10-7-2013

April Beguesse, Inc. v. Rammell Appellant's Brief Dckt. 40212

IN THE SUPREME COURT OF THE STATE OF IDAHO

APRIL BEGUESSE, INC., An Idaho Corporation, Plaintiff/Counterdefendant/Respondent, v. KENNETH RAMMELL, an individual, and CHRISTA BEGUESSE, INC., an Idaho Corporation, Defendants/Counterclaimants/Appellants.	Supreme Court Docket No. 40212 Seventh Judicial District Court Docket No. CV-2009-2767

APPELLANTS' BRIEF

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, Presiding

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

The Plaintiff in this case is an Idaho corporation, April Beguesse, Inc. (ABI), wholly owned by April Beguesse (hereinafter, "April"). The Defendants are Christa Beguesse, Inc. (CBI), an Idaho corporation owned by Christa Beguesse Rammell (hereinafter, "Christa"), now deceased, and her husband, Kenneth Rammell ("Ken"). Christa was the mother of April. Christa operated, through her corporation, a typesetting business that she started in 1980 in California. At all times relevant to this case, her business had one customer, a legal publisher known as The Rutter Group ("Rutter"). Rutter is now an imprint of West Publishing Co., a division of Thompson-Reuters Corp. Christa performed the typesetting for more than 25 of Rutter's titles, most of which are looseleaf services relating to various aspects of California law. Christa, due to her mastery of the typesetting software known as Adobe PageMaker, was able to process the periodic updates and new editions so quickly that she retained Rutter's business for more than 20 years, and so efficiently that the business was quite profitable.

In January 2002, April moved to Idaho Falls, Idaho to begin working for CBI in order to learn the business. It was expected that she would take it over and buy it from CBI beginning in 2004. In January 2004, she formed ABI and took over the operation of the typesetting business pursuant to a contract that required her to pay $12,000 per month to CBI for eight years. Christa provided production help and consultation on operation of the typesetting software to April for several years. ABI made payments to CBI out of the cash flow of the business from February

2004 to November 2008. April has continued to operate the business since then. It has prospered and grown, as Rutter has added additional titles and has continued to use her typesetting services.

In November 2008, Christa passed away unexpectedly. When April learned that her mother did not leave her anything in her will, she quit making payments as required under the contract, and moved the business to Nevada. Defendants sought to enforce the contract in Nevada. Plaintiff had that action dismissed, and filed suit in Idaho alleging breach of contract and fraud. At trial in April 2012, a jury found fraud by Christa, Ken, and CBI, and breach of the contract by CBI, and awarded damages. The Court below denied Defendants' Motion for Judgment Notwithstanding the Verdict. However, it set aside the finding of fraud against the Estate of Christa Beguesse, holding that there was no evidence of fraudulent statements by Christa. The Court below granted a remittitur reducing the damage award, finding that the amount stated by the jury was not supported by evidence and was the result of passion and prejudice. Defendants appealed.

B. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS BELOW

Defendants Kenneth Rammell and Christa Beguesse Rammell were married in California in 1988.[1] Christa was at that time owner of CBI, a California corporation, and did typesetting work for several customers, including Rutter.[2] By 1996, Rutter was her only customer.[3] In 1996, Ken retired from his accounting practice, and Ken and Christa moved to Idaho Falls.[4] Christa dissolved the California corporation and created a new Idaho corporation. Ken and Christa each owned 50 percent of the stock in the new corporation.[5] and continued to provide typesetting

[1] T. 317
[2] T. 319
[3] T. 319
[4] T. 317-318
[5] T. 318

services for Rutter from Idaho Falls.[6] Ken provided some bookkeeping services but had limited involvement in CBI's operations.[7] He had no expertise in or particular knowledge about typesetting,[8] as was known to April.[9]

As an example of the business' profitability, in 2000, CBI had revenues of $238,140.00,[10] and profits of $127,885.[11] Figures for 1999 were similar.[12]

In 1999, Ken and Christa had some estate planning performed. They claimed all assets as community property, including their shares in CBI. At that time, they valued the business at $40,000.00,[13] based on the value of its cash and physical assets.[14] They were aware at that time that the business would have no value as a going concern if Christa were to die or retire, because the business relied on her work and knowledge to earn income.[15]

Some time after that, Ken and Christa began considering how to configure the business to provide them a retirement income and to provide for Christa's children.[16] Ken calculated that with an appropriate person running the business, it could provide retirement income for him and Christa and a good income for the person operating it.[17] The value of the company lay not in its assets considered separately, but in its ability to earn substantial income from its work for Rutter.[18]In September 2001, they invited April to meet with them about the proposal.[19]

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[6] T. 319
[7] T. 320
[8] T. 322
[9] T. 176-177
[10] T. 327
[11] T. 328
[12] T. 327
[13] T. 336
[14] T. 363
[15] T. 336, 359, 365
[16] T. 359-360
[17] T. 359-360
[18] T. 456
[19] T. 81-82

Christa proposed that April move to Idaho Falls and go to work for CBI to learn the business. After two years working for CBI, she would take over the business, making monthly payments to CBI for eight years.[20] According to April, it was suggested to her that when she was ready to retire, she could make the same deal with another person.[21] April testified that she was told that the deal was "an investment in my future," which she interpreted to mean "that the monies were going to go into her (Christa's) estate; and then, of course, when Christa passed, the estate was going to be divided."[22] She testified she understood she would be able to make the same deal "on the back end to secure my retirement."[23] She testified that Christa told her, "you can get your inheritance sooner or it will be less than eight years once I pass," which she said she interpreted to mean that payments would cease if Christa died in less than eight years.[24] April testified that she did not rely on any statements by Ken regarding the operation of the business.[25] She relied on some statements he made regarding the business' finances, principally a cash flow projection that he prepared.[26]

April accepted the proposal, moved to Idaho Falls, and went to work for CBI on January 6, 2002.[27] The plan was that she would spend a year learning how the business operated and interacted with its customer, and meeting the principals with Rutter.[28] On January 7, 2002, she sent a letter to Rutter's president, Linda Diamond, introducing herself and announcing that she was joining CBI and would be working with her mother.[29] April testified that Christa worked

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[20] T. 83-84
[21] T. 84
[22] T. 106
[23] T. 107
[24] T. 108
[25] T. 176
[26] T. 176-177, Ex. B
[27] T. 111
[28] T. 112
[29] T. 113

"meticulously" over this two-year period to make the transition acceptable to the customer.[30] April testified that she needed to be trained in the methods that her mother used at that time to do the work.[31] She testified that developing the knowledge to use the PageMaker software to typeset the customer's books took years of Christa's work.[32]

In December 2003, right before April took over the typesetting business for good, Christa advised Rutter of the change and indicated that she would continue to work with ABI on a consulting basis.[33] April acknowledged that she had to prove herself to the customer to make the deal work.[34] She continued to use the methods and processes that her mother developed and taught her.[35] As a result of her mother's work in training her, preparing her, and preparing the customer for the change, April was able to assume the typesetting business with no objection from the customer.[36]

Prior to April making the transition and taking over the business, Ken prepared a cash flow projection for ABI for 2004.[37] This was the only information from Ken that April relied on in deciding to purchase the business.[38] This document projected monthly cash flow for the business, to demonstrate how ABI could make payments of $12,000.00 per month to CBI while meeting expenses and paying April salary, benefits, and profits.[39] The cash flow projected sales for 2004 of $320,871.00.[40] ABI's actual sales for 2004 were $316,000.00.[41] Ken projected April would take out in salary and profits (net of payments to CBI and all expenses, including health

[30] T. 189-191
[31] T. 121-124
[32] T. 250
[33] T. 120, 191, Ex. 9
[34] T. 193-194
[35] T. 121
[36] T. 236-237
[37] Ex. B
[38] T. 176.16-177.2
[39] T. 178-182
[40] T. 184, Ex. B
[41] T. 186

insurance and April's car payments) of $72,000.00.[42] Her actual salary and profits for the year were $68,000.00.[43] Ken's projection, which was the only statement by Ken that April relied on, was substantially accurate.

The parties eventually reduced the agreement to writing, which took the form of a lease agreement.[44] The arrangement was so structured for tax purposes.[45] (Structuring the deal as a lease benefitted ABI, in that it could deduct the payments as business expenses, and caused CBI to show them as ordinary income rather than capital gains.[46]) Although the Court below ruled that the writing did not fully reflect the terms of the agreement, because it was a sale, not a lease, April testified the writing accurately stated the substantial terms of the agreement, including the requirement for payment of $12,000.00 per month for eight years.[47] Mr. Rammell testified that he was not aware of any term of the agreement between CBI (of which he was an owner and officer) and ABI that the payments would cease on Christa's death. He said the payments were to provide retirement income for himself and his wife, and he would not have agreed to such a term.[48]

At her death, Christa left a will leaving her entire estate to her husband. April challenged the will in a probate action, but lost.[49]

When ABI took over the typesetting business in January 2004, it received the exact same equipment, computers, software, and files that CBI had used to run the business until a few days

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[42] T. 185
[43] T. 188-189
[44] Ex. 2
[45] T. 343
[46] T. 454-455
[47] T. 264-267
[48] T. 451-452
[49] *In the Matter of the Estate of Christa Beguesse Rammell,* Bonneville County Case No. Case No. CV-09-1682, Findings of Fact, Conclusions of Law, and Order on Petition for Formal Adjudication of Testacy and Motion to Remove Personal Representative, August 16, 2011.

before.[50] ABI has continued to use CBI's files, software and methods to serve its customer. ABI's financial performance in the following years was as follows[51]:

Year	Gross Revenue	Salary to April	Profits	Paid to CBI
2004	316,000	48,000	20,000	144,000
2005	350,000	48,000	28,000	144,000
2006	395,000	50,000	55,000	144,000
2007	435,000	46,000	100,800	144,000
2008	430,000	48,000	74,000	132,000
2009[52]	427,000	57,500	80,000	0
2010	408,000	55,500	145,000	0
2011[53]	400-410,000	Similar	Similar	0

April testified that Christa taught her how to use the PageMaker typesetting software the way CBI used it.[54] She worked with Christa using this software on an almost daily basis until her death.[55] April testified that at the 2001 meeting, Christa told her she would get "a type of proprietary software she told me she created to work with the Rutter Group."[56] April testified Christa told a local civic group called the Exchange Club, at a meeting April attended, that Christa had "come up with a program to make the operating processes much more easily and just invented this operating system to make these books."[57] This was her sole testimony regarding

[50] T. 221-222
[51] T. 185-186 for 2004; T. 204-209 for remaining years
[52] ABI moved its operations to Las Vegas in March 2009 and incurred increased expenses. T. 207
[53] April was "not prepared to answer" at trial questions about ABI's revenues and profits in 2011. T. 211
[54] T. 245.2-246.22
[55] T. 247.3-.7
[56] T.150.15-.20
[57] T. 151

alleged false statements of fact regarding the software. A witness who was present at Christa's Exchange Club presentation, attorney Stephen Hall, testified that he asked Christa a question about the program she said she wrote or developed to streamline her production process.[58] Christa told him that she used "one of the off-the-shelf publishing software packages[59] ... I think during her presentation she told us all that it had taken a lot of work for her to do."[60]

April testified that in November of 2006, almost five years after she started working with the program, she upgraded the PageMaker software[61] and read the manual for the first time.[62] She discovered by reading the manual that "it wasn't a proprietary programming system. It was just actually a lot of dedicated hard work of reading the PageMaker manuals and stringing some macros and commands together that anyone could do."[63]

Christa died suddenly in November 2008. April testified that as she and Ken were leaving the funeral home after making arrangements for Christa's burial, April asked about when they would have "a reading of the will,"[64] and was told there would be none. She asked again after the funeral, and was told that "nothing was going to change."[65] She said she "began to pay attention to her life" at that point, and called the president of Rutter.[66] April asked "the files I have on my server, am I able to – do I own them and am I able to sell them, you know, when I retire?"[67] The

[58] T. 445.9-449.4
[59] T. 447.22-.23
[60] T. 448.15-.16
[61] T. 151.13-152.25
[62] T. 257.11-.24
[63] T. 152.18-.25
[64] T. 143.19-.21
[65] T. 143.25
[66] T. 145.20-.25
[67] T. 147.2

president of Rutter responded, "no."[68] The Court below admitted this testimony for the limited purpose of showing April's knowledge and notice of Rutter's position.[69]

April testified about the significance of the "library of files" as follows:

> My understanding of the library of files was, I was purchasing them, the tangible files on the server. And what I was promised and what I was paying a million plus for was in turn, when it was time for me to retire, I could then in turn sell those files to a third party.[70]

April testified she expected she would be able to make a deal with a third party similar to her own arrangement with CBI, in which the buyer would be trained and made acceptable to Rutter before the transfer took place.[71] April acknowledged on cross-examination that she was aware that the files could only be sold in a transfer of the business to a third party who would take over Rutter's typesetting:

> **Q. So isn't it true that you were aware at the time you entered into this agreement with your mother's company that you could not simply sell these files to anybody, you could only sell them to somebody who was taking over the business?**
> A. I'm not sure that question – why would I sell the files to somebody who wasn't taking over the business?
> **Q. Exactly my point. It only – those files would only go to somebody who was taking over the business.**
> A. And going to be doing work with the Rutter Group; that's correct.
> **Q. Absolutely. Exactly my point. And you said that you were told you could sell them like your mother sold them to you, correct?**
> A. I could make the same agreement that they made to me. That's what was proposed to me in 2001.
> **Q. Okay. So the answer is "yes"?**
> A. Yes.[72]

The President of Rutter, Linda Diamond Raznick, testified by deposition. She stated Rutter had no written or oral agreements with CBI or ABI, but owned the *copyright* in the files

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[68] T. 147.6
[69] T. 147.8-.14
[70] T. 116.8-,12
[71] T. 84.11-.25
[72] T. 234.25-236.18

they possessed.[73] On further questioning, Ms. Raznick confirmed that her ground for asserting that April would not have the right to sell her PageMaker format files to a third party is that Rutter owns the copyright.[74] She testified, "It is our proprietary information. It is not hers to give away or to sell or to do anything with *without our approval.*"[75] Thus, the customer's testimony was clear and uncontradicted that ABI could, in fact, transfer the files to a third party along with the rest of the typesetting business as long as Rutter approved, just as CBI had sold the business to ABI.

April testified she has never attempted to sell the business to a third party the way CBI sold it to her.[76]

ABI made no further payments under the contract with CBI after Christa's death.[77] There are still owing to CBI 37 payments of $12,000.00 each, for a total of $444,000.00.[78]

April brought this action in August 2009.[79] The Complaint made the following claims in eight counts:

1. Declaratory relief.

2. Fraud regarding ownership and value of the "library of files" containing copies of Rutter's books in PageMaker format.

3. Fraud regarding a "guaranteed self-sustaining contract" with Rutter, which was dismissed on summary judgment because April admitted she was aware that there was no

[73] T. 300, Deposition of Linda Diamond Raznick 30-31
[74] T. 303, Deposition of Linda Diamond Raznick 38.15-.18
[75] T. 302, Deposition of Linda Diamond Raznick 37.6-.19
[76] T. 237.6-239.15
[77] T. 148
[78] T. 378
[79] R. 19

contract with Rutter, but only that it would be difficult for Rutter to take the work in-house or to a competitor.[80]

4. Fraud regarding the proprietary software.

5. Fraud regarding "other intellectual property," which was dismissed on summary judgment because Plaintiff was unable to specify what this other intellectual property was.[81]

6. Fraud based on alleged misrepresentations that Christa would provide in her will that payments to CBI would cease on Christa's death; on summary judgment, the Court below found that such a promise was not enforceable but statements as to the existence of a will could support a fraud claim.[82] However, the Court dismissed it on motion for directed verdict,[83] but the Court never advised the jury of this ruling, and permitted testimony about the existence of a will to be used to determine the terms of the agreement.[84] Plaintiff nevertheless argued fraud in the alleged statements as to the existence of a will and misrepresentations of the terms of the contract.[85]

7. Fraud based on failure to disclose Ken's ownership interest in CBI. This claim was dismissed on directed verdict because there was no showing that this was material.[86]

8. Constructive fraud. This was dismissed on summary judgment.[87]

9. Breach of contract regarding the "guaranteed self-sustaining contract" with Rutter; which was dismissed on summary judgment.[88]

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[80] R. 107
[81] R. 108
[82] R. 109
[83] T. 437
[84] T. 436-438
[85] T. 515-516
[86] T. 436
[87] R. 110
[88] R. 112

10. Breach of contract related to the "proprietary software." The Court below ruled on summary judgment[89] that this claim would be barred by the statute of limitations,[90] but that equitable estoppel may apply to prevent the application of the statute.

11. Breach of contract related to other intellectual property, which was dismissed on summary judgment.[91]

12. Breach of contract related to the "library of files." The Court held that the statute of limitations did not bar this claim because it did not arise until an adverse claim to the "library of files" was made.[92]

13. Breach of contract based on CBI's failure to provide consulting services after the death of Christa. This was dismissed on summary judgment based on impossibility and because ABI never made a demand that CBI perform by providing alternative consulting services.[93]

14. Breach of warranties regarding the assets including the library of files, the proprietary software, other intellectual property, and the guaranteed contract. The guaranteed contract claim and the claim regarding other intellectual property were dismissed on summary judgment on the same grounds fraud and breach claims on these subjects were dismissed.[94]

15. Unjust enrichment. This claim was dismissed on summary judgment.[95]

16. Quasi-estoppel. This claim was dismissed on summary judgment.[96]

At trial, April provided the sole testimony regarding ABI's damages for fraud and breach of contract and warranty. She testified that ABI made payments under the contract with CBI

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[89] R. 113
[90] I.C. §§ 28-2-725, 5-217
[91] R. 113
[92] R. 113-114
[93] R. 115
[94] R. 115
[95] R. 116-117
[96] R. 118

totaling $708,000.00 between February 2004 and November 2008.[97] She testified that the value of what she received in January 2004 was, in her opinion, "about $250,000.00."[98] She testified she was thereby damaged in the amount of the difference, or $455,000.00.[99] She testified that she probably could not sell the business for $250,000.00 because she did not own the files.[100]

April offered no testimony as to the damages she suffered because she did not receive the "proprietary software," other than to state that the PageMaker software she received retailed for about $600.00.[101] She did not in her testimony place a value on the "proprietary software."

Thus, the entirety of her evidence of damages was the difference in value between what she paid CBI and what she claims she received as of January 1, 2004, which figure resulted from her unsubstantiated belief that she was unable to sell the business.

At the close of the Plaintiff's case, Defendants moved for Directed Verdict, which was granted in part. The Court below granted directed verdict as to the fraud claims based on misrepresentations as to Ken's ownership interest in CBI,[102] and as to the claim regarding misrepresentations as to Christa's will.[103] The Court, however, denied a directed verdict on the fraud claims,[104] including those against the Estate,[105] even though no evidence of any statement by Christa to April was admitted against the Estate. The Court below did not advise the jury that it had granted directed verdict on the two fraud claims.

The jury found fraud by Christa, Ken, and CBI, and breach of the contract by CBI, and awarded damages in the amount of $354,000.00 for fraud, and $190,013.00 for breach of

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[97] T. 156
[98] T. 158.15
[99] T. 158.16-.19
[100] T. 158.20-159.5
[101] T. 157.14
[102] T. 436
[103] T. 437
[104] T. 438
[105] T. 439

contract with regard to the library of files.[106] The jury awarded nothing for breach of the contract regarding the proprietary software.[107]

The Court below denied Defendants' Motion for Judgment Notwithstanding the Verdict.[108] However, it set aside the finding of fraud against the Estate of Christa Beguesse, holding that there was no evidence of fraudulent statements by Christa.[109] The Court below denied Defendants' Motion for New Trial;[110]however, it granted a remittitur reducing the damage award by $90,113.00, finding that the amount stated by the jury was not supported by evidence and was the result of passion and prejudice.[111] Defendants appealed.

II. ISSUES PRESENTED ON APPEAL

1. Whether the District Court erred in Denying Defendants' Motions for Directed Verdict and JNOV because there was insufficient evidence to support an award of damages.

2. Whether the District Court erred in denying motions for directed verdict and JNOV on Plaintiff's fraud claims because Plaintiff did not prove fraud by clear and convincing evidence,.

3. Whether the District Court erred in denying directed verdict and JNOV on Plaintiff's claims of fraud and breach of warranty because representations of value are not statements of fact or warranties.

4. Whether the District Court erred in denying directed verdict and JNOV on the breach of warranty claim regarding the library of files because a mere adverse claim of ownership does not establish a breach of the warranty of title.

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[106] R. 410
[107] R. 411
[108] R. unnumbered page following 494. Page 4 of Order on Motion JNOV or New Trial.
[109] Id.
[110] R. 495
[111] R. 495-496

5. Whether the District Court erred in denying directed verdict or JNOV on Plaintiff's claims of fraud and breach based on the alleged misrepresentation of ownership of the library of files, because the claim lacks a foundation in fact and law based on the evidence heard at trial.

6. Whether the District Court erred in denying directed verdict or JNOV on Plaintiff's claims of fraud and breach related to the proprietary software, for failure to prove damages.

7. Whether the District Court erred in denying directed verdict or JNOV on Plaintiff's claims of fraud and breach related to the proprietary software, for failure to prove the materiality of the alleged misrepresentations.

8. Whether the District Court erred in denying directed verdict or JNOV on Plaintiff's claims of fraud and breach related to the proprietary software, for failure to prove false statements of fact.

9. Whether the District Court erred in denying directed verdict or JNOV on Plaintiff's claims of fraud and breach related to the proprietary software, for failure to prove reasonable reliance.

10. Whether the District Court erred in denying directed verdict or JNOV on Plaintiff's claims of fraud against Kenneth Rammell for failure to prove material misstatements and justifiable reliance.

11. Whether the District Court erred by admitting irrelevant testimony regarding Christa Beguesse's will.

12. Whether the District Court erred by submitting to the jury fraud claims on which the Court had granted directed verdict.

13. Whether the District Court erred in failing to grant directed verdict or JNOV that the breach of warranty and contract claims were barred by the statute of limitations.

14. Whether the District Court erred in failing to grant a new trial with regard to Defendant CBI's counterclaim.

15. Whether Appellant is entitled to an award of attorney fees on appeal.

III. STANDARD OF REVIEW

The Supreme Court on appeal reviews de novo a district court's decision to deny a motion for a judgment notwithstanding the verdict. *Griff, Inc. v. Curry Bean Co., Inc.,* 138 Idaho 315, 319, 63 P.3d 441, 445 (2003) (citing *Polk v. Larrabee*, 135 Idaho 303, 311, 17 P.3d 247, 255 (2000)). The standard of review of a grant or denial of a motion for judgment notwithstanding the verdict is the same as that of the trial court when ruling on the motion. *Horner v. Sani-Top, Inc.*, 143 Idaho 230, 233, 141 P.3d 1099, 1102 (2006) (citing *Quick v. Crane*, 111 Idaho 759, 764, 727 P.2d 1187, 1192 (1986)). A trial court will deny a motion for judgment notwithstanding the verdict if there is evidence of sufficient quantity and probative value that reasonable minds could have reached a similar conclusion to that of the jury. *Id.* (citing *Hudson v. Cobbs*, 118 Idaho 474, 478, 797 P.2d 1322, 1326 (1990)). A trial court is not free to weigh the evidence or pass on the credibility of witnesses, making its own independent findings of fact and comparing them to the jury's findings. *Griff, Inc.*, 138 Idaho at 319, 63 P.3d at 445. A trial court reviews the facts as if the moving party admitted any adverse facts and draws all reasonable inferences in favor of the non-moving party. *Ricketts v. E. Idaho Equip., Co.,* Inc., 137 Idaho 578, 580, 51 P.3d 392, 394 (2002).

"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 (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 (App. 1997). 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.

When considering an appeal from a district court's ruling on a motion for new trial, this Court applies the abuse of discretion standard. The appellate Court must recognize the district court's wide discretion to grant or refuse to grant a new trial, and, on appeal, a court will not disturb a district court ruling, absent a showing of manifest abuse of that discretion. This Court's primary focus is on the process by which the district court reached its decision, not on the result of the district court's decision. Thus, the sequence of this Court's inquiry is: (1) whether the district court correctly perceived the issue as one of discretion; (2) whether the district court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the district court reached its decision by an exercise of reason. *Sheridan v. St. Luke's Reg'l Med. Ctr.*, 135 Idaho 775, 780 (2001)

IV. ARGUMENT

A. The District Court Erred in Denying Defendants' Motions for Directed Verdict and JNOV Because There Was Insufficient Evidence to Support Damages

The Court below erred in not directing a verdict in favor of the Defendants on all fraud and breach of contract claims, because the evidence was insufficient to prove any amount of damages. 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).

Likewise, to recover for breach of contract, a plaintiff must prove damages resulting from the breach. "The burden is upon the plaintiff 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. "Reasonable certainty" does not mean that damages need to be proven with "mathematical exactitude," but it does require a plaintiff to prove that damages are not merely speculative. *Harris, Inc. v. Foxhollow Construction & Trucking,* 151 Idaho 761, 770 (2011).

The Plaintiff presented no evidence, much less clear and convincing evidence, of damages. The sole evidence of damages on all claims was April's testimony that the business was worth $250,000.00, which was less than the $708,000.00 she paid. She also testified that the "library of files" was worth nothing, rather the $1.2 million Ken and Christa supposedly represented as the value. This evidence was insufficient for the following reasons.

i. Value of the Business.

April's estimate as to the value of the business was based on the unsupported assumption that she could not sell the business. This assumption was based on her mistaken belief that she does not own the files, cannot sell the files, and therefore has nothing to offer a potential buyer. But the testimony of Linda Diamond Raznick was clear that Plaintiff can sell the files with Rutter's approval, just as CBI sold the business and transferred the files to ABI with Rutter's approval. Therefore, the entire basis for the Plaintiff's claim of damages is factually unsupported. It is not clear and convincing evidence of damages, and it is speculative, because the damage has not yet occurred and, on the basis of the evidence presented, will never occur, because ABI can sell the business with Rutter's approval.[112]

In this case, the dispute is purely hypothetical: Will the Plaintiff suffer the damages alleged when and if the Plaintiff attempts to sell the business? A hypothetical dispute is not ripe, and should be dismissed. "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) This dispute would only be removed from the realm of the hypothetical if the Plaintiff proved that the business cannot be sold – but the evidence was to the contrary. The business can be sold, just as it was sold to her.

This Court has held that "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

[112] As April testified, this was all she ever expected, because she understood she could one day sell the business to a third party the way CBI sold it to her – i.e., with Rutter's approval. T. 84.11-.25; 235.12-.18

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 outlined 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,* 152 Idaho 531, 539, 272 P.3d 503 (2012) (citing *Griffith v. Clear Lakes Trout Co.*, 143 Idaho 733, 740, 152 P.3d 604, 611 (2007) (internal citations omitted).

Thus, the damages must not only be proven, but must be shown to have flowed from the breach or fraud alleged.

Here, Plaintiff contended at trial that ABI had been defrauded and the contract breached because the value of the business was misrepresented. Plaintiff claimed damage because she could not sell the business. The business was worth less than represented because it could not be sold to a third party; the business could not be sold to a third party because it allegedly did not "own" a "library of files" that it could sell to a third party. All of the claimed damages, for both fraud and breach, flowed from this inability to sell the business.

However, there was absolutely no proof at trial that Plaintiff could not sell the business. April Beguesse admitted that she has never actually attempted to sell the business. No expert testified that she could not sell the business. In fact, the only evidence at trial was that Linda

Diamond-Raznick told April that she *could* sell ABI with Rutter's permission,[113] just as April's mother and CBI had done with April. Thus, there was no evidence that ABI suffered damages.

The damages April testified to are remote and speculative, because they would be incurred only upon an event that has not and may never happen – Rutter's refusal to do business with a third party to whom April proposed to sell the business. That April could apply a precise number to those damages at trial does not remove them from the realm of speculation, because there is a question whether the damages have occurred or will ever occur.

This Court adopted the following definitions of "remote" and "speculative" damages from 25 C.J.S. *Damages* §2:

> *Remote damages*. Remote damages are such as are the result of accident or an unusual combination of circumstances which could not reasonably be anticipated, and over which the party sought to be charged had no control."
>
> "*Speculative damages*. The term 'speculative damages' is sometimes used as synonymous with 'exemplary damages'; but ordinarily damages are said to be speculative when the probability that a circumstance will exist as an element for compensation becomes conjectural."[114]

The damages April testified to are remote, in that they assume a circumstance that is beyond the control of the Defendants (and which April knew was beyond the control of the Defendants, since she admitted that she knew that she did not have control over the customer's choice of typesetters). They are speculative because the probability that Rutter will deny approval of her sale of the business is purely conjectural, and will depend upon facts unknown at this time, including some wholly within ABI's control, such as her choice of a buyer.

Where injury is remote, contingent, and not necessarily a proximate result of the acts complained of, an action in fraud may not be maintained. *Bryant Motors v. American States Ins. Cos.*, 118 Idaho 796, 800 (Idaho Ct. App. 1990)

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[113] T. 302, Deposition of Linda Diamond Raznick 37.6-.19

[114] *Lockwood Graders v. Neibaur,* 80 Idaho 123, 128; 326 P.2d 675, 677-678 (1958)

In summary, April's testimony that she was damaged in an amount equal to the difference between what she paid for the business and what she believes it was worth in 2004 is contrary to the evidence, remote, and speculative. Therefore, there was no evidence of damage resulting from fraud or breach of contract, much less clear and convincing evidence.

ii. Ownership and Value of the Library of Files.

The only other evidence that would appear to establish a basis for an award of damages was April's testimony that the "library of files" was represented to her to be worth more than $1 million, but was actually worthless because the files were "owned" by Rutter and could not be sold to a third party.[115] As April acknowledged, however, she understood that the files could not be sold apart from the business, and therefore had no value as a separate asset.[116] Her testimony about the value of the library of files, then, is essentially the same as that regarding the value of the business as a whole: that it has no value because she cannot sell it the way CBI sold it to her, as it was represented she could do. And for the same reasons as stated above, this testimony does not establish any damages, because the evidence was undisputed that she *can* sell the files *in the same way CBI sold it to her* – with Rutter's approval. By her own testimony, this is what was represented to her, and what she received.

Because ABI's measure of damages requires that it be unable to sell the business in the manner represented to April, and the undisputed evidence at trial was that it can sell the business in that manner, April's testimony failed to prove any damages. Without proof that ABI cannot sell the business, there are no damages, and the fraud and breach of contract claims must fail.

In addition, the Plaintiff failed to prove that Rutter "owns" the files. There was evidence presented that Rutter claims to own the *copyright* in its books, and evidence that April became

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[115] See footnotes 70 to 74, supra, and accompanying text.
[116] T. 234.25-236.18. See footnote 72, supra, and accompanying text

aware of that claim after Christa's death, but there was no evidence or testimony that was sufficient to enable the jury to determine ownership of the files that were on ABI's computer. The jury was not instructed in the applicable law. No expert witness testified to establish ownership of the files, or the effect on ownership that Rutter's claim to the copyright would have on ownership of the files.[117] The evidence, taken in the light most favorable to the Plaintiff, at best established only that Rutter owned the copyright, and asserted that because of its copyright, ABI could not transfer possession of the files without its permission. This evidence is not sufficient to establish actual ownership of the files that CBI transferred to ABI.

Rather, the Plaintiff's measure of damages *assumes* that Rutter, not Plaintiff, owns the files. Damages follow from the evidence presented at trial only if one assumes that April was correct that Rutter owns the files and ABI cannot sell them. But neither a jury nor a judge may simply assume the facts supporting the Plaintiff's damage claims. A plaintiff must prove its contract damages, both amount and causation, with reasonable certainty. *Watkins Co., LLC v. Storms, supra,* 152 Idaho at 539. Plaintiff must prove fraud damages with clear and convincing evidence. *Kuhn v. Coldwell Banker Landmark, Inc., supra,* 150 Idaho at 250. Evidence based on unwarranted assumptions is not clear and convincing. Plaintiff cannot assume causation; April's testimony about damages is meaningless, as her evidence did not prove damages were incurred.

Because the Plaintiff failed to present evidence from which a reasonable jury could have concluded that ABI suffered damages, the District Court erred when it failed to direct a verdict or grant JNOV as to all claims for fraud and breach of contract or warranty. The judgment entered by the Court below should be reversed.

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[117] As a matter of federal copyright law, ownership of the copyright is irrelevant to the question of ownership of any particular copy. 17 U.S.C. § 202.

B. The District Court Erred In Denying Motions for Directed Verdict and JNOV on Fraud and Breach Claims Because Plaintiff Did Not Prove Fraud by Clear and Convincing Evidence, and Representations of Value are Not Statements of Fact or Warranties.

i. Representations of value.

In her testimony at trial, April vaguely contended that she understood the Defendants to have represented that the business owned a "library of files" worth more than a million dollars. As this amount happens to be the price that she agreed to pay for the entire business, and she acknowledged that she knew she could not sell the files as a separate asset, but only as part of the business,[118] her statements can only be taken to mean that the Defendants made a representation of the value of the business. This is not clear and convincing evidence of a false statement of fact. It is well settled that representations as to the 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).

ii. Representations as to a future sale of the business.

Similarly, a representation that she could sell the business at a later date is by its nature an opinion as to a future event that is beyond the control of the Defendant, and therefore cannot form the basis for a fraud or breach of warranty action.

iii. Representations as to "ownership" of the "library of files." April's testimony that someone led her to believe that CBI "owned" the files is not clear and convincing evidence of a false statement of fact. First, the only evidence she presented that this statement is false is a contrary claim to ownership made by Rutter. But, as discussed in Section A above, the evidence

[118] T. 234.25-236.18

was not sufficient to establish which party actually owned the files. If ownership cannot be established, neither can the truth or falsity of the alleged representation.

Second, her testimony about "ownership" of the files is inherently confused. She acknowledged that she received possession of the files which CBI had used to perform work for Rutter; she acknowledged that she used them up to the time of trial to perform work for Rutter, for which she was paid more than $3 million. The only sense in which she could say ABI did not "own" the files was in her understanding that she could not sell them to a third party.[119]

On summary judgement, when the District Court dismissed April's claim of fraud based on an alleged representation of a "guaranteed, self-sustaining contract with Rutter," the Court held that her testimony had to be interpreted in the light of her special understanding of the word "contract" to mean some means of control over Rutter's choice of typesetters.[120] In the same way, the claim of fraud relating to ownership of the files must be interpreted in light of her special understanding of "ownership" to mean the ability to sell the business to a third party. As discussed in Section A above, that understanding is not supported by any evidence. There was no evidence presented from which a jury could conclude that ABI could not sell the business to a qualified buyer that the customer would be willing to do business with. Ms. Beguesse never tried to sell the business.[121] Her customer never told her she could not sell the business.[122] The president of the Rutter Group testified that ABI *could* sell the business with Rutter's approval.[123] And, of course, the evidence was undisputed that CBI sold the business to ABI without objection from Rutter or disruption of the business.

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[119] T. 116.8-,12
[120] R. 107
[121] T. 237.6-239.15
[122] T. 243.17-.20
[123] T. 302, Deposition of Linda Diamond Raznick 37.6-.19

Thus, in the special sense in which April uses the word "ownership" with respect to the files, meaning the ability to sell them, ABI failed to prove that it did not receive ownership. Therefore, it was error for the District Court to deny a directed verdict and Defendant's Motion JNOV with respect for this fraud claim. It has no support in the evidence.

iv. Representations relating to ownership and value, and lack of reliance. In fact, it should be clear to this Court that ABI's claims of fraud and breach of warranty relating to the ownership of the files, the value of the files, the value of the business, and the ability to sell to a third party, are all in fact the same claim. They all boil down to an assertion that ABI's business has little value because it cannot be transferred to a third party the way CBI transferred it to ABI. At their heart, all of these claims for fraud and breach, and the measure of damages claimed for them, are identical. And, they are identical also to the claim based on the alleged "guaranteed self-sustaining contract," which the Court below dismissed on summary judgment. This claim, too, was based on ABI's supposed inability to sell the business. In its Complaint, ABI alleged that CBI misrepresented the existence of a "guaranteed self-sustaining contract" with Rutter.[124] April asserted that this contract was an asset of the business that she was buying. April eventually acknowledged during discovery that she knew all along there was no agreement with Rutter;[125] rather, as she testified at trial, she believed that Rutter was somehow unable to make changes to the typesetting files that she used, and she therefore had control over the customer's choice of typesetter,[126] and she chose to call this control a "contract."[127] The Court granted summary judgment, holding as follows:

> April understood that no contract existed. April understood that Rutter was not required by contract to do business with CBI (or ABI), but only that the companies had a

[124] R. 242, ¶ 58(a)
[125] R. 106-107
[126] T. 241.17-.25
[127] R. 107

> good working relationship and that it would be expensive for Rutter to take its business elsewhere. ABI knew or should have known that at best, Rutter was, to a degree, a captive client. Any testimony from April that uses the term "contract" must be considered in light of her understanding of that term. Affidavits of Plaintiff attempting to subsequently re-characterize her deposition testimony will not be considered.
>
> Thus, the record establishes 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.[128]

April's testimony at trial repeated this misunderstanding with respect to the fraud claims regarding misrepresentation of the value of the files, and misrepresentations as to the ownership of the files. With respect to both, her testimony was not that specific false representations were made to her, but that she came to a mistaken understanding that the customer was somehow obligated to use her services, and that this obligation could be transferred to a buyer the way CBI supposedly transferred it to her. With regard to ownership of the files, she testified that she thought CBI had control over the relationship with the customer;[129] that there was a "partnership,"[130] by which she meant that "Christa worked very hard into performing her work to every detail, every need of the Rutter Group. So – and because of that, there was no need to even think about going anywhere else."[131] Having ownership of the files, she went on, would have made it difficult for them (Rutter) to go elsewhere.[132] Just as "contract" had a special meaning for her, it appears that "ownership" of the files also has a special meaning – the same meaning, in fact: some kind of control over the customer relationship.[133] At trial she presented no evidence of any false statements by Ken or Christa that such an obligation existed. At trial, April testified

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[128] R. 106-107
[129] T. 116.19-.22
[130] T. 116.22-117.4
[131] T. 119.13-.21
[132] T. 119.22-.25
[133] T. 116.19-.22

they told her she could someday sell the business to a third party in a similar deal.[134] But a reasonable buyer would interpret that statement in light of her knowledge that the customer could take its business elsewhere if she failed to keep the customer happy. April could not justifiably rely on it as a statement of fact that she could sell the business in spite of Rutter.

Likewise, her testimony regarding the alleged misrepresentations of the value of the files is based on the same misunderstanding. April acknowledged that she knew the files had no value by themselves, but only had value to a typesetter who was doing business for Rutter.[135] Her testimony was that she was told the files were valuable because she could someday sell the business to a third party *the way CBI sold it to her.*[136] She could not justifiably rely on this statement as a guarantee that she could sell the files without Rutter's permission.

For the same reason that the Court below granted summary judgment on the "guaranteed, self-sustaining contract" claim for fraud, the Court should have granted directed verdict or JNOV on the other fraud claims. They are the same claim: that she was led to believe she could keep Rutter's business even if Rutter did not like her work, and that she could sell that business to a third party against Rutter's wishes. But, just as April was aware when she went to work for CBI that Rutter could take its business elsewhere, and that Rutter could take its business from ABI if she failed to meet their requirements, she was necessarily aware that Rutter could take its business elsewhere if she sold the business to a third party that Rutter objected to. She cannot claim to have relied on any representations that led her to believe otherwise, since she knew the truth. Her confusion is evidence only of her failure to reason properly, not of fraud.

Thus, ABI presented no clear and convincing evidence that would establish any statements of material fact by Ken or Christa that would have caused April to believe that the

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[134] T. 84
[135] T. 225.12-227.4
[136] T. 84.11-.25

files or the business could be sold without regard to Rutter; nor did she present any evidence, much less clear and convincing evidence, that any statements were false, because she never established that the files could not be sold in the same way CBI sold them to ABI. Plaintiff failed to introduce clear and convincing evidence of false, material statements of fact, and of her justifiable reliance on them. The Court erred in denying directed verdict and JNOV.

C. Liability for Breach of Warranty of Title Does Not Extend to Unfounded Claims.

The Court below should have dismissed the breach of warranty claim regarding the library of files. The Defendant CBI is not liable for a breach of warranty of title because of a mere adverse claim against the title. The plaintiff in an action for breach of covenants of title has the burden of proving that he was prevented from using his property by a person asserting title paramount to the plaintiff's. *Roper v. Elkhorn at Sun Valley,* 100 Idaho 790, 794, 605 P.2d 968, 972 (1980). "The mere showing of a cloud on the grantee's title is insufficient to establish a breach, for the warrantor is not bound to protect his grantor against a mere trespasser or against an unlawful claim of title." *Id., citing* 20 Am.Jur.2d, Covenants, Conditions, & Restrictions §83 (1965). In the absence of proof of Rutter's superior title, rather than its mere assertion, it was reversible error to permit the jury to find breach of warranty and damages on this issue.

D. Fraud and Breach Claims Based on Ownership of Files is Without Basis in Law.

The Court below erred when it denied directed verdict and JNOV on ABI's claims of fraud and breach based on the alleged representation of "ownership" of the "library of files" because the claim is without a legal basis. The jury found a breach of contract and warranty on these claims, and may have found fraud as well. However, there was no legal basis for either claim under the evidence presented at trial, and neither should have been sent to the jury. April claimed she believed she was buying a legal right incident to "ownership" of the files that does

not and cannot exist: namely, the right to control Rutter's choice of typesetters. Ownership of computer files does not carry with those particular rights; they are not incidents of ownership. Thus, the Plaintiff's claims of fraud and breach of warranty are premised on April's 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 was necessary for the trial Court 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 included 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.[137] 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 a copy of the files. It is the Defendants' supposed failure to deliver these alleged incidents of ownership that constitutes the fraud and breach of warranty 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 ABI purchased, and April's belief to the contrary was unreasonable under the circumstances. Since the Plaintiff does not own the copyright, the files naturally and obviously have no significant value without the copyright owner's permission to use them to typeset new editions. April admitted this fact in her testimony at trial.[138] It follows that if the copyright owner withdraws its typesetting work from the Plaintiff, it thereby also withdraws its permission to use the files for their intended purpose, and they become of little value. "Ownership" of the files has nothing to do with it; there is no kind of ownership that would permit a typesetter to retain the value in files of this nature without the copyright owner's business.

Thus, the damages April claims do not flow from a breach of warranty or a fraud, but from the existence of a business risk which the Plaintiff was of aware when she entered the agreement, as the District Court found on summary judgment[139] As a matter of law and logic, the

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[137] T. 165.22-166.13
[138] T. 234.25-236.18
[139] R. 107

facts presented at trial fail to state a claim of fraud or breach of warranty. The rights April claims to have been denied simply do not come with the property she purchased.

The same analysis applies to any fraud or warranty claim in which the damages arise from the alleged inability to sell the business. The District Court erred when it denied directed verdict or JNOV as to the fraud and breach of warranty claims.

E. The District Court Erred in Denying Directed Verdict and JNOV on the Claims of Fraud and Breach Related to the Proprietary Software.

April claims that she believed the macros and commands that she used within the PageMaker software to format Rutter's books, which she used on a daily basis from January 2002 on, were written from scratch by Christa. She testified that this understanding was based on Christa's statement that she would receive the proprietary software she used, and on a presentation Christa gave to a local civic group some time after April went to work for CBI.[140] April claims she discovered in 2006 that these commands were inherent functions of PageMaker, adapted and organized by her mother into an efficient work flow. The jury found a breach of contract with regard to this claim, so it may have found fraud as well. However, the jury awarded no damages for the breach, indicating that it felt the breach to be immaterial, and so it was. April acknowledged that the software worked as expected, and she was unable to identify any damages flowing from the fact that the "software" she bought was PageMaker rather than some custom software.

The District Court erred when it denied directed verdict and JNOV on the fraud and breach claims arising from the "proprietary software" allegations.

i. April presented no evidence of damages or materiality. April's damage testimony was based on her supposed inability to sell the business because she did not "own" the files. She

[140] T. 150-151

offered no testimony as to the value of the alleged "proprietary software," either as she believed it to be before discovering the truth, or after. As this claim for fraud and breach of contract and warranty is entirely separate from the other fraud claims, based on different facts, the Plaintiff must identify damages flowing from this fraud or breach. "Resultant damage" is an element of fraud. *Mannos v. Moss*, 143 Idaho at 931. Fraud without damages is not actionable. *Cooper v. Wesco Builders*, 76 Idaho at 284, 281 P.2d at 672-673. A plaintiff must prove by clear and convincing evidence that any damage alleged was caused by the breach. *Watkins Co., LLC v. Storms,* 152 Idaho at 539, 272 P.3d 503 (2012).

Without evidence of damages resulting from the alleged misrepresentations regarding the software, the Plaintiff had no claim for fraud or breach. Without evidence showing that the origin of the "proprietary software" made a difference to her business, Plaintiff could not show that the statements were material. The District Court should have granted directed verdict and JNOV on this issue rather than let the jury find fraud with no evidence.

ii. Plaintiff did not prove false statements of fact with clear and convincing evidence. In addition, ABI did not identify any false statements of fact relative to this issue. Under the applicable law, the statements she testified to were true. April testified Christa told her she would get "a type of proprietary software she told me she created to work with the Rutter Group."[141] She then testified that in 2006 she upgraded PageMaker and discovered that "it really wasn't a proprietary programming system. It was just actually a lot of dedicated hard work of reading the PageMaker manuals and stringing some macros and commands together that anyone could do."[142] In other words, she discovered that it was a type of software that Christa had created to

[141] T. 150
[142] T. 152

work with the Rutter Group, that was proprietary to her because no one else knew how to do it, and could only recreate it with "a lot of dedicated hard work."

The term "computer program" is defined in Idaho law. While the Idaho Trade Secrets Act, Idaho Code § 48-801 *et seq.,* is not directly applicable to the facts of this case, it is nevertheless instructive in determining whether April received what was promised. The "strings of macros and commands" are a computer program within the meaning of the Act. A program is defined as information which is capable of causing a computer to perform logical operation, is contained on any media or in any format, and is capable of being input, directly or indirectly, into a computer. I.C. § 48-801(4) (The final requirement for coverage under the Act, a copyright notice, is not relevant for these purposes since we are not attempting to enforce the Act; we are simply referring to the Act for guidance in defining what a "computer program" is. A program is a program whether or not a copyright notice is affixed to it.) The "strings of macros and commands" used by April on a daily basis to process and format Rutter's books are clearly a computer program.

These macros and commands, taken as a whole, would also constitute a trade secret under the Act, since they derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and are the subject of efforts that are reasonable under the circumstances to maintain their secrecy. I.C. § 48-801(5). April Beguesse did not know these strings of commands and macros, in spite of her supposed knowledge of the PageMaker software. Christa Beguesse had to teach them to her over a period of years. They were not generally known, but were developed and kept confidential by CBI. April obtained a great deal of economic value from using them. That another person could theoretically recreate

the macros "with a lot of dedicated hard work," as April testified (T. 152), does not render them "readily ascertainable." I.C. § 48-801(5).

Thus, under Idaho law, CBI delivered to the Plaintiff a computer program that qualifies as a proprietary trade secret. That this software was developed within the PageMaker program does not change this. April did not testify as to any particular statement made by her mother that the software was written from scratch rather than from within another program. Therefore, there is no evidence, much less clear and convincing evidence, from which a jury could conclude that Christa's statement was false.

iii. April's belief that the software was written from scratch, and her reliance on that belief, were not reasonable. April worked with the software on a daily basis for five years. She learned that she was using strings of PageMaker macros and commands in November 2006 when she read the manual for the first time. She testified she paid people to read the manual for her, that she knew that Christa was famous for reading the manual "from start to finish," and that the manual was "too technical" for her to understand.[143]

Deliberate ignorance on the part of the buyer does not equal fraud on the part of the seller. The Plaintiff had every opportunity to learn the nature of the software she was using, but chose not to. She cannot hide behind her reliance on other people to read the manual for her to shield herself from the consequences of her choice. April testified to no way in which the Defendants misled her about the origin of the software. Christa did not tell April that it was written from scratch; there was no evidence at trial that Christa said any such thing. Rather, the jury heard evidence that Christa admitted in a public setting that her "proprietary software" was compiled within PageMaker. This is inconsistent with Christa having deliberately withheld the information from April. April's belief that it was written "from scratch" rather than within

[143] T. 257.11-.24

PageMaker was unsubstantiated and unreasonable. She could not justifiably rely on a misunderstanding based on her own negligence and ignorance.

Even viewed in the light most favorable to the Plaintiff, the evidence at trial failed to prove by clear and convincing evidence that there was a false statement of fact that April justifiably relied on to her detriment. Where no substantial evidence supports a claim, the trial court should withdraw the issue from the jury or grant JNOV. *Federal Land Bank v. Parsons,* 116 Idaho 545, 549, 777 P.2d 1218, 1222 (1989).

The District Court erroneously determined that substantial evidence supported the Plaintiff's fraud and breach claims related to the "proprietary software," and failed to apply Idaho law to the facts to determine that CBI did, in fact, deliver proprietary computer software to the Plaintiff. The Court below erred when it denied directed verdict and JNOV, and allowed the "proprietary software" claim to go to the jury.

F. The District Court Erred In Denying Directed Verdict or JNOV on Fraud Claims Against Kenneth Rammell.

The evidence at trial established that Ken made no false representations of fact that April relied on in entering the contract with CBI. April testified that she was aware that Ken had no knowledge regarding the operation of the business, relations with Rutter, or the software CBI used.[144] She testified that he "sided"[145] and "concurred"[146]with Christa regarding these matters, but she did not rely on his statements. "I wasn't relying on Ken for anything. He was there only in the capacity of being my mother's husband."[147]

[144] T. 155.3-156.3, 176.16-177.2
[145] T. 85.1-.8
[146] T. 183.3-.9
[147] T. 176.16

She relied only on the financial information he provided, which was primarily the cash flow projection for ABI for its first year of operation.[148] As discussed above, the cash flow projection was uncannily accurate.

Thus, based on April's own testimony, there was no evidence from which a jury could find that Ken made any false, material representations of fact that April relied on. She relied on his financial opinions and projections, which would not be actionable. "Where actual value is known and false statements are knowingly made with intention to deceive, and do deceive the parties to whom they are made, such statements constitute actionable fraud. Such statements are not expressions of opinion but are statements of material facts." *Fox v. Cosgriff*, 66 Idaho 371, 380 (Idaho 1945). Here, there was no evidence that either Ken or Christa intentionally made a false statement of value with the intent to deceive April. Therefore there was insufficient evidence to find fraud. The fraud claims against Ken should have been dismissed on motion for directed verdict or JNOV.

G. The District Court Erred By Admitting Irrelevant Testimony of Christa's Will.

The Court below committed reversible error when it permitted April to testify repeatedly about statements Christa supposedly made about the contents of her will.[149] Such evidence violated Rule of Evidence 601. In addition, the will was not relevant to the issue of fraud, since fraud cannot be premised on a promise to make a will. Nor was it relevant to the issue of the contract, since the terms of the contract between the two corporations cannot be established by reference to a will made by one party in her individual capacity, which will the other party to the contract has never seen, because evidence of the will cannot establish what terms the parties agreed to.

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[148] Ex. B

[149] T. 106-108, 131-134, 143, are a few examples of testimony elicited by Plaintiff.

This testimony confused the jury, and allowed it to decide the case as a will challenge, to the Defendants' prejudice. The Court's limiting instruction was not sufficient to prevent it. The Court below found that there was passion and prejudice on the part of the jury in awarding an amount greater than the damages claimed by the Plaintiff.[150] The District Court also concluded that the jury's finding of fraud against the Estate of Christa Beguesse was made in the absence of any evidence of any statement by Christa (per the Court's limiting instruction).[151] This is also an indication that the jury was influenced by passion and prejudice and ignored the instructions of the Court.

Further, Plaintiff argued to the jury that one of the fraudulent statements was a representation by Christa that payments would cease on her death.[152] Plaintiff's counsel made this argument despite the fact that the Court had granted a directed verdict as to this particular fraud claim.[153] The Court below agreed that a misrepresentation of the terms of a contract cannot be the basis of a fraud claim. A party to a contract cannot fraudulently misrepresent the terms of the contract to the other party. The terms are what are agreed to; they cannot be fraudulently misrepresented. The Court below, however, then permitted evidence regarding the will to be evidence of the terms of the agreement, which was error. The contents of a will which were never seen by one of the parties cannot possibly establish the terms of a contract. Further, the Court never advised the jury of the directed verdict on the issue. As a result, Plaintiff's counsel was permitted to argue to the jury that it was evidence of fraud, and the jury was permitted to find fraud on the issue.

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[150] R. 495
[151] R. 494
[152] T. 515-516, 524
[153] T. 436-437

The award of damages for fraud is similarly flawed. We can have no idea what portion of the damages the jury ascribed to the "fraud" by Christa Beguesse, and what portion was the fault of other parties. It is possible that the entirety of the fraud found by the jury lay in the failure to make a will which relieved April of the obligation to make payments. It is not possible to separate out the impermissible fraud damages from others, due to the trial Court's errors in permitting this evidence and these issues to go to the jury, and in failing to instruct the jury that issues on which it had heard evidence were withdrawn on directed verdict. This Court, therefore, can have no confidence that any of the damages awarded by the jury are not the result of passion and prejudice, or improper evidence, or otherwise fail to comport with the law.

By permitting the introduction of improper evidence regarding the will, and permitting the jury to find fraud against Christa Beguesse in the absence of any evidence to support it, the Court below erred and rendered the verdict in this case irreparably suspect. This Court cannot determine whether the jury's award of damages is proper, and therefore must reverse and remand for further proceedings.

H. The District Court Erred in Failing to Grant Directed Verdict or JNOV on the Breach of Contract and Warranty Claims as Barred by the Statute of Limitations.

The Court below ruled on summary judgment that there was a question of fact whether the statute of limitations barred ABI's breach of contract claim with respect to the library of files.[154] The Court also ruled that the statute barred the proprietary software claim unless application of the statute was prevented on grounds of equitable estoppel.[155] The trial court submitted both issues to the jury. This was reversible error. The trial Court should have granted directed verdict as to both claims on statute of limitations grounds.

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[154] R. 113-114
[155] R. 113

With respect to the "library of files," the jury was asked whether the Plaintiff knew of Rutter's claim to own the files more than four years before filing suit.[156] This was error. As discussed above, when ABI claims "ownership" of the files, it means the ability to sell the files. The testimony was undisputed that April was aware she could not sell the files without Rutter's permission at the time she entered into the contract. This was the basis for the Court's grant of summary judgment, and there is no logical reason why the same analysis would not lead to the conclusion that this claim is barred by the statute of limitations.

With respect to the proprietary software, the testimony presented at trial was that April learned that the software was not written from scratch when she read the manual for the first time in November 2006. She testified that previously, she "hired people" to read the manual for her. She was aware of the need to read the manual, had the means to do so, but chose not to. There was no testimony that suggested that Christa deprived her of information or discouraged her from reading the manual. Therefore, the evidence was undisputed that April could have become aware of the facts regarding her software by acting as a reasonable person would, and referring to the manual.

Equitable estoppel requires that the Plaintiff prove that Christa made a false statement or concealment of material fact; that Christa made it with the intent that she rely on it; that April did not know or could not discover the truth; and that April relied and acted upon the misstatements and concealments.[157] The evidence at trial, taken in the light most favorable to the Plaintiff, simply cannot be construed to establish that Christa intentionally concealed facts from April (Christa spoke openly and publicly at the Exchange Club meeting about how she did not

[156] R. 396, J.I. 34.2
[157] R. 397, J.I. 35

write the software from scratch) or that April could not discover the truth (all she had to do was read the manual).

Rather than submit the issue to a jury, the Court should have granted directed verdict or JNOV on the breach of contract and warranty claims on grounds that both were barred by the statute of limitations.

I. The Court's Judgment on Defendant CBI's Counterclaim Should be Reversed or Remanded for New Trial.

The jury's verdict on the counterclaim is suspect, given the obvious passion and prejudice on the part of the jury, and its clear failure to follow the instruction of the Court. Further, it was admitted that ABI breached the contract, in that it failed to make payments as required. It is clear that the jury found Plaintiff did not breach the contract only because it improperly found that the Defendant committed fraud and breached the contract. As these findings should be reversed on appeal, as argued above, the jury's verdict on the counterclaim should be reversed, and damages awarded; or, at the very least, Defendant should be awarded a new trial on its counterclaim.

Under Rule 59(a) of the Idaho Rules of Civil Procedure, a new trial may be granted for, *inter alia*, any of the following reasons: 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; excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice; or insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.

The Court below, having found that the jury ignored its instructions when it found fraud against the Estate in the absence of any admissible evidence thereof, and having further found that the jury was influenced by passion and prejudice when it awarded damages in excess of the

proof, abused its discretion when it failed to grant Defendants a new trial. The jury's misconduct in ignoring its instructions was clear evidence that its appraisal of the evidence could not be trusted. In any event, should this Court find that the judgment entered in favor of the Plaintiff should be reversed, then Defendant CBI should be granted a remand for a new trial in order to have a fair opportunity for a decision on its counterclaim.

J. Defendants are Entitled to Attorney Fees on Appeal.

The Defendants are entitled to an award of attorney fees on appeal pursuant to Idaho Code § 12-120(3), as this is an action on a commercial transaction, as argued by the Plaintiff and found by the trial Court on Plaintiff's motion for fees.[158] Idaho Rule of Civil Procedure 54(e)(1) permits a court to award fees to the prevailing party when provided for by statute. Idaho Appellate Rule 41 permits awards of fees on appeal when otherwise permitted by rule, contract, or statute. The claims and counterclaims in this case arise from a commercial transaction. The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes.[159] This case arises from the sale of a business from Defendant CBI to Plaintiff ABI. All claims and counterclaims arise from this transaction, as Plaintiff would have no claim of any kind against ABI but for the transaction. For fees to be awarded, the action must be one to recover on the contract. *Cheney v. Agri-Lines Corp.,* 106 Idaho 687, 682 P.2d 640 (App. 1984). Both the claims and the counterclaims sought recovery on the contract. Accordingly, Defendants are entitled to an award of fees on appeal as the prevailing party.

CONCLUSION

This case went to trial on two claims of fraud premised on misrepresentations as to the ownership of a library of computer files and the origin of a string of macros and commands;

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[158] R. 500-503

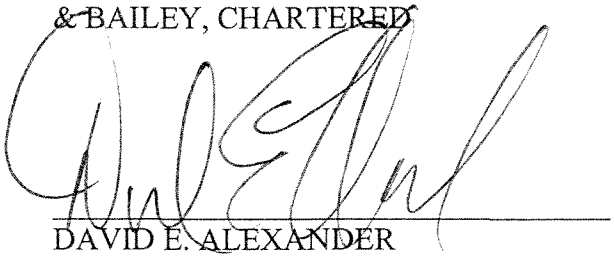
[159] I.C. §12-120(3)

breaches of contract and warranty based on the same claims; and a counterclaim to require the plaintiff to pay for the business it purchased. As demonstrated above, the Plaintiff failed to produce evidence from which a reasonable jury could have found fraud, or breach of warranty or contract; the Plaintiff failed to prove any damages that were more than remote or speculative; the Plaintiff failed even to put forth sufficient facts to demonstrate prima facie claims for fraud and breach. However, the Plaintiff raised the specter of a daughter cheated out of her inheritance, and with that specter inflamed the passions and prejudices of the jury.

This Court may and should hold as a matter of law that the evidence presented at trial was not sufficient to prove the Plaintiff's claims, and reverse the judgment entered by the Court below with respect to the fraud and breach claims, and the award of damages against Defendants CBI and Kenneth Rammell. This Court should reverse the judgment entered with respect to CBI's counterclaim, and remand to the trial court for an award of damages. In the alternative, Defendants respectfully request that the counterclaim be remanded to the trial court for a new trial.

Dated this 2nd day of October, 2013.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED



DAVID E. ALEXANDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of OctoberOctober, 2013, 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

[✓] U. S. Mail
Postage Prepaid
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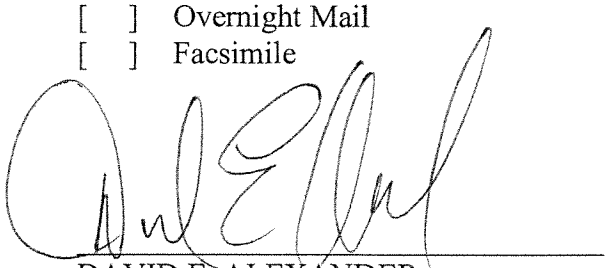

DAVID E. ALEXANDER