1-22-2018

Lunneborg v. My Fun Life Appellant's Reply Brief Dckt. 45200

IN THE SUPREME COURT OF THE STATE OF IDAHO

MY FUN LIFE CORP., a Delaware Corporation, DAN E. EDWARDS and CARRIE L. EDWARDS, Husband and Wife	)	
Defendants/Appellants,	)	Supreme Court Docket No. 45200-2017
vs.	)	Kootenai County Case No. CV-2014-8968
THOMAS LUNNEBORG,	)	
Plaintiff/Respondent.	)	

APPELLANTS' REPLY BRIEF

On Appeal from the decision of the District Court of the First Judicial District of the State of Idaho in and for the County of Kootenai;

Hon. John T. Mitchell District Judge, Presiding

Mary E. Shea, ISB #6115
MERRILL & MERRILL, CHARTERED
109 N. Arthur Ave., 5th Floor
Pocatello, Idaho 83204
Telephone: (208) 232-2286
Facsimile: (208) 232-2499
Email: mary@merrillandmerrill.com

Michael Hague, ISB #3574
HAGUE LAW OFFICES, PLLC
401 Front Avenue, Suite 212
Coeur d'Alene, ID 838154
Telephone: (208) 215-2400
Facsimile: (800) 868-0224
Email: mhague@haguelawoffices.com

Attorneys for Defendants/Appellants My Fun Life, Corp; Dan E. Edwards and Carrie L. Edwards

Michael F. Nienstedt, ISB #3770
Christopher G. Varallo, ISB #6135
WITHERSPOON KELLEY
Attorneys and Counselors
The Spokesman-Review Building
608 Northwest Boulevard
Coeur d'Alene, ID 83814-1246
Telephone: (208) 667-4000
Facsimile: (208) 667-8470
Email: mfn@witherspoonkelley.com
Email: cgv@witherspoonkelley.com

Attorneys for Plaintiff/Respondent Thomas Lunneborg

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Appellants My Fun Life Corp., a Delaware Corporation, Dan E. Edwards, and Carrie L. Edwards (husband and wife), by and through their attorneys of record Mary E. Shea, Merrill and Merrill Chartered, and Michael Hague, Hague Law Offices PLLC, state their Reply Brief as follows:

SUMMARY OF ARGUMENT

Lunneborg asks this Court to uphold the District Court's findings on all issues as factually based and supported by the record. Upholding the District Court's decisions in this case would require this Court to ignore well-settled law in this jurisdiction concerning the burden of proof on employment decisions. It would allow trial courts throughout Idaho to substitute their own judgment for that of an employer in a dispute concerning grounds for termination, in violation of Idaho precedent and contrary to decisions in similar cases all over the country. It would ignore the well-settled law in this jurisdiction and in other jurisdictions concerning the burden of proof required in piercing the corporate veil. It would allow the separate and personal property of a spouse of the owner of the corporation to be reached on a piercing the veil theory without requiring any proof that the spouse controlled the corporation or had any decision-making authority concerning the financial transactions in question. The District Court made multiple errors in its legal analysis which resulted in faulty factual and legal findings. Applying the correct legal standards, Lunneborg did not meet his burden of proof on just cause for termination; on piercing the corporate veil generally; or on finding that the personal and separate property of Carrie Edwards could be reached even though she is not an owner of MFL.

Employers in Idaho must feel confident that if they conduct a reasonable investigation concerning the conduct of their employees and find cause to terminate, an Idaho court will not simply second guess that decision and substitute its own judgment as some "super personnel committee." Corporate owners in Idaho must feel confident that corporate protections will not be set aside and personal assets will not be reached without requiring strict proof of the elements necessary to pierce the corporate veil. MFL and the Edwards ask this Court to take a very close look at the record in this case, and to apply the law correctly, and to reverse the unsupported findings of the District Court.

Lunneborg argues that the District Court made several factual findings that deserve this Court's deference on appeal and which support the final decision regarding termination for cause. Respondent's Brief pp. 1-2. This Court has stated that a trial court's reliance on only one side's proposed findings of fact and conclusions of law is disfavored, particularly where those findings are not supported by the record. *Rosecrans v. Intermountain Soap & Chem. Co.*, 100 Idaho 785, 789, 605 P.2d 963, 967 (1980). In this case, findings of fact and conclusions of law were not submitted, but instead the parties filed briefs in lieu of closing argument. The District Court adopted virtually all the factual assertions and legal arguments presented by Lunneborg, and rejected virtually all the factual conclusions and legal arguments presented by MFL and the Edwards. The District Court even after finding that the attorneys' fees request by Lunneborg "shocked the conscience," awarded Lunneborg most of what was requested. This Court should examine the record closely, because the District Court did not apply the law fairly and correctly to the undisputed and admitted relevant and material facts in this case.

GROUNDS FOR TERMINATION FOR CAUSE CAN BE DECIDED BY THE COURTS AS A MATTER OF LAW

Lunneborg argues that the District Court's findings on termination for cause and pretext must be upheld because these determinations are factual in nature, and the District Court's findings were based on substantial and competent evidence. Lunneborg cites the case of *Rosencrans*, *supra*, for this proposition. In the *Rosencrans* decision, this Court did not discuss the trial court record in detail, but this Court noted that in that case, the witnesses "disagreed about almost everything," and credibility of the witnesses was, therefore, determinative. 100 Idaho at 789, 605 P.2d 963.

MFL and the Edwards recognize that this Court must give deference to the District Court's credibility determinations. In this case, however, most of the relevant and material facts are undisputed, and credibility is not the primary issue. The evidence on which MFL relies to support the decision to terminate was presented by and admitted by Lunneborg in his own testimony, and through the testimony of his witnesses Richard Brooke and Dr. Schlapfer, and he cannot rise above his own evidence as will be discussed more fully below. There were not many disputes of material fact on the record in this case. Based on the undisputed and uncontroverted facts, including those judicially admitted by Lunneborg through his own testimony, there were reasonable grounds to terminate based on a good faith and appropriate investigation conducted by Dan Edwards about the noncompete contract being negotiated behind his back.

The Idaho courts will not lightly second guess such decisions. A plaintiff employee's burden of proof on pretext is not met by merely alleging some alternative grounds for termination.

The plaintiff's burden is to provide substantial probative evidence to prove the proferred grounds were 1) not believed subjectively by the employer, or 2) not consistent or believable. The Idaho courts give deference to nondiscriminatory employment decisions "even if the reason is foolish or trivial or even baseless." *Frogley v. Meridian School District*, 155 Idaho 558, 556, 314 P.3d 613, 621 (2013).

This Court's articulation of this rule of law is consistent with the cases previously cited in Appellants' Brief, pp. 29-30. As the Washington Supreme Court, sitting *en banc*, stated in the *Baldwin* decision (which was relied upon by the District Court below), there are two threshold issues presented when an employer terminates for just cause: 1) what is the meaning of "just cause," and 2) who gets to make the decision. The Washington Court, consistent with the Oregon Supreme Court and the California Supreme Court, and consistent with this Court's decision in *Frogley v. Meridian School District*, decided that it is fundamentally and primarily the employer's decision to determine just cause, and it is the role of the courts to determine simply whether the employer acted reasonably under the circumstances. *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wash.2d 127, 769 P.2d 298 (1989), *citing Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982) (en banc); *see also Cotran v. Rollins Hudig Hall, International Inc.*, 17 Cal.4th (1998).

If the employer acted reasonably and in good faith belief that the facts it relied upon were true, a plaintiff employee cannot meet their burden of proof and persuasion on pretext. Courts all over the country have dismissed employment termination for cause cases as a matter of law, usually on summary judgment. For example, in *Jameson v. Pacific Gas and Electric Company*,

16 Cal.App. 5th 901, 225 CalRptr3d 171 (2017), the California court upheld summary judgment for defendant employer, which terminated an employee for retaliating against a co-worker who reported safety violations. In that case, the employer did an investigation and reached supported conclusions, but the plaintiff employee challenged the sufficiency of the investigation and conclusions. The California Supreme Court held the issue was not whether the employer could have conducted a better investigation or should have reached different conclusions – the issue was whether the employer reached conclusions honestly after a reasonable investigation, and did not act arbitrarily. 16 Cal.App. at 910-911, 225 CalRptr 3d 178-179. *See also Tibbs v. Administrative Office of the Illinois Courts*, 860 F.3d 502 (7th Cir. 2017) (summary judgment granted in favor of defendant employer); *Stacey Bird v. Cascade County*, 386 Mont. 69, 386 P.3d 602 (7th Cir. 2016); *Juback v. Michaels Stores, Inc.*, 143 F.Supp. 3d 1195 (M.D. Florida 2015) (dismissing cause to terminate/pretext case on summary judgment, stating courts do not sit as a "super personnel department" that re-examines an entity's business decisions).

Lunneborg succeeded in convincing the District Court this case was a "good guy versus bad guys" dispute, and Lunneborg succeeded in convincing the District Court that the Edwards were the bad guys in every respect. The Edwards do not agree the record supports this characterization, but that is not the legal issue before this Court. If this Court agrees that the undisputed and admitted material facts on this record demonstrate that MFL, acting through Dan Edwards, conducted a reasonable investigation of the facts under the circumstances, and those facts reasonably supported his decision to terminate Lunneborg, this Court must reverse the District Court and enter final judgment in favor of MFL consistent with the law.

LUNNEBORG CANNOT RISE ABOVE HIS OWN EVIDENCE CONCERNING TERMINATION FOR CAUSE

It is well-settled law in Idaho and throughout the country that a litigant cannot rise above their own evidence. The rule in Idaho is that party testimony offered into evidence is prima facie proof of the facts asserted, and it will be binding if it is not contradicted. *Strouse v. K-Tek, Inc.*, 129 Idaho 616, 619, 930 P.2d 1361, 1364 (1997). As this Court has explained, "[s]tatements contained in the evidence of a party constitute informal judicial admissions on his part which are accorded the quality of prima facie proof and for purposes of the action must be taken as true." *Crenshaw v. Crenshaw*, 68 Idaho 470, 475, 199 P.2d 264, 266 (1948).

This case did not present a real credibility contest that needed to be resolved by the trier of fact. Lunneborg testified unequivocally that the central purpose of his employment at MFL was to be COO, *and* to lead development of products for the members of the multi-level marketing company to distribute. (Tr. p. 271, L. 7-10). Lunneborg testified it was always his intent, Dr. Todd Schlapfer's intent, and Dan Edwards' intent that Lunneborg and Dr. Schlapfer would work together to develop products for MFL, and that was a primary reason why Lunneborg was hired by MFL. (Tr. p. 316). Lunneborg testified that Dan Edwards had no experience in product development, and that is why he need to recruit someone who did. (Tr. p. 167). Lunneborg testified that he requested, and his previous employer agreed to pay him $5,000/month for a consulting arrangement with OxyFresh, because he was an asset to OxyFresh and it would hurt his former employer if he departed without helping the company to transition to a future without him. (Tr. p. 173-174). Lunneborg also testified he wanted this pay from OxyFresh to be a "bridge" until

his performance based salary increases kicked in at MFL, because he was taking a pay cut to work for MFL. (Tr. p. 175).

Dan Edwards testified he knew about and supported Lunneborg's ongoing paid consulting relationship with OxyFresh, provided it did not prevent Lunneborg from developing products for MFL. (Tr. p. 502-503). This testimony was not rebutted. Both Dan and Lunneborg testified that Lunneborg could not enter into a noncompete or similar agreement with OxyFresh that would prevent Lunneborg from developing products at MFL, because such an agreement would defeat a primary purpose of his employment at MFL. (Tr. pp. 337-340; p. 428-429; p. 507).

The evidence is undisputed because Lunneborg himself testified that on May 15, 2014, he wrote to a message to Dan and Carrie Edwards stating:

> Good news. I had over an hour face-to-face with RB [Richard Brooke] last night. We are good now. He signed my consulting agreement. We have a mutual understanding and ended upon on good terms. They will name me to the advisory board and announce that I have taken an opportunity to grow my career. I'll stay as an advisor and R&D guru on the advisory board. Six-month consulting agreement. This gives them ample transition time.

(Tr. p. 210, L. 10-17). The evidence is additionally undisputed, because Lunneborg himself testified that Brooke had not, in fact, signed any written consulting agreement with Lunneborg. Instead, Lunneborg said they "shook hands" on the deal, which Lunneborg in his mind felt was as good as a written agreement. (Tr. 335). There is no testimony that Lunneborg clarified this distinction with the Edwards, although Lunneborg assumed they must have known there was no written agreement when Brooke was requesting a written agreement containing a noncompete clause be signed. (Tr. 336-337). Dan and Carrie Edwards reasonably assumed from this representation by Lunneborg that they did not have to worry about Brooke's desire for a non-

compete agreement, because he had already signed a consulting agreement that did not require one. Dan Edwards testified that he was confused because he learned there was never a written consulting agreement between Lunneborg and OxyFresh for the first time at trial. Dan further testified that regardless of whether the contract was oral or written, Brooke had made it clear to Dan Edwards that in his view, Lunneborg's consulting agreement with OxyFresh was contingent on Lunneborg not developing products for MFL as a multi-level marketing entity, and Brooke would not permit Lunneborg to do so. (Tr. pp. 580-583).

The evidence is undisputed that between May 22, 2014 and July 15, 2014, Richard Brooke expressed clearly, consistently, and multiple times to Lunneborg, Dr. Schlapfer, and ultimately on July 15 to Dan Edwards, that Lunneborg could not continue to be employed in any capacity at OxyFresh while developing competing products for MFL as a multi-level marketing company, and any consulting agreement between OxyFresh and Lunneborg was conditioned on that understanding. (Tr. pp. 211-212; pp. 338-342; p. 379; p. 513-520; Defendants' Exh. A. p. 38-39; p. 200; p. 502; Plaintiff's Exhs. 25-28). It is additionally undisputed that Brooke was fine with Lunneborg developing products for MFL in a retail capacity. (Defendants' Exh. A, pp. 202-203; Plaintiff's Exh. 28, p. 10).

Lunneborg's witnesses Richard Brooke and Dr. Schlapfer testified consistently. Brooke testified that Lunneborg told him repeatedly that he was not hired to develop products at MFL, a statement which by Lunneborg's trial testimony was not true. (Plaintiff's Exh. 47, Tr. p. 41, L. 6-21; p. 344, L. 5-7). Dr. Schlapfer testified unequivocally that he knew from the beginning that Brooke would "never" allow Lunneborg to develop product at MFL while he was in a paid

consulting and advising relationship with OxyFresh. (Plaintiff's Exh. 48, Tr. p. 33-34). The only real material disputes of fact in this case, aside from Lunneborg and Schlapfer's assertions about Dan Edward's request that they "knock off" an OxyFresh product, are between Lunneborg and Brooke. Lunneborg testified that Brooke had agreed to continue the paid consulting arrangement even though Lunneborg refused to sign the contract containing noncompete clause. Brooke testified he would not continue to employ Lunneborg on the consulting arrangement without the noncompete clause, he believed Lunneborg had agreed to it in principal, and that was the basis for his continued payments to Lunneborg and request that Dan and Carrie Edwards sign the noncompete agreement. The Idaho courts are not permitted to second guess Dan Edward's reasonable decision under the circumstances to believe Brooke that Lunneborg would not be able to develop products at MFL unless he quit his position with OxyFresh. When Lunneborg declined to do that, Dan Edwards had no choice but to terminate Lunneborg for being unable to fulfill one of the central purposes of his job at MFL.

As the *Baldwin* court noted, the threshold question this Court must answer is what constitutes "good cause" to terminate when an employment contract does not define it. Employee disloyalty, including full disclosure of all facts relevant to the employment relationship, is a reasonable expectation of Idaho employers. *Jensen v. Sidney Stevens Implement Co.*, 36 Idaho 348, 353, 210 P. 1003, 1005 (1922). It logically follows that breach of that duty of loyalty and full disclosure would constitute just cause to terminate under Idaho law. The Idaho courts may also look to the employment expectations understood by both parties to determine whether just cause to terminate exists. In this case, the evidence is undisputed that leading product development was

a primary purpose of Lunneborg's work for MFL. If Dan Edwards had a reasonable belief based on a reasonable investigation of facts that Lunneborg could not or would not fulfill that job duty, that would logically constitute just cause to terminate.

Lunneborg persuaded the District Court to chase some "red herrings" in this case, by making findings of fact and law that are completely irrelevant to the reason why Lunneborg was fired. This Court should not make the same mistake. For example, the District Court agreed with Lunneborg that there was some legal significance to the fact that Lunneborg was hired to be COO of MFL, and not just develop products for MFL. The undisputed fact that Lunneborg was also hired by MFL to be its COO, and that MFL took no issue with Lunneborg's job performance as COO, is irrelevant. As one court explained, "it is nonsensical to suppose that a plaintiff should be able to demonstrate that an employer's stated reason for its adverse action is pretext for discrimination merely because the employer cannot prove that the plaintiff was deficient in every aspect of his job performance." *Brown v. Vance-Cooks*, 920 F. Supp. 2d 61, 72 (2013) (granting summary judgment for defendant employer). MFL did not fire Lunneborg because he was not a good COO. MFL fired Lunneborg because in the two months of his employment, he had made no progress in leading product development, and because Dan Edwards learned after speaking with Richard Brooke and Dr. Schlapfer that Lunneborg would never be able to lead product development for MFL so long as he was still employed by OxyFresh. Defendant's Exh. A, p. 500.

As another example, the District Court attached legal significance to the fact that there was no final written consulting contract between OxyFresh and Lunneborg, and that Dan Edwards relied on "false rumor" that there was one. First, there was no false rumor. Dan Edwards had

seen for himself that there was contract being circulated between OxyFresh and Lunneborg, because Lunneborg showed him the contract. Dan Edwards confirmed through his conversation with Richard Brooke, CEO of OxyFresh, on July 15, 2014, that Brooke believed there was an agreement being actively negotiated, and that Lunneborg's continued relationship with OxyFresh depended on it. Although Lunneborg denied this, Edwards was not required to take Lunneborg's word for it, especially after Brooke's position had been confirmed by Lunneborg's good friend and collaborator, Dr. Schlapfer.

Second and perhaps more importantly, Dan Edwards did not fire Lunneborg because he thought there was an existing written noncompete contract. He fired Lunneborg, on the face of the termination letter, because he believed Richard Brooke that Lunneborg had been *negotiating* such a contract with OxyFresh. Edwards testified that Brooke could potentially sue if Lunneborg violated that understanding, and Edwards believed, reasonably after investigating and talking to the interested parties, that was the reason why Lunneborg was not making progress in developing products for MFL. Lunneborg, and the District Court, completely ignored the legal exposure Lunneborg's conduct created for MFL and the Edwards. If Lunneborg tried to develop products for MFL, Brooke could have taken legal action based on OxyFresh's performance of what he thought was an agreement between OxyFresh and Lunneborg.

Lunneborg persuaded the District Court there was some legal significance to the fact that Lunneborg could not have brought a product to market in the two months he was employed by MFL, because Dan had to "green light" any product development, and because Dr. Schlapfer had not been hired on contract with MFL. This is another red herring. The testimony of both

Lunneborg and Edwards was that there was no expectation that Lunneborg had to bring products to market within the first few months of his employment. (Tr. 169). Dan understood that was not possible. On the face of the termination letter written by Dan Edwards, Lunneborg was terminated because he was not making "any significant progress" to the end of bringing products to market, and because he seemed to be stalling with product development. Defendant's Exh. A, p. 500. Lunneborg's own testimony establishes it was always the intent of Lunneborg, Dr. Schlapfer, and Dan Edwards that Dr. Schlapfer would be brought on contract with MFL to help Lunneborg with product development. At the time he was terminated, Lunneborg was preparing the agreement with Dr. Schlapfer. The evidence is further undisputed because Lunneborg himself testified that Lunneborg was expected to lead product development, because he and Dr. Schlapfer had the expertise and experience, and Dan Edwards did not. (Tr. 418). Although Dan had final say on what products would be developed, the evidence is undisputed Lunneborg was expected to bring Dan Edwards feasible ideas for product development, and that he and Dr. Schlapfer were the "experts" in that department. (Tr. pp. 167, 169). When Lunneborg did not do that, and when Dan realized the reason why was the consulting arrangement with OxyFresh based on his discussions with Brooke and Dr. Schlapfer, Dan had no choice but to terminate Lunneborg for cause.

This Court should reject Lunneborg's attempts to argue he proved "pretext" through his allegations, made for the very first time the day after Lunneborg and Dr. Schlapfer realized Dan Edwards was considering firing Lunneborg, that Dan Edwards asked them to illegally "reverse-engineer" an OxyFresh product, and this was the "real reason" for the termination. By law, this allegation is insufficient to prove pretext, unless Lunneborg can also persuade this Court that Dan

Edwards did not subjectively and reasonably believe that Lunneborg had been negotiating a non-compete agreement with OxyFresh, and that Lunneborg could not or would not develop products for MFL so long as he continued working for OxyFresh. The District Court committed legal error by not giving deference to Dan Edwards' factual determinations that Lunneborg did not make "significant progress" leading product development for MFL, and the reasons for it. This Court should reject Lunneborg's invitation to do the same.

It should be remembered that the Idaho Wage Claims Act trebles damages, and therefore the burden of proof must be followed strictly. Idaho courts cannot be cavalier in reciting facts that are not material to the reason for termination in justifying such an award. Idaho courts must follow the law and give appropriate deference to the reasonable factual findings of the employer justifying the adverse employment action. On this record, Dan Edwards had adequate grounds to terminate, and the District Court focused on irrelevant facts, and did not give Dan Edwards appropriate deference as the primary fact finder on whether grounds to terminate existed.

LUNNEBORG IS BOUND BY THE UNCONTRADICTED EVIDENCE OF HIS WITNESS CARRIE EDWARDS, AND HE CANNOT SHIFT THE BURDEN OF PROOF TO DEFENDANTS ON PIERCING THE CORPORATE VEIL

The general and well settled rule of evidence followed throughout the country, acknowledged in part by this Court in the *Crenshaw* decision, supra, states that when a party uses an adverse witness to prove elements of their claims, they are bound by that testimony if it is clear, reasonable, and uncontradicted. *See, e.g., Horne v. Milrim*, 226 Va. 133, 306 S.E.2d 893 (1983); *Proctor Elec. Co. v. Zink*, 217 Md. 22, 141 A.2d 721 (1958); *Amato v. Landy*, 416 Pa. 115, 204 A.2d 914 (1964); *Bucyna v. Risso Bros. Movers, Inc.*, 31 Ill.App.2d 31, 175 N.E.2d 640 (1961);

Humes v. Young, 219 Miss. 417, 69 S.O.2d 245 (1954). Lunneborg did not request specifically to treat Carrie Edwards as an adverse witness, but no objections were made on the record to any leading questions asked of Carrie Edwards.

Even if Carrie Edwards was not an adverse witness, then the general rule articulated above and as stated in the *Crenshaw* case applies: Lunneborg cannot rise above his own evidence. He called Carrie Edwards to prove his case in chief on piercing the corporate veil. Her testimony was not impeached, and it was not contradicted. Lunneborg persuaded the District Court to find that because Carrie's testimony concerning the accounting practices of the companies and the Edwards was not "backed up" by actual bank statements and loan documents, it was not credible. Lunneborg cannot call Carrie Edwards as a witness to prove the elements of his case related to piercing the corporate veil, and then ask the Court to find her testimony incredible because it was not bolstered by documentation. Lunneborg in his Respondent's Brief does not disagree that he bears the burden of proof and persuasion on piercing the corporate veil. Requiring Carrie Edwards to bolster her testimony through additional documentation effectively and improperly shifts the burden of proof to the Defendant to demonstrate that their financial transactions were legitimate to avoid liability. It was Lunneborg's burden to prove the financial transactions of MFL and the Edwards were not legitimate or accounted for properly; it was not the Edwards' burden to prove they were.

Lunneborg produced no evidence that challenged or contradicted Carrie Edward's testimony that funds and debts were properly segregated between the various corporations and between Dan and Carrie Edwards personally; that all compensation received by Dan and Carrie

Edwards and their children were pursuant to the membership agreements and the legitimate and legal business plan of MFL; that all funds received by the Edwards from MFL were reported properly for income tax purposes; that automobile expenses were segregated by proper accounting procedures and based on the advice of an accountant; that all loans between entities were paid back among the entities, to the penny; and that rent and building maintenance payments between the entities were shared equitably. Carrie's testimony was clear, and it was supported by spreadsheets she downloaded from the bookkeeping systems of the entities which were offered and admitted without objection as to foundation or for any other reason. Her testimony was uncontradicted by any other documents or testimony offered by Lunneborg. The District Court committed legal error by rejecting that testimony because it was not bolstered by additional documentation, instead of holding Lunneborg to his very high burden of proof on piercing the corporate veil.

It must also be remembered that most of the financial transactions complained of by Lunneborg as some suggestion of impropriety by the Edwards occurred before Lunneborg was even hired. They could not, as a matter of law, evidence an intent to defraud him or create an unjust result.

Finally, even though Idaho law holds, and the District Court recognized that MFL's bankruptcy is not enough to pierce the corporate veil, the District Court did find the bankruptcy to be evidence of the Edwards' "depletion" of the corporation, although there was no proof offered of such depletion between the years 2014-2016. The evidence was uncontradicted and supported by Lunneborg's own testimony that MFL was flush with cash and was growing in 2013 and 2014. By July 2014, Lunneborg testified that he realized MFL membership was waning. He testified

that he knew this was caused, in part, by the failure to bring new products for members to distribute. (Tr. 397, 396-397). Lunneborg testified there were other legitimate reasons for the decrease in membership in 2014 (Tr. 396-397), and he testified that he did not believe raising membership prices without offering more products or services would be an appropriate way to address the downward business trajectory. (Tr. 202-203). Carrie Edwards testified as Lunneborg's witness, and her testimony was uncontradicted, that by late 2014 and 2015, MFL was losing members and therefore losing money, to the point where the Edwards' other entity TraffiCorp was propping it up financially, and it was clear MFL would not survive. (Tr. pp. 53-55; 141-145). There was virtually no evidence produced to support any inference that it was improper depletion of the corporate resources by the Edwards between 2014 and 2016 that caused the company to go bankrupt. The only evidence on this record is that MFL was losing members, at least in part indisputably because they did not bring new products to market for members to distribute in 2014 or subsequent.

Lunneborg does not dispute the Edward's legal position that a creditor cannot reach the personal assets of a corporate non-shareholder absent proof that the non-shareholder effectively controlled the financial decision making of the corporation. There was absolutely no evidence offered by Lunneborg on this issue. All that was asked of Carrie Edwards during her testimony was her job titles. She was not asked to explain her job duties. The fact that she helped recruit Lunneborg and attended meetings and discussed Lunneborg's employment is irrelevant; the District Court found correctly that Carrie Edwards was not sued directly for her role in the termination of Lunneborg.

The District Court found that Carrie Edwards "moved the money" between the entities, but there were absolutely no questions asked of Carrie to prove this. Carrie testified extensively about her knowledge about the bookkeeping and accounting practices of all the entities, but she was never asked, and she never testified, about who made the bookkeeping and accounting decisions for MFL. Even if she physically moved the money, and the record is silent about that, there was no testimony adduced to prove this was based on her own decision making. No other witness, including Dan Edwards, was asked about Carrie's decision-making authority for MFL or her control of the finances of MFL. As a matter of law, Lunneborg did not meet his burden of proof to pierce the corporate veil for Carrie Edwards as a non-shareholder. This Court must, at a minimum, reverse this part of the District Court's judgment. It is the unusual set of facts that would allow a court to pierce the corporate veil to reach the personal assets of a non-owner of a corporation. Idaho courts ought not permit veil piercing for non-owners when the proof of financial control for the purpose of self-dealing and defrauding creditors was not adduced on the record.

THE ATTORNEYS' FEE AWARD BY THE DISTRICT COURT WAS EXCESSIVE AND UNFAIR

MFL and the Edwards will not restate their arguments previously made. Lunneborg complains that MFL and the Edwards did not prove that the plaintiff's investment of legal resources was unreasonable for a three-day trial. The District Court found that the fees requested were excessive for a factually and legally uncomplicated three-day trial, the demand shocked the court's conscience, and they were unprecedented in the trial judge's fifteen years on the bench.

That is proof that the investment of legal resources was unreasonable under the circumstances. The District Court committed error by arbitrarily slicing the fee by only ten percent on that basis, and by reducing hourly fees only slightly. Allowing five attorneys to bill time on a case like this was not reasonable under the circumstances. Defendants only had one attorney to present their case, which he did competently.

Lunneborg complains that MFL caused him to invest more time in the case due to the discovery disputes. The record is undisputed, however, that attorneys' fees award related to that discovery dispute was $8,823.75. That is the proper and fair measure of the legal cost of that discovery dispute to Lunneborg. Lunneborg employs hyperbole to suggest that it was the discovery delay that permitted the Edwards' to loot the company and deplete assets, without providing any proof whatsoever that improper depletion of MFL assets occurred between 2014 and 2016. Further, by Lunneborg's own timeline, the discovery dispute was first raised as an issue in July 2015, and it was resolved by early October 2015. Respondent's Brief, p. 3-4. It is ludicrous to suggest that the discovery dispute or the bankruptcy of MFL complicated this litigation sufficient to justify an award of $167,028.69. This award amounted to a trial cost of $55,676.23 per day. Five attorneys and 1048 hours were not required to competently try this case, and even with that investment of resources, Lunneborg failed to meet the elements of proof on his claims. It should be noted that part of Lunneborg's justification for including the discovery dispute in the final attorneys' fee award was to avoid the fact that only MFL was the defendant during the discovery dispute resulting in the first attorneys' fee judgment, and MFL is now insolvent. This Court should reverse the District Court on the substantive legal issues and enter final judgment in

favor of MFL and the Edwards, and render this issue moot. If this Court affirms or remands any issue, this Court must direct the District Court to re-examine this award and reduce it down to a something more reasonable.

CONCLUSION

The District Court committed legal errors in its analysis of the breach of contract claim and piercing the corporate veil. The District Court's attorneys' fee analysis evidence a desire to punish the Defendants for alleged malfeasance, even though there was no malfeasance shown on this record. This Court should reverse the decisions, and find that MFL and the Edwards are not liable to Lunneborg, and grant any other relief deemed appropriate.

Dated this 18thth day of January 2018.

MERRILL AND MERRILL CHARTERED

By: Mary E Shea
Mary E. Shea

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the electronic submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

Michael F. Neinstedt, mfn@witherspoonkelley.com
Christopher G. Varrallo, cgv@witherspoonkelley.com

Dated and certified this 18th day of January 2018.

MERRILL AND MERRILL CHARTERED

By: Mary E Shea
Mary E. Shea

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January 2017, two true and correct copies of Appellant's Brief were served by email and mailed, postage prepaid, to the following:

Michael F. Nienstedt
Christopher G. Varallo
WITHERSPOON KELLEY
Attorneys and Counselors
The Spokesman-Review Building
608 Northwest Boulevard
Coeur d'Alene, ID 83814-1246
Email: mfn@witherspoonkelley.com
cgv@witherspoonkelley.com

Dated and certified this 18th day of January 2018.

MERRILL AND MERRILL CHARTERED

By: Mary E Shea
Mary E. Shea