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IN THE SUPREME COURT OF THE STATE OF IDAHO

DUANE KEMMER, KAREN KEMMER, AND
TIM DOLPH,

Plaintiffs/Appellants,

vs.

BOB NEWMAN, PHYLLIS MILLER, AND
RUTH SMITH,

Defendants/Respondents,

and

BOB QUINN,

Defendant.

DOCKET NO. 42566-2014

APPELLANTS' OPENING BRIEF

(Bonner County Case No. CV-2011-2173)

APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNER

HONORABLE BARBARA A. BUCHANAN
DISTRICT JUDGE, PRESIDING

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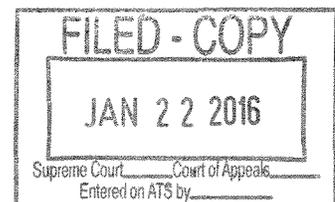


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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case arises from a dispute about the governance of the New Life Missions, Inc. (“NLM”) church under the Idaho Nonprofit Corporations Act. NLM was incorporated on May 14, 2001. Trial Exhibit 1. In 2010, competing claims emerged regarding governance of NLM’s Board of Directors. The Defendants claimed they were the duly elected directors of NLM pursuant to a special meeting held August 1, 2010. R p. 20. On December 7, 2011, Plaintiffs Duane Kemmer, Karen Kemmer, and Tim Dolph filed a complaint in the district court of Bonner County seeking a declaration that Duane Kemmer, Tim Dolph and Ruth Smith remained the authorized Board of Directors of NLM according to the corporate Bylaws and the Idaho Nonprofit Corporation Act because the special meeting was not properly called. R p. 19-23.

B. COURSE OF PROCEEDINGS

On December 7, 2011, Plaintiffs filed a complaint for declaratory judgment in the district court of Bonner County seeking a declaration that Duane Kemmer, Tim Dolph and Ruth Smith remained the authorized Board of Directors of NLM according to the corporate Bylaws and the Idaho Nonprofit Corporation Act. R p. 19-23. On January 9, 2012, the Defendants, Bob Newman, Bob Quinn, Phyllis Miller, and Ruth Smith answered the complaint, claiming to be the properly elected directors. R p. 24-26. The Defendants also raised the affirmative defenses of fraud, illegality, waiver, insufficient process/service, failure to state a claim upon which relief could be granted, failure to join an indispensable party, and failure to join a necessary party. R p. 24-26.

On October 23, 2012, attorney Steven Frampton moved the court to an Order granting him leave to withdraw as the Defendants’ attorney. R p. 30. An order granting leave for

withdrawal of attorney was entered on November 7, 2012. R p. 30-32. That order required the Defendants to appear within 20 days of being served by either appearance by another attorney, or their own personal appearance in the action. R p. 30-32. On November 14, 2012, Bob Newman appeared pro se. R p. 9, 43-45.

On March 4, 2013, Plaintiffs moved for an entry of default against the remaining Defendants. R p. 35-36. On the same day Plaintiffs also moved the court for an entry of default judgment against the Defendants because of their non-appearance. R p. 37-38. On March 7, 2013, the court entered a Clerk's Entry of Default against Defendants Bob Quinn, Phyllis Miller, and Ruth Smith. R p. 39-40. On the same date district judge Steve Verby entered a default judgment against the Defendants Bob Quinn, Phyllis Miller, and Ruth Smith, requiring those defendants to return all corporate assets and control of the Board of Directors to the Plaintiffs. R p. 41. On August 2, 2013, the Defendants moved to have the March 7, 2013, Entry of Default set aside, and on September 4, 2013, the district court entered an Order Setting Aside Default. R p. 48-52.

Prior to the withdrawal of Defendants' counsel, the Plaintiffs had moved for summary judgment on October 11, 2012; and on April 3, 2013, a hearing was held on that motion with oral argument presented by Plaintiffs' counsel and Defendant Bob Newman. R p. 46. On April 10, 2013, the district court entered an Order Denying Plaintiffs' Motion for Summary Judgment. R p. 46-47. Judge Barbara Buchanan ruled genuine issues of material fact precluded summary judgment. R p. 47.

A four-day bench trial was held on May 27-30, 2014. R p. 76. On August 8, 2014, the district court entered its Memorandum Decision, concluding that the Defendants were the rightful directors of the NLM because they were voted in at a properly called and noticed special

meeting held August 1, 2010. R p. 76-88. The district court also concluded that the special meeting was approved by Bob Newman as senior pastor as required by the Bylaws. R p. 76-88. Judgment was entered on the same day for the Defendants, declaring the Defendants the lawful Board of Directors of NLM. R p. 89-90. This appeal followed. R p. 91-93.

C. STATEMENT OF FACTS

New Life Missions, Inc. (NLM) was founded and incorporated as an Idaho non-profit corporation by Pastor Jack Kirk, who served as senior pastor of the church and president of the Corporation from its inception through 2009. Trial Exhibit 1, 3-9; Tr. p. 247, L. 10 – p. 248, L. 1. After operating for a few years, the church was incorporated on May 14, 2001. Trial Exhibit 1. NLM adopted Bylaws on May 1, 2001, although the location of the formally adopted and signed Bylaws was unknown by either party until those Bylaws appeared at the third day of trial in the possession of a member of the congregation who had removed them from the church for safekeeping. Trial Exhibit 30; Tr p. 438, L. 13 – p. 445, L. 9. The church regularly held Sunday services and a Thursday night bible study. R p. 77; Tr p. 160, L. 20-24.

After NLM was incorporated, it acquired a piece of real property at 55 Walden Lane, Spirit Lake, Idaho, with a truck shop on it. R p. 77; Trial Exhibit 22. NLM converted the shop into a church. R p. 77. The majority of the cost of acquisition was advanced by Jack Kirk, Ken Ewing and Jim Kirk. Tr p. 93, L. 13 – p. 95, L. 18; p. 97, L. 18-20; p. 26, L. 18 – p. 27, L. 12. Ken Ewing also contributed substantial time and labor into the conversion of the building into a church. Tr p. 94, L. 4 – p. 95, L. 13.

In 2005, Ruth Smith was appointed to the Board of Directors. Trial Exhibit 6; Tr p. 214, L. 1 – p. 215, L. 5. In 2008, Duane Kemmer was appointed as a member of the Board of Directors. Tr p. 446, L. 22 – p. 447, L. 1. In 2008, Karen Kemmer was appointed as

secretary/treasurer. Tr p. 539, L. 12 – p. 540, L. 5; p. 247, L. 10-13. Tim Dolph was appointed to the Board in 2009. Tr p. 572, L. 8-13.

For many years, NLM's senior pastor was Jack Kirk until he left the church in 2009. Tr p. 209, L. 6-9; p. 247, L. 10 – p. 248, L. 1. After Jack Kirk left the church in 2009, NLM had no senior pastor. Trial Exhibit 12; Tr p. 398, L. 14 – p. 399, L. 19. James Tapani was appointed the acting senior pastor for a period of time after Jack Kirk resigned. Tr p. 249, L. 11-21; p. 618, L. 4 – p. 619, L. 12. At a Board of Directors meeting held March 28, 2010, the Board discussed the need to have a regular senior pastor to minister to the congregation. Trial Exhibit M, March 28, 2010, meeting minutes; Tr p. 254, L. 16-18. James Tapani acknowledged at this meeting he was not qualified to be the senior pastor. Tr p. 618, L. 9 – p. 619, L. 12; Trial Exhibit M.

Several names were discussed as potential candidates for senior pastor. Trial Exhibit M. The Board decided to approach select individuals to determine if they were a good fit with the congregation and were interested in serving as senior pastor. Trial Exhibit M. The Board discussed having those individuals preach sermons so the congregation and Board could determine if they were appropriate to serve as senior pastor. Trial Exhibit M. Duane Kemmer endorsed having Bob Newman serve as acting pastor for a two-month trial period. Trial Exhibit M; Tr p. 254, L. 22 – p. 255, L. 20. At the conclusion of the meeting, the Board invited Bob Newman into the meeting and requested he serve as an acting pastor for Sunday services and asked Bob Quinn to serve as acting pastor for Thursday night bible studies. Trial Exhibit M; Tr p. 252, L. 21 – p. 254, L. 11; p. 332, L. 7 – p. 333, L. 17.

Bob Newman testified he believed the Board appointed him as the senior pastor at the March board meeting. Tr p. 396, L. 17 – p. 397, L. 2; p. 397, L. 20-22. However, the minutes of the meeting clearly indicate that several individuals were discussed as candidates for the position

of senior pastor, and the Board made no determination regarding the senior pastor. Trial Exhibit M, March 28, 2010, meeting minutes. The minutes also reflect that Bob Newman was invited into the board meeting toward the end of the meeting and there was no vote to appoint him as senior pastor and there was no special meeting for the membership to vote him as senior pastor as required by the bylaws. Trial Exhibit M; Tr p. 252, L. 21-24; p. 253, L. 18-21; p. 254, L. 12 – p. 257, L. 14; p. 254, L. 1 – p. 255, L. 6; p. 425, L. 25 – p. 428, L. 23; p. 548, L. 1-20; p. 518, L. 7 – p. 519, L. 5. The minutes support the trial testimony of other trial witnesses that Bob Newman and Bob Quinn were only appointed as acting or temporary pastors. Tr p. 548, L. 1-20; p. 252, L. 21-24; p. 253, L. 18-21; p. 246, L. 2-5.

After Bob Newman assumed responsibility for delivering the Sunday services, Duane Kemmer received complaints from members of the congregation that they were dissatisfied with his sermons, and attendance decreased. Tr p. 607, L. 18 – p. 608, L. 25; p. 211, L. 15-18. This state of affairs caused the Board of Directors to informally discuss the direction of the church moving forward. One of the names that the board discussed at its March meeting as a possible senior pastor was Ken Ewing, who had previously served as an associate pastor at the church. Trial Exhibit M, March 28, 2010, meeting minutes; Tr p. 135, L. 21 – p. 136, L. 7; p. 98, L. 17 – p. 99, L. 5. When approached by Tim Dolph, Ken Ewing expressed an interest in merging his church, Church of the Solid Rock, with NLM and becoming its senior pastor. Tr p. 136, L. 8-21.

An informal meeting of board members occurred at Ruth Smith's house around May, 2010, to discuss the direction the Board should take, and it was agreed the board would hold a board meeting and invite Ken Ewing to discuss Pastor Ewing assuming the senior pastor position and merging his church with NLM. Tr p. 257, L. 15 – p. 260, L. 24.

Following the informal meeting at Ruth Smith's house in May 2010, a formal board meeting was held in May attended by the directors, Karen Kemmer, Ken Ewing and his wife, Phyllis Ewing. Tr p. 105, L. 11 – p. 110, L. 6; p. 310, L. 12-22; p. 338, L. 10 – p. 341, L. 3. Without direction from the other directors, Ruth Smith invited Bob Newman to the meeting. Tr p. 310, L. 17 – p. 311, L. 2. Bob Newman then invited Bob Quinn to the meeting. Tr p. 310, L. 21-22. Bob Newman and his wife, Connie, and Bob Quinn and his wife, Norma, attended this meeting. Tr p. 105, L. 11 – p. 110, L. 6; p. 310, L. 12-22; p. 338, L. 10 – p. 341, L. 3.

The trial testimony established that before the board convened its business, Bob Newman launched into an hour long speech to dissuade the Board from appointing Ken Ewing as senior pastor. Tr p. 615, L. 19 – p. 616, L. 3. No minutes were prepared because the board never officially convened the board meeting due to Pastor Newman's actions. Tr p. 620, L. 18 – p. 621, L. 1. Ruth Smith testified that she became upset and left the meeting. Tr p. 284, L. 14-18.

On July 15, 2010, following Thursday night bible study, Bob Quinn initiated a meeting. Trial Exhibit 25. Tim Dolph distributed a copy of the Bylaws to those who remained for the meeting. Tr p. 220, L. 20 – p. 221, L. 8; p. 229, L. 22-24; p. 321, L. 25 – p. 322, L. 7; p. 359, L. 17-20; p. 367, L. 15-25; p. 408, L. 24 – p. 409, L. 12. Tim Dolph expressed to the members present his belief that the board had decided to merge the NLM church with Ken Ewing's church, the Church on the Solid Rock. Tr p. 258, L. 12-24; p. 300, L. 7-15. Ruth Smith admitted at trial that Tim Dolph's announcement did not reflect any decision approved by the board and that the board did not have any specific merger plans. Tr p. 301, L. 20-24; p. 259, L. 18 – p. 260, L. 8; p. 324, L. 2-14. Ruth Smith also testified that Tim Dolph's announcement at the impromptu meeting caused him to forfeit his position on the board of directors. Tr p. 315, L. 13-16. Tim Dolph attended no more NLM services after the July 15, 2010, bible study and before

the August 1, 2010, service or following special meeting. Tr p. 308, L. 23 – p. 309, L. 1. Tim Dolph was not given notice of the August 1, 2010, special meeting. Tr p. 272, L. 12-14. There were no Board meetings held between July 15, 2010, and August 1, 2010. Tr p. 240, L. 24 – p. 241, L. 3; p. 244, L. 17 – 245, L. 13; p. 265, L. 6-22.

Another informal meeting was held on Saturday July 17, 2010. Trial Exhibit 26; Tr p. 265, L. 6-22. The purpose of this meeting was to have further discussions with Tim Dolph regarding his views that NLM should merge with the Church of the Solid Rock. Tr p. 509, L. 19 – p. 510, L. 24. Tim Dolph did not attend the meeting. Trial Exhibit 26; Tr p. 511, L. 2-20. The minutes of the meeting reflect some church members attended and discussed the future direction of the church. Trial Exhibit 26; Tr p. 511, l. 21-23.

The trial exhibits indicate in July, 2010, Phyllis Miller, a member of the church, prepared a document entitled “New Life Missions Meeting Minutes.” Trial Exhibit 25. At trial, Miller could provide no specific facts of when she prepared this document. Tr p. 167, L. 4-20. However, it is clear the document was prepared before August 1, 2010, because it discussed a special meeting to occur in the future on August 1, 2010. Trial Exhibit 25. Phyllis Miller could not explain why she indicated her title was “secretary pro tem” on the minutes. Tr p. 167, L. 4 – p. 168, L. 11. This document purported to be minutes of special meetings of the members of the corporation held in July, 2010. Trial Exhibit 25; Tr p. 262, L. 18-22. Ruth Smith could not explain at trial why these meetings were described as “special meetings” and testified that none of these meetings were announced at the three immediately preceding Sunday services as required for special meetings under the bylaws. Tr p. 234, L. 21 – p. 239, L. 3-19.

The church traditionally held a lunch after Sunday services. Trial Exhibit 29; Tr p. 177, L. 1-7. One meeting listed on Trial Exhibit 25 was a meeting following the lunch on Sunday,

July 18, 2010. Trial Exhibit 25. Miller's minutes indicate the bylaws were a topic of discussion at the July 18, 2010, alleged special meeting that followed the church lunch. Trial Exhibit 25.

Miller's minutes reflect another special meeting was held Wednesday, July 21, 2010, at which time a rough draft of new bylaws was presented that had been prepared by church member Karen Ferrell and Miller. Trial Exhibit 25. Miller testified she did not recall working on bylaw revisions and did not know what changes were proposed. Tr p. 173, L. 17 – p. 174, L. 13. The minutes reflect Duane Kemmer attended this meeting. Trial Exhibit 25. Karen Kemmer was not present. Trial Exhibit 25. The minutes also reflect at the last two meetings, merger with Ken Ewing's church was a topic of discussion. Trial Exhibit 25. The minutes also declare that Karen Kemmer verbally resigned as church secretary and as a church member prior to the July 21, 2010, meeting, with no more specific information. Trial Exhibit 25.

Miller testified that she announced an August 1, 2010, special meeting on three consecutive Sundays: July 18, 2010, July 23, 2010, and August 1, 2010. Tr p. 175, L. 19 – p. 176, L. 17; p. 180, L. 8-12; p. 192, L. 5 – p. 195, L. 9.

A meeting occurred following church on August 1, 2010, at which time some of those in attendance voted for the defendants as new board members. Tr p. 175, L. 15-21; p. 180, L. 14; p. 198, L. 5-24. On or about August 4, 2010, Newman signed a letter prepared by Miller addressed to Dolph which informed Dolph he was removed August 1, 2010, as a board member. Trial Exhibit E. The letter informed Dolph two-thirds of those members present removed him from his director's position. Trial Exhibit E. At the same time, a letter was prepared by Miller and signed by Newman addressed to Karen Kemmer demanding she turn over the church's financial records, claiming a new board was elected at the August 1, 2010 meeting. Trial Exhibit G.

At trial Defendants claimed Dolph's and Kemmer's board positions were vacant at the time of the August 1, 2010, meeting due to their resignations. Tr p. 272, L. 22 – p. 274, L. 17; p. 390, L. 10 – p. 391, L. 7; p. 391, L. 5-16. Defendants claimed Dolph forfeited his Board position when he disagreed with Smith regarding the person who should hold the senior pastor position. Tr p. 315, L. 13 – p. 316, L. 13; p. 317, L. 10-14. However, the letter sent to Dolph dated August 4, 2010, indicated he was removed from his position on the board due to a conflict of interest. Trial Exhibit E.

Defendants claimed Kemmer verbally resigned his board position prior to August 1, 2010. Tr p. 381, L. 6-12; p. 513, L. 9-18; p. 523, L. 2 – p. 525, L. 15. The trial testimony was that Kemmer expressed his frustration with the chaos within the church and stated to more than one member on more than one occasion in casual conversation he did not want to be on the board anymore because of the turmoil. Tr p. 588, L. 19 – p. 586, L. 1; p. 587, L. 25 – p. 588, L. 7; p. 523, L. 2 – p. 525, L. 15. There was no evidence that either Kemmer or Dolph resigned in writing or were removed as board members. To the contrary, the undisputed trial testimony was there was never any written resignations provided by either of them. Tr p. 587, L. 22-24; p. 522, L. 21 – p. 523, L. 1; p. 272, L. 3-14.

The Defendants also claimed Karen Kemmer resigned her position as secretary. Trial Exhibit 25; Tr p. 230, L. 14 – p. 231, L. 17. However, there was no evidence presented that Kemmer was a Board member, or that her alleged resignation as secretary caused any meaningful vacancies on the board of directors.

Following trial, the district court concluded that Smith was the sole remaining board member because Kemmer and Dolph had both resigned or absented themselves, causing them to lose their positions as directors. R p. 84, L. 13-16. The district court also concluded that Smith

had authority as the sole director to call a special meeting under the Idaho Nonprofit Corporation Act. R p. 84, L. 13-16. The district court further concluded that Newman was appointed as senior pastor at the March 28, 2010, Board meeting and as senior pastor/President of NLM he had authority to approve the special meeting, satisfying the requirement under the NLM bylaws that special meetings be approved by the senior pastor. R p. 85, L. 6 – p. 86, L. 3. The district court also found there was sufficient oral notice given at three consecutive Sunday meetings prior to the August 1, 2010, special meeting as required by the bylaws. R p. 86. Based on those conclusions, judgment was entered for the Defendants, declaring the Defendants the lawful Board of Directors of NLM. R p. 89-90.

II. ISSUES PRESETED ON APPEAL

1. Did the district court err by concluding that Ruth Smith had authority to call a special meeting?
2. Did the district court err by finding that the Board appointed Bob Newman as senior pastor on March 28, 2010?

III. ARGUMENT

A. STANDARD OF REVIEW

This Court exercises free review over the district court’s conclusions of law, but will not set aside a finding of fact unless it is clearly erroneous. *Insight LLC v. Gunter*, 154 Idaho 779, 783, 302 P.3d 1052, 1056 (2013). Findings of fact will not be disturbed if they are supported by substantial and competent evidence, even if there is conflicting evidence. *Machado v. Ryan*, 153 Idaho 212, 217, 280 P.3d 715, 720 (2012). “Substantial evidence is that which a reasonable trier of fact would accept and rely upon it in determining findings of fact.” *Id.* When reviewing mixed questions of law and fact, “this Court will differentiate among the fact-finding, law-stating, and

law-applying functions of the trial courts.” *Sells v. Robinson*, 141 Idaho 767, 771, 118 P.3d 99, 103 (2005).

B. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT RUTH SMITH HAD AUTHORITY TO CALL A SPECIAL MEETING

The district court erred in concluding that Smith had authority to call the August 1, 2010, special meeting. The trial court concluded Smith’s actions were proper because she was the sole remaining board member at the time the special meeting was called. The district court lacked substantial or competent evidence that either Kemmer or Dolph resigned as board members. Because Smith was not the sole remaining board member, she lacked authority to call a valid special meeting to elect new board members.

The Idaho statute controlling non-profit corporations in 2010, and at the time of trial was the Idaho Nonprofit Corporation Act (“the Act”), I.C. § 30-3-1 et seq.¹ A nonprofit corporation was required to have a board of directors. I.C. § 30-3-63. The Act also required that “all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board.” I.C. § 30-3-63. “A director may resign at any time by delivering written notice to the board of directors, its presiding officer or to the president or secretary.” I.C. § 30-3-69. Removal of directors required an affirmative act of either the Board or the members, depending on the circumstances by which the director to be removed was originally placed on the Board. *See* I.C. §§ 3-3-70 and 3-3-71.

Actions taken in violation of the Act and/or governing corporate documents are void. *See Twin Lakes Vill. Prop. Ass'n v. Aune*, 124 Idaho 132, 857 P.2d 611 (1993) (amendments made to bylaws in violation of the procedure required by the bylaws were void and action based on improper amendment was also void); *Hanny v. Sunnyside Ditch Co.*, 82 Idaho 271, 353 P.2d 406

¹ The Idaho Nonprofit Corporation Act was repealed effective July 1, 2015, by S.L. 2015, ch. 337, § 3, and has been recodified at I.C. § 30-30-101 et seq.

(1960) (sale of treasury stock was void because contrary to articles of incorporation and bylaws); *Glahe v. Arnett*, 38 Idaho 736, 741, 225 P. 796, 798 (1924) (election of new directors and officers at an improperly called stockholders' special meeting was void.)

A corporation with members can call a special meeting of members in one of these three ways:

- (a) On call of its board or the person or persons authorized to do so by the articles or bylaws; or
- (b) Except as provided in the articles or bylaws of a religious corporation if the holders of at least ten percent (10%) of the voting power of any corporation sign, date and deliver to any corporate officer one (1) or more written demands for the meeting describing the purpose or purposes for which it is to be held.

I.C. § 30-3-47. Besides the methods specified by the Act, the New Life Missions bylaws allow a supermajority of the voting membership of the church to call for a special meeting: "Special meetings of the voting membership may be called by or at the request of two-thirds (2/3) of the voting membership, and shall take place at the principal place of worship for New Life Missions." Trial Exhibit 30, p. 3, § 7. Therefore, the Idaho Nonprofit Corporation Act and the NLM bylaws provided only two ways to call a special meeting: 1) by call of the Board, or 2) by call of two-thirds of the voting membership.²

The evidence and testimony was undisputed that the directors of the NLM Board in early 2010 were Kemmer, Dolph, and Smith. Trial Exhibit 12; Tr p. 178, L. 23 – p. 179, L. 23; p. 211, L. 19 – p. 217, L. 25; p. 244, L. 23 – p. 245, L. 4; p. 446, L. 22 – p. 447, L. 1; p. 572, L. 8-13. However, the district court erroneously found that Kemmer resigned as a director before the August special meeting: "Duane Kemmer repeatedly stated he no longer wished to be a Board

² There is an unresolved question whether the 2/3 vote described in the Bylaws is an independent ground to call a special meeting as contemplated by I.C. § 30-3-47(a) or a permissible modification to the statutory default found at I.C. § 30-3-47(b) provided for religious corporations. The difference between the two is whether written notice delivered to a corporate officer is required. There was no evidence written notice was delivered to any corporate officer. Tr p. 187, L. 19-22. There was also no evidence that 2/3 of the voting membership called for the special meeting. The trial court found that the meeting was called by the board.

member and indicated his resignation to Bob Newman, Ruth Smith, and others.” R p. 81. The district court also erroneously found that Dolph had either resigned or was removed as a director because he stopped attending services after a July 15, 2010, bible study. R p. 81. Based on those erroneous findings, the trial court incorrectly concluded that Smith had the sole authority to call a special meeting, acting as the remaining member of the board:

By mid-July 2010, due to Tim Dolph, Duane Kemmer, and Karen Kemmer having resigned and/or absented themselves from NLM, Ruth Smith was the only remaining Board member. Therefore, Ruth Smith, as the “board,” could call a special meeting under Idaho Code § 30-3-47.

R p. 84, L. 13-16. These findings are not supported by substantial or competent evidence in the record. The trial court’s conclusion of law is not supported by Idaho law. The conclusion of law drawn by the trial court ignores the statutory requirements to remove a director, or find a resignation occurred.

Regarding the evidentiary aspect, there is no substantial or competent evidence that Kemmer and Dolph resigned their Board positions by mid-July. There were no written resignations submitted by either board member as required by I.C. § 30-3-69. The trial court discounts this aspect, noting Kemmer’s statements of reluctance to continue to serve on the board. The trial court ignores Kemmer’s statements of reluctance to serve on the Board were accompanied by continuing service as a board member. Never did he abdicate his position and fail to attend a board meeting.

Further, there is no factual support for the trial court’s finding that Kemmer and Dolph “absented” their board positions. Based on Miller’s minutes, Kemmer was even present at the July 17, 2010 informal meeting of the members when the bylaws were discussed even though it was not a board meeting. Trial Exhibit 26. Smith testified that she didn’t think Duane Kemmer resigned until July 21, 2010. Tr p. 244, L. 17 – p. 245, L. 4 Dolph was present at the July 15,

2010, impromptu meeting. There were no board meetings called after July 15, 2010, which either missed. Tr p. 240, L. 24 – p. 241, L. 3; p. 244, L. 17 – 245, L. 13; p. 265, L. 6-22. There is no substantial or competent evidence that Kemmer or Dolph “absented” themselves as board members.

More importantly, there is no law to support the trial court’s conclusion that Kemmer and Dolph forfeited their board positions because they “absented” themselves. Board members could resign their position as provided in I.C. § 30-3-69. They could be removed as provided by I.C. § 30-3-70 or I.C. § 30-3-71. However, there is no law which allows their position to be forfeited because they allegedly “absented” during a two-week period. The trial court erred as a matter of law in concluding their positions were vacant, and Smith was the only board member at the time the special meeting was called.

As mentioned above, director resignation under the Idaho Nonprofit Corporation Act requires a written resignation: “A director may resign at any time by delivering written notice to the board of directors, its presiding officer or to the president or secretary.” I.C. § 30-3-69. Removal of a director requires affirmative acts by either the board or the members, depending on the circumstances by which the director obtained that position. *See* I.C. §§ 3-3-70 and 3-3-71. Furthermore, the NLM bylaws only allow removal of a director by unanimous vote of the remaining directors. Trial Exhibit 30, p. 3, § 6.

There was no evidence that either Kemmer or Dolph resigned their positions on the board by written resignation as required by the Act. To the contrary, the trial testimony was clear that neither tendered a written resignation. Tr p. 587, L. 22-24; p. 522, L. 21 – p. 523, L. 1; p. 272, L. 3-14; p. 245, L. 17-19. To effectuate a resignation under the Idaho Nonprofit Corporation Act,

Kemmer or Dolph would have had to tender a written resignation, like Ken Ewing did when he resigned as director in 2003. Tr p. 127, L. 6 – p. 128, L. 6.

Instead of following the Act's requirements to determine if a resignation occurred, the trial court deduced Kemmer's resignation from verbal statements wherein Kemmer expressed his displeasure with serving on the board under the current circumstances, and Dolph's absence from church for a two week period before the special meeting was held. R p. 81, L. 1, 14-15; p. 84, L. 13-16. This conclusion ignores the testimony that Kemmer's statements were expression of frustration with the chaos in the church, not a written resignation of his Board position. Tr p. 588, L. 19 – p. 586, L. 1; p. 587, L. 25 – p. 588, L. 7; p. 523, L. 2 – p. 525, L. 15. As to Dolph, the trial court's inference was that absence for a two-week period when no board meeting was called in the middle of the summer raised the inference that Dolph intended to resign.

Not only were the district court's findings of resignation insufficient under Idaho law to support a finding of a resignation, they ignored the true reasoning the defendants provided for their belief that Kemmer's and Dolph's board positions were vacant. For instance, the district court relied on testimony that Dolph's board position was forfeited because he ceased attending meetings after the July 15, 2010, meeting. Tr p. 308, L. 23 – p. 309, L. 1. However, the district court failed to recognize that the letter to Dolph from the Newman Board indicated they had removed Dolph from the board because of his "conflict of interest with the current undertakings" of the church. Trial Exhibit 23. That letter is inconsistent with the district court's finding that Dolph resigned or was automatically removed from the board for unexcused absences. The district court also ignored Smith's testimony at trial that she considered Dolph and Kemmer forfeited their director positions because they were in discord with her. Tr p. 281, L. 10-17.

The trial court's findings that Kemmer and Dolph were no longer board members by mid-July 2010, is contrary to Idaho's Nonprofit Corporation Act. There was simply no evidence of a valid removal of either Kemmer or Dolph from the board by the members. There are no written resignations. The trial court's conclusion that Smith was the sole remaining board member by mid-July, 2010, is not supported by substantial and competent evidence or Idaho law. There is no law that allows forfeiture of a board position by allegedly being absent over a two-week period. In fact, the nonprofit code was written to prevent such spurious arguments and to preclude arguments that verbal statements or actions constitute resignations by directors.

The special meeting held August 1, 2010, was not called by the NLM Board of Directors because neither Kemmer, nor Dolph were involved in calling that meeting. The special meeting was void as were the actions that took place at that meeting. Therefore, this Court should reverse the trial court's declaration that Newman, Quinn, Miller, and Smith were duly elected as the directors of NLM at a properly called special meeting of the members.

C. THE DISTRICT COURT ERRED IN FINDING THAT THE BOARD APPOINTED BOB NEWMAN AS SENIOR PASTOR ON MARCH 28, 2010

Although the previous argument resolves the matter on appeal, the district court erred in finding that Bob Newman was appointed senior pastor by the Board on March 28, 2010. The evidence was clear that Bob Newman was only asked to serve as an associate pastor. Bob Newman did not have the authority to approve the special meeting held August 1, 2010.

The NLM Bylaws provide that the senior pastor "shall be the president of this corporation and shall act as chairman of all the business meetings of the voting membership and the board of directors." Trial Exhibit 30, p. 4, § 2(1). After a special meeting is properly called, the NLM Bylaws require the senior pastor to approve the special meeting: "The senior pastor shall provide for the supervision of all services of the membership and shall approve of all special meetings,

conventions or revival campaigns.” Trial Exhibit 30, p. 4, § 2(6). The Bylaws also describe a subordinate pastor position, the associate pastor. Trial Exhibit 30, p. 4, § 6. The Bylaws also contemplate a vacancy in the office of senior pastor and describe the procedure to fill that vacancy.

If a vacancy occurs in the senior pastor position, the Board is supposed to take certain steps to fill that position. Trial Exhibit 30, p. 4, § 4. Those include assigning an associate pastor to act as a temporary replacement, reviewing potential candidates to fill the senior pastor position, and holding a special meeting of the members to vote on the replacement senior pastor. Trial Exhibit 30, p. 4, § 4. The Bylaws specifically state that appointment of a senior pastor requires a majority vote of the members at a special meeting: “After the voting membership has had an opportunity to review all candidates set forth by the board of directors, a special meeting will be called and a vote taken, **with majority vote required for the final appointment of the new senior pastor.**” Trial Exhibit 30, p. 4, § 4 (emphasis added). The Bylaws do not require this process be completed within a particular time frame. The Bylaws also require that a special meeting be preceded by “oral notice [of the meeting] at three consecutive Sunday services.” Trial Exhibit 30, p. 3, § 7.

The district court ignored the requirements of the Bylaws for appointing a senior pastor and simply concluded that the Board’s inquiry into Bob Newman’s *interest* in being pastor was his appointment as senior pastor: “Once the Board appointed Bob Newman on March 28, 2010, as pastor, he succeeded to the ‘Senior Pastor’ role according to the Bylaws and, therefore, was President of NLM.” R p. 86, L. 2-3. The district court’s conclusion is not supported by substantial and competent evidence because there was no evidence there was a properly called special meeting where Newman was appointed as senior pastor by majority vote.

The meeting minutes for a March 28, 2010, Board meeting were discussed at trial as evidence supporting Newman's contention he was appointed senior pastor. However, those minutes never even use the term "senior pastor." The minutes read "[a]nd ask Bob Newman if he would be interested in being the pastor and he said he would be interested in being the pastor." Trial Exhibit M, March 28 minutes. That line says nothing more than Newman was asked if he was interested and he said he was interested. No appointment was mentioned. No requisite member vote at a special meeting was mentioned.

The March 28, 2010, minutes suggest that the Board knew appointment of a senior pastor requires a membership vote at a special meeting:

Tim: We need a pastor right now. We are waiting week to week to do something. Who is making the decision to be a pastor for us? We vote on it and then we place it to the congregation to vote on it.

Trial Exhibit M, March 28 minutes. The next entry attributed to Dolph expresses there are "mixed feelings" about who should serve as senior pastor. Further down in those minutes it was suggested that Newman be given 2 months "to see." It was also suggested in those minutes that Ken Ewing come four weeks to pastor the church. Review of those minutes clarifies that the Board had not made a final decision on who it wanted as senior pastor and had appointed no one as senior pastor. There was no motion made or passed that Newman would be selected as the Board's candidate for senior pastor, subject to the majority vote of the members. There was no evidence that the members ever voted to select Newman as senior pastor.

The district court's conclusion that Newman was appointed senior pastor also ignores trial testimony. Smith, a board member in 2010, testified that on March 28, 2010, Newman was appointed as a temporary pastor. Tr p. 252, L. 21-24; 246, L. 2-5. Smith testified a "temporary pastor" was "put in temporarily until the new one could be elected." Tr p. 253, L. 18-21. Smith

also testified that the purpose of the March 28, 2010, meeting was to try and determine who should be the senior pastor, but there were competing ideas on how the vacancy should be handled and a consensus was never reached by the Board. Tr p. 254, L. 12 – p. 257, L. 14. Smith testified that Newman did not become senior pastor until the August 1, 2010, special meeting. Tr p. 254, L. 1 – p. 255, L. 6. Smith's testimony is supported by the testimony of Karen Kemmer who testified that Newman was only asked to preach, but was not asked to be the senior pastor at the March 28, 2010, meeting. Tr p. 548, L. 1-20.

The district court's conclusion is also unsupported by the testimony describing the purpose and subject of a subsequent May 2010, board meeting with Ken Ewing. Ruth Smith testified that the purpose of that meeting was to discuss Ewing becoming the NLM pastor. Tr p. 257, L. 15-25. Ewing testified that he met with the Board after the March meeting to discuss him serving as the new pastor. Tr p. 105, L. 11 – p. 106, L. 10. Had Newman been appointed as the senior pastor in March there would have been no need to discuss Ewing becoming the senior pastor or meeting with him.

Unsurprisingly, the only testimony that supported the district court's conclusion that Newman was appointed senior pastor on March 28, 2010, was testimony from Newman and his wife Connie. However, that testimony does not establish the necessary facts to conclude there was an effective appointment; specifically, that the appointment resulted from a majority vote of the members at a special meeting. Newman simply testified that he believed he was asked to be senior pastor at the board meeting in March, and that must have been the case because no one referred to him as a temporary pastor. Tr p. 396, L. 10 – p. 398, L. 13. Yet Newman acknowledged that he was not appointed as senior pastor in March and that no vote was taken in

March. Tr p. 428, L. 11-23.³ Ms. Newman’s testimony was similar, testifying that she remembered Dolph asking Newman, “Would you be interested in being the senior pastor.” Tr p. 496, L. 2-3. However, Ms. Newman also testified there was no vote to appoint Newman as senior pastor that night. Tr p. 518, L. 7 – p. 519, L. 5.

The testimony at trial is absolutely clear that on March 28, 2010, Newman was not appointed senior pastor following a majority vote of members at a special meeting. The district court made no findings there was a properly called special meeting at which Bob Newman was appointed by a majority vote of the members on March 28, 2010. That was a requirement of the Bylaws which was not satisfied. Accordingly, the district court’s conclusion that Bob Newman was appointed senior pastor at the March 28, 2010, board meeting is clearly erroneous. Without Bob Newman being properly appointed as senior pastor on March 28, 2010, it also follows that the district court’s conclusion that the August 1, 2010, special meeting was approved by the senior pastor is also clearly erroneous because Bob Newman was not the senior pastor and did not have the authority to approve the special meeting called by Smith. This Court should reverse the district court’s ruling that Bob Newman had authority as senior pastor in July, 2010, to approve a special meeting.

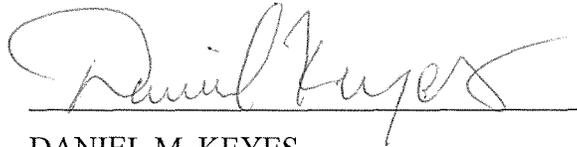
³ It is also noteworthy that in ruling on an objection the trial court judge recognized the significance of the language “interested in being” and the lack of formal Board action or a vote at that meeting. Tr p. 427, L. 3 – p. 428, L. 8.

IV. CONCLUSION

The Appellants request the Court reverse the district court's declaration that Defendants Bob Newman, Bob Quinn, Phyllis Miller, and Ruth Smith are declared the lawful Board of New Life Missions, Inc. and request the Court declare that Duane Kemmer, Tim Dolph and Ruth Smith are the duly constituted Board of Directors of New Life Missions, Inc.

Respectfully submitted this 20th day of January, 2016.

JAMES, VERNON & WEEKS, P.A.



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Kemmer, and Tim Dolph

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2016, I caused to be served a true and correct copy of the foregoing instrument by the method indicated below, and addressed to the following:

U.S. Mail, Postage Prepaid
 Hand Delivered
 Facsimile: 208-263-0400

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