3-21-2014

Mosell Equities, LLC v. Berryhill & Co., Inc. Respondent's Brief Dckt. 41338

IN THE SUPREME COURT OF THE STATE OF IDAHO

MOSELL EQUITIES, an Idaho Limited Liability Company, Plaintiff–Respondent, vs. BERRYHILL & COMPANY, INC. an Idaho Corporation, Defendant–Appellant,	Supreme Court Docket No. 41338-2013 Ada County Case No. CV OC 0909974

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District County of Ada

The Honorable Dennis E. Goff, Senior District Judge Presiding at Trial

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Statement of the Case.

Berryhill continues to misrepresent Mosell Equities' claim as a "simple loan." Mosell Equities loaned money to Berryhill & CO secured by John Berryhill's promise of equity in his restaurant. When Berryhill refused to transfer the promised equity, even after Berryhill had his attorney draft the appropriate corporate documents including a document titled "Satisfaction of Loan," the Mosell Equities' loaned funds remained a loan. Contrary to Berryhill's contention, neither Mosell Equities nor Judge Goff asserted that Mosell Equities had somehow changed its argument and on appeal was now arguing the deal was a straight "buy-in" with no loan intended. That was Berryhill's claim below; there was no loan, but Mosell Equities was buying equity. Unfortunately, no evidence other than Berryhill's self-serving testimony corroborated his straight buy-in *theory*. Accordingly, all Berryhill & CO seeks on appeal is for this Court to second guess Judge Goff.

On July 11, 2013, Judge Goff heard oral argument on Plaintiff's Motion for New Trial. During this hearing, Judge Goff made several comments about his ruling and his analysis of the Supreme Court's decision. Despite Judge Goff's comments on the record, he specifically stated he intended to draft and enter a written decision, which he reiterated in his written Memorandum Decision. "During oral argument, the Court orally granted the motion for a new trial. The Court indicated that it would issue this written ruling to clarify its analysis and conclusions." (Memorandum Decision and Order, p. 3. (R. p. 91.)) Thus, to the extent that any of the Court's comments on July 11, 2013 conflict with the Court's written ruling, the Court has manifested its intention that the written ruling controls.[1]

[1] Judge Goff's written opinion is in the Clerk's record for this appeal at pp. 89–109.

Additional Issues on Appeal.

1. Whether the Respondent is entitled to attorney fees and costs on Appeal?

RESPONDENT'S ARGUMENTS

Standard of Review of the Court's exercise of its discretion.

> We review a trial court's determinations regarding motions for new trial and attorney fees for abuse of discretion. *Bybee v. Isaac,* 145 Idaho 251, 255, 178 P.3d 616, 620 (2008); *Shore v. Peterson,* 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009). We assess whether the trial court "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason." *Sun Valley Potato Growers, Inc. v. Tex. Refinery Corp.,* 139 Idaho 761, 765, 86 P.3d 475, 479 (2004). Only an error which affects a party's substantial rights is grounds for new trial. I.R.C.P. 61; *Schmechel v. Dillé,* 148 Idaho 176, 180, 219 P.3d 1192, 1196 (2009); *Burgess v. Salmon River Canal Co., Ltd.,* 127 Idaho 565, 575, 903 P.2d 730, 740 (1995).

Carrillo v. Boise Tire Co., 152 Idaho 741, 748, 274 P.3d 1256, 1263 (2012).

Standard of Review of a Motion Granting a New Trial.

> If a trial court determines that (1) the damages awarded are excessive and appear to be the result of passion or prejudice, (2) the evidence is insufficient to justify the verdict, or (3) legal error occurred at trial, the court in its discretion may grant a new trial. I.R.C.P. 59(a). This Court "is firmly committed to the rule that a trial court possesses a discretion to be wisely exercised in granting or refusing to grant a new trial and that such discretion will not be disturbed on appeal unless it clearly appears to have been exercised unwisely and to have been manifestly abused." *Dinneen v. Finch,* 100 Idaho 620, 626, 603 P.2d 575, 581 (1979).

Carrillo v. Boise Tire Co., 152 Idaho 741, 748, 274 P.3d 1256, 1263 (2012).

THE TRIAL COURT ACTED CORRECTLY AND WITHIN THE BOUNDS OF ITS DISCRETION WHEN IT GRANTED MOSELL EQUITIES' MOTION FOR NEW TRIAL.

1. Judge Goff acknowledged and identified the abuse of discretion standard applied.

> Further, ""[t]he trial court is given broad discretion in this ruling." *Karlson v. Harris.* 140 Idaho 561, 568, 97 P.3d 428, 435 (2004). Thus, "[t]he trial judge may set aside the verdict even though there is substantial evidence to support it." *Id.* "[T]he trial judge must disclose his reasoning for granting or denying motions for a new trial ... unless those reasons are obvious from the record itself." *Quickv. Crane,* 111 Idaho

759, 772, 727 P.2d 1187, 1200 (1986). "The grant or denial of a motion for a new trial is reviewed ... under an abuse of discretion standard." *Kuhn, supra.*

(Memorandum Decision and Order. (R. p. 93.))

2. Judge Goff acted within the boundaries of his discretion and consistently with the legal standards applicable to the specific choices available.

Judge Goff cited to Idaho Rule of Civil Procedure 59(a)(6) as providing the basis for the decision. Judge Goff also cited to *Kuhn* v. *Coldwell Banker Landmark Inc.,* 150 Idaho 240, 247, 245 P.3d 992, 999 (2010); *Warren* v. *Sharp,* 139 Idaho 599, 603, 83 P.3d 773, 777 (2003); *Johannsen* v. *Utterbeck,* 146 Idaho 423, 430, 196 P.3d 341, 348 (2008); *Karlson v. Harris.* 140 Idaho 561, 568, 97 P.3d 428, 435 (2004) and *Quick v. Crane,* 111 Idaho 759, 772, 727 P.2d 1187, 1200 (1986); as relevant case law applicable to consideration of whether the Court should grant a new trial. (Memorandum Decision and Order. (R. p. 91–92.))

Judge Goff then confirmed he is applying these standards to his decision.

> Applying the foregoing legal standard to the issue before this Court, a new trial is warranted on Count I only if this Court concludes: (1) the jury verdict that there was no express contract which was breached is not in accord with the clear weight of the evidence and the ends of justice would be served by vacating the verdict; and (2) there is a probability that a new jury will conclude there is an express contract which was breached if this Court orders a new trial. The Court addresses each of these issues in turn below.

(Memorandum Decision and Order. (R. p. 94.))

Judge Goff was entitled to independently weigh the evidence and personally assess the credibility of the witnesses when ruling on this motion, which he did.

> The district court is given broad discretion to grant or deny a motion for a new trial based on sufficiency of the evidence made pursuant to I.R.C.P. 59(a)(6). Sheridan v. St. Luke's Regional Medical Center, 135 Idaho 775, 780, 25 P.3d 88, 93 (2001)....While this Court must necessarily review the evidence, we have recognized limitations on our review:
>
> The trial court is in a far better position to weigh the demeanor, credibility and testimony of witnesses, and the persuasiveness of all the evidence. Appellate review is necessarily more limited. While we must review the evidence, we are

not in a position to "weigh" it as the trial court can. Id. (quoting Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986)).

Craig Johnson v. Floyd Town Architects, 142 Idaho 797, 800, 134 P.3d 648, 651, (2006).

After complying with this standard, Judge Goff stated; "Weighing all the evidence submitted, including the key evidence summarized above, the Court concludes a verdict that there was no express contract is against the clear weight of the evidence." (Memorandum Decision and Order. (R. p. 104.)) Additionally, after Judge Goff painstakingly identified in the Memorandum the evidence the Court considered in its ruling, the Court also stated; "...the Court reiterates many of its same findings and conclusions set forth in its October 7, 2010 ruling from the bench granting Mosell Equities judgment notwithstanding the verdict and in its July 11, 2013 ruling from the bench granting Mosell Equities a new trial." (Memorandum Decision and Order. (R. p. 105.)) One particularly important conclusion that Judge Goff reached in his October 7, 2010 ruling was that John Berryhill was not credible.

[JNOV Tr., p. 91]
17 ...And the Law talks about the
10 probative values and - - rather, the requisite standard is
19 whether the evidence is sufficient of quality and
20 probative value that reasonable minds could reach the
21 same conclusion as did the jury/
22 So, when I analyze this, and based really
23 upon Counsels' arguments today, it seemed to me, in
24 trial and during the arguments today, that Berryhill
25 wants to only take one side or one edge of the sword. If
P. 92
1 you call something a loan in your handwriting, and
2 you put in our own – and instruct your own staff to
3 insert it, whether you're a taxpayer, or for tax
4 purposes, or for whatever, as a loan, than how can you
5 not take the other side of the - - the deal that it is a
6 loan. And that has bothered me from day one.

Judge Goff was also correct that the clear weight of the evidence confirmed Berryhill understood Mosell Equities' funds would remain a loan pending an agreement on the proposed

"buy-in." "The conduct of the parties to a contract and their practical interpretation of it is an important factor when there is a dispute over its meaning." *Mountainview Landowners Co-Op. v. Cool*, 142 Idaho 861, 865, 136 P.3d 332, 336, (2006).

As evidence of Berryhill conduct confirming he understood the deal was for a loan, Berryhill wrote in Exhibit 1, "This is a loan..."; then accepted Exhibits 2–10, each of which is marked "loan"; and then accounted for the funds as loans on Berryhill's accounting records. (Exhibit 53.) Additionally, the Berryhill & Co. General Manager, Joy Luedtke, testified Berryhill told her to account for the money as loans. Tr. Vol. I, p. 268, L. 9, to p. 270, L. 7.

There were also the Meier documents, drafted by Berryhill & Co.'s legal counsel after meeting with Berryhill, which clearly stated Mosell Equities' money was a loan, and which the Court cites specifically in its ruling. (Exhibit 35.)

And, there was also Luedtke's testimony, when Mosell asked for the money back; she and Berryhill reviewed the Berryhill & Co. finances to see if there was money available to *repay* Mosell Equities. Tr. Vol. I, p. 284, L. 8 to p. 285, L. 5.

Finally, Berryhill testified that he did not believe Mosell Equities was just giving him the money, which is consistent with an understanding the money was a loan.

Tr. Vo. I, p. 482 [by Mr. Clark – Berryhill Testifying]

Q. Did you tell Mr. Berry - or Mr. Mosell that if there's no transition to the buy-in, that you got to keep the money that he had given you?
A. No.

Based on this evidence, and the other evidence the Court identified in its Memorandum Decision, including the finding that Berryhill was not credible, the Court correctly ruled the verdict finding there was no express contract was against the clear weight of the evidence. "All of the exhibits and testimony, taken as a whole, show the clear weight of the evidence is that

there was an express contract that the loan was an "interim substitute" to be transitioned into a "buy-in" of MoBerry Venture Corp." (Memorandum Decision and Order. (R. p. 106.))

Even Berryhill's counsel, during oral argument on Mosell Equities' Motion for New Trial, conceded the evidence proved there was a contract.

> [July 11, 2013 Hearing Tr., p. 67]
> MR. WILLIAMS: **What I'm trying to say is that there was an agreement between these parties.** Obviously, it's in the context of everything they're trying to do jointly to market this Polo Cove concept and development. That's our context. That's our backdrop, but I think what the parties intended by Exhibit 1 is more limited. We'll acknowledge that. And what they're doing is they're structuring a buy-in. **It is a buy-in. The word loan is given the special meaning that we're going to park this money and spend it.** The fact that it's spent doesn't matter to us. **But it's going to be parked on the books as a loan until we get our relationship legal, signed --**
> THE COURT: Okay.
> MR. WILLIAMS: Okay.

Mr. Williams merely restated the obvious, which the facts presented at trial confirmed, there was a contract.

Judge Goff also addressed the second issue; if there was a contract, was there a breach?

> Thus, although Mosell Equities performed its obligations to Berryhill & Company under the contract by providing the requisite funds, Berryhill & Company did not completely perform its obligations within a reasonable time by failing to transition the funds into a "buy-in." Therefore, the clear weight of the evidence establishes that Berryhill & Company breached the express contract.

(Memorandum Decision and Order. (R. p. 107.))

The Court therefore properly addressed each issue as directed by the Supreme Court on remand.

3. Judge Goff reached his decision by an exercise of reason.

Judge Goff considered the extensive evidence presented at trial, then weighed this evidence and the veracity of the witnesses, and confirmed he had done so in his decision. "Weighing all the evidence submitted, including the key evidence summarized above, the Court concludes a verdict that there was no express contract is against the clear weight of the evidence." (Memorandum Decision and Order. (R. p. 104.)) Judge Goff did exactly what he was supposed to do as a judge considering a motion for new trial.

a. Judge Goff did not "recast" the plaintiff's theory of the case when concluding a finding of no breach of contract was against the clear weight of the evidence.

Mosell Equities has steadfastly maintained the agreement was Mosell Equities would lend Berryhill money, which if the parties ultimately agreed to the terms of a "buy-in," then those funds would be transitioned into equity. If not, then the funds remained as a loan, which is exactly how Berryhill accounted for the funds in his accounting records. While Berryhill claimed that Mosell Equities was purchasing equity not lending money, Berryhill presented no evidence that Berryhill transferred the promised equity. There were no stock transfer documents or any evidence that Berryhill transferred Mosell Equities' money from long term debt to an equity account, which Berryhill's bookkeeper testified she would have done to reflect such a transfer from debt to equity. Tr. Vol. I, p. 275, L. 4–9. Nor was there evidence that Mosell Equities simply paid Berryhill to use Berryhill's name, as Berryhill would have had to report that money as income. However, there is no evidence Berryhill ever reported Mosell Equities' money as income. As the clear weight of the evidence established the parties intended the funds to remain a loan pending the "buy-in," when and if the "buy-in" occurred, Judge Goff was correct in his ruling.

Berryhill, however, misstates Judge Goff's ruling when it argues Judge Goff considered the deal as a straight "buy-in." Berryhill argued:

> Unfortunately, however, the trial court remade Plaintiffs theory and found that a jury finding of 'no breach' was against the clear weight of the evidence, because "the proposed buy-in never happened - Berryhill & Company never gave Mosell Equities shares in the proposed MoBerry Corporation or the established Berryhill & Company. (Supp. R., p. 106)."[2]

Reading the entire written decision, it is clear the Court did not conclude that the agreement was for a straight "buy-in" and that agreement was breached. To the contrary, Judge Goff concluded the clear weight of the evidence established Berryhill breached by not transitioning the *loaned* funds to equity.

b. The proper remedy for breach of the loan agreement was the amount Mosell Equities' loaned to Berryhill & CO.

Initially, Berryhill concocted the story that Mosell Equities had not loaned money to Berryhill, nor had there been any agreement for a "buy-in." As this Court noted in the first appeal, Berryhill claimed that Mosell Equities gave the money to Berryhill as "simply sums spent to market the Polo Cove development." *Mosell Equities, LLC v. Berryhill & Co.*, ___ Idaho ____, 297 P.3d 232, 239 (2013) (Emphasis Added.) However, once again, during oral argument regarding Mosell Equities' Motion to New Trial, Berryhill's counsel conceded this contention was not true.

> [July 11, 2013 Hearing Tr., p. 57.]
> 21 MR. WILLIAMS: Because it's always been our
> 22 contention that what the parties were agreeing to here
> 23 was a buy-in. **<u>This was a buy-in</u>.** And they were using
> 24 specialized language for the term loan. They attached a
> 26 special meaning to it, which parties are entitled to do,
> [p. 58.]
> 1 and this is contracts -- contracts of any kind.

[2] Appellant's Brief, p. 26.

Even during the trial, Berryhill contradicts his claim the money was an "investment in Polo Cove."

> Trial Tr. p. 482 [by Mr. Clark – Berryhill Testifying]
> Q. And – and you, in response, denied that the funds were ever a loan, and denied any liability, and refused to pay Mr. Mosell back.
> **A. That's correct. They were never a loan.**
> **Q. Okay. Let me ask you then, what those were funds, in your mind?**
>
> Trial Tr. p. 483 [by Mr. Clark]
> **He was buying into my business.**

While Berryhill repeatedly accuses Judge Goff of "recasting" Mosell Equities' claims, in reality it is Berryhill who simply ignores the obvious. Berryhill admits;

> Throughout the proceedings below, Plaintiff consistently prosecuted this action on the sole theory that Exhibit 1 described a simple loan transaction and all monies that eventually were exchanged likewise constituted a loan. Mosell Equities brought this action upon the exclusive theory that the parties intended a loan. **At no time in these proceedings has Plaintiff asserted a claim for any kind of ownership interest in Defendant, whether based on an express or constructive partnership or other potential theory.**[3]

Accordingly, Berryhill understood Mosell Equities' claims were legal, not equitable.

Berryhill then appears to contort Judge Goff's ruling that the funds were a loan pending a "buy-in" as if Judge Goff had concluded the agreement was for a straight "buy-in." "In characterizing the "loan" as a "buy-in," then the remedy available is in equity and requires an accounting."[4] Berryhill ignores the fact that while parties to a purchase agreement may seek specific performance, an equitable remedy, the aggrieved party is not prohibited from seeking damages for a breach. Moreover, if Berryhill really believed the contract was a straight "buy-in" he could have countersued for specific performance. However, Berryhill chose not to do so for

[3] Appellant's Brief, p. 25.
[4] Appellant's Brief, p. 28.

the very reason he breached the agreement in the first place, because once Berryhill built his restaurant with Mosell Equities' money, Berryhill did not want to transfer the promised equity or repay the loan. Berryhill then concocted his story about Mosell Equities money being an "investment in Polo Cove." Accordingly the funds Mosell Equities loaned to Berryhill remained a loan, and as Berryhill refused to transfer the promise equity or to repay the loans, he was in breach.

Finally, even assuming for the sake of argument that Judge Goff's discussions regarding the amount of damages in his oral or written opinion were somehow error; then such error was harmless.

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

I.R.C.P. 61.

While clearly any issue about the calculation of damages will be addressed during the next trial, Berryhill has failed to argue or establish that Judge Goff's discussion of damages in his ruling has affected Berryhill's substantial rights. Accordingly, Berryhill has failed to establish that any alleged error was anything other than harmless.

c. Judge Goff Properly Instructed the Jury.

While Berryhill cites to *Bates v. Seldin*, 146 Idaho 772, 203 P.3d 702 (2009), he fails to identify just what jury instructions were erroneous in this case. Mosell Equities is not asserting it was entitled to a new trial based on any erroneous instructions.

> "The propriety 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, and

> whether the instruction is a correct statement of the law." *Clark v. Klein,* 137 Idaho 154, 156, 45 P.3d 810, 812 (2002) (internal citations omitted). This Court reviews jury instructions as a whole to determine whether the instructions fairly and adequately present the issues and state the law. *Silver Creek Computers, Inc. v. Petra, Inc.,* 136 Idaho 879, 882, 42 P.3d 672, 675 (2002). Even where an instruction is erroneous, the error is not reversible unless the jury instructions taken as a whole mislead or prejudice a party. *Id.* **Likewise, a special verdict form does not constitute reversible error unless it incorrectly instructed the jury as to the law or its form was confusing.** *VFP VC v. Dakota Co.,* 141 Idaho 326, 332, 109 P.3d 714, 720 (2005) (citing *Le'Gall v. Lewis Cnty.,* 129 Idaho 182, 185, 923 P.2d 427, 430 (1996)).

Mackay v. Four Rivers Packing Co., 151 Idaho 388, 391, 257 P.3d 755, 758 (2011).

Berryhill fails to argue or establish, based on the evidence presented, the jury verdict form that Judge Goff used was somehow erroneous. Judge Goff analyzed and discussed Berryhill's claim the jury verdict form does not address whether the contract was for a loan or a straight buy-in, although Mosell Equities had submitted a proposed verdict form wherein Mosell Equities specifically used "loan" language. (Memorandum Decision and Order. (R. pp. 108–109.))

Judge Goff understood the parties had presented evidence to support their respective interpretations of the contract. Mosell Equities claimed the agreement was a loan, which may be converted to equity at some future time.[5] Berryhill contends the deal was for a straight buy-in, and a loan was never intended. For that reason, as he stated in his decision, Judge Goff drafted a verdict form which addressed these conflicting claims, and simply asked the jury whether or not there was a contract that had been breached. The respective parties were then entitled to argue facts to support their individual interpretations of the contract. Judge Goff therefore did not err in using the jury verdict form he chose.

Berryhill criticism of Mosell Equities' lack of objection when Judge Goff refused to give Mosell Equities' verdict form is without merit. Yes, in Mosell Equities' proposed verdict

[5] Mosell Equities presented a proposed jury verdict form which asked the jury to decide whether the parties intended a loan. (R. p. 1060-64.)

form, (R. p. 1060-64.), Mosell Equities requested an instruction that addressed its version of the contract. However, Berryhill ignores the fact that Berryhill objected to Mosell Equities proposed verdict form.

> [Trial Tr. p. 920]
> 10 Okay. Mr. Williams, on the defendants, with
> 11 regard to the jury instructions.
> 12 MR. WILLIAMS: Thank you, Your Honor.
> 13 In general, we object to the plaintiff's
> 14 instructions, we continue to believe our submissions
> 15 should be given.

While Berryhill argues Mosell Equities failed to object when the Court refused to give Mosell Equities' proposed verdict form, Berryhill now appears to claim the Court erred by refusing to give instructions to which Berryhill objected? Moreover, Berryhill filed a proposed verdict form. (R. p. 1066-75.) However, nowhere in this proposed form does Berryhill request that the jury determine whether the contract was for a loan, or strictly a "buy-in." Berryhill submitted no proposed jury instruction related to his claim the contract was really for a straight "buy-in" as he now asserts on appeal. Berryhill's failure to submit proposed instructions related to his claims or defenses, and his objection to Mosell Equities' instructions constitutes invited error.

> "It has long been the law in Idaho that one may not successfully complain of errors one has acquiesced in or invited. Errors consented to, acquiesced in, or invited are not reversible." *State v. Owsley,* 105 Idaho 836, 838, 673 P.2d 436, 438 (1983) (internal citation omitted). "Invited error" is "[a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the erroneous ruling." Black's Law Dictionary 249 (3rd pocket ed. 2006).

Taylor v. Mcnichols, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010).

4. Judge Goff applied his discretion and concluded a new trial would produce a different result.

"Based on the foregoing, the Court concludes that the jury on retrial will find contrary to the first jury by finding an express contract that Berryhill & Company breached by failing to perform within a reasonable period of time." (Memorandum Decision and Order. (R. p. 107.)) Berryhill's counsel obviously agreed with Judge Goff, as evidenced by Mr. Williams' admission on the record on July 11, 2013.

> [July 11, 2013 Hearing Tr., p. 67]
> MR. WILLIAMS: **What I'm trying to say is that there was an agreement between these parties.** Obviously, it's in the context of everything they're trying to do jointly to market this Polo Cove concept and development. That's our context. That's our backdrop, but I think what the parties intended by Exhibit 1 is more limited. We'll acknowledge that. And what they're doing is they're structuring a buy-in. **It is a buy-in. The word loan is given the special meaning that we're going to park this money and spend it.** The fact that it's spent doesn't matter to us. **But it's going to be parked on the books as a loan until we get our relationship legal, signed --**
> THE COURT: Okay.
> MR. WILLIAMS: Okay.

Berryhill fails to establish that Judge Goff erred in concluding a new trial would produce a different result, considering Judge Goff believed after sitting through the trial and hearing all of the testimony, and reviewing all of the evidence, and observing the witnesses as they testified, that the verdict was against the clear weight of the evidence. Moreover, if a Court finds the verdict is "not in accord with his assessment of the clear weight of the evidence," as Judge Goff had, then the rational conclusion is some force, other than the logical and reasoned interpretation of the evidence caused the particular result. Accordingly, where there is a finding that the verdict was not in accord with the Court's

assessment of the clear weight of the evidence, a new trial is warranted and a different result is likely.

5. Mosell Equities is entitled to attorney fees on appeal.

Respondent Mosell Equities respectfully requests attorney fees pursuant to I.C. §12-120(3), on appeal, as the "gravamen" of this case involved a commercial loan transaction. If Mosell Equities prevails on this appeal, it is entitled to attorney fees. *Garner v. Povey*, 151 Idaho 462, 259 P.3d 608 (2011).

CONCLUSION

Based on the record and Judge Goff's well-reasoned and comprehensive opinion, Mosell Equities respectfully requests this Court AFFIRM Judge Goff's order granting a new trial.

RESPECTFULLY SUBMITTED this 21st day of March, 2014.

CLARK & ASSOCIATES, ATTORNEYS

Eric R. Clark
For the Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of March, 2014, I served the foregoing, by having two true and complete copies delivered via the manner indicated to:

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ERIC R. CLARK