this by focusing on matters previously rejected by the Court, making arguments not based on evidence presented at trial, and inflaming the jury by arguing irrelevant matters. However, the Defendants have waived their right to make such an argument. Furthermore, counsel for ABI did not act inappropriately in delivering his closing argument to the jury.

By failing to make a proper objection to ABI's counsel's closing argument at trial, the Defendants have waived their right to make any objection. The Idaho Supreme Court addressed this issue in *Gillingham Const., Inc. v. Newby-Wiggins Const., Inc.*, in which the Court found that the district court erred in granting a new trial based in part on statements made by counsel in closing argument:

> The district court likewise erred in finding counsel's statements at trial caused an irregularity in the proceedings that unfairly prejudiced the jury against Newby-Wiggins. This Court has held that where counsel fails to make a proper objection to evidence or testimony offered at trial the issue is not preserved for appeal. *See, Wheaton v. Indus. Special Indem. Fund, 129 Idaho 538, 541, 928 P.2d 42, 45 (1996).* Gillingham's counsel remarked in closing that should the jury find the State was required to indemnify Newby-Wiggins for Gillingham's claim, the result would be that Gillingham will recover nothing. Counsel's statement was an inaccurate portrayal of Gillingham's recovery, but Newby-Wiggins failed to object to the statement during trial. The district court ignored Newby-Wiggins' waiver of objection and instead granted a new trial. This was improper and an insufficient ground to grant a new trial.

142 Idaho 15, 24-25, 121 P.3d 946, 955-56 (2005). Because counsel in the *Gillingham* case failed to object to opposing counsel's inaccurate remarks during the trial, it waived any objections. Just as in *Gillingham*, counsel for the Defendants failed to object to

anything said by ABI's counsel during closing argument, and by failing to do so waived all objections to anything said during ABI's counsel's closing argument.

Furthermore, nothing said by ABI's counsel during closing argument was inappropriate. The Defendants first accuse ABI's counsel of focusing on matters previously rejected by the Court, specifically that Rammell only contributed $500 to become a fifty percent member of CBI, that the jury should find fraud concerning the will, and that April had a right to a guaranteed contract with the Rutter Group. ABI's counsel did not inappropriately allude to any of these issues in his closing statement.

Evidence that Rammell only contributed $500 to become a fifty percent member of CBI came into the record during Rammell's testimony at trial, and goes to the materiality of ABI's claims against the Defendants. In addition, ABI's counsel never suggested in his closing argument that the jury should find fraud regarding the will. Rather, ABI's counsel instead focused on representations made by the Defendants to April that her monthly payments should cease upon Christa's death. Finally, and contrary to the Defendants' arguments, counsel for ABI never suggested that April had the right to a guaranteed contract with the Rutter Group. This was simply not mentioned during his closing argument.

The Defendants also argue that counsel for ABI improperly argued in closing that they defrauded ABI because it would be worth nothing if April died. This is, however, a logical extension of earlier testimony given by Rammell. Rammell testified that when he and Christa were valuing their assets for estate planning purposes, CBI was estimated to be worth $40,000, because if Christa died, that was the amount of assets that could be liquidated from the business. Rammell testified that when he and Christa were engaging

in this valuation analysis for estate planning reasons, they determined the business wouldn't be worth anything if Christa died. Regardless, there was no objection to any statements concerning these arguments.

With this testimony from Rammell in the record, and other evidence being what it is, it only makes sense that ABI, like CBI before it, would lose its value upon the death of its owner, April. This argument pertains to the issue of valuation, and counsel for ABI did not inappropriately bring it up in his closing argument to the jury.

Finally, the Defendants make a conclusory statement that counsel for ABI inflamed the jury by arguing irrelevant matters in his closing argument, which tainted every claim before the jury and urged them to find fraud without any basis in the evidence or in the law, and instead agree on a verdict based on passion and prejudice. The Defendants offer absolutely no evidence to support this claim. Instead, the circumstances suggest that the jury's verdict was based on the evidence of the trial.

V. The Court should uphold the jury's verdict as to ABI's fraud claims against all Defendants.

a. The jury verdict form was proper.

The Defendants argue that the jury verdict form was improper because it is impossible to determine what specific acts of fraud the jury determined were committed by the Defendants. However, the Defendants effectively waived their ability to make this argument upon submission of their proposed jury verdict form. Furthermore, the jury verdict form was proper in this case.

On September 9, 2011, the Defendants submitted their proposed special verdict form. Several of the questions on the verdict form are substantially identical to the verdict

form utilized by the jury. Examples of similar or identical questions include the following:

> Did the Defendants commit fraud? (Defs.' Proposed Jury Instructions and Special Verdict Form, Question 1.)
> Did Kenneth Rammell commit fraud? (Verdict Form, Question 2.)
> Did Christa Beguesse, Inc. commit fraud? (Verdict Form, Question 3.)
> Did Christa Beguesse commit fraud? (Verdict Form, Question 4.)
> ...
> Did the plaintiff know or should it reasonably have known, on or before May 7, 2005, that it could not sell the library of files without its customer's permission? (Defs.' Proposed Jury Instructions and Special Verdict Form, Question 3.)
> Are Plaintiff's claims of fraud barred by the statute of limitations? (Verdict Form, Question 1.)
> ...
> Did the defendants breach a contract with plaintiff ABI relating to the library of proprietary files? (Defs.' Proposed Jury Instructions and Special Verdict Form, Question 4.)
> Did the defendants breach a warranty with plaintiff ABI relating to the library of proprietary files? (Defs.' Proposed Jury Instructions and Special Verdict Form, Question 5.)
> Did Christa Beguesse, Inc. breach its contract and/or warranty with Plaintiff as to a library of files? (Verdict Form, Question 7.)
> ...
> Did the defendants breach a contract with plaintiff ABI relating to the proprietary software? (Defs.' Proposed Jury Instructions and Special Verdict Form, Question 7.)
> Did the defendants breach a warranty with plaintiff ABI relating to the proprietary software? (Defs.' Proposed Jury Instructions and Special Verdict Form, Question 8.)
> Did Christa Beguesse, Inc. breach its contract and/or warranty with Plaintiff as to proprietary software? (Verdict Form, Question 10.)

By submitting a proposed jury verdict form that is substantially similar to the verdict form utilized by the jury in reaching its verdict, the Defendants have waived any objections to the verdict form.

Furthermore, the jury verdict form is proper. With regards to ABI's fraud claims against the Defendants, it asks whether each defendant individually committed fraud against ABI. This is more specific than the Defendants' proposed special verdict form

regarding whether the Defendants committed fraud against ABI. The jury verdict form is more specific than the Defendants make it out to be, and it sufficiently and properly outlined the questions for the jury to answer in delivering its verdict. The Court should uphold the jury's verdict on all of ABI's fraud claims against the defendant.

b. The jury instructions were proper.

The Defendants also argue that the jury instructions were improper because "[t]he jury was allowed to consider fraud on the basis of 'misrepresentations as to the terms of the contract.'" (Defs.' Mem. Re: JNOV or New Trial at 11-12.) The Defendants then make a confusing argument that a party cannot misrepresent terms while negotiating a contract. In stating that the Court erred in giving the jury a blanket and confusing fraud instruction, the Defendants do not point out that they failed to submit a proposed jury instruction that would fix the alleged failings in the instruction given by the Court to the jury. The Defendants effectively waived their ability to argue that the jury instruction pertaining to fraud was improper by failing to submit a better alternative in their proposed jury instructions. Additionally, the Defendants offer no evidence to show that the jury's instruction on fraud was improper.

c. The evidence supports the amount of damages awarded by the jury.

The Defendants argue that the amount of damages awarded by the jury are not supported by the evidence, and that the jury improperly based its damages award on ABI's fraud claims related to Christa Beguesse's will. However, in making this argument, the Defendants use blatantly incorrect reasoning.

The Defendants claim that the jury improperly awarded ABI damages for fraud based on Christa's will, and that the award was merely a retrial of the probate issue. In

arguing this, the Defendants state that "the amount awarded [by the jury for ABI's fraud claims] is exactly one-half of the value of the community property as it appears in the notes of attorney Stephen Martin." (Defs.' Mem. In Supp. Defs.' Mot. JNOV or New Trial 12.) This is incorrect. Mr. Martin's notes plainly showed that the value of the community property, as estimated by Christa Beguesse and Rammell in 1999, was $900,000.00. (*See* Pl.'s Trial Ex. 44.) The jury awarded ABI $354,000.00 in damages for ABI's fraud claims against the Defendants. Contrary to what the Defendants argue, $354,000.00 is not half of the $900,000.00 valuation of the community in 1999, and there is no indication that the jury based its fraud award on the issue of Christa Beguesse's will.

The Defendants ignore the fact that the jury spent several hours deliberating the case's merits. The Defendants' arguments are based solely on supposition. Simply arguing that the jury must have awarded damages based on passion or prejudice *because the verdict was large* is insufficient. This is a commercial claim, which by its very nature involves significant dollar amounts. There must be some evidence that passion or prejudice was involved in this case. The Defendants have no such evidence.

In arguing that the evidence at trial did not support the amount of damages awarded by the jury, the Defendants have failed to meet their burden under either the jnov standard or the standard for a new trial under I.R.C.P. 59(a). In drawing every inference in favor of ABI, as the Court must do on a motion for jnov, the Defendants have failed to show that reasonable minds could not have arrived at the verdict and award reached by the jury. The Defendants have also failed to show that the jury's verdict was

not supported by a clear weight of the evidence, as required for a motion for new trial under I.R.C.P. 59(a).

VI. ABI did not fail to prove all the essential elements of fraud.

The Defendants later argue that ABI failed to prove all the essential elements of fraud, specifically that CBI owned a library of proprietary titles valued at over $1,000,000; that CBI owned proprietary PageMaker software unique to CBI's business; and that Christa had a will that allowed ABI to stop making payments to CBI upon Christa's death. In making this argument, the Defendants fail to provide evidence to support its argument while ignoring testimony in the record that contradicts its position.

a. Representations regarding ownership of the library of files.

The Defendants' argument is based on its mischaracterization of April Beguesse's testimony regarding representations made to her by the Defendants concerning ownership of the library of files. As established above, April testified at trial that she knew CBI and ABI did not own the copyright to the physical books produced by the Rutter Company, but she testified repeatedly that she believed she owned the library of files used to create and update the finished product. April's belief was supported by her testimony that CBI, and later ABI, provided locked versions of the files to the Rutter Group, requiring any edits or changes to be made by CBI or ABI. This testimony provided evidence that April Beguesse and ABI were in fact ignorant of the falsity of the Defendants' representations about CBI's ownership of the library of files.

It should be noted that April's testimony about her belief regarding the ownership of files is undisputed. The Defendants disclosed Pete Masterson as a potential expert witness to rebut April's testimony about ownership of the files, but declined to call him at

trial. Therefore, April's testimony about ownership of the library of files remains undisputed.

b. Representations regarding the proprietary software.

In arguing that ABI failed to show it was ignorant of the falsity of the Defendants' representations to April that CBI owned proprietary software, the Defendants ignore evidence from April's testimony indicating otherwise. April testified that Christa told her that she would be getting software, including proprietary software, as part of her purchase of CBI. April further testified that she heard Christa tell members at a meeting of the Exchange Club that Christa had invented a software operating program. April also testified that Rammell concurred with Christa's representations about the proprietary software, and that she relied on these representations by Christa and Rammell. April's testimony provides evidence that she and ABI were ignorant of the falsity of the Defendants' representations regarding the proprietary software.

c. Representations regarding ABI's payments to cease upon the death of Christa.

The Defendants argue that ABI failed to prove all the essential elements of fraud in its attempts to relitigate the issues stemming from Christa's will and decided earlier by the probate court. This is a misstatement of ABI's position – ABI argued that the Defendants represented to April that ABI's payments for the purchase of CBI would cease upon Christa's death. The terms of the will are irrelevant to this argument; instead, what is relevant are the representations made by the Defendants to April about ABI's monthly payments stopping after Christa's death as a part of ABI's deal to purchase CBI. Furthermore, counsel for ABI never urged the jury to rewrite Christa's will – in claiming

this, the Defendants merely rely on a conclusory statement without any evidence to support it.

In arguing that ABI failed to prove all of the essential elements of fraud, the Defendants fail to provide evidence to meet their high burden under the standards for granting a motion for jnov or a new trial. The Defendants have failed to demonstrate that reasonable minds could not have reached the same verdict as that reached by the jury, making the Defendants' motion for jnov inappropriate. The Defendants have also failed to show that the jury's verdict was not supported by the clear weight of the evidence, making the Defendants' motion for a new trial under I.R.C.P. 59(a) inappropriate.

VII. The Court should uphold the jury's verdict as to ABI's fraud claims against the Estate.

The Defendants also argue that ABI's fraud claims against the Estate must fail for a lack of substantial and competent evidence. In making this argument, the Defendants ignore several pieces of testimony that came from different sources throughout the course of the trial that supported ABI's claims of fraud against the Estate.

April testified during direct examination that Christa and Rammell told her that she would be getting the turnkey business, software, and a library of files worth 1-1.3 million dollars, which could later fund April's retirement. This testimony came in prior to counsel for the Defendants raising an objection under Idaho Code § 9-202 and Idaho Rule of Evidence 601(b), and before the Court issued its limiting instruction to the jurors. Therefore, April's above testimony about representations made in part by Christa about the elements of April's purchase of CBI provides substantial and competent evidence of fraud on the part of the Estate.

Later in the trial proceedings, counsel for the Defendants opened the door for April to testify about further representations made by her mother regarding April's purchase of CBI. Under cross-examination by counsel for the Defendants, April testified that Christa told her the business would belong to April one hundred percent and that payments would cease upon Christa's death. This testimony provided further substantial and competent evidence supporting ABI's claims of fraud against the Estate.

Stephen Hall provided further evidence of fraud by the Estate against ABI. Mr. Hall testified that he attended the meeting in which Christa addressed the Exchange Group. Mr. Hall further testified that he thought Christa said she developed a software program or process related to her line of work. He further testified that he thought he approached Christa after the presentation and learned that she used off-the-shelf software, but that April, who was present at the general presentation, may not have heard Christa's answer to Mr. Hall. Mr. Hall's testimony provided additional evidence supporting ABI's claim of fraud against the Estate.

Finally, Rammell's testimony provided even more evidence supporting ABI's claims of fraud against the Estate. Rammell testified that he and Christa both told April that she would be able to sell ABI for the same amount that she paid to Christa and Ken for the purchase of CBI. The Defendants argue that any representations made by Rammell and Christa to April regarding the valuation of CBI were merely statements of opinion rather than statements of fact. In making this argument, the Defendants cite to three cases, none of which are Idaho cases. However, should the Court choose to consider them, these cases actually support ABI's claims against the Estate by distinguishing that false statements by a person with special knowledge of a matter may be actionable:

> Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce. . .
>
> For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers, or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined. Opinions upon such matters are capable of approximating the truth, and for a false statement of them, where deception is designed, and injury has followed from reliance on them, an action may lie.

Gordon v. Butler, 105 U.S. 553, 558 (1882).

> A statement as to value of property may also be actionable as a fraudulent representation of fact under some circumstances, where there is a special reliance placed upon it and superior knowledge on the part of the maker. In such a case it may also be said that the statement of value when the value is known to be different from that stated is a fraudulent misrepresentation of an opinion as existing that does not exist.

Byers v. Federal Land Co., 3 F.2d 9 (8th Cir. Wyo. 1924).

While these cases are not binding in Idaho, they offer persuasive authority to support ABI's claims for fraud against the Estate. Given Christa's extensive experience in the typesetting field – a fact that was testified by several witnesses – she had superior knowledge about CBI and typesetting, and any representations made by her as to the value of CBI should be held to a higher standard. Ultimately, Rammell's testimony, combined with the testimonies of April Beguesse and Stephen Hall, provide substantial and compelling evidence to support ABI's fraud claims against the Estate.

VIII. The Court should uphold ABI's fraud and breach claims against all Defendants regarding the library of files.

a. ABI did not pursue a claim of guaranteed contract at trial.

The Defendants argue that ABI improperly argued a guaranteed contract claim at trial under the guise of ABI's claims for fraud and breach of contract and warranty against the Defendants. However, in making this argument, the Defendants again improperly cite April's unpublished deposition, which is not in the trial record.

Additionally, in claiming that ABI merely reargued its earlier guaranteed contract claim that was dismissed by this Court in its summary judgment decision, the Defendants ignore the fact that the evidence in question goes to the materiality of the representations made by the Defendants to April regarding her purchase of CBI and the library of files. Even the evidence from April's unpublished deposition relied on by the Defendants goes to the materiality of the Defendants' representations to April.

In making their argument, the Defendants are overstating the significance of the Court's summary judgment decision regarding ABI's guaranteed contract claim. In its decision, the Court ruled simply that the alleged facts did not support a claim for a guaranteed contract between ABI and the Rutter Group. (Nov. 2, 2010 Mem. Decision and Order 10 ("Thus, the record established that ABI can not prove its ignorance of the falsity of the alleged statement regarding a guaranteed contract with Rutter. Defendants are entitled to summary judgment dismissing ABI's claim for fraud as it relates to this alleged misrepresentation.")) The Court's decision regarding ABI's guaranteed contract claim was limited to that particular claim and did not limit ABI's ability to present evidence as to the materiality of the Defendants' representations regarding ownership.

Finally, contrary to what the Defendants argue, there is no "law of this case" until the case is concluded. The Defendants' conclusory statement that "[h]aving heard the evidence, judgment for the Defendant is warranted on the law of this case, which is that

Plaintiff was aware at the time she entered the contract that she would have no ability to control her customer's typesetting choices" is both misleading and confusing. (Defs.' Mem. Re: JNOV or New Trial 19.) ABI was not trying to pursue its earlier claim of a guaranteed contract under different terms, and the evidence referenced by the Defendants in attempting that argument instead goes to show the materiality of the defendant's representations to April Beguesse regarding ownership of the library of files.

b. ABI established a legal basis for its claims of fraud and breach against the Defendants regarding the library of files.

The Defendants next launch into a confusing litany about ownership rights and copyright law. In making their argument that ABI failed to establish a legal basis for its claims of fraud and breach of contract and warranty, the Defendants mischaracterize exactly what constituted ownership of the files as discussed between April Beguesse and the Defendants. In so doing, the Defendants also fail to provide any evidence or authority for their argument that ABI had no legal right in the files.

The question of ownership of the library of files is a fact question, and was appropriate for the jury to consider. April testified repeatedly throughout the trial that she thought she owned the library of files, and that this ownership belief was significant to her. April testified that she thought she owned the files and was free to sell them until her conversation with Linda Raznick, during which April learned she did not own the files. April further testified that she would not have agreed to the deal had she known that CBI did not own the library of files.

The Defendants again mischaracterize April's testimony about ownership of the library of files. April testified throughout the trial that she did not believe CBI had ownership of the finished publications – CBI did not own the physical books. April

testified instead that the Defendants represented to her that CBI owned the files used to create the Rutter Group's finished publications. April testified several times that CBI, and later ABI, would send locked versions of the files to the Rutter Group for its review. April explained in her testimony that the locked version meant that the Rutter Group could not manipulate the file, and any changes or updates had to be made by CBI and later ABI. April's testimony in this regard is undisputed.

This evidence indicates that contrary to what the Defendants argue, ABI had an exclusive version of the files and April reasonably believed she owned the files and that if the Rutter Group severed ties with ABI, it would have to pay ABI for the files. This evidence provides substantial support for the jury's determination on ABI's claims for fraud and breach of contract and warranty on the question of the library of files. In arguing otherwise, the Defendants ignore the evidence presented at trial.

IX. The Court should uphold ABI's breach of contract and warranty claim against the Defendants.

The Defendants next argue that April's testimony at trial regarding the terms of the contract was vague and irrational. In making this argument, the Defendants don't cite to any evidence or testimony in the record supporting this claim. An examination of April's testimony contradicts the Defendants' charges that it was vague and irrational.

April testified consistently during both direct and cross-examination about the terms of the agreement between ABI and the Defendants. April testified that Christa told her that the business would belong completely to April. April testified that Christa and Rammell told her that no one would be able to take the business away from her. April also testified that she believed that under the contract, she was paying for the library of files, income from the business, and the ability to sell the files later. April testified that

she would not have agreed to the deal had she known that CBI didn't own the library of files, and that instead ABI would be paying for Christa's mentoring, obsolete computers, furniture, and PageMaker. This extensive testimony from April is neither vague nor irrational, and it shows that the jury's verdict in favor of ABI was not against the clear weight of the evidence at trial.

The Defendants also cite to the Court's summary judgment decision to argue that ABI is precluded from recovery for both its fraud and breach claims against the Defendants. However, in doing so, the Defendants completely misapply the Court's language in the decision, which addresses the Defendants' counterclaims:

> 8. Defendants' Counterclaims
> Defendants also seek summary judgment on their counterclaims seeking relief for breach of contract, constructive trust, and injunctive relief. Defendants' argument is primarily based on the claim that Plaintiff has breached the contract by failing to pay $12,000 a month pursuant to the agreement.
>
> While the evidence established that Plaintiff has stopped making the monthly payment, there is a disputed issue of fact as to whether the non-payment is a breach of contract. *If Plaintiff is successful on the fraud claim, the contract may be considered void and there would be no breach.*

(Nov. 2, 2010 Mem. Decision and Order 21 (emphasis added).)

This language by the Court clearly pertains to the Defendants' counterclaims. However, the Defendants are attempting to flip the language around to apply it to ABI's claims of fraud and breach against the Defendants. This argument misrepresents the Court's language in its summary judgment decision, and the Defendants fail to offer any reason why ABI should be precluded from recovery under both its fraud and breach claims.

The Defendants again argue that the jury verdict form was improper and warrant an order granting their motion for jnov or a new trial. However, for the reasons argued

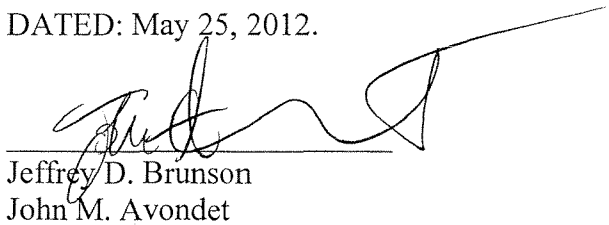
above, the Defendants have waived any objections by submitting their proposed special verdict form, which is substantially similar to the verdict form utilized by the jury. Additionally, contrary to the Defendants' argument, Question 8 of the jury verdict form does not fail to specify whether the jury's determination of breach was related to the library of files or to a term of the agreement. Question 8, which asks the total amount of damages owed to ABI from the Defendants' breach, refers back to Questions 6 and 7 – both of which address ABI's claims regarding the library of files. (Verdict Form, Question 8.) With that context, Question 8 clearly contemplates ABI's damages stemming from its breach claim related to the ownership of the files. The Defendants fail to provide any evidence to support its claim that the jury could have awarded damages based on a different breach by CBI, because there is no evidence to support this argument.

The Defendants conclude by rehashing their earlier argument that the damages awarded by the jury, in this case for ABI's breach of contract and warranty claims against the Defendants, were not supported by the evidence. Again, the Defendants fail to provide any evidence for this argument. In contrast, the evidence at trial shows that ABI presented a range of potential damages valuations, and the jury's award is well within this range. And again, the Defendants' argument that the jury must have awarded damages based on passion or prejudice rather than on the evidence, merely because the verdict was large, is insufficient. In this area, as with their overall arguments throughout their brief, the Defendants fail to meet their burden to justify this Court granting their motion for jnov or a new trial under I.R.C.P. 59(a).

CONCLUSION

As a result of the foregoing, the Defendants' motion for jnov and a new trial should be denied.

DATED: May 25, 2012.



Jeffrey D. Brunson
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I certify that I am an attorney licensed in the State of Idaho, have my office located in Idaho Falls, Idaho and on May 25, 2012, I served a true and correct copy of the foregoing PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR JNOV OR NEW TRIAL upon the following as indicated below:

David E. Alexander Racine Olson Nye Budge Bailey PO Box 1391 Pocatello, ID 83204-139 Fax: 232-6109	☐ U.S. Mail	☐ Hand-Delivered	☑ Facsimile
Bonneville County Courthouse 605 N Capital Avenue Idaho Falls, ID 83402 Fax: 529-1300	☐ U.S. Mail	☑ Hand-Delivered	☐ Facsimile
Judge Tingey Chambers Bonneville County Courthouse 605 N Capital Avenue Idaho Falls, ID 83402 Fax: 529-1300	☐ U.S. Mail	☑ Hand-Delivered	☐ Facsimile

Jeffrey D. Brunson
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho corporation, Plaintiff, vs. KENNETH RAMMELL, an individual CHRISTA BEGUESSE, INC., an Idaho corporation, ESTATE of CHRISTA BEGUESSE RAMMELL, by its qualified personal Representative, Kenneth Rammell, Defendants.	MINUTE ENTRY Case No. CV-09-2767

On the 5th day of June, 2012, Plaintiff's motion for attorney fees and costs and Defendants' motion for judgment notwithstanding the verdict or for new trial came before the Honorable Joel E. Tingey, District Judge, by telephonic connection in open court at Idaho Falls, Idaho.

Mr. Jack Fuller, Court Reporter, and Mrs. Marlene Southwick, Deputy Court Clerk, were present.

Mr. Jeff Brunson appeared for and on behalf of the Plaintiff.

Mr. David Alexander appeared on behalf of the Defendants. Defendant Kenneth Rammell was present at counsel table.

Mr. Alexander presented Defendants' motion for judgment notwithstanding the verdict or for new trial. Mr. Brunson presented argument in opposition to the motion. Mr. Brunson

presented Plaintiff's motion for attorney fees and costs. Mr. Alexander presented rebuttal argument and argument in opposition to Plaintiff's motion for attorney fees and costs.

The Court will take the matter(s) under advisement and issue a decision as soon as possible.

Court was thus adjourned.

JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2012, I caused a true and correct copy of the foregoing document to be delivered to the following:

RONALD LONGMORE

ms
Deputy Court Clerk

Jeffrey D. Brunson
John M. Avondet
2105 Coronado Street
Idaho Falls, ID 83404-75495

W. Marcus W. Nye
David E. Alexander
PO Box 1391
Pocatello, ID 83204-1391

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Attorneys for Plaintiff

DISTRICT COURT SEVENTH JUDICIAL DISTRICT BONNEVILLE COUNTY IDAHO

April Beguesse, Inc., an Idaho Corporation, Plaintiff/Counterdefendant, vs. Kenneth Rammell, an individual, Christa Beguesse, Inc., an Idaho corporation, The Estate of Christa Beguesse Rammell, by its qualified personal representative, Kenneth Rammell, Defendants/Counterclaimants.	Case No.: CV-09-2767 PLAINTIFF'S ACCEPTANCE OF COURT'S REMITTITUR

The Plaintiff, April Beguesse, Inc. (ABI), by and through its counsel of record, Jeffrey D. Brunson and the firm Beard St. Clair Gaffney PA, respectfully accepts the Court's remittitur outlined in its *Order on Motion JNOV or New Trial* filed June 11, 2012 and further clarified in its *Supplemental Order on Motion For New Trial* filed June 12, 2012.

491 C

DATED: June 12, 2012.

Jeffrey D. Brunson
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I certify that I am an attorney licensed in the State of Idaho and on June 12, 2012, I served a true and correct copy of the foregoing PLAINTIFF'S ACCEPTANCE OF COURT'S REMITTITUR upon the following as indicated below:

David E. Alexander
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Fax: 529-1300

☐ U.S. Mail ☐ Hand-Delivered ☑ Facsimile

Jeffrey D. Brunson
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff/Counterdefendant, vs. KENNETH RAMMELL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, THE ESTATE OF CHIRISTA BEGUESSE RAMMELL, by it qualified personal representative, Kenneth Rammell, Defendants/Counterclaimant.	Case No. CV-09-2767 **ORDER ON MOTION FOR JNOV OR NEW TRIAL**

THIS MATTER is before the Court on Defendants' Motion for judgment notwithstanding the verdict, or in the alternative a new trial.

I. PROCEEDINGS

Plaintiff April Beguesse, Inc., (ABI) brought this action seeking to recover for fraud and breach of contract in the purchase of a business from Defendant Christa Beguesse, Inc., (CBI). CBI counterclaimed for breach of contract in failing to make payments pursuant to the purchase agreement. Following a jury trial, the jury returned a verdict finding that CBI breached its contract and that Defendants committed fraud. The jury further denied CBI recovery on its counterclaim.

I. STANDARD OF ADJUDICATION

In considering a motion for judgment notwithstanding the verdict, the law provides that "a jury verdict must be upheld if there is evidence of sufficient quantity and probative value that reasonable minds could have reached a similar conclusion to that of the jury." *Hall v. Farmers Alliance Mut. Ins. Co.*, 145 Idaho 313, 324, 179 P.3d 276, 287 (2008) (citing *Gillingham Const., Inc. v. Newby-Wiggins Const., Inc.*, 142 Idaho 15, 20, 121 P.3d 946, 951 (2005)). In making the motion, a defendant admits the truth of all of the plaintiffs' evidence and every legitimate inference. *Stephens v. Stearns*, 106 Idaho 249, 252-53, 678 P.2d 41, 44-45 (1984).

Whether that evidence is sufficient to create an issue of fact is for the court to determine. Furthermore the question is not whether there is literally no evidence supporting the jury verdict, but whether there is substantial evidence upon which the jury could properly find a verdict for that party. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974). Accordingly, the trial judge does not weigh the evidence or pass on the credibility of witnesses and make his own separate findings of fact and compare them to the jury's findings as he would in deciding on a motion for a new trial. *Quick v. Crane* 111 Idaho 759, 763-764, 727 P.2d 1187, 1191 - 1192 (1986).

With regard to a motion for new trial, Idaho Rule of Civil Procedure 59(a) states that "[a] new trial may be granted to all or any of the parties and on all or part of the issues in an action for . . ." (1) irregularity in the proceedings/abuse of discretion, (5) excessive damages, (6) Insufficiency of the evidence/against the law, and (7) error in the law.

In considering an allegation of excessive damages, the trial court is to weigh the evidence and then compare the jury's award to what he would have given had there been

no jury. If the trial judge discovers that his determination of damages is so substantially different from that of the jury that he can *only* explain this difference as resulting from some unfair behavior such as "passion or prejudice," then the court should grant a new trial. The disparity in damages should "shock the conscience" of the trial judge or lead him to conclude that it would be "unconscionable" to let the damage award stand as the jury set it. *Gibson v. Western Fire Ins. Co.,* 682 P.2d 725 (Mont.1984); *Mammo v. State,* 138 Ariz. 528, 675 P.2d 1347 (1983). *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

A motion based upon subdivision 6 must "set forth the factual grounds therefore with particularity." I.R.C.P. 59(a).

> A trial judge may grant a new trial based on I.R.C.P. Rule 59(a)(6) where "after he has weighed all the evidence, including his own determination of the credibility of the witnesses, he concludes the verdict is not in accord with his assessment of the clear weight of the evidence." The trial court is given broad discretion in this ruling. The trial judge may set aside the verdict even though there is substantial evidence to support it. In addition, the trial judge is not required to view the evidence in a light most favorable to the verdict-winner. Addressing the considerable discretion given to the trial court in deciding motions for new trials, this Court has said:
>
> > "[t]he trial court may grant a new trial when it is satisfied the verdict is not supported by, or is contrary to, the evidence, or is convinced the verdict is not in accord with the clear weight of the evidence and that the ends of justice would be subserved by vacating it, or when the verdict is not in accord with either law or justice."
>
> Furthermore, "[i]f having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial."

Karlson v. Harris, 140 Idaho 561, 568, 97 P.3d 428, 435 (2004)

After a trial court assesses the credibility of the witnesses and weighs the evidence, the court may grant a new trial on the ground of insufficiency of the evidence if the court determines that the verdict is against the clear weight of the evidence and that a different result would follow a retrial. *Hudelson v. Delta Int'l Mach. Corp.*, 142 Idaho 244, 248, 127 P.3d 147, 151 (2005); *O'Shea v. High Mark Development*, LLC 2012 WL 1436898, 13 (Idaho,2012).

III. ANALYSIS

A. Motion for JNOV.

Defendants ask the court to enter a judgment notwithstanding the jury verdict dismissing ABI's claim. Defendants argue that the verdict is unsupported by the evidence and contrary to law. First, the Court finds that there was no error in the application of the law to the claims made. Second, the Court finds that there was sufficient evidence to support the jury verdict with the exception of the claim against the Estate of Christa Beguesse.

In its verdict, the jury determined that ABI was entitled to recover against the Estate by reason of fraud. However, pursuant to Rule 601, IRE, the jury was instructed that the testimony of April Beguesse could not be considered as evidence supporting a claim against the Estate. Jury Instruction No. 21. Absent the testimony of April, there is no testimony or evidence of any statement made by Christa to April which would satisfy the elements of fraud.

Accordingly, there is insufficient evidence to support a fraud claim against the Estate, and that claim should be dismissed. The remainder of Defendants' motion for judgment notwithstanding the verdict should be denied.

B. Motion for New Trial.

Defendants based their motion for new trial on Rule 59(a), subdivisions (1) irregularity in the proceedings and/or abuse of discretion, (5) excessive damages, (6) Insufficiency of the evidence and/or the verdict being against the law, and (7) error in the law. In considering the evidence and course of trial, the Court finds that there was no irregularity in the proceedings or error in the law entitling Defendants to a new trial.[1]

As to allegedly excessive damages, the amount of damages this Court would have awarded does vary from the damages awarded by the jury. April testified that ABI paid $708,000 to CBI yet she thought that the business was only worth $254,100 when considering the fraud and breach of contract. The measure of damages would then be $453,900. It is the Court's opinion that this testimony by April set out the maximum amount of recovery available to ABI. As such, the Court finds the jury award of damages in excess of that amount to be inexplicable and based on passion and prejudice.

There was testimony that for purposes of estate planning some years prior to the sale of the business to ABI, Christa and/or Rammell advised the estate planning attorney that the value of the business was $40,000. It is the Court's opinion that reliance upon the $40,000 figure would not be reasonable, but rather would be against the clear weight of the evidence and particularly April's own testimony. As such, the Court finds that the ends of justice would be served by granting a conditional new trial.

Specifically, Rule 59.1, IRCP allows for a new trial conditioned upon the acceptance of a remittitur. Accordingly, the Court finds that Defendants would be

[1] There is no basis for the Estate to seek a new trial inasmuch as the claim against the Estate will be dismissed pursuant to the Estate's motion for jnov.

entitled to a new trial on the issue of damages unless Plaintiff accepts a remittitur in the amount of $90,113, resulting in a judgment of $453,900.

In considering the evidence presented at trial, the Court is of the opinion that the evidence would have supported a finding in favor of ABI or Defendants, depending on whom the jury believed. Again, the credibility of witnesses was a critical factor. The jury's determinations finding liability against CBI and Rammell in favor of ABI are supported by substantial evidence and are not against the clear weight of the evidence. The Court does not believe a new trial on these issues would result in a different outcome. As such, Defendants are not entitled to a new trial on the issue of liability.

CONCLUSION AND ORDER

Based on the foregoing, Defendants' motion for judgment notwithstanding the verdict is granted in part and denied in part, as set out above. Defendant's motion for new trial is granted in part and denied in part, as set out above. Plaintiff shall have 42 days from the entry of this order to accept a remittitur.

IT IS SO ORDERED.

Dated this 11 day of June, 2012.

JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of June, 2012, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon, or by placement in the courthouse mailbox.

Jeffrey D. Brunson
BEARD ST.CLAIR GAFFNEY
2105 Coronado Street
Idaho Falls, ID 83404-7495 529-9732

David E. Alexander
RACINE OLSON NYE BUDGE
P.O. Box 1391
Pocatello, ID 83204 232-6109

Clerk of the District Court
Bonneville County, Idaho

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff/Counterdefendant, vs. KENNETH RAMMELL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, THE ESTATE OF CHIRISTA BEGUESSE RAMMELL, by it qualified personal representative, Kenneth Rammell, Defendants/Counterclaimant.	Case No. CV-09-2767 **SUPPLEMENTAL ORDER ON MOTION FOR NEW TRIAL**

In its Order on Motion for JNOV or New Trial, this Court conditionally granted a new trial on the issue of damages subject to Plaintiff accepting a remittitur in the amount $90,113. For purposes of clarification, the remittitur only applies to the damages assessed against CBI. For example, if Plaintiff accepted the remittitur, total damages assessed against Rammell would remain at $354,000, while the total damages assessed against CBI would be reduced to $453,900.

IT IS SO ORDERED.

Dated this 12 day of June, 2012.

JOEL E. TINGEY
DISTRICT JUDGE

498

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of June, 2012, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon, or by placement in the courthouse mailbox.

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Idaho Falls, ID 83404-7495 529-9732

David E. Alexander
RACINE OLSON NYE BUDGE
P.O. Box 1391
Pocatello, ID 83204 232-6109

Clerk of the District Court
Bonneville County, Idaho

By MA
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff/Counterdefendant, vs. KENNETH RAMMELL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, THE ESTATE OF CHIRISTA BEGUESSE RAMMELL, by it qualified personal representative, Kenneth Rammell, Defendants/Counterclaimant.	Case No. CV-09-2767 **ORDER ON MOTION FOR COSTS AND ATTORNEY FEES**

This matter has come before the Court upon Plaintiff's motion for costs and attorney fees. Defendants have objected to the motion.

ANALYSIS

Defendants seek an award of costs pursuant to Rule 54, I.R.C.P. and an award of attorney fees pursuant to I.C. §12-120(3). Section 12-120(3) allows for an award of attorney fees in actions "to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction . . .".

While Plaintiff may have requested attorney fees pursuant to the contract between the Parties for purchase of the business, there is no evidence that the oral purchase contract contained an attorney fee provision.

In considering a motion for costs and fees, the Court is granted broad discretion in determining a prevailing party. Rule 54(d)(1)(B) provides as follows:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

1. COSTS

The Court has considered the claims made in this matter, the progress of the litigation, and the ultimate outcome. The Court finds that Plaintiff is the prevailing party as against Defendants Kenneth Rammell and Chirista Beguesse, Inc. Based on the record, the Court finds that Plaintiff is entitled to an award of costs as a matter of right (Rule 54(d)(1)(C)) in the amount of $2,409.29, as against said Defendants, jointly and severally.

2. ATTORNEY FEES

Under § 12-120(3), attorney fees are recoverable when the action arises from a contract or commercial transaction.

> A "commercial transaction" is defined in Section 12-120(3) as "all transactions except transactions for personal or household purposes." Id. An award of attorney fees under this section is proper "if the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover." *Blimka v. My Web Wholesaler, LLC,* 143 Idaho 723, 728, 152 P.3d 594, 599 (2007) (quoting *Brower v. E.I. DuPont De Nemours and Co.,* 117 Idaho 780, 784, 792 P.2d 345, 349 (1990)).

BECO Const. Co., Inc. v. J-U-B Engineers, Inc., 145 Idaho 719, 726, 184 P.3d 844, 851 (2008) (emphasis added); See also *Gunter v. Murphy's Lounge, LLC,* 141 Idaho 16, 32, 105 P.3d 676, 692 (2005).

In this case, all claims were based on a purchase agreement between Plaintiff and CBI for an ongoing business. The Court finds that attorney fees are awardable under § 12-120(3).

The Court has reviewed the record and Plaintiff's memorandum of fees and costs. The Court has further considered the factors set out in Rule 54(e)(3), I.R.C.P., including but not limited to the time required, the novelty and difficulty of the case, prevailing rates for attorney fees, the amount in dispute, and duplication of effort. When considering those factors, the Court finds that the claim for attorney fees should be discounted somewhat.

Additionally, it is the Court's opinion that the amount of attorney fees should be tempered inasmuch as Plaintiff should not recover attorney fees incurred in prosecuting the claim against the Estate, since the Court dismissed that claim. Furthermore, it appears to the Court there was at least some overlap between attorney fees incurred in this action and fees incurred in the separate probate proceedings. Finally, certain discovery and other matters pursued by Plaintiff did not materially contribute to Plaintiff prevailing in this matter.

In consideration of the foregoing, the Court finds that Defendants are entitled to an award of attorney fees in the amount of $85,000.

CONCLUSION

Based on the record and the foregoing analysis, Plaintiffs motion for costs and fees is granted. As against Kenneth Rammell and CBI, Plaintiff is awarded $2,409.29 in costs and $85,000 in attorney fees.

IT IS SO ORDERED.

Dated this 19 day of June, 2012.

JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of June, 2012, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon, or by placement in the courthouse mailbox.

Jeffrey D. Brunson
BEARD ST.CLAIR GAFFNEY
2105 Coronado Street
Idaho Falls, ID 83404-7495

David E. Alexander
RACINE OLSON NYE BUDGE
P.O. Box 1391
Pocatello, ID 83204

Clerk of the District Court
Bonneville County, Idaho

By MS
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff/Counterdefendant, vs. KENNETH RAMMELL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, THE ESTATE OF CHIRISTA BEGUESSE RAMMELL, by it qualified personal representative, Kenneth Rammell, Defendants/Counterclaimant.	Case No. CV-09-2767 **AMENDED JUDGMENT**

The jury having entered a verdict in this matter, and the Court having entered its order on Defendants' motion for jnov or new trial, and Plaintiff have accepted the Court's remittitur, and the Court having entered its order on Plaintiff's motion for costs and attorney fees, and good cause appearing therefore;

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff shall have judgment against Defendants Kenneth Rammell and Christa Beguesse, Inc., joint and several, in the amount of $354,000. Plaintiff shall also have judgment against Defendant Christa Beguesse, Inc., in the additional amount of $99,900 for a total of $453,900. Plaintiff shall also have judgment against Defendants Kenneth Rammell and Christa Beguesse, Inc., for costs in the amount of $2,409.29, and attorney fees in the amount of $85,000. Resulting in a total judgment of $ 541,309.29 as to Christa Beguesse, Inc., and $441,409.29 as to Kenneth Rammell, with interest accruing thereon at the statutory rate.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's claim against the Estate of Christa Beguesse is dismissed with prejudice.

Dated this 19 day of June, 2012.

JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of June, 2012, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon, or by placement in the courthouse mailbox.

Jeffrey D. Brunson
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David E. Alexander
RACINE OLSON NYE BUDGE
P.O. Box 1391
Pocatello, ID 83204

Clerk of the District Court
Bonneville County, Idaho

By _____
Deputy Clerk

W. Marcus W. Nye (ISB#: 1629)
David E. Alexander (ISB#: 4489)
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

April Beguesse, Inc. An Idaho Corporation, Plaintiff, vs. Kenneth Rammell, an individual, Christa Beguesse, Inc., an Idaho Corporation. Estate of Christa Beguesse Rammell, by its qualified personal representative, Kenneth Rammell. Defendants.	Case No. CV-09-2767 **NOTICE OF APPEAL**

TO: THE ABOVE-NAMED RESPONDENT, APRIL BEGUESSE, INC., AND ITS ATTORNEY AND THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN that:

1. The above-named Appellant appeals against the above-named Respondent to the Idaho Supreme Court from the Judgment entered on Jury Verdict in the above-entitled action on the 17th day of April, 2012, and the Order entered in the above-entitled action on the 12th day of June, 2012, the Honorable Joel B. Tingey presiding, and subsequent supplemental Orders and Judgments.

2. The Appellants, Kenneth J. Rammell and Christa Beguesse, Inc., have a right of

appeal to the Idaho Supreme Court, and the judgments or orders described in Paragraph 1 above are appealable orders under and pursuant to Rule ll(a)(l), I.A.R.

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal.

a. Whether the trial court erred in failing to grant judgment notwithstanding the verdict on all claims against Kenneth J. Rammell and Christa Beguesse, Inc.;

b. Whether the trial court erred in failing to grant new trial on all claims against Kenneth J. Rammell and Christa Beguesse, Inc., and the counterclaim of Christa Beguesse, Inc., against Plaintiff-Respondent;

c. Whether the trial court's instructions to the jury were in error or contrary to law;

d. Whether the trial court erred in failing to grant directed verdict as to Count 3 of the Complaint, and all claims for fraud against the Defendants;

e. Whether the trial court erred in admitting the testimony of Rick Trulson;

f. Whether the trial court erred in admitting Plaintiff's Exhibit 27a and examination of the Defendant thereon;

g. Whether the evidence was sufficient to support the findings of the jury on Plaintiff's claims;

h. Whether the evidence was sufficient to support the findings of the jury as to Question 1 of the Verdict Form, regarding the statute of limitations;

i. Whether the evidence was sufficient to support the findings of the jury as to Question 6 of the Verdict Form, regarding the statute of limitations;

j. Whether the evidence was sufficient to support the findings of the jury as to Question 9 of the Verdict Form, regarding the statute of limitations;

k. Whether the Court erred in admitting the testimony of April Beguesse in violation of Idaho Code § 9-202;

l. Whether the Court erred in awarding attorney fees to Plaintiff.

4. No order has been entered sealing any portion of the record.

5. (a) Appellant requests the preparation of a reporter's transcript. The appellant requests the preparation of the following portions of the reporter's transcript in [X] hard copy [ ] electronic format [ ] both (check one): The reporter's standard transcript as defined in Rule 25, I.A.R. supplemented by the following: Voir dire examination of jury, closing arguments of counsel, conferences on requested instructions, arguments on motion for directed verdict.

6. The appellant requests the following documents to be included in the clerk's (agency's) record in addition to those automatically included under Rule 28, I.A.R.: All requested and given jury instructions; Appellants' motion for directed verdict and briefs submitted therewith; Appellant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial, and briefs and exhibits submitted therewith.

7. The appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court: Plaintiff's Exhibits 1, 2, 7, 9, 14, 27a, and 45; Defendants' Exhibits A and B.

5. I certify:

(a) That a copy of this Notice of Appeal has been served on the reporter;

(b) That the reporter of the District Court has been paid the estimated fee for

preparation of the transcript;

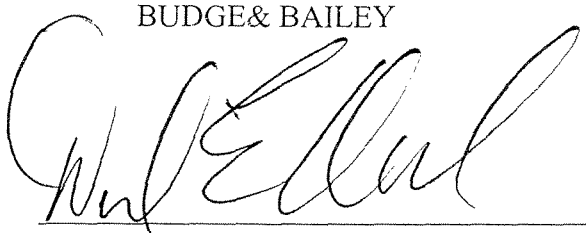
(c) That the estimated fee for preparation of the clerk's record has been paid;

(d) That the Appellate filing fee has been paid;

(e) That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 19th day of July, 2012.

RACINE OLSON NYE
BUDGE& BAILEY



DAVID E. ALEXANDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of July, 2012, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Jeffrey D. Brunson
John M. Avondet
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495

[X] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[ ] Facsimile

DAVID E. ALEXANDER

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff/Counterdefendant/Respondent, vs. KENNETH RAMMEL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, Defendants/Counterclaimants/Appellants. and, THE ESTATE OF CHRISTA BEGUESSE RAMMELL, by it qualified personal representative, Kenneth Rammell, Defendant/Counterclaimant.	)	Case No. CV-2009-2767 Docket No. **CLERK'S CERTIFICATE OF APPEAL**

Appeal from: Seventh Judicial District, Bonneville County

Honorable Joel E. Tingey, District Judge, presiding.

Case number from Court: CV-2009-2767

Order or Judgment appealed from: Judgment Upon Verdict, entered April 18, 2012; Supplemental Order on Motion for New Trial; Order on Motion for JNOV or New Trial, entered June 12, 2012; Order on Motion for Costs and Attorney Fees, entered June 19, 2012; and Amended Judgment, entered June 19, 2012

Attorney for Appellant:	David Alexander, RACINE OLSON NYE BUDGE BAILEY PO Box 1391, Pocatello, ID 83204-1391
Attorney for Respondent:	Jeffrey Brunson, BEARD ST.CLAIR GAFFNEY PA 2105 Coronado Street, Idaho Falls, ID 83404-7495
Appealed by:	Kenneth Rammell and Christa Beguess, Inc.
Appealed against:	April Beguess, Inc.
Notice of Appeal Filed:	July 20, 2012

511

Appellate Fee Paid: Yes

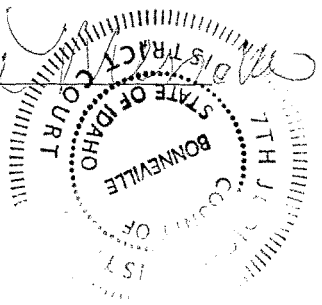
Was Reporter's Transcript requested? Yes

If so, name of reporter: Jack Fuller, no estimate in file

Dated: July 30, 2012

RONALD LONGMORE
Clerk of the District Court

By: _____
Deputy Clerk



W. Marcus W. Nye (ISB#: 1629)
David E. Alexander (ISB#: 4489)
RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208)232-6101
Fax: (208)232-6109

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

April Beguesse, Inc. An Idaho Corporation, Plaintiff, vs. Kenneth Rammell, an individual, Christa Beguesse, Inc., an Idaho Corporation. Estate of Christa Beguesse Rammell, by its qualified personal representative, Kenneth Rammell. Defendants.	Case No. CV-09-2767 **AMENDED NOTICE OF APPEAL**

TO: THE ABOVE-NAMED RESPONDENT, APRIL BEGUESSE, INC., AND ITS ATTORNEY AND THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN that:

1. The above-named Appellant appeals against the above-named Respondent to the Idaho Supreme Court from the Judgment entered on Jury Verdict in the above-entitled action on the 17th day of April, 2012, and the Order entered in the above-entitled action on the 12th day of June, 2012, the Honorable Joel B. Tingey presiding, and subsequent supplemental Orders and Judgments.

2. The Appellants, Kenneth J. Rammell and Christa Beguesse, Inc., have a right of

appeal to the Idaho Supreme Court, and the judgments or orders described in Paragraph 1 above are appealable orders under and pursuant to Rule ll(a)(l), I.A.R.

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal.

a. Whether the trial court erred in failing to grant judgment notwithstanding the verdict on all claims against Kenneth J. Rammell and Christa Beguesse, Inc.;

b. Whether the trial court erred in failing to grant new trial on all claims against Kenneth J. Rammell and Christa Beguesse, Inc., and the counterclaim of Christa Beguesse, Inc., against Plaintiff-Respondent;

c. Whether the trial court's instructions to the jury were in error or contrary to law;

d. Whether the trial court erred in failing to grant directed verdict as to Count 3 of the Complaint, and all claims for fraud against the Defendants;

e. Whether the trial court erred in admitting the testimony of Rick Trulson;

f. Whether the trial court erred in admitting Plaintiff's Exhibit 27a and examination of the Defendant thereon;

g. Whether the evidence was sufficient to support the findings of the jury on Plaintiff's claims;

h. Whether the evidence was sufficient to support the findings of the jury as to Question 1 of the Verdict Form, regarding the statute of limitations;

i. Whether the evidence was sufficient to support the findings of the jury as to Question 6 of the Verdict Form, regarding the statute of limitations;

j. Whether the evidence was sufficient to support the findings of the jury as to Question 9 of the Verdict Form, regarding the statute of limitations;

k. Whether the Court erred in admitting the testimony of April Beguesse in violation of Idaho Code § 9-202;

l. Whether the Court erred in awarding attorney fees to Plaintiff.

4. No order has been entered sealing any portion of the record.

5. (a) Appellant requests the preparation of a reporter's transcript. The appellant requests the preparation of the following portions of the reporter's transcript in [X] hard copy [ ] electronic format [ ] both (check one): The reporter's standard transcript as defined in Rule 25, I.A.R. supplemented by the following: Voir dire examination of jury, closing arguments of counsel, conferences on requested instructions, arguments on motion for directed verdict.

6. The appellant requests the following documents to be included in the clerk's (agency's) record in addition to those automatically included under Rule 28, I.A.R.: All requested and given jury instructions; Appellants' motion for directed verdict and briefs submitted therewith; Appellant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial, and briefs and exhibits submitted therewith.

7. The appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court: Plaintiff's Exhibits 1, 2, 7, 9, 14, 27a, and 45; Defendants' Exhibits A and B.

8. I certify:

(a) That a copy of this Notice of Appeal has been served on the reporter, Jack Fuller;

(b) That the reporter of the District Court has been paid the estimated fee for preparation of the transcript;

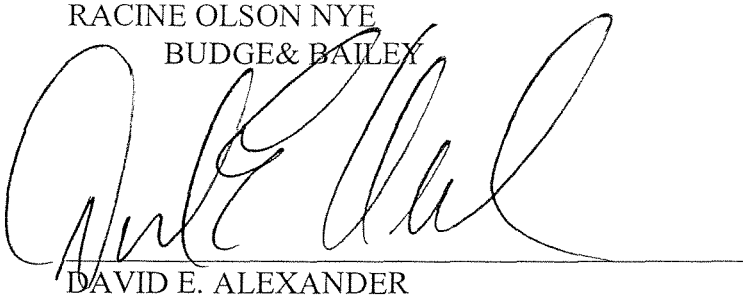
(c) That the estimated fee for preparation of the clerk's record has been paid;

(d) That the Appellate filing fee has been paid;

(e) That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 21st day of August, 2012.

RACINE OLSON NYE
BUDGE& BAILEY



DAVID E. ALEXANDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of August, 2012, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Jeffrey D. Brunson John M. Avondet BEARD ST. CLAIR GAFFNEY PA 2105 Coronado Street Idaho Falls, Idaho 83404-7495	[X]	U. S. Mail Postage Prepaid
	[ ]	Hand Delivery
	[ ]	Overnight Mail
	[ ]	Facsimile
Mr. Jack Fuller, Court Reporter Bonneville County Courthouse 605 N. Capitol Ave. Idaho Falls, ID 83402	[X]	U. S. Mail Postage Prepaid
	[ ]	Hand Delivery
	[ ]	Overnight Mail
	[ ]	Facsimile

DAVID E. ALEXANDER

Jack L. Fuller, CSR
Official Court Reporter
Seventh Judicial District
Bonneville County Courthouse
605 N Capital Ave
Idaho Falls, Idaho 83402
(208) 529-1350 Ext. 1138
E-Mail: jfuller@co.bonneville.id.us

****

NOTICE OF TRANSCRIPT LODGED

****

DATE: November 20, 2012

TO: Stephen W. Kenyon, Clerk of the Court
Supreme Court / Court of Appeals
P.O. Box 83720
Boise, ID 83720-0101

SUPREME COURT DOCKET NO: 40212

DISTRICT COURT CASE NO: CV-09-2767 (Bonneville County)

CAPTION OF CASE: April Beguesse, Inc. vs. Kenneth Rammell, et al

You are hereby notified that a reporter's appellate transcript in the above-entitled and numbered case has been lodged with the District Court Clerk of the County of Bonneville in the Seventh Judicial District. Said transcript consists of the following:

1. Jury Trial (April 10-13, 2012)

Respectfully,

Jack L. Fuller

JACK L. FULLER
Idaho CSR #762

cc: District Court Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff/Counterdefendant/Respondent, vs. KENNETH RAMMEL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, Defendants/Counterclaimants/Appellants. and, THE ESTATE OF CHRISTA BEGUESSE RAMMELL, by it qualified personal representative, Kenneth Rammell, Defendant/Counterclaimant.	)	Case No. CV-2009-2767 Docket No. 40212 **CLERK'S CERTIFICATION OF EXHIBITS**

STATE OF IDAHO)
)
County of Bonneville)

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination: please see attached sheets:

Exhibit List – April 10, 2012

1. Exhibit 7: Letter to The Rutter Group from Chrita Buguesse, dated January 7, 2011
2. Exhibit 9: Letter to The Rutter Group from Christ Beguesse, dated December 22, 2003
3. Exhibit 14: ABI Codes

4. Exhibit 2: Lease Agreement effective January 1, 2004
5. Exhibit B: 2004 Cash Flow Statement for April Beguesse
6. Exhibit A: List of Publications by The Rutter Group
7. Exhibit 1: ABI Payment Ledger
8. Exhibit 45: S. Martin handwritten notes
9. Exhibit 27a: Christa Burgesse 2000 K-1 tax schedule

And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court this 28th day of December, 2012.

RONALD LONGMORE
Clerk of the District Court

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff/Counterdefendant/Respondent, vs. KENNETH RAMMEL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, Defendants/Counterclaimants/Appellants. and, THE ESTATE OF CHRISTA BEGUESSE RAMMELL, by it qualified personal representative, Kenneth Rammell, Defendant/Counterclaimant.	)	Case No. CV-2009-2767 Docket No. 40212 **AMENDED CLERK'S CERTIFICATION OF EXHIBITS**

STATE OF IDAHO)
)
County of Bonneville)

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination: please see attached sheets:

Exhibit List – April 10, 2012

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6. Exhibit A: List of Publications by The Rutter Group
7. Exhibit 1: ABI Payment Ledger
8. Exhibit 45: S. Martin handwritten notes
9. Exhibit 27a: Christa Burgesse 2000 K-1 tax schedule

I FURTHER CERTIFY, that the following documents will be submitted as exhibits to the record:

1. Transcript: Deposition of Kenneth Rammell, Volume I, taken December 17, 2009
2. Transcript: Deposition of Kenneth Rammell, Volume II, taken December 18, 2009
3. Transcript: Deposition of Linda Diamond Raznick, taken June 30, 2009
   (*The transcript of the Deposition of Linda Raznick was not located in the file; a copy was obtained from Jeffrey Brunson)*
4. Transcript: CV-09-1682 Probate Hearing, held August 4, 2011

And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court this 1st day of May, 2013.

RONALD LONGMORE
Clerk of the District Court

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff/Counterdefendant/Respondent, vs. KENNETH RAMMEL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, Defendants/Counterclaimants/Appellants. and, THE ESTATE OF CHRISTA BEGUESSE RAMMELL, by it qualified personal representative, Kenneth Rammell, Defendant/Counterclaimant.	)	Case No. CV-2009-2767 Docket No. 40212 **CLERK'S CERTIFICATE**

STATE OF IDAHO)
)
County of Bonneville)

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the above and foregoing Record in the above-entitled cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that all exhibits, offered or admitted in the above-entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript (if requested) and

the Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand affixed the seal of the District Court this 28th day of December, 2012.

RONALD LONGMORE
Clerk of the District Court

By: _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

APRIL BEGUESSE, INC., an Idaho Corporation, Plaintiff/Counterdefendant/Respondent, vs. KENNETH RAMMEL, an individual, CHRISTA BEGUESSE, INC., an Idaho Corporation, Defendants/Counterclaimants/Appellants. and, THE ESTATE OF CHRISTA BEGUESSE RAMMELL, by it qualified personal representative, Kenneth Rammell, Defendant/Counterclaimant.	Case No. CV-2009-2767 Docket No. 40212 **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 10 day of January, 2013, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

David Alexander
RACINE OLSON NYE BUDGE BAILEY
PO Box 1391
Pocatello, ID 83204-1391

Jeffrey Brunson
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, ID 83404-7495

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

RONALD LONGMORE
Clerk of the District Court

By: _____
Deputy Clerk