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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

INVESTOR RECOVERY FUND, LLC, an Idaho limited liability company, Plaintiff/Appellant/Cross Respondent, v. RANDALL H. HOPKINS, an individual, BRIAN MURPHY, an individual, HOPKINS FINANCIAL SERVICES, INC., an Idaho corporation, Defendants/Respondents/Cross-Appellants, and DOES I-V whose true names are unknown, Defendants.	SUPREME COURT NO. 46247-2018 1 Ada County District Court Case No.: CV-OC-2014-22941

PLAINTIFF/APPELLANT/CROSS-RESPONDENT'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada
The Honorable Richard D. Greenwood

Wyatt Johnson, ISB: 5858
ANGSTMAN JOHNSON
199 N. Capitol Blvd., Ste 200
Boise, ID 83702
Phone: (208) 384-8588
Fax: (208) 853-0117
Email: Wyatt@angstman.com

Attorney for Appellant

Robert Faucher
Sara M. Berry
HOLLAND & HART, PLLC
800 W. Main Street, Suite 1750
Post Office Box 2527
Boise, Idaho 83701-2527
Fax: (208) 343-8869
Email: RFaucher@hollandandhart.com
SMBerry@hollandandhart.com

Attorneys for Respondents

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I. STATEMENT OF THE CASE

This is a fraudulent nondisclosure case against Randall Hopkins ("Randy")[1], Brian Murphy ("Brian") and Hopkins Financial Services Inc. ("Hopkins Financial"). The nondisclosures were made in the course of promoting investments in an investment fund, Hopkins Northwest Fund LLC ("HNWF"). The claims are brought by Investor Recovery Fund, LLC, an assignee of the claims of Carol Snyder, (individually, and as trustee of the Van Hees Family Trust), Bill and Kellie Pugh, and Larry and Elisabeth Erickson.

a. Course of Proceedings

This case was initially filed December 8, 2014. It proceeded slowly for various reasons including the bankruptcy of HNWF, various discovery disputes and production delays, and several reassignments of judges due to a judicial retirement and disqualification of later assigned judges.

The trial court heard multiple motions for summary judgment. The summary judgment decision at issue in this appeal was heard on September 29, 2017 and a written decision was issued November 17, 2017. This decision included a dismissal of all claims against the entity, Hopkins Financial.

A hearing on motions in limine addressing multiple issues was heard on May 14, 2018. As a result of that motion, the court ruled in limine that Investor Recovery could not present the testimony of R. Wayne Klein at trial.

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[1] Mr. Hopkins and Murphy's first names are being used because there are multiple entities involved as parties and as subjects of this litigations whose names incorporate Mr. Hopkins' last name. Using the first names makes it easier to distinguish the parties.

This case proceeded to jury trial before the Honorable Richard Greenwood commencing Monday June 4, 2018. After seven days of trial, the court entered directed verdict dismissing the case in its entirety.

Judgment was entered July 2, 2018.

Notice of appeal was filed August 9, 2018.

On August 13, 2018, the trial court held a hearing on the Randy, Brian and Hopkins Financial's request for attorney fees. A memorandum decision awarding attorney fees was entered on September 19, 2018.

Amended judgment was entered on September 27, 2018

b. Summary of the Facts

Investor Recovery's claim of fraud by omission arises out of a conspiracy to defraud investors perpetrated Randy, Brian and Hopkins Financial (collectively, the "Hopkins Associates") while managing HNWF between 2007 and 2008.

HNWF pooled investors' funds and loaned those funds in real estate secured transactions. Investors in HNWF were issued interests called "debentures" which entitled them to participate in a proportionate share of the loan portfolio returns. The purported benefit of the fund was that it gave investors the benefits of real estate investments, with the benefit of liquidity because investors could get their money out of the investment at their convenience. HNWF operated from 2001 until 2014, when it filed a voluntary Chapter 11 bankruptcy. As a result of the bankruptcy, the investors whose claims are at issue in this case lost their entire investment.

Investor Recovery took an assignment of the claims of six HNWF investors: Carol Snyder, the Van Hess Family Trust, Bill Pugh, Kellie Pugh, Larry Erickson, and Betsy Erickson. Together, these investors lost nearly $1,400,000 in principal invested Northwest Fund.

i. ***Conspiracy to Defraud in 2007 and 2008***

A material feature of the fund was the investors' ability to take their money out of the fund when they wished. The members of Investor Recovery found this attribute to be important. The Hopkins Associates advertised this defining feature and led the members of Investor Recovery to believe the ability to withdraw their money within 121 days always existed.

In July of 2007, financial difficulties with HNWF put the investors' redemption rights in jeopardy. This was due largely to the intersection of two material events: first, one of HNWF's largest loans, the Hunter Point Loan, defaulted on payments, thus constricting cash-flow to the fund; and second, a high number of investors began giving 121 day notices to redeem their debentures. The Fund was faced with the very real possibility that it could not honor the redemption requests of its investors.

The potential inability to meet investor redemptions caused a change in the investors' rights. Pursuant to the Private Placement Memorandum ("PPM") that defines the rights of HNWF investors, management could declare a moratorium if they had "concern" that the liquidity of the fund had fallen to a level where they could not treat investors with parity or honor future redemption requests. If HNWF declared a moratorium, the fund was required to freeze its assets, thus preventing investors from redeeming their investments.

Despite the fact that recent demands on the fund were altering investors' rights, the Hopkins Associates formulated a plan to restrict investor information about the financial hardships experienced by HNWF. Rather than fully disclose the threats to the fund's liquidity, investors would be managed on a "one-on-one" or a "case-by-case" basis with the objective of convincing them to keep their investments in the fund. This strategy included withholding important infonnation, not only from the investors at large, but also the individuals which spoke with them about their investments. The Hopkins Associates hoped this strategy would convince debenture holders that their investments were still safe.

This strategy was designed to protect the interests of the Hopkins Associates, at the expense of the investors. The possibility of a moratorium would make the fund less attractive to new investors. Randy and Brian directly benefitted from new investment in the Northwest Fund. They were not paid by Northwest Fund. Instead, Hopkins Financial Services, owned by Randy Hopkins and Brian Murphy, generated fees for its work placing and servicing loans in the Northwest Fund, and these fees allowed Hopkins Financial Services to pay substantial salaries and owner distributions to Randy and Brian.

Despite a requirement within the PPM that all investors be treated with parity, the Hopkins Associates disclosed select information regarding the health of the fund only to preferred investors. This included correspondence with an investor named Charles Williams notifying him of an imminent moratorium in February. This also included correspondence with an investor Larry Stevenson in the Spring of 2008, alerting Mr. Stevenson to problems associated with the Hunter's Point Loan.

The Hopkins Associates' campaign to hide material information from investors included omissions that a moratorium could be called at any time after August 2007. The only mentions of a moratorium before it was declared occurred at February 2008 investor meeting in which Randy stated that the conditions for a moratorium had not yet occurred despite the fact that he knew conditions had actually been triggered in 2007. During that February meeting, Randy only stated that "should desired investor redemption requests exceed issuer's available cash flow to pay those requests, this may cause issuer to declare a moratorium." However, that statement withheld the fact that the Hopkins Associates already knew that events triggering their discretion to declare a moratorium had existed since the summer of 2007. The statements fell short as any substantive disclosure because the investors were already advised in the PPM that when they hear statements prefaced with "should," meaning that the moratorium conditions had not yet occurred. In other words, Hopkins gave nothing more than speculative "forward-looking statements" regarding the conditions allowing for a moratorium, rather than stating them as the present facts they were.

The Hopkins Associates successfully concealed and failed to disclose the moratorium risk. Ultimately, on September 8, 2008, more than a year after recognizing the problem, HNWF imposed the "moratorium." The moratorium froze pending redemption requests and prevented any new requests. On April 8, 2014, HNWF filed Chapter 11 Bankruptcy. According to the confirmed Chapter 11 plan, debenture investors will receive no recovery on their investments.

ii. Fraud upon Carol Snyder and the Van Hees Trust.

By late summer of 2007, Carol Snyder ("Snyder") invested substantially more in HNWF than she wanted to have in one place. She also anticipated a substantial tax bill coming due in April of 2008. She met with Brian in August 2007 to discuss her concerns and make a request to

withdraw $400,000 from her HNWF debenture. Recognizing that the PPM for HNWF required investors to give 121 days' notice to redeem without an early withdrawal penalty, Snyder planned her requested redemption far in advance.

During Snyder's meeting with Brian she talked about her investments in HNWF and Brian gave his advice about the best financial course to achieve her personal goals, which included redeeming a portion of her debenture to pay taxes. Critically, instead of informing Snyder that her investments in HNWF were now potentially subject to a moratorium, Brian convinced her that she could diversify her investments by converting the form of some of her HNWF "debenture" into a HNWF "promissory note." Snyder relied upon the information she was receiving from Brian. Snyder followed Brian's advice and decided to invest half of her funds into a promissory note and keep the other half as a debenture, both within HNWF.

Had Snyder known that management could declare a moratorium at any time, she would have refused to convert part of her investment into a fixed-term promissory note and, instead, would have withdrawn the entire amount of her personal debenture investment. As the Trustee of the Van Hees Family Trust, Snyder would have withdrawn the entire amount of its investment as well.

iii. Fraud upon Larry and Betsy Erickson.

In the summer of 2007, Larry and Betsy Erickson ("Ericksons") both had investments in HNWR. In the fall of 2007, Larry scheduled a meeting with Brian to discuss possible additional investment, and the security of the investments in the Fund. Larry said he would be selling a farm property for a significant amount of money. Larry asked Brian if there was any risk in investing in

the Northwest Fund. Brian told Larry that he would get his money back because they would put him in top priority for HNWF withdrawals and ahead of other investors in the fund. Brian even told Erickson that "Business is Booming" which made Erickson feel that his investment was secure. The statement plainly implied, and Larry understood it to mean, that HNWF had new investment opportunities it would like to fund. Larry was not told that the fund needed new investment to avoid a moratorium and redeem out other investors. Although Erickson's did not purchase new investments at that time, based on the conversation with Murphy, Ericksons continued to invest in the Northwest Fund. Murphy's omission deceived the Ericksons and other investors into believing that there was no significant risk of loss from investing or keeping investments in the Northwest Fund. The Ericksons have over $200,000.00 in damages from the fraud committed by the Hopkins Associates.

iv. ***Fraud against Bill and Kellie Pugh.***

By July 2007, Bill and Kellie Pugh ("Pughs") had substantial amounts invested in HNWF. In 2007, the Pughs had an additional $150,000 that they wanted to invest for a short period of time. Bill Pugh had cash he received from an unrelated loan disbursement. Bill knew he had to repay the loan within a year and wanted to find a safe place to park his money that would create a short-term gain.

In late December of 2007, or early January of 2008, Bill spoke to Brian and explained that he wanted to invest the money for a short period of time in the Northwest Fund. Rather than simply explain that HNWF was facing the possibility of a moratorium on investment redemptions which could make a redemption impossible, Brian sidestepped the issue and told Bill to put the money into a separate fund, the Hopkins Western Fund. Brian did not explain why he preferred the

Western Fund. Brian did not disclose the facts creating a significant risk of loss related to the money the Pughs had already invested in HNWF.

Had the Pughs known of the facts creating the significant risk of loss at the time of Bill's conversation with Brian in 2007, they would have requested a full redemption of the entire amount of their investment in HNWF. The Pughs relied, to their detriment, upon the representations by the Hopkins Associates by postponing any decision to withdraw their entire investment from HNWF before the imposition of the moratorium that prevented any further withdrawals. Following the imposition of the moratorium, the value of Pughs' investment has been completely lost and they will recover no portion of their investment back from the Northwest Fund.

II. ISSUES PRESENTED ON APPEAL

a. Did the trial court err in granting directed verdict dismissing Investor Recovery's claims against Randy and Brian?

b. Did the trial court abuse its discretion in refusing to allow the admission of testimony by R. Wayne Klein?

c. Did the trial court err by granting summary judgment dismissing Investor Recovery's claims against Hopkins Financial?

d. Did the trial court err in granting an award of attorney fees and costs to Randy and Brian?

e. Is Investor Recovery entitled to an award of attorney fees and costs on appeal?

III. STANDARDS OF REVIEW

The trial court dismissed this case on Hopkins' motion for directed verdict under I.R.C.P. 50(a). A decision on Rule 50 is a pure question of law over which this court has free review. *See Quick v. Crane*, 111 Idaho 759, 763, 727 P.2d 1187, 1191 (1986).

A Rule 50(a) motion requires the court to assume as true every legitimate inference that can be drawn from the evidence in favor of Investor Recovery. *Quick,* 111 Idaho at 763, 727 P.2d at 1191. The court cannot weigh the evidence or pass on the credibility of witnesses. *Id.* The test is whether, in view all of the evidence and all inferences drawn therefrom in favor of Investor Recovery, there is substantial evidence to justify submitting the case to the jury. *Quick,* 111 Idaho at 764, 727 P.2d at 1192.

The trial court ruled, in limine, that Investor Recovery could not present testimony by its expert witness, R. Wayne Klein. Whether to admit expert testimony is within the discretion of the trial court. *See e.g. State v. Pearce*, 146 Idaho 241, 245, 192 P.3d 1065, 1069 (2008).

The trial court entered summary judgment dismissing Investor Recovery's claims against Hopkins Financial. The standard of review for an order granting summary judgment is the same standard used by the trial court in ruling on the motion. Summary judgment is only allowed "if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *See e.g. Dickinson Frozen Foods v. J.R. Simplot Co.*, No. 45580, 2019 Ida. LEXIS 81, at *9 (May 3, 2019) (citations omitted).

IV. ARGUMENT

1. The Trial Court Erred Dismissing Investor Recovery's Fraud Claims

At trial, Judge Greenwood correctly found that there was enough evidence for a jury to conclude that there were material nondisclosures by Randy and Brian[2] between August of 2007

[2] Because claims against Hopkins Financial had been dismissed at summary judgment, the trial did not involve development of the liability of that entity for the critical statements and omissions.

and January of 2008. (Tr. p. 1441 Ll. 4-13.) However, the court erred when concluded that verbal and written statements given to the fund investors, at large, during a meeting on February 29, 2008, sufficiently revealed the true facts so as to prevent Investor Recovery from reasonably relying upon the fraudulent omissions. (Tr. p. 1441 L. 1444 L. 7.) This decision was error for at least three separate reasons: (1) The evidence shows that the subsequent statements did not reveal the fraud; (2) the subsequent statements occurred after the harm occurred; and (3) Judge Greenwood refused to consider additional evidence bearing on Hopkins' duty to disclose.

a. The Evidence Supports the Claims of Fraudulent Omissions against Snyder in August of 2007, against Ericksons in October of 2007 and against Pughs by January of 2008

The evidence in record support Judge Greenwoods correct conclusion that a jury conclude that there were material nondisclosures by the Hopkins Defendants between August of 2007 and January of 2008. (Tr. p. 1441 Ll. 4-13.)

At trial, Investor Recovery needed to present evidence on fraud by omission and conspiracy. In summary, it needed to prove fraud by omission by showing:

1. That Randy Hopkins and/or Brian Murphy knew of certain facts and had a duty to disclose those facts;

2. Brian Murphy and/or Randy Hopkins failed to disclose the facts;

3. Carol Snyder, the Van Hees Family Trust, Bill and Kellie Pugh, and/or Larry and Elizabeth Erickson relied upon this nondisclosure;

4. This reliance upon the nondisclosure was material to their decision to invest in, or keep their existing investments in the Northwest Fund;

5. Carol Snyder, the Van Hees Family Trust, Bill and Kellie Pugh, and/or Larry and Elizabeth Erickson were harmed by the nondisclosure.

Tusch Enters. v. Coffin, 113 Idaho 37, 43, (1987); *Watts v. Krebs,* 131 Idaho 616, 619, 962 P.2d 387, 390 (1998); *Country Cove Development, Inc. v. May,* 143 Idaho 595, 150 P.3d 288, 294 (2006); *Humphries v. Becker,* 159 Idaho 728, 736, 366 P.3d 1088, 1096 (2016); *James v. Mercea,* 152 Idaho 914, 277 P.3d 361 (2012).

There is duty to speak in any of the following circumstances: (1) if the law imposes a duty upon a party to speak; (2) if a person has a relationship of trust and confidence with the other; or (3) if, in light of the surrounding facts and circumstances, disclosure is necessary in order to prevent a partial statement of the facts from being misleading. The law imposes a duty to speak: (a) if a person makes a statement which he or she believes is true but later discovers the statement was untrue or misleading when the statement was made; or (b) if a person fails to update a statement which became misleading when viewed in the context of subsequent events. *G & M Farms v. Funk Irr. Co.,* 119 Idaho 514, 521, 808 P.2d 851, 858 (1991); *St. Alphonsus Reg'l Med. Ctr. V Krueger,* 124 Idaho 501, 508, 861 P.2d 71, 78 (Ct. App. 1992); *Sowards v. Rathbun,* 134 Idaho 702, 707, 8 P.3d 1245, 1250 (2000).

Materiality can be either objective or subjective. A nondisclosed fact can be material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in a transaction." Alternatively, it can be subjectively material if "the maker of the representation [or omission] knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." *Watts v. Krebs,* 131 Idaho 616, 620, 962 P.2d 387, 398 (1998).

i. Hopkins and Murphy's Knowledge of Facts Investors Would Want to Know.

Investor presented the following evidence:

- Investors were sold debenture investments on the promise of a right to withdraw money with 120-days' notice. (Ex. 7, 9, 11, 13, 16, 18, 20, 22, 24, 26, 28, 20, 32, 34, 36, 38; testimony of Snyder, B. Pugh, L. Erickson, E. Erickson.)
- Under ordinary circumstances, the right to withdraw is absolute. However, management will have the option to suspend that right if there are a sufficient number of requests for withdrawal submitted to give management concern for liquidity of the fund or parity of treatment among the investors. (Ex. 4, sec. 16.4.B.)
- Starting in July 2007, the NW Fund received a significant increase in redemption requests. (Ex. 47, 48, 49, 50). These outstanding requests, which were given 121 days before the payments were due, were not disclosed to investors. (Testimony R. Hopkins Tr. p. 486 L. 22 – p. 487 L. 5; see Ex. 71.)
- These redemption requests triggered management's right to suspend withdrawals from the fund.
- The increase in redemptions corresponded with a default in the Hunter's Point loan held by the Fund, which caused a dramatic drop in yields. (Testimony of R. Hopkins Tr. p. 500 L. 18 – p. 501 L. 17, Ex. 40, Ex. 46.) Randy and Brian wanted to keep investors from withdrawing their investments in order to protect the fund. (Testimony of R. Hopkins, B. Murphy; B. Murphy prior testimony, Bankruptcy Tr. 8-20-2015 read into record, Tr. p. 553 L. 2 – p. 557 L. 10.)

They formed a plan to work with investors on a "case by case" basis in order to try to convince them to rescind or reduce their redemption request. The admission of the plan is an express admission of redemptions causing concern for the liquidity of the fund, as well as the fact that the redemptions were causing unequal treatment among investors (through the "case by case" efforts to convince them to rescind investments).

- One of the devices the NW Fund used to convince investors to keep their money in the fund was to have them "convert" debentures to a note. The rights were slightly different, but the funds stayed in the NW Fund. The first conversion was the one used on Carol Snyder in August of 2007. (Testimony B. Murphy Tr. P. 581 l. 8 – p. 583 L. 17.) In contrast, another investor, Normatt Properties, requested a $1 million withdrawal at the same time as Mr. Murphy's August meeting with Carol Snyder. (Ex. 47). Normatt Properties received that money in November 2007. (Ex. 85).

- Starting in August of 2007 and continuing through the Moratorium, the fund was borrowing money in excess of its borrowing limits against dilution in order to pay redemption requests. (Testimony of D. Reinstein Tr. p. 692 L. 22 – p. 710 L.11; Ex. 54). The dilution is, in and of itself, unequal treatment of investors. The violation of the PPM lending limits also demonstrates concern for liquidity.

- Multiple admissions by Hopkins and Murphy confirm they understood the significance of the pending redemption requests. Murphy wrote to Charley Wilson in February of '08 that he and Hopkins knew they had the right to suspend withdrawals. (Ex. 72.) Hopkins admitted to Larry Stevenson in April '08 he believed they were "still" very close to a moratorium as they "always" disclosed. Hopkins and Murphy both signed off on March meeting minutes

acknowledging their belief that disclosure of a potential moratorium to investors would cause "too much panic." (Ex. 73). Mr. Hopkins testified this nondisclosure, in violation of the NW Fund rules against non-disclosure, was a "business decision." (Testimony of. R. Hopkins Hopkins p 489 L. 21 – p. 493 L. 24.) Although the admissions of the knowledge of the right to suspend withdrawals occurred after the meetings with Snyder, Pugh, and Erickson, the jury can infer that the same knowledge existed starting in July 2007 when Hopkins and Murphy have acknowledged that "cash flow" concerns prompted them to convince investors not to withdraw their money.

ii. *Duty to Disclose and International Failure to Disclose*

Investor Recovery has presented the following evidence:

- The PPM says the fund will make "available to each investor . . . the opportunity . . . to obtain any additional information the officers can reasonably supply which may be necessary to verify the accuracy of the information contained in this Memorandum." (Ex. 4 p. 3)
- Randy Hopkins admits there is no circumstance under which anyone at the NW Fund can withhold critical information from investors. (Testimony R. Hopkins Hopkins p. 463 L. 3 – p. 464 L. 7.)
- The fund was sold with the express and emphasized promise of a withdrawal with 120 days advance notice. (Ex. 7, 9, 11, 13, 16, 18, 20, 22, 24, 26, 28, 20, 32, 34, 36, 38; testimony of Snyder, B. Pugh, L. Erickson, E. Erickson.)

- Withdrawing money is the only way for investors to take action to protect themselves, because the investment decisions in the NW Fund are controlled by Randy Hopkins and others in the fund. (PPM, sec. 4.3; testimony R. Hopkins, L. Erickson, Hopkins p. 481 L. 4 – p. 482 L. 16.)
- After receiving the PPM and the confirming letters assuring him of the "120 day" right to withdraw, Larry Erickson met with Brian Murphy to discuss the security of HNWF because he was intending to invest a million more dollars in addition to his current investment. The meeting was in October 2007. At the time of the meeting, Brian Murphy knew that pending redemption requests gave management the option to suspend withdrawals. Although the subject of the meeting was the security of HNWF investments, Murphy said nothing about the current option to suspend withdrawals. Mr. Murphy allowed Mr. Erickson (and by extension, his wife Elizabeth Erickson) to continue with the inaccurate understanding that he had an unqualified right to withdraw his money with 120-days' notice. (Testimony L. Erickson).
- After receiving the PPM and the confirming letters assuring him of the "120 day" right to withdraw, Bill Pugh met with Brian Murphy to specifically discuss the ability to withdraw his investments in the future. The meeting was in around December of 2007. At the time of the meeting, Brian Murphy knew that pending redemption requests gave management the option to suspend withdrawals. Although the subject of the meeting was Mr. Pugh's ability to withdraw investments in the future, Mr. Murphy allowed Mr. Pugh to continue with the inaccurate understanding that she had an unqualified right to withdraw his money with 120-days' notice. (Testimony B. Pugh).
- After receiving the PPM and the confirming letters assuring her of the "120 day" right to withdraw, and after Brian Murphy had expressly assured her that the money she deposited

would be available to pay her taxes, Carol Snyder met with Brian Murphy to request the withdrawal of her money because she was concerned it was not secure. The meeting was in early August 2007. At the time of the meeting, Brian Murphy knew that pending redemption requests gave management the option to suspend withdrawals. Although the subject of the meeting was the security of Ms. Snyder's investments, personally and in her fiduciary capacity, Murphy said nothing about the current option to suspend withdrawals. Mr. Murphy allowed Ms. Snyder to continue with the inaccurate understanding that she had an unqualified right to withdraw her money with 120-days' notice. (Testimony C. Snyder). The misunderstanding was perpetuated by correspondence following the meeting reassuring Ms. Snyder of the unqualified right to withdraw money with 120-days' notice. (Ex. 13)

- The failure to disclose was deliberate and intentional. Brian and Randy had the specific objective of getting investors to keep money in the fund, even though that would be detrimental to the investors. (Testimony of R. Hopkins, B. Murphy; B. Murphy prior testimony, Bankruptcy Tr. 8-20-2015 read into record, Tr. p. 553 L. 2 – p. 557 L. 10.)

- The evidence of financial motive also supports the intentionality. Randy Hopkins testified that they could place another $5 million to $20 million of loans with the Northwest Fund. Hopkins Financial Service was getting a placement fee of 3-4% with each. As he testified, that is $150,00 to $800,000 in placement fees. Randy Hopkins and Brian Murphy did not get paid for managing the fund, but out of the fees earned by Hopkins Financial Service (and the Hopkins Loan Service). Those fees ended up providing a significant salary and profit distribution. Hopkins and Murphy both had an interest in keeping the fund placing loans and

buying properties, regardless of whether the fund was financially successful. (Tr. p. 473 L. 22 – p. 481 L. 1.)

iii. Reliance on the Non-Disclosure and the Materiality to the Decision to Keep Money in the Northwest Fund

The Fund's right to suspend withdrawal requests, and the conditions allowing the fund that right were both subjectively and objectively material.

- Larry Erickson testified he went to Brian Murphy to specifically discuss the risks of the fund because he was contemplating a substantial investment. He was assured of the security of the investment by promises of a priority note. Brian did not mention the fact that Larry's only means of protection, a withdrawal, was at risk of being suspended. If Brian told Larry about that, he would have pulled out his investment. (Testimony of L. Erickson). Elizabeth, his wife, relied on this communication by extension, because Larry and Elizabeth consult on all investment decisions. (Testimony of E. Erickson.)

- Bill Pugh testified he went to Brian Murphy to specifically discuss the fact that Bill needed to be assured his ability to withdraw his money, because he was contemplating depositing loan proceeds in the Hopkins NW Fund until they became due. Instead of mentioning the fact that the Fund had the option to suspend withdrawals, Brian redirected Bill Pugh to the Western Fund – a fund that Bill previously didn't know existed. Brian did not mention the fact that Bill's only means of protection in the Northwest fund, a withdrawal, was at risk of being suspended. If Brian told Bill about that, he would have immediately withdrawn all his investment. (Testimony of L. Erickson).

- When Carol Snyder deposited a portion of her money in July of 2007, she told Brian Murphy she had capital gains taxes coming due and would need to have access to the money. Carol

Snyder later went to meet with Brian Murphy in August 2007 about taking her money out because she was worried about having "all of her eggs in one basket." Instead of mentioning the fact that the Fund had the option to suspend withdrawals, Brian convinced Ms. Snyder to do the first Northwest Fund "conversion" of a debenture to a note. Mr. Murphy made various assurances of how secure a note would be; but avoided any discussion about the current option that the fund management had to suspend withdrawals. If Brian told Ms. Snyder about the potential suspension, she would have immediately withdrawn all her investment. (Testimony of C. Snyder).

- In addition to the investors whose claims are at issue in this case, Larry Stevenson and Charley Williams also testified that the withdrawal feature of the fund was important. The significance was particularly well illustrated by Mr. Williams' statement that when Murphy actually admitted that he thought the fund was going to suspend withdrawals, "it scared the crap out of me." (Tr. p. 840 L. 8 – p. 841 L. 3.) Charley, of course, put in his redemption request right away.

iv. Reliance upon and Injury from the Nondisclosure

- Larry Stevenson got one of the last two full redemptions to be paid. (Ex. 85). He had to request his redemption by February 29, 2008, in order to get that redemption. (Testimony of L. Stevenson; Ex. 82). Ericksons put in their redemption request on April 8, 2008, and were told in June of 2008 they would get almost nothing. (Ex. 93, Testimony of L. Erickson Tr. P. 349 L 25 – p. 354 L. 21; Ex. 94.) The moratorium was declared in September 2008. The fund then filed bankruptcy. For anyone who had not put in a redemption request by the end of February of 2008, it was too late.

- Larry Erickson's meeting with Brian Murphy was in October of 2007. (Testimony of L. Erickson.) Following that meeting, both Larry and Elizabeth Erickson were allowed to continue believing that they had the security of the right to withdraw their money if they felt the fund was not performing. Had they known the truth, they would have withdrawn their money immediately.

- A redemption requested by October of 2007 that time would have been due in February 2008. From March through the moratorium, HNWF paid $2,305,425.00 in redemptions. That money would have been available and sufficient to pay the Erickson's investments which total $233,820. (Ex. 49.2.)

- Bill Pugh's meeting with Brian Murphy was in late December of 2007 or Early January 2008. (Testimony of B. Pugh.) Following that meeting, both Bill and Kellie Pugh were allowed to continue believing that they had the security of the right to withdraw their money if they felt the fund was not performing. Had they known the truth, they would have withdrawn their money immediately.

- A redemption requested in December of 2007 would have been due in May 2008. From June through the moratorium, HNWF paid $1,006,887.00 in redemptions. (Ex. 49.2.) That money would have been available and sufficient to pay the Erickson's investments which totaled $413,015.00 at that time (Ex. 459).

- Carol Snyder's meeting with Brian Murphy was at the start of August of 2007. (Testimony of C. Snyder.) Following that meeting, she was allowed to continue believing she had the security of the right to withdraw her money if she felt the fund was not performing. Had she known the truth, she would have withdrawn her money and her family trust money, immediately.

- A redemption requested by August 2007 would have been due the first of December 2008. From December through the moratorium, HNWF paid $5,002,854.00 in redemptions. (Ex. 49.2) That money would have been available and sufficient to pay the Ms. Snyder's investments. She claims her debenture which was $561,823.00 in December 2007, less $150,000 she received in April 2008, for a remaining balance of $411,823. (Ex. 436). $218,522.00 for the value of the Van Hees family trust as of that date. Of the $400,000.00 note, she is owed $110,238 after applying all prior payments to principal. (Ex. 135; testimony of C. Snyder).

v. *Conspiracy to Commit Fraud by Nondisclosure.*

Conspiracy exists when there is an agreement or understanding between Hopkins and Murphy to commit fraud by omitting material facts. *McPheters v. Maile*, 138 Idaho 391, 64 P.3d 317 (2003); Barlow v. International Harvester, 95 Idaho 881, 889, 522 P.2d 1102, 1110 (1974). Conspiracy only requires proof by a preponderance of the evidence.

There is substantially more than a preponderance of evidence of a conspiracy between Murphy and Hopkins to commit fraud.

- Randy Hopkins' deposition testimony read into record on impeachment acknowledges the plan from mid-2007 to the moratorium in August of 2008. (Tr. p. 489 L 21 – p. 491 L. 24.)

- Brian Murphy's bankruptcy testimony read into the record explained the details of the plan. (Tr. P. 554 L. 8 – p. 557 L. 10.)

- Brian Murphy's deposition testimony read into the record on impeachment confirmed he and Randy specifically planned to use the conversions of debentures to notes to keep investors in the fund. (Tr. P. 554 L. 8 – p. 557 L. 10; Tr. p. 584 L. 19 – p. 586 L. 4.)

- All important decisions were made through consultation between Randy and Brian and Aaron Van Der Aa. (Tr. p. 570 L. 21 – p. 572 L. 21.) (Tr. p. 570 L. 21 – p. 572 L. 21.)

- Randy's own correspondence with Larry Stevenson demonstrated that he was withholding information from Mr. Stevenson as part of his efforts to convince Mr. Stevenson to rescind his withdrawal request. He trying to avoid responding to direct questions by promising to pay Mr. Stevenson instead. (Ex. 83) Randy's own actions indicate that he understood withholding information was part of the plan to convince investors to stay in the Fund.

- The March meeting minutes (Ex. 73) in which they acknowledge the intent to keep pending moratorium news from investors, and Hopkins testimony it was a "business decision" indicates that through the meetings and planning with Mr. Murphy, he understood that withholding critical information was, in fact, a part of the plan.

b. <u>The Evidence Shows that the Subsequent Statements Did Not Reveal the Fraud</u>

Judge Greenwood's dismissal relied upon his conclusion that information revealed at a February 29, 2008 meeting would reveal the material omissions to Snyder, Pughs and Ericksons that occurred at earlier dates. However, the evidence presented at trial showed that the February statements were nothing more than further fraudulent statements which did not reveal the fraud.

In order for subsequent statements or information to break the causal link from an initial fraudulent statement, such information must actually reveal the falsity. *Mannos v. Moss,* 143 Idaho

927, 932, 155 P.3d 166, 1171 (2007) (an inspection of a company's books and records does not prevent a claim for fraud where the records would not reveal the fraud). Moreover, this defense is limited to information that would be revealed by records a victim actually inspected. It is no defense that a victim could have conducted a more thorough inspection. *Watson v. Weick*, 141 Idaho 500, 507, 112 P.3d 788, 795 (2005). Therefore, unless subsequent statements actually reveal the fraud, there is no break in the chain of causation.

c. <u>There is Evidence the Subsequent Statements Occurred After the Injury from the Fraud</u>

Second, even if a subsequent disclosure would reveal the fraud, it must occur before the injury has occurred. The proximate cause element for fraud is the same test as cause for other torts. *See Edmark Motors v. Twin Cities Toyota*, 111 Idaho 846, 849, 727 P.2d 1274, 1277 (Ct. App. 1986) (applying the "substantial factor" causation test to fraud claims).

In this case, the evidence in record presented, and Judge Greenwood likewise concluded, that there were fraudulent omissions to the various investors as various times between August of 2007 and January of 2008. Judge Greenwood then concluded that information provided at a <u>later</u> time revealed the fraud. He did NOT conclude that the investors had the information revealing the fraud at the time of the omissions. Rather, his conclusion was that the revelation of the information cut off the various investors damages. (Tr. p. 1441, Ll. 14-21.) What Judge Greenwood based his decision on was a conclusion that there was a superseding cause. "A superseding cause refers to an independent act or force that breaks the causal chain between a defendant's culpable act and the claimed injury." *Printcraft Press, Inc. v. Sunnyside Park Utils., Inc.*, 153 Idaho 440, 460, 283 P.3d 757, 777 (2012).

Critically, the evidence presented at trial, construed in a light most favorable to Investor recovery, demonstrates that the last date upon which any disclosure would have allowed the investors to potentially avoid their losses was February 29, 2008. Larry Stevenson got one of the last two full redemptions to be paid. (Ex. 85). He had to request his redemption by February 29, 2008, in order to get that redemption. (Testimony of L. Stevenson; Ex. 82). Ericksons put in their redemption request on April 8, 2008, and were told in June of 2008 they would get almost nothing. (Testimony of L. Erickson; Ex. 93.) The moratorium was declared in September 2008. The fund then filed bankruptcy. For anyone who had not put in a redemption request by the end of February of 2008, it was too late.

In order for any disclosure to breach the chain of causation, it needed to be made before the end of February 2008. There was a meeting on February 28, 2008. However the only disclosures at that time were likewise incomplete and misleading and insufficient to break the chain of causation. At that time, the Hopkins Associates knew that their rights to declare a moratorium had been triggered, and they fully intended to declare a moratorium. Brian specifically stated in an email to an individual investor (who was not affiliated with the Investor Recovery investors) "I believe that all redemptions will be suspended in Hopkins Northwest Fund on 2-28-08. The size of the redemption is not the issue, it is the cumulative amount of redemptions and the cash availability." (Ex. 72). The reason is apparent from Exhibit 50.4 which shows the acceleration in redemption requests from the fund starting in July of 2007. Because these requests were made 120 days in advance, they were all essentially unfunded, undisclosed liabilities for 4 months. The result was a compounding amount of pending, but unfunded redemption requests.

Despite the fact of the redemption crisis, two days after Brians admission to Charley Williams, the only statements by the Hopkins Associates pertaining to the potential for a moratorium were as follows:

> "If investors desire redemptions, Issuer (HNWF) will continue to honor those requests in accordance with the memorandum.
>
> However, should desired investor redemption requests exceed Issuer's available cash flow to pay those requests, this may cause the issuer to declare a moratorium." (Ex. 43 p. INV REC 002705).

Construed most favorably to Investor Recovery, the February 2008 disclosures: (1) falsely imply that there is no present risk of moratorium because of the express promise to continue paying redemptions; (2) falsely imply that any moratoriums triggers (redemption requests exceeding cash flow) that the triggers for management's right to declare a moratorium had not occurred. The Hopkins Associates did nothing but make a further misleading statement regarding the condition of the fund which obscured the undisclosed risk to the investors that they would not be able to withdraw their funds. The falsity of the statement is starkly apparent when compared to Brian's statement two days before "all redemptions will be suspended in [HNWF] . . .[because of] the cumulative amount of redemptions and the cash availability." A jury could find from the evidence that the statements to the Investor Recovery investors in February of 2008 did not reveal the omitted facts and did not breach the chain of causation.

Judge Greenwood impermissibly weighed the evidence and came to the conclusion that the later disclosures were a supervening cause. However, the evidence in record construed in a light most favorable to Investor Recovery establishes that the February statements did not break the causal chain between the fraudulent omissions and the resulting injuries.

d. Judge Greenwood Erred in Determining the Standard Regarding, and Excluding Evidence of the Scope of the Hopkins Associates' Duty to Disclose

This is a case of fraud based on failures to disclose adverse material facts. "Omission of information may constitute fraud when a duty to disclose exists." *Humphries v. Becker*, 159 Idaho 728, 736, 366 P.3d 1088, 1096 (2016). "A party may be under a duty to disclose: (1) if there is a fiduciary or other similar relation of trust and confidence between the two parties; (2) in order to prevent a partial statement of the facts from being misleading; or (3) if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other does not know it." *Sowards v. Rathbun,* 134 Idaho 702, 707, 8 P.3d 1245, 1250 (2000). In ruling on the motion to dismiss, Judge Greenwood ruled, as a matter of law, that there was no duty arising under the first element, i.e. the "fiduciary or other similar relation of trust and confidence between the two parties." Specifically, he said "[t]he defendants are not investment advisers; they were the managers of a company speaking to lenders to the company." (Tr. p. 1433 L. 18 – p. 1434 L. 2.) Judge Greenwood erred in his legal conclusion on this issue.

The trial court construed the test for a duty to disclose too narrowly. Specifically, one of the first alternatives under the statement articulate by the Court in *Sowards v. Rathbun* is the existence of a "fiduciary <u>or other similar relation of trust and confidence</u> between the two parties . . ." 134 Idaho at 707, 8 P.3d at 1250. The securities laws give rise to an "other similar relation of trust and confidence."

Nowhere in the law of fraud by omission is there a requirement that a victim bring a successful independent claim for breach of fiduciary duty in order to bring a claim for fraud. Thus,

a claim could proceed where a victim is unable to proceed on the basis of breach of fiduciary duty for a reason such as the expiration of the statute of limitations, but where the discovery rule has extended the cause of action for fraud. Likewise, it is unnecessary for Investor Recovery to proceed with claims for remedies arising under the securities laws in order to proceed with a claim for nondisclosure arising from Randy and Brian's breaches of their disclosure duties arising under the securities laws.[3] This is consistent with the analysis of *Printcraft Press, Inc. v. Sunnyside Park Utils., Inc.,* in which this court rejected an argument that that no duty to disclose could arise in favor of a third party beneficiary to a contract. 153 Idaho at 454, 283 P. 3d at 771. In that case the Court states "we can discern no public policy that would be advanced by permitting parties to consciously misrepresent a contract that will benefit them to the detriment of a third party, simply because that person or entity is not a party to the contract." *Id.* What the Court acknowledges is that the existence of a duty to disclose is a separate question from whether a disclosure is otherwise actionable by the recipient.

The "other similar relation of trust and confidence" in this case arises from legal duties to disclose in this case arise under the state and federal securities laws. *See* I.C. 30-14-501(2); 15 USC 78j(b), SEC Rule 10b-5. The fact of the existence of these other statutory duties should be considered in the analysis of whether there is a duty to disclose. By failing to allow consideration of these duties, the trial court erred. The trial court should allow full consideration of both the common law bases for the duty to disclose, and the duties arising under the securities laws.

[3] In this case, the statutes of limitations for causes of action arising under the securities laws expired before the suit was filed. It is not a case where there was no violation of the securities laws, just that Investor Recovery was prohibited from pursuing those claims.

2. The Trial Court Abused its Discretion in Refusing to Admit the Testimony of Wayne Klein.

On June 1, 2018 the trial court ruled, in limine, that testimony by R. Wayne Klein. (6/1/2018 Order on Defendants' Motions In Limine.) The trial court's reasoning was that: (1) this case was not plead as a securities law case and Investor Recovery was not claiming relief under the securities laws; and (2) the duty to disclose is based on the general common law duty to disclose and the court did not think Mr. Klein's testimony would be relevant to that decision. (Tr. p. 121 L. 2 – p. 125 L. 10.) At trial, Investor Recovery submitted Exhibit 143, Mr. Klein's report, as an offer of proof, which court accepted, Exhibit 143. (Tr. P. 949 L. 23 – p. 950 L. 4). In other words, the court excluded Mr. Klein's testimony only because the trial court did not consider compliance with securities laws to be relevant to the inquiry.

The trial court's analysis misconstrued the purpose of Mr. Klein's testimony. The issue that Mr. Klein's testimony is relevant to is the question of the materiality of the omitted facts. Materiality is determined, in part, by the context of the omission. Materiality has both objective and subjective components. Objectively, a nondisclosed fact can be material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in a transaction." However, there is also the subjective analysis that examines whether "the maker of the representation [or omission] knows or **has reason to know** that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." *Watts v. Krebs,* 131 Idaho 616, 620, 962 P.2d 387, 398 (1998).

Mr. Klien's analysis establishes that one of the reasons Randy, Brian and Hopkins Financial Services, Inc. had reason to know the omitted information was important was because they were participants in the highly regulated securities industry. Mr. Klein's report certainly

outlines as his foundation the federal and state securities laws that obligate individuals in the positions held by Randy and Brian to make certain disclosures with respect to securities investments such as the debentures at issue in this case. However, that portion of his analysis is merely his foundation. The essential relevant points can be found at pages 37-40 of his report (Ex. 143) where Mr. Klein distills down his opinions. He opines that, based on the expectations in the securities industry (which are, of course, largely guided by the securities laws), for individuals in the roles of Randy, Brian and the entity Hopkins Financial Services, they had reason to know they needed to disclose facts including: (1) an escalation in redemption requests on the fund; and (2) the occurrence of the preconditions that triggered HNWF's right to stop redemptions (a "moratorium). This is evidence, the omitted information was material.

Whether to admit expert testimony is within the discretion of the trial court. *See e.g. State v. Pearce*, 146 Idaho 241, 245, 192 P.3d 1065, 1069 (2008). The abuse of discretion standard looks at "whether the trial court: 1) correctly perceived that the issue is one of discretion; 2) acted within the outer boundaries of its discretion and consistent with the legal standards applicable to the specific choices available to it; and 3) reached its decision by an exercise of reason." *Bailey v. Sanford*, 139 Idaho 744, 748, 86 P.3d 458, 462 (2004)(citations omitted.) "In the case of an incorrect evidentiary ruling, a new trial should be granted only if the error affects a substantial right of one of the parties."

In this case, the trial court exceeded the outer boundaries of its discretion because it deemed the information inadmissible because Investor Recovery was not pursuing claims under the securities law. However, the fact this case does not involve securities law claims does not make the information irrelevant. It is relevant question of materiality. The trial court's analysis was not

consistent with the legal standards applicable to the specific choice because it was based upon the erroneous conclusion that Mr. Klein's opinion would only be material to a securities law violation.

The refusal to admit Mr. Klein's testimony also impacted a substantial right of Investor Recovery. Without his testimony, there is no evidence of the impact of the security industries standards to give context to the omissions by Randy, Brian and Hopkins Financial Services, Inc. This removes one of the facts that a jury should be able to consider in determining the materiality of the omissions.

Upon remand, this Court should vacate the trial court's order preventing Wayne Klein from testifying and direct the trial court to reconsider the admissibility of Wayne Klein's testimony in light of its relevance to the question of materiality.

3. **The Court Erred Dismissing the Claims Against Hopkins Financial Services, Inc.**

On November 17, 2017 the trial court entered summary judgment dismissing the claims against defendant Hopkins Financial Services, Inc. with prejudice. That dismissal is in error because there was a genuine issue of material fact regarding whether Randy Hopkins and Brian Murphy were acting in their individual capacities or on behalf of Hopkins Financial Services Inc. when they made the fraudulent omissions at issue in this case.

The trial court mistakenly concluded "It also does not appear to be disputed that all the written disclosures and communications to the debenture holders were signed by Hopkins and Murphy on behalf of [the Hopkins Northwest Fund LLC]." (Mem. Decision and Order RE: Defendants' Mot. Summ. J. entered 11/17/2017 p. 6.) The trial court concluded that the evidence only showed that Hopkins and Murhpy were officers in both Hopkins Financial Services, Inc. and the Hopkins

Northwest Fund LLC, and there was nothing in record to show any of the misconduct was done on behalf of Hopkins Financial Services, Inc. (Mem. Decision and Order RE: Defendants' Mot. Summ. J. entered 11/17/2017 p. 7.) The court's conclusion was a product of the courts' weighing of the evidence and drawing conclusions against the non-moving party. The court did not apply the correct standard on summary judgment, and this Court should reverse the summary judgment dismissing Hopkins Financial Services, Inc.

The standard of review for an order granting summary judgment is the same standard used by the trial court in ruling on the motion. Summary judgment is only allowed "if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *See e.g. Dickinson Frozen Foods v. J.R. Simplot Co.*, No. 45580, 2019 Ida. LEXIS 81, at *9 (May 3, 2019) (citations omitted).

The facts demonstrate that the misconduct in this case could have been either by Randy Hopkins and Brian Murphy as individuals, or in their representative capacity on behalf of Hopkins Financial Services, Inc., depending upon the interpretation of the evidence.

Randy and Brian's involvement with the matters pertaining to HNWF inextricably involves the entity, Hopkins Financial Services, Inc. HNWF was under the total control of Hopkins Financial Services, Inc. HNWF technically acted through a board made up of five members. The Board operated by majority rule. *Aff. Richardson Filed 3/31/2017, Ex. A (Hopkins Depo., p. 28 Ll. 11-25.)* Three of the board members were controlled by Hopkins Financial Services Inc. Two

members were the owners of Hopkins Financial Services, Inc, Randy Hopkins, Brian Murphy.[4] The third was Hopkins Financial Services Employee, Aaron Van Der Aa. Randy, Brian and Aaron personally selected the other two Board members. *Aff. Johnson filed 5/24/2017*, Ex. 4 (BK Transcript 8-19-2015 p. 112 L. 25 – p. 113 L. 5).

Defendants Randy Hopkins and Brian Murphy were both managers of the HNWF. *Aff. Richardson Filed 3/31/2017, Ex. A (Hopkins depo p. 27 L. 20-23); Aff. Richardson Filed 3/31/2017, Ex. B (Murphy Depo. p. 8 Ll. 2-18.)* Matters of policy, as well as the agenda for the HNWF Board were crafted by the HNWF "management" (i.e. Randy, Brian, and Aaron), as opposed to the Board, itself. *Aff. Johnson filed 9/22/2017, Ex. 4 (Dept. Fin. Murphy Depo 1/27/2017, p. 178-180.)* In practice, Randy, Brian and Aaron collaborated and made all the daily decisions for the HNWF. *Aff. Richardson Filed 3/31/2017, Ex. A (Hopkins Depo., p. 28 L. 11 – p. 34 L. 11.)* As a result of the management structure, there was no decision in the operation of HNWF that was not under the control of Hopkins Financial Services, Inc.

Critically, despite their apparently extensive work on matters involving the HNWF, the fund did not provide any direct compensation to Randy, Brian or Aaron. In fact, HNWF has no employees. *Aff. Richardson Filed 3/31/2017, Ex. A (Depo Ex. 5, p. 2718, para. 6.3.)* Rather, Randy, Brian and Aaron were compensated through salaries and shareholder distributions exclusively by Hopkins Financial Services, Inc. *Aff. Richardson Filed 3/31/2017, Ex. B (Murphy Depo p 116 Ll. 6-17.)* The HNWF Private Placement Memorandum states that the fund has delegated day to day

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[4] Randy Hopkins owned 92% of Hopkins Financial Service Inc. (*Aff. Richardson Filed 3/31/2017*, Ex. A (Depo. R. Hopkins p. 17).) Brian Murphy owned 8%. (*Aff. Richardson Filed 3/31/2017,* Ex. B Depo B. Murphy p. 3).)

management to the entities Hopkins Financial Services, Inc. and Hopkins Loan Services. *Aff. Richardson Filed 3/31/2017, Ex. A (Hopkins Depo p. 48 L. 21 – 24.)*

The only apparent reason for Hopkins Financial Services, Inc. to pay for the operation of HNWF is that Hopkins Financial Services, (and an affiliated entity, Hopkins Loan Services,) received fees from HNWF incident to the operation of the fund. *Aff. Richardson Filed 3/31/2017, Ex. B (Murphy Depo p. 113 L 22 – p. 114 L. 15); Ex A (Depo Ex. 5, p. 2732, para. 13.1.)* There is no contract between Hopkins Financial Services, Inc. and HNWF actually defining the respective responsibilities of the entities or the terms pertaining to payment of fees between the entities. *Aff. Richardson Filed 3/31/2017, Ex. A (Hopkins Depo p. 46-47.)*

Randy, Brian and Aaron observed no formalities to clarify when they were acting on behalf of one entity as opposed to another. Randy was the President with hands on control of Hopkins Financial Services, Inc, HNWF and Hopkins Loan Services. *Aff. Richardson Filed 3/31/2017, Ex. A (Hopkins Depo p. 48 L. 17 – p. 49 L. 19.)* Randy, Brian and Aaron collectively made all critical decisions pertaining to the entities, without any involvement of any other board members. *See Aff. Richardson Filed 3/31/2017, Ex. A (Hopkins Depo p. 50 L. 21 – p. 56 L. 14.)* When asked how they made any delineation between their functions on behalf of one entity as opposed to the other, Mr. Hopkins response was "Well, surely there was a distinction, . . . [HNWF] made the decisions based upon the funds investment criteria and the board of mangers' feedback . . . [a]nd Hopkins Financial and Loan Services provided the administrative and the contractual functions in the PPM." *Aff. Richardson Filed 3/31/2017, Ex. A (Hopkins Depo p. 56 L. 25 – p. 58 L. 7.)* Mr. Hopkins was then asked to confirm that Hopkins Financial Services Inc. was not making any decisions for the HNWF. He the gave a "qualified" response that they did "'Decision-making' in

the sense that we were the contract placement manager as contemplated in the PPM . . . Just as any company, Northwest Fund contracted with us to provide the services we provided." *Aff. Richardson Filed 3/31/2017, Ex. A (Hopkins Depo p. 58 Ll. 11 – 22).* Of course, by referring to the "contract" to identify the division of labor between the entities, Randy Hopkins essentially says there was no fonnal division of labor because there was no contract.

The merger of activity between HNWF and the Hopkins Financial Services, Inc. is material because, in light of the amorphous capacity of the individuals involved, a jury could find the representations and omissions pertaining to HNWF were not only a product of the actions of the individuals, but also of Hopkins Financial Services, Inc. Randy, Brian and Aaron worked together to determine the "salient" information for the monthly information letter to investors. *Aff. Richardson filed 3/31/2017, Ex. A (Hopkins Depo p. 131 L. 6 – P. 133 L. 8.)* Randy, Brian and Aaron were all informed about pending investor redemption request and the decisions whether to pay the redemption request. *Aff. Richardson Filed 3/31/2017, Ex. B (Murphy Depo p. 11, Ll. 5-13; p. 38 Ll. 16-24.)* Notwithstanding their knowledge of pending investor request, they elected to omit any information about pending redemption requests from the monthly investor letters. *Aff. Richardson Filed 3/31/2017, Ex. B (Murphy Depo p. 62 Ll. 7-13; depo Ex. 10.)* Finally, throughout the entire records in this case, correspondence to investors pertaining to HNWF business typically sent on Hopkins Financial Services Inc. letterhead. (See Ex. 7, 9, 13, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 378, 380, 382, 385, 388, 389.)

Generally speaking an employer is responsible for the torts of its employee done within the scope of authority delegated by the principal. This extends to authority extended by apparent authority. *Jones v. Healthsouth Treasure Valley Hosp.* 147 Idaho 109, 112, 203 P.3d 473, 476

(2009). Apparent authority is "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has the authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Id.* at 113-114, 203 P.3d at 477-78.

In this case Randy Hopkins and Brian Murphy were agents with apparent authority to bind Hopkins Financial services. This arises from the fact that they were the owners and controlling employees of Hopkins Financial. Their decisions and actions with respect to the company were the decisions of the company.

The evidence in this case, construed in a light most favorable to Investor Recovery, demonstrates that the entity, Hopkins Financial Services, Inc. is equally responsible for the fraud perpetrated by Randy and Brian. Because there was a genuine dispute of material fact exists as to whether Hopkins Financial Services Inc. is also liable for fraud, the trial court erred dismissing the claims against the entity.

4. **<u>The Court Should Reverse the Award of Attorney fees</u>**

On September 19, 2018, the trial court entered its Memorandum Decision and Order RE: Defendants' Motion for Attorney Fees and Costs ("9/18/2018 Order RE: Attorney Fees"). Preliminarily, Investor Recovery asserts that the judgment of the court dismissing the claims should be reversed. Such reversal would obviously require that the judgment awarding attorney fees be vacated.

If the judgment of dismissal is not reversed, Investor Recovery contends that the trial court incorrectly ruled that this case involved a "commercial transaction," and, therefore, erroneously

awarded attorney fees pursuant to Idaho Code 12-120(3). "Whether a district court has correctly determined that a case is based on a commercial transaction for the purpose of I.C. § 12-120(3) is a question of law over which this Court exercises free review." *Garner v. Povey*, 151 Idaho 462, 469, 259 P.3d 608, 615 (2011).

For an award of attorney fees on the basis of a "commercial transaction," three circumstances must be present: 1) the commercial transaction took place between the litigants (*Great Plains Equip. v. Nw. Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001)); 2) the transaction can be characterized as a "commercial purpose" (*Carrillo v. Boise Tire Co.*, 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012)); and 3) the commercial transaction is the "gravamen" of a suit (*See, e.g, Clayson v. Zebe*, 153 Idaho 228, 236, 280 P.3d 731, 739 (2012).

In this case, there is no transaction between the parties. "There must be a commercial transaction ***between the parties*** for attorney fees to be awarded." *Great Plains Equip. v. Nw. Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001) (emphasis added). The Supreme Court has also held that transactions between privies or third parties do not qualify as commercial transactions which would open the door to a fee award under 12-120(3) "We have previously held that a transaction cannot exist under the statute unless the parties dealt with each other ***directly***." *Miller v. St. Alphonsus Reg'l Med. Ctr., Inc.*, 139 Idaho 825, 839, 87 P.3d 934, 948 (2004) (emphasis added). In a case such as this, where fraudulent nondisclosures induced victims to enter transactions with third parties, there is no transaction between the parties. *See Brower v. E.I. DuPont de Nemours & Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990); *Printcraft Press, Inc., v. Sunnyside Park Utils., Inc.*, 153 Idaho 440, 461, 283 P.3d. 757, 778 (2012)(In the absence of a

contract between the parties to the lawsuit, there is no "commercial transaction" sufficient to support a claim for attorney fees in a fraud case).

In this suit, Investor Recovery sued intermediary meddlers, Hopkins and Murphy, alleging their fraud prevented its members them from engaging in a transaction with Hopkins Northwest Fund. As discussed, Hopkins Northwest was one of many funds managed by Hopkins Financial Services. Hopkins Financial Services was owned by Hopkins and Murphy. All transactions took place between the members of Investor Recovery personally, and the Northwest Fund. The only evidence of transactions in this suit were the purchase and sale of debentures between the members of Investor Recovery and the Hopkins Northwest Fund. (Exs. 8. 10, 12, 14, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39).[5] The transaction thus cannot be defined as between the litigants.

The trial court concluded that this case is governed by *Bryan Trucking, Inc. v. Gier,* 160 Idaho 422, 427, P. 3d 585 (2016). That case also involved fraudulent statements by a litigant that induced a transaction by the victim with a third party. However, that case does not overrule this court's precedent that there must be a transaction between the litigants. Rather, despite the fact there was no transaction, this Court in *Bryan Trucking* upheld the award of fees on the basis that the non-prevailing party had alleged the existence of a "commercial transaction" and that fees are awarded when the existence of a "commercial transaction" is disproven. 160 Idaho at 427, 792 P. 3d at 590. In contrast, the allegations of this case allege fraud on the basis of the independent

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[5] Recognizably, the enclosure letters were all on Hopkins Financial Services, Inc. letterhead. However, the letters all state the investments are with Hopkins Northwest Fund, LLC. An agent is not a party to a transaction for a disclosed principal. "A person making a contract with another as an agent for a disclosed principal does not become a party to the contract. A principal is "disclosed" if, at the time of making the contract in question, the other party to it has notice that the agent is acting for a principal and of the principal's identity." *Gen. Motors Acceptance Corp. v. Turner Ins. Agency*, 96 Idaho 691, 696-97, 535 P.2d 664, 669-70 (1975).

actions of the defendants. Unlike *Bryan Trucking* which alleged that the defendant in that case was an agent of the entity which had the transaction, and was therefore a party to the transaction, the only allegation of agency in this case is that Randy and Brian were agents of Hopkins Financial Services, Inc., which also had no transaction with the individual investors. Further, the complaint makes a general allegation claiming fees, but does not state the allegation that this is a "commercial transaction." (Am. Compl. Filed 10/13/2017, p. 32). The result in *Bryan Trucking* was specific to the facts arising from the allegations in that complaint and does not apply to this case.

Secondly, the evidence did not support a finding that these investments were for "commercial purposes." "[I]n order for a transaction to be commercial, each party to the transaction must enter the transaction for a commercial purpose." *Carrillo v. Boise Tire Co.*, 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012). In other words, in order to find a commercial transaction in this case, there would need to be evidence that the investors objectives in placing their investments in HNWF was motivated by a commercial objective. There is no such evidence.

With respect to the Ericksons, the court concluded "to the extent the money was being held in the debentures as part of the assets of the Erickson's construction business, the purchase was a commercial transaction." (9/18/2018 Order RE: Attorney Fees, p. 8). This is in error for the simple reason that there is no testimony anywhere in the record that states that the Ericksons have a construction business. They are both retired. There is no evidence that they had any business ventures at the time they placed their investments.

Bill Pugh has a construction business, Bill Pugh Construction, Inc., which was incorporated in 2000. (Tr. p. 855, Ll. 11-24.) However, none of the investments at issue in this case are held in the name of Bill Pugh Construction, Inc. (Ex. 19, 21, 23, 25, 27, 29, 31.) Mr. Pugh used his HNWF investment money at various times for personal purposes, such as the construction of his house.

(Tr. pp. 863-4). Some money invested in a *different fund*, the Western Fund, came from a loan which Mr. Pugh took out with a person he did some subdivision business with in Caldwell. However, Mr. Pugh had no objective but to hold the money for a year and repay it. He had no "business" purpose for that money. (Tr. p. 883 L. 10 – p. 886 L. 13.) To the extent the trial court had that money in mind, it was in error to conclude that lead to a "commercial transaction" because the money was not used or intended for any business purpose and was not invested in any of the investments with HNWF that are at issue in this case.

The trial court found that Carol Snyder invested money in part, to hold for taxes, and, in part, as proceeds from the sale of business property. (9/18/2018 Order RE: Attorney Fees p. 7.) While it is true that Ms. Snyder had made her money in a small development project, development was finished. The money she invested with HNWF was her distribution from that project, and she had no further business purpose for the money. It was simply her money. (Tr. p. 975 L. 4 – p. 979 L. 5.) She did not say that she was doing another business venture or project. She was done. There is nothing more than the fact that she made her money in business. On this record, without evidence that the investments with HNWF had a commercial purpose, the trial court should not be able to conclude this case involved any "commercial transactions."

If the judgment of dismissal is not otherwise vacated, the Court should, nonetheless, revers the judgment for attorney fees because there was no legal basis for the award of fees in this case.

V. **ATTORNEY FEES ON APPEAL**

Obviously, Investor Recovery does not content it is entitled to attorney fees on appeal because it contends there is no legal basis in this case. However, if this Court determines that attorney fees are, in fact, awardable in this case, and if Investor Recovery otherwise prevails on this appeal, it seeks an award of the fees incurred in this appeal.

VI. CONCLUSION

For the reasons state above, Investor Recovery requests that the Court:

a. Reverse the directed verdict dismissing the claims against Randy and Brian;

b. Reverse the summary judgment dismissing the claims against Hopkins Financial;

c. Vacate the judgments entered in this matter (including the judgments for attorney fees) and remand the matter for new trial against Randy, Brian and Hopkins Financial;

d. Instruct the court, on remand, to instruct the jury on the securities laws creating a duty of disclosure, in addition to the common law duties to disclose; and

e. Overrule the trial court's order in limine preventing presentation of testimony by R. Wayne Klein and instruct the trial court on remand to consider the admission of Mr. Klein's testimony in light of its probative weight toward the issue of the materiality of the omissions at issue in this case; or

f. Alternatively, in the absence of other relief, overrule the trial court's award of attorney fees and vacate the Amended Judgment awarding attorney fees to Randy and Brian entered September 27, 2018.

DATED this 8 day of May, 2019.

WYATT JOHNSON
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy eat served on each party at the following email address(es):

Robert Faucher
Sara M. Berry
HOLLAND & HART, PLLC
800 W. Main Street, Suite 1750
Post Office Box 2527
Boise, Idaho 83701-2527
Fax: (208) 343-8869
Email: RFaucher@hollandandhart.com
SMBerry@hollandandhart.com

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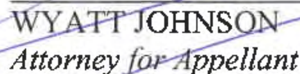
Attorneys for Respondents

DATED this 8 day of May, 2019.



WYATT JOHNSON
Attorney for Appellant