STATEMENT OF THE CASE

Plaintiff/appellant Thomas & Wong General Contractor ("Thomas & Wong") filed its complaint in this cause on July 12, 2005 against defendant/appellee Jan Wallace ("Wallace"), and against Gary Blume and the Blume Law Firm, P.C. ("the Blume defendants"). C.I. 1.[1] Plaintiff's First Amended Complaint was filed on October 27, 2005. C.I. 7. The gravamen of the complaint as to Wallace was that she had breached fiduciary and contractual duties to represent the interests of Thomas & Wong in a loan for $1.5 million that Thomas & Wong made in March of 2003 to third party BDV Investments, Inc. C.I. 7 at 24-25. Thomas & Wong further alleged that the Blume defendants fell below the standard of care and breached fiduciary duties in their representation of Thomas & Wong in the BDV Investments loan. C.I. at 20-24.

The Blume defendants filed their motion to dismiss on November 30, 2005, alleging that Thomas & Wong lacked standing to sue since it was not authorized to transact business in this state pursuant to A.R.S. § 10-1502. C.I. 14. Wallace filed her answer denying liability on December 9, 2005 (C.I. 16), and also filed her joinder in the Blume defendants' motion to dismiss on that date. C.I. 17. Thomas & Wong filed its response to the motion to dismiss on December 23, 3005 (C.I. 18), and the Blume defendants filed their reply on January 9, 2006. C.I. 19. The motion to dismiss was denied by the trial court's minute entry filed February 24, 2006. C.I. 23.

[1] References to the Index of proceedings before the trial court submitted by the Clerk of the Maricopa County Superior Court shall be denominated "C.I.", followed by the number assigned to the referenced pleading in the Clerk's Index.

The Blume defendants filed their answer denying liability and their counterclaim and third-party complaint against Edward Tarapaski ("Tarapaski") seeking unpaid attorneys' fees on March 28, 2005. C.I. 28. Thomas & Wong filed its reply to this counterclaim and Tarapaski filed his separate answer May 5, 2006. C.I. 33, 34. The Blume defendants filed their notice identifying third parties BDV Investments, Inc., and related parties including John Beardmore, William Cortegiano, Donald Nooe, Lee Wark and the Lake Bank as non-parties at fault in accordance with Rule 26(b)(5), Ariz. R. Civ. P., on August 24, 2006. C.I. 40. Wallace filed her notice joining the Blume defendants' non-party at fault notice on March 16, 2007. C.I. 53.

Following mediation in June of 2007 Thomas & Wong reached terms of compromise with the Blume defendants, and a stipulation to dismiss all claims and counterclaims between these parties with prejudice was submitted on August 3, 2007. C.I. 55. The court's order dismissing these claims and counterclaims was filed on August 10, 2007. C.I. 56. By minute entry filed on September 11, 2007, the court set the claims against defendant Wallace for jury trial commencing February 4, 4008. C.I. 57.

On January 25, 2008, Wallace filed her motion to dismiss, again alleging that Thomas & Wong lacked standing to prosecute claims as an unauthorized foreign corporation pursuant to A.R.S. § 10-1502. C.I. 71. Thomas & Wong responded to this motion on January 30, 2008 (C.I. 71), and Wallace replied on January 31, 2008. C.I. 78. This motion was denied by the court's minute entry filed February 7, 2008.

C.I. 79.

On January 28, 2008, Thomas & Wong filed its trial memorandum urging that Wallace was not entitled to an instruction that the jury could allocate fault to non-parties since her joinder in the non-party at fault designation filed by the Blume defendants was untimely under Rule 26(b)(5). C.I. 72. Wallace filed her opposition to this memorandum on January 31, 2008. C.I. 76. The trial court sustained Thomas & Wong's position, and the final jury instructions read to the jury on February 7, 2008, did not include non-party at fault instructions. Tr. IV, 153-161.[2] No objection to the instructions read to the jury was made by Wallace at trial. Tr. IV, 6.

Trial to a jury commenced as scheduled on February 4, 2008. C.I. 79. Thomas & Wong rested its case on February 6, 2008. C.I. 90 at 2. Wallace then moved for judgment as a matter of law under Rule 50, Ariz. R. Civ. P., on the following grounds: (1) Thomas & Wong lacked standing to prosecute claims as an unauthorized foreign corporation pursuant to A.R.S. § 10-1502; (2) the evidence that Jan Wallace owed fiduciary duties to Thomas & Wong was inadequate as a matter of law. Tr. III, 69-71. The trial court ruled on February 6, 2008, that the evidence Wallace undertook an agency relationship with Thomas & Wong was sufficient to submit the case to the jury. Tr. III, 79-80; C.I. 90 at 3. The trial court denied Wallace's motion for judgment as a matter of law concerning A.R.S. § 10-1502 on February 7, 2008. Tr. IV, 4; C. I. 112 at 1.

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[2] Reference to the transcript of the trial proceedings in this cause shall be abbreviated as follows: references to the transcript of proceedings on February 4, 2008, shall be denominated "Tr. I"; references to the transcript of proceedings on February 5, 2008, shall be denominated "Tr. II"; references to the transcript of proceedings on February 6, 2008, shall be denominated "Tr. III"; and references to the transcript of proceedings on February 7, 2008, shall be denominated "Tr. IV".

The jury returned its verdict in favor of Thomas & Wong on February 7, 2008, finding Thomas & Wong's total damages to be $1,554,934 and allocating 16% of the fault to Thomas & Wong and 84% of the fault to Wallace. C.I. 112 at 4-5. Written judgment consistent with the jury's verdict was signed and filed on April 11, 2008. C.I. 126.

On April 28, 2008, Wallace filed her motion for new trial under Rule 59, Ariz. R. Civ. P. (C.I. 129), and her separate motion for judgment as a matter of law under Rule 50, Ariz. R. Civ. P. C.I. 130. Thomas & Wong responded to both motions on May 27, 2008. C.I. 133; C.I. 134. Wallace filed replies in support of both motions on June 2, 2008. C.I. 138; C.I. 139. Oral argument proceeded on June 5, 2008. C.I. 145. By minute entry dated June 20, 2008, the trial court denied Wallace's motion for judgment as a matter of law, but granted her motion for new trial. C.I. 149. The trial court filed its signed order granting Wallace's motion for new trial on July 11, 2008. C.I. 153.

Thomas & Wong filed its notice of appeal of the trial court's order granting Wallace's motion for new trial on July 31, 2008. C.I. 156. Wallace filed her notice of cross-appeal on August 8, 2008. C.I. 159. This court has jurisdiction pursuant to A.R.S. § 12-2101(F)(1).

STATEMENT OF FACTS

A. **The Parties.** Ed Tarapaski ("Tarapaski") was born and raised in Canada and lived there until 1997. Tr. I, 48-49. He is a high school graduate who has worked primarily as a crane operator. Tr. I, 49. Tarapaski started his own company

renting and trading cranes, but surrendered that to his wife in conjunction with their divorce. Tr. I, 49.

In the late 1990s Tarapaski went to work for plaintiff/appellant Thomas & Wong General Contractor ("Thomas & Wong") in Brunei, which is on the island of Borneo. Tr. I, 50. The company is owned by Thomas Wong and Charlene Wong, who are husband and wife. Tr. I, 51. Thomas & Wong is a construction company that does contracting work at oil refineries and trades heavy equipment. Tr. I, 51. Tarapaski's job is to buy and sell cranes and heavy equipment around the world. Tr. I, 51-52.

Jan Wallace ("Wallace") describes herself as a venture capitalist who assists in funding and management of start-up companies seeking to take these companies to their initial public offering. Tr. II, 130-131. Wallace, who is college-educated, was the first female executive at Pitney Bowes at age 28. Tr. III, 129. She thereafter founded her own business, which she sold for $3 million at age 31. Tr. III, 129-130.

Wallace began her career as a venture capitalist in 1992 and has done seventeen deals since then. Tr. III, 128-130. Twelve of those companies went public, and she has been CEO of six publically-traded companies. Tr. II, 131; Tr. III, 133. Wallace specializes in SEC compliance issues – she drafts documents, assembles paperwork and works with counsel to comply with SEC regulations, and joins corporate boards to oversee investor money. Tr. III, 129.

B. <u>BDV Investments</u>. BDV Investments, Inc. ("BDV Investments"), is a Minnesota corporation. "BDV" is an acronym for Beardmore Dulce Vida. Tr. III, 136. Donald Nooe and Lee Wark controlled a company called Dulce Vida de Vallarta, SA, which owned gold dore (partially refined precious metals including

gold). Tr. III, 136. They incorporated BDV Investments in collaboration with John Beardmore, a Minnesota resident who owned a business called Beardmore Investments. Tr. III, 136; Beardmore Depo. at 7.[3] Title to the gold dore, which was represented to have a value exceeding $50 million, was then conveyed to BDV Investments. Ex. 6; Ex. 7 at COT034.[4] The plan was for BVD Investments to use this gold dore as collateral to secure loans that would finance other business operations. Beardmore Depo. at 11; Tr. III, 136.

John Beardmore and Lee Wark were Directors of BDV Investments. The third Director was William Cortegiano, a Phoenix resident who has been involved in check cashing businesses here for twenty years. Tr. II, 100. Cortegiano met John Beardmore in June of 1999 and later became a Director of BDV Investments. Tr. II, 101. Cortegiano put together a business plan to operate mobile check cashing operations using armored vans, and BDV Investments sought financing to fund this operation. Tr. II, 102. BDV Investments applied to Dumaine Consulting for $20 to $30 million in financing for this purpose. Tr. II, 102. BDV Investments sought a bridge loan of $1.5 million while the application to Dumaine was pending. Tr. II, 103. One purpose of the bridge loan was to fund the check cashing operation. Beardmore Depo. at 32. Another purpose of the bridge loan was to retire debts of $570,000 which John Beardmore owed to Lake Bank in order to avoid regulatory problems. Beardmore Depo. at 8-9; Beardmore Depo. at 31; Ex. 5. Beardmore also

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[3] References to excerpts from the deposition of John Beardmore taken in this cause on October 26, 2007, which were read into evidence at trial will be denominated "Beardmore Depo."

[4] Reference to exhibits admitted into evidence at trial shall be denominated "Ex."

owed some $1.9 million under a judgment which had been taken against him in August of 2002 in the U.S. District Court in Minnesota which remained unpaid. Beardmore Depo. at 15; Ex. 41. Wallace's handwritten notes reflect that she was aware of John Beardmore's indebtedness to Lake Bank and to the judgment creditor. Ex. 8.

C. **M W Asia and Wallace Black LLC Contracts.** Wallace secured five publically-traded shell corporations through a bankruptcy proceeding including a company called M W Asia. Tr. II, 132-133. These shell corporations had value since they can be used to take a privately-held company public through a reverse merger. Tr. II, 133. Beardmore Investments entered into an agreement with Wallace dated December 6, 2002, under which Beardmore Investments would pay $250,000 for M W Asia. Tr. II, 138-139; Beardmore Depo. at 20-21; Ex. 3. This contract called for a reverse merger with Wallace's shell corporation. Tr. III, 127-128; Tr. II, 138-139. If BDV Investments had gone public, Wallace would have been paid $250,000 and would have held valuable stock in a publically-traded company. Tr. II, 138-139; Tr. II, 143. This type of transaction is what Wallace has done for a living since 1992. Tr. III, 128. Wallace testified that BDV Investments was her client as a result of the M W Asia contract. Tr. III, 133; Tr. IV, 32.

A deposit of $50,000 was due to Wallace under the M W Asia agreement by January 31, 2003, but this was not paid when due. Tr. II, 139-140; Ex. 3 at 2. Wallace solicited the opportunity to raise funds for BDV Investments because she would benefit from this by the sale of her shell corporation. Beardmore Depo. at 26-27. Wallace owned a company with Kelly Black called Wallace Black LLC which was involved in fund raising. Tr. II, 140-142; Tr. III, 134. Wallace reached an

agreement under which Wallace Black LLC would be paid one percent of the funds raised for BDV Investments. Tr. IV, 31-32. Wallace admitted that as a result of these agreements she had a profit motive in securing financing for BDV Investments. Tr. II, 142-143.

D. The Introduction. Tarapaski has been coming to Arizona to vacation since the 1970s. Tr. I, 52. He had cosmetic surgery on his eyelids in Scottsdale in 2002. Tr. I, 52. The surgeon made a mistake and Tarapaski returned for reconstructive surgery in February of 2003. Tr. I, 53. Tarapaski arrived on February 17, 2003, and his surgery was scheduled for February 25, 2003. Tr. I, 53.

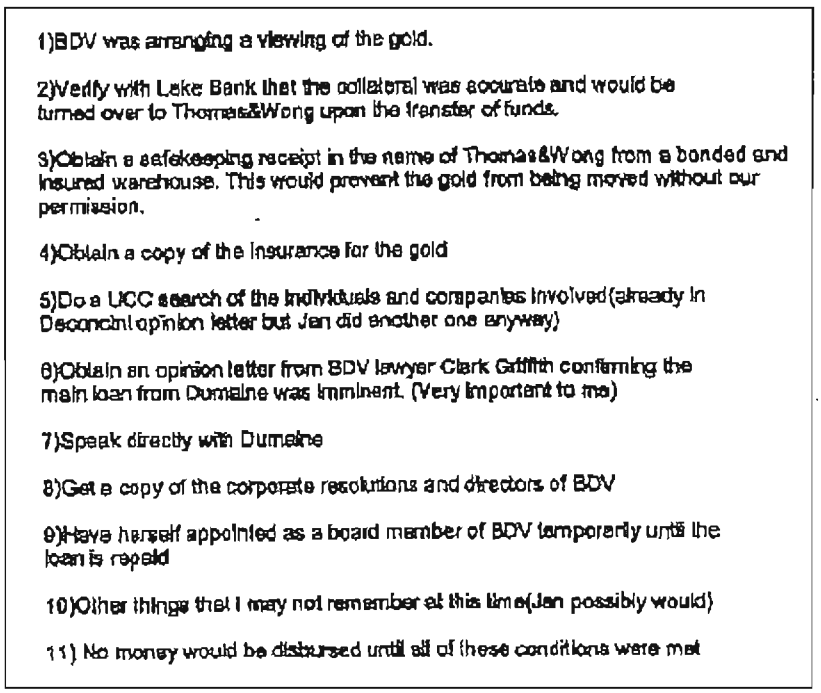
Before his surgery, Tarapaski met Wallace at a hair removal salon that she owned in Scottsdale known as Le Vanishe. Tr. I, 53-54. Tarapaski's hotel reservations were botched and Wallace invited Ed to stay in her guest house. Tr. I, 54. While he was in her house Tarapaski overheard Wallace participating in a telephone conversation with John Beardmore that left her upset and in distress. Tr. I, 55; Tr. II, 24-25. When Tarapaski asked her what was wrong, she said that she was trying to arrange financing for John Beardmore to pay off debts he owed to Lake Bank which needed to be retired since he was a shareholder in the bank. Tr. I, 55. Wallace made no mention that Beardmore owed money to her, and Tarapaski discovered that only after this litigation was filed. Tr. I, 55.

Wallace arranged a meeting with John Beardmore within a few days of Tarapaski's taking up residence in her guest house. Tr. I, 55-56. This meeting, which was attended by John Beardmore, Lee Wark, Jan Wallace, a German investment banker named Oudo Shieken, and Ed Tarapaski, occurred at the Mountain Shadows Resort on Lincoln Drive. Tr. I, 56. Beardmore said he wanted a 60-day bridge loan

of $1.5 million pending funding of a much larger loan from Dumaine Consulting and offered to collateralize the bridge loan with bars of gold dore. Tr. I, 56-57. Beardmore explained that the primary purpose of the loan was to retire debts he owed to Lake Bank, which needed to be repaid since he was an owner of the bank. Tr. II, 26. The funds were also going to be used to purchase some ATM machines BDV Investments would operate and an office condominium in Minneapolis. Tr. II, 29. Tarapaski stated that he would need to take possession of the gold collateral, and when Beardmore and Wark refused Tarapaski declined to participate. Tr. I, 57.

A few days later Tarapaski had another meeting with John Beardmore at Houston's Restaurant, which was also attended by William Cortegiano. Tr. I, 58. This was perhaps two days after Tarapaski's eye surgery, and his eyes were partially sewn shut and bandaged. Tr. I, 58-59. During this meeting Beardmore offered additional collateral for the bridge loan including a second mortgage on his Paradise Valley residence, stock in the Founder's Mezzanine Stock Fund and in Superior Financial Holding Co. (the holding company for Lake Bank), and a car and boat. Tr. I, 59; Tr. II, 28. Tarapaski was more comfortable with this collateral, but explained that he could only fund $800,000 at that time. Tr. I, 59-60.

E. The Checklist. Tarapaski then returned to Wallace's house and discussed the BDV Investments proposal with her. Tr. I, 60. Wallace and Tarapaski collaborated in drawing up a due diligence checklist of conditions to funding of the loan (Tr. I, 60-61), which Tarapaski later summarized in his statement to the Office of Homeland Security:



1)BDV was arranging a viewing of the gold.

2)Verify with Lake Bank that the collateral was accurate and would be turned over to Thomas&Wong upon the transfer of funds.

3)Obtain a safekeeping receipt in the name of Thomas&Wong from a bonded and insured warehouse. This would prevent the gold from being moved without our permission.

4)Obtain a copy of the insurance for the gold

5)Do a UCC search of the individuals and companies involved(already in Deconcini opinion letter but Jan did another one anyway)

6)Obtain an opinion letter from BDV lawyer Clark Griffith confirming the main loan from Dumaine was imminent. (Very important to me)

7)Speak directly with Dumaine

8)Get a copy of the corporate resolutions and directors of BDV

9)Have herself appointed as a board member of BDV temporarily until the loan is repaid

10)Other things that I may not remember at this time(Jan possibly would)

11) No money would be disbursed until all of these conditions were met

Ex. 69 at 3.

Tarapaski proposed three of these items (Nos. 1, 6, and 7) while Wallace identified the rest. Tr. I, 61. Tarapaski was impressed because he wouldn't have considered the additional items that Wallace recommended. Tr. I, 61. Exhibit 10 is the second page of a handwritten list of these due diligence items – the first page has been lost. Tr. I, 62; Tr. II, 147. This checklist was written by Wallace in her house as she and Tarapaski met that evening in late February of 2003. Tr. I, 62-63.

During this conversation, Tarapaski told Wallace that he was worried about the stock as collateral because he didn't deal in stocks. Tr. I, 63. Wallace told him, "I live in a paper world, that's what I do for a living." Tr. I, 63. Wallace said that she was experienced with stock transactions and that she would do the paperwork while he looked after lending the money. Tr. I, 63; Tr. II, 60. She made similar statements

to Tarapaski at least three times. Tr. I, 64. Tarapaski hence relied on her expertise in tending to the details of the transaction and considered that she was representing Thomas & Wong's interests. Tr. I, 63-64. Wallace proposed that she would join the Board of Directors of BVD Investments so that she could monitor developments, ensure that the transaction stayed on track, and let Tarapaski know if something wasn't going right. Tr. I, 64; Tr. II, 50. Tarapaski considered this an excellent idea. Tr. I, 64.

F. **Gary Blume.** Wallace suggested that Tarapaski retain counsel to document the deal and recommended Gary Blume, who had been her lawyer since 1995. Tr. I, 65; Tr. II, 33-34; Tr. II, 133-134. Wallace arranged a meeting, and Tarapaski and Wallace met with Gary Blume on March 1, 2003, at his office in Scottsdale. Tr. I, 65. At the meeting Wallace reviewed their checklist of conditions to funding and showed Blume an opinion letter that DeConcini McDonald Yetwin & Lacey had written regarding the gold dore. Tr. I, 66; Ex. 7. Tarapaski could not read very well due to his eye problems and never read this lengthy opinion letter. Tr. I, 66. Wallace explained that the opinion letter confirmed that the gold dore had been conveyed from Lee Wark to BDV Investments. Tr. II, 39. Wallace and Gary Blume discussed the checklist, which was the focus of the meeting, and how those items could be satisfied. Tr. I, 67; Tr. II, 41.

Within a few days there was another meeting at Blume's office which was attended by Jan Wallace, Ed Tarapaski, Gary Blume and John Beardmore. Tr. I, 67-68. Tarapaski believes this meeting occurred on Thursday, March 6, 2003. Tr. II, 59. Wallace was the spokesperson and took the lead in clarifying the transaction. Tr. II, 60. Tarapaski explained that prompt repayment to Thomas & Wong was essential

since the company needed the funds to open an office in Korea. Tr. I, 71; Tr. II, 82-83. The parties discussed preparation of a promissory note to Thomas & Wong for $1.5 million with terms including that the interest rate would be 25%, that payment was due by May 6, 2003, that there would be a substantial penalty if payment was late, and that the debt would be secured by the gold dore, by a Minneapolis condominium, and by collateral which currently secured Beardmore's debt to Lake Bank. Tr. I, 69-70. The condominium was located at 660 North Second Street in Minneapolis and was described both as an office condominium (Tr. I, 70; Tr. II, 84) and as a residential condominium. Beardmore Depo. At 41-42. Beardmore said it was urgent that this be acquired quickly because there was a competing buyer. Tr. I, 70. The parties discussed that Wallace would join the Board of Directors of BDV Investments and Beardmore approved her appointment. Tr. I, 70-71.

G. **BDV Board Meeting.** On March 6, 2003, a meeting of the BDV Investments Board of Directors convened at the Villages Restaurant in Scottsdale. Tr. II, 112-113. John Beardmore, Lee Wark, William Cortegiano, and Jan Wallace were present for this meeting. Tr. II, 113. At that time Wallace was elected to the BDV Investments Board and minutes reflecting her election were signed by the Directors that day. Tr. II, 110; Tr. II, 153; Beardmore Depo. at 35-38; Ex. 15. Wallace acknowledges that she joined the Board of BDV Investments because Tarapaski asked her to oversee Thomas & Wong's funds. Tr. II, 157; Tr. III, 127. The Directors including Wallace then voted to approve the Thomas & Wong loan transaction, and written minutes reflecting this approval were signed by all Directors including Wallace on that date. Tr. II, 113; Tr. II, 156; Beardmore Depo. at 35-38; Ex. 17. Wallace took handwritten notes of the proceedings at the March 6, 2003

Board meeting. Tr. II, 161; Ex. 16. Her notes and the typewritten minutes of the meeting demonstrate that Wallace was aware that two promissory notes payable to Thomas & Wong were then approved by the BDV Investments Board, one for $1.5 million and the other for $275,000. Ex. 16; Ex. 17.

H. Cane O'Neill. Wallace has used the Las Vegas law firm of Cane O'Neill & Taylor, LLC ("Cane O'Neill") for SEC compliance issues since 1998. Tr. II, 134. Wallace opened a trust account with Cane O'Neill and recommended that Thomas & Wong escrow its funds there. Tr. II, 42-44. Wallace also recommended that the funds be brought into the U.S. to show good faith and to ensure their availability. Tr. I, 72. On March 5, 2003, Thomas & Wong wire-transferred $550,000 into the Cane O'Neill trust account. Tr. I, 71; Tr. II, 45; Ex. 14. On March 7, 20003, Thomas & Wong wire-transferred another $250,000 into the Cane O'Neill trust account. Tr. I, 73; Tr. II, 47-48; Ex. 22. These funds were to remain in escrow with Cane O'Neill until the conditions on the due diligence checklist had been satisfied. Tr. I, 71-72. It was ultimately Tarapaski's responsibility to decide whether those funds could be released from escrow. Tr. I, 73.

I. The Promissory Note. Although the parties had agreed in principle to terms at the meeting in Gary Blume's office on March 6, 2003, there was no deal between Thomas & Wong and BDV Investments until the promissory note was signed. Tr. II, 97. The $1.5 million promissory note from BDV Investments to Thomas & Wong was completed by Gary Blume on Saturday, March 8, 2003. Tr. I, 74-75; Tr. III, 6-7. Tarapaski was present that day in Gary Blume's office with Jan Wallace, John Beardmore and Gary Blume. Tr. I, 74. They arrived at Blume's office around 10:30 a.m., but the note was not ready until shortly before noon. Tr. I, 75.

After the note was drafted, the parties reviewed it and discussed the terms. Tr. II, 65. The note was in the principal amount of $1.5 million and called for repayment in one installment by May 6, 2003, with interest at 25%. Tr. II, 62-63; Tr. II, 65-66; Ex. 21. The note included provisions which had been recommended by Wallace that Thomas & Wong could immediately have gold melted to repay its debt if BDV Investments could not provide satisfactory evidence by April 20, 2003, that it would be able to fully repay the note by the due date. Tr. II, 9; Ex. 21. The note recited that a late fee of $1 million would be assessed if payment was not made by the due date. Tr. II, 66; Ex. 21.

Although the note bears the date March 6, 2003, it was signed by John Beardmore and William Cortegiano and notarized on Saturday, March 8, 2003. Tr. II, 114-115; Ex. 21. Gary Blume confirmed that he finished drafting the $1.5 million promissory note on Saturday, March 8, 2003. The parties originally went to a bank location to find a notary, but the bank was closed. Tr. II, 146-147. The note was later signed at a bank branch in a Home Depot location. Tr. I, 76; Tr. II, 114-115. Tarapaski was present that day as the note was signed; Wallace went to the first bank, but then left. Tr. I, 75; Tr. II, 146-147.

J. **The Minneapolis Condominium.** At Gary Blume's office on Saturday, March 8, as they were waiting for the promissory note to be finished, John Beardmore asked Wallace if the funds to purchase the Minneapolis condominium could then be released. Tr. I, 76. Wallace turned to Gary Blume, who said he didn't see why not once the promissory note was signed. Tr. I, 77. Tarapaski, however, did not authorize the release of funds to purchase the condominium. Tr. II, 70-71.

As this discussion proceeded in Wallace's presence, Wallace did not tell Tarapaski that the funds to purchase the Minneapolis condominium had already been transferred to Minnesota. Tr. I, 77; Tr. I, 81. A few days prior, representatives of BDV Investments had told Wallace that there was an immediate need for $275,000 to purchase the Minneapolis condominium. Tr. II, 151. On March 6, 2003, Wallace had sent written authorization to Cane O'Neill to wire-transfer $275,000 of Thomas & Wong's escrowed funds to U.S. Bank in Minneapolis to purchase this condominium. Tr. I, 77; Tr. II, 172; Ex. 19. The $275,000 that Wallace released was in fact wire-transferred to U.S. Bank in Minneapolis on March 7, 2003. Ex. 24; Ex. 25. Wallace expressed her displeasure to the Cane O'Neill staff that the funds had not been transferred on March 6, 2003, as she had instructed. Ex. 20. Tarapaski testified that Wallace was not authorized to release those funds on March 6, 2003. Tr. I, 78. Thomas & Wong had not even committed to the loan transaction on that date since the promissory note in favor of Thomas & Wong was not signed until March 8, 2003. Tr. I, 78. If Tarapaski had known that Wallace had released $275,000 of Thomas & Wong's funds to the Minnesota bank without his authorization he would have cancelled the entire transaction. Tr. I, 80.

Wallace testified that on Thursday, March 6, 2003, Gary Blume had advised her that the $275,000 could be transferred from the Cane O'Neill trust account to purchase the Minneapolis condominium. Tr. II, 165-167. Gary Blume, who was co-counsel of record for Wallace in the trial proceedings, denied that he told Wallace or Tarapaski that Wallace could release $275,000 from the Cane O'Neill trust account on March 6, 2003, and testified that he did not even know that account existed. Tr. III, 17-18; Tr. III, 33-34; Tr. III, 46. Gary Blume further denied that he ever gave

legal advice to Wallace or Tarapaski that funds could be released from a trust account. Tr. III, 46.

K. The Mystery Promissory Note. A promissory note to Thomas & Wong for $275,000 dated March 6, 2003 was signed by John Beardmore and Sokim Lach for L Trust, which evidently was to buy the condominium. Ex. 18. A telefax header on the document shows that it was transmitted on March 7, 2003, from The Literacy Company, which is an entity owned by William Cortegiano. Tr. I, 80. Wallace had direct knowledge of this note's existence, since the minutes of the March 6, 2003 meeting of the BDV Investments Board and her handwritten notes of that meeting both made specific reference to it. Ex. 16; Ex. 17.

Gary Blume denied having drafted the $275,000 note and testified that he first saw it after he commenced litigation on behalf of Thomas & Wong to collect the BDV Investments indebtedness later in 2003. Tr. III, 9-11. No witness at trial could identify who drafted this document. Tarapaski first saw the $275,000 note in the fall of 2003 when Gary Blume showed it to him in Blume's office. Tr. I, 79. Tarapaski did not know it existed before then and never authorized its execution. Tr. I, 79.

L. Further Investigation. On the evening of March 8, 2003, the day the $1.5 million promissory note was signed, Tarapaski and Wallace had a conversation at her house about whether to release the loan funds. Tr. I, 81-82. They decided that they needed to contact Lake Bank in Minnesota to secure the Lake Bank collateral before anything further was done. Tr. I, 82.

Tarapaski met on Sunday, March 9, 2003, at the Villages Restaurant in Scottsdale with parties including John Beardmore and Clark Griffith, BDV Investments' lawyer. Tr. I, 82-83. Griffith said that he was arranging the permanent

financing from Dumaine Consulting for BDV Investments and was in direct communication with Dumaine on a daily basis. Tr. I, 83. During that conversation John Beardmore said that he had leased a plane to fly the group to view the gold dore at the warehouse where it was stored in Lordsburg, New Mexico. Tr. I, 84. Tarapaski, Beardmore, Wallace, Lee Wark, and John O'Neill of Dumaine were supposed to attend that viewing. Tr. I, 84. This trip was cancelled, allegedly because the warehouse insisted that security clearance be arranged for each attendee. Tr. I, 84-85. The gold viewing was postponed to a date after March 17, 2003, when Tarapaski was scheduled to leave the country to return to work. Tr. I, 84. Before Tarapaski left, Wallace agreed that she would take responsibility on behalf of Thomas & Wong to confirm the existence of the gold collateral. Tr. I, 85. Wallace provided William Cortegiano a copy of her passport so that she could gain admittance to the warehouse where the gold dore was stored. Tr. II, 108-109; Ex. 40.

M. **Lake Bank Collateral.** As of Wednesday, March 12, 2003, Tarapaski had not agreed to the release of any of Thomas & Wong's funds from the Cane O'Neill trust account. Tr. I, 85. That day, Tarapaski and Wallace participated in a telephone conference with Tom Kell of Lake Bank. Tr. I, 85. Kell explained that the bank needed to get Beardmore's loans off the books because a regulatory audit was imminent. Tr. I, 87. On March 12, 2003, Tom Kell telefaxed Wallace a memo confirming that upon payment to the bank of the debt owed by John Beardmore, Lake Bank would assign to Thomas & Wong collateral which had secured the bank loan including a second mortgage on John Beardmore's Arizona residence, a 1999 Mercedes, an 18-foot boat, stock in Superior Financial Holdings, Inc., and a 22% interest in the Founders Mezzanine Stock Fund. Tr. I, 86; Ex.27. Tarapaski then

went back to Wallace's house because his eyes hurt. Tr. I, 87-88. Wallace said that she was taking Kell's memo to Gary Blume's office to get Blume's approval. Tr. I, 88.

N. Pressure to Close. During the evening of March 12, 2003, Tarapaski and Wallace had a discussion at her house about whether funds could now be released from the Cane O'Neill trust account. Tr. I, 88. Tarapaski said he still had reservations about funding the loan because they could move the gold dore. Tr. I, 88. The checklist that Tarapaski had drawn up with Wallace's assistance included requirements that BDV Investments provide a safekeeping receipt that prohibited the gold dore from being moved from the warehouse without Thomas & Wong's consent, and a certificate of insurance confirming that Thomas & Wong was insured against its theft. Tr. I, 89. Tarapaski understood that those conditions had been met because he was shown a certificate of insurance and a safekeeping receipt at his second meeting with John Beardmore, and Wallace told him that those documents, which were supposedly being kept in Gary Blume's office, had been assigned to Thomas & Wong. Tr. I, 90.

As they conversed, Wallace became impatient with Tarapaski's reluctance and said that the safekeeping receipt prevented the gold from being moved, and that if something did happen Thomas & Wong would have an insurance claim and a claim against DeConcini McDonald. Tr. I, 89. Wallace stated that she lived in a man's world and that she had beat them at their own game. Tr. II, 10. Wallace claimed that she had protected Tarapaski well to that point and urged him to allow the release of the funds. Tr. II, 10.

O. Authorization to Release Funds. Tarapaski relented, and on the evening of March 12, 2003, he signed a letter in Wallace's home authorizing Wallace to release funds from the Cane O'Neill trust account on behalf of Thomas & Wong. Tr. I, 90-91; Ex. 28. This is the first point that Wallace had any authority to transfer funds on behalf of Thomas & Wong. Tr. II, 85. Tarapaski signed this document because he believed that all of the items on the due diligence checklist had been completed except for viewing of the gold. Tr. I, 91; Tr. III, 103-104. Tarapaski understood that Wallace would act as Thomas & Wong's agent with regard to release of the trust funds. Tr. I, 92.

On March 12, 2003, Wallace signed a letter instructing Cane O'Neill to transfer $500,000 from its trust account to Lake Bank. Tr. I, 92; Ex. 29. Tarapaski authorized Wallace to transmit those funds without any knowledge that she had already transferred $275,000 of Thomas & Wong's funds from the Cane O'Neill trust account, which she was not authorized to so. Tr. I, 92-93.

P. Agency Relationship. Tarapaski testified that Wallace was Thomas & Wong's agent in the loan to BDV Investments. Her duties were to ensure that necessary paperwork was completed and that funds were released from escrow only when the items on the due diligence checklist had been completed. Tr. II, 51; Tr. II, 60-61. Wallace was also responsible to provide truthful information about the financial status of BDV Investments to protect Thomas & Wong's right to melt down gold to secure repayment in accordance with the terms of the promissory note. Tr. II, 94-96. Tarapaski agreed to give Wallace these responsibilities at her own request, as Wallace repeatedly asked Tarapaski to repose trust in her with regard to the BDV Investments loan. Tr. II, 8. Tarapaski identified four specific circumstances in which

Wallace had asked him to trust her, including after the meeting in early March 2003 with John Beardmore and William Cortegiano at Houston's Restaurant (Tr. II, 8); the occasion when Wallace said that she wanted to be appointed to the BDV Board of Directors (Tr. II, 9); during the conversation on the evening of March 12, 2003, when Tarapaski vacillated on proceeding with the deal (Tr. II, 9-10); and when Tarapaski prepared to leave Phoenix in mid-March of 2003. Tr. II, 10.

Others involved in the BDV Investments loan shared Tarapaski's perspective that Wallace was acting as Thomas & Wong's representative. William Cortegiano understood that Wallace was joining the Board of BDV Investments as the representative of Thomas & Wong, and that she would act on Tarapaski's behalf since he would be out of the country. Tr. II, 105-106. Wallace herself told William Cortegiano that she was a representative of Thomas & Wong. Tr. II, 126. Cortegiano also understood that Wallace was supposed to approve the release of the funds from the Cane O'Neill trust account and to ensure that certain conditions were satisfied before Thomas & Wong's funds were released to BDV. Tr. II, 107-108; Tr. II, 116. Among those conditions was that Wallace would join BDV's Board of Directors and would participate in a viewing of the gold as Thomas & Wong's representative. Tr. II, 108-109.

Consistent testimony was given by John Beardmore. Beardmore understood that Wallace came on the BVD Investments Board as a representative of Tarapaski and Thomas & Wong. Beardmore Depo. at 55. Wallace told John Beardmore that Tarapaski wanted her to be on the Board to know what was going on with the company and to participate in controlling his investment. Beardmore Depo. at 37. Beardmore understood that she was representing Tarapaski to protect the investment

made by Thomas & Wong. Beardmore Depo. at 37, at 55.

Q. L Trust. Tarapaski left the United States for business in Korea on March 17, 2003. Tr. I, 93. Wallace told Tarapaski to relax and that if anything went wrong she would be in touch with him. Tr. II, 11. After Tarapaski went to Korea, Wallace telefaxed him to reassure him that the Dumaine loan was on track and that everything was fine. Tr. II, 11; Ex. 38. Wallace provided Tarapaski with a copy of the proposed loan agreement between BDV Investments and Dumainc consulting. Tr. II, 11; Ex. 38. This reassured Tarapaski that Wallace protecting Thomas & Wong's interests as she had promised to do. Tr. II, 12.

On March 21, 2003, Wallace authorized the release of $20,000 of Thomas & Wong's money from the Cane O'Neill trust account to an entity known as L Trust LLC and also sent an e-mail to Susan Johnson of Cane O'Neill requesting the transfer. Tr. I, 93; Tr. II, 180-181; Ex. 33; Ex. 34. L Trust LLC was owned by Sokim Lach, who was John Beardmore's girlfriend. Tr. I, 79-80; Tr. I, 94; Beardmore Depo. at 60, at 95. Wallace testified at deposition that she had no idea why she approved the release of these funds. Tr. II, 181-182. Tarapaski was unaware that this fund transfer had occurred until after this suit was filed and never approved it. Tr. I, 93-94.

R. Completion of Loan Funding. The remaining $700,000 to be loaned by Thomas & Wong was wired directly by Thomas & Wong to Lake Bank in two wire transfers. Tr. I, 94; Tr. III, 94; Tr. III, 96. This was done directly because Wallace said that the conditions in their checklist had been satisfied and there was no further reason to use the Cane O'Neill trust account. Tr. I, 94. Wallace had told Tarapaski on several occasions that she had completed all of the due diligence except for viewing the gold. Tr. III, 103-104. In a telephone conversation in March of 2003

Wallace told Tarapaski that all of the items on the checklist had been satisfied. Tr. I, 95. When Tarapaski asked Wallace if there had been a viewing of the gold, she said that "the gold had been viewed." Tr. I, 95. Tarapaski understood from this that Wallace had been at the viewing. Tr. I, 95. This "viewing," which involved only a display of some sealed barrels that were never opened, took place at a storage warehouse in Chandler, Arizona, and Wallace was not in attendance. Tr. II, 109-110; Beardmore Depo. at 57-58.

Wallace was personally involved in ensuring that Thomas & Wong sent the remainder of the loaned funds to Lake Bank. Tr. I, 96. In March of 2003, Wallace spoke with Tarapaski and with Charlene Wong about funding the remaining balance of the loan. Tr. I, 96. Wallace telefaxed a handwritten note to Charlene Wong telling her that it was imperative that $300,000 be wired to Lake Bank by March 31, 2003. Tr. I, 97; Ex. 39. The remainder of the funds comprising the $1.5 million that was loaned by Thomas & Wong were wire-transferred in April of 2003. Tr. I, 97.

S. Payment to Wallace. It was understood between Wallace and John Beardmore that if the Thomas & Wong loan closed, Wallace would be paid the $50,000 that was due to her under the M W Asia contract, since there was no other source of funds to pay her. Beardmore Depo. at 103. Wallace acknowledged that she did receive $50,000 from a Lake Bank account in the summer of 2003. Tr. II, 185. This $50,000 was paid from the first disbursement of funds from the Thomas & Wong loan. Beardmore Depo. at 22-23. Wallace then renewed efforts to proceed with the reverse merger of M W Asia and BDV Investments and sent correspondence to John Beardmore in August of 2003 setting forth a list of due diligence items for that transaction. Tr. III, 132; Beardmore Depo. at 65-66; Ex. 50. Wallace admitted that

she personally benefitted from the Thomas & Wong loan transaction in that it generated the $50,000 which John Beardmore paid her. Tr. III, 140-141.

In the spring of 2005 Wallace first informed Tarapaski that she had received $50,000 as a result of the Thomas & Wong loan. Tr. III, 99. Tarapaski did not know before then that Wallace had a contract to sell BDV Investments a shell corporation, or that she was owed money under that contract as Thomas & Wong made its loan to BDV Investments. Tr. II, 88; Tr. III, 96; Tr. III, 100.

T. **Default.** The Thomas & Wong loan came due on May 6, 2003, and it was not repaid. Tr. I, 97. Tarapaski contacted Wallace, who said that Lee Wark had agreed to melt some of the gold dore to repay Thomas & Wong. Tr. I, 98. On May 13, 2003, Tarapaski sent an e-mail to Wallace reciting that she and Gary Blume were authorized to represent Thomas & Wong in collecting the BDV Investments loan. Tr. I, 98; Ex. 45. He sent this because Wallace asked him to do so. Tr. I, 98.

Wallace told Tarapaski in a telephone conversation that Thomas & Wong would be repaid from a gold melt that was proceeding in Salt Lake City, Utah, at the Johnson Matthew Refinery. Tr. I, 99. Wallace later told Tarapaski that the gold melt had been accomplished and that $12 million had been raised by selling the gold. Tr. I, 100; Tr. III, 105. Wallace said that the sale proceeds had been transferred offshore as part of this process and had been returned to a Florida bank, where they would be held in escrow until paperwork was completed. Tr. I, 100-101. Wallace told Tarapaski that she was in touch with the Florida bank on a daily basis and that there was delay involved in completing the paperwork. Tr. I, 101; Tr. III, 106. In June of 2003 Wallace told Tarapaski that there was a problem and that the money had been "pulled back." Tr. I, 101-102.

At the end of June, 2003, Tarapaski flew to Phoenix, where he discovered that there had been no gold melt at all. Tr. I, 102. Wallace admits that she told Tarapaski that there would be a gold melt in Salt Lake City and that this never occurred. Tr. II, 182-183. Tarapaski hired Gary Blume to act as local counsel for Thomas & Wong. Tr. I, 102. Wallace hired a New Mexico lawyer to represent Thomas & Wong, who secured an order on July 9, 2003, to allow access to the warehouse in Lordsburg, New Mexico, where the gold dore was supposedly stored. Tr. I, 104. Gary Blume and Wallace went into the warehouse, and told Tarapaski that although the barrels containing the gold dore weren't present there were rectangular containers in the warehouse that had gold concentrate in them. Tr. I, 104-105. Tarapaski later went to the Lordsburg warehouse and discovered that it was not a high-security facility with restricted access, but an ordinary warehouse. Tr. I, 105. He there found the rectangular containers that allegedly contained gold concentrate, but testing proved the contents to be worthless. Tr. I, 105.

Tarapaski attempted to track down the barrels that were supposed to contain gold dore. Tr. I, 105. He then learned that the viewing Wallace had mentioned to him had not occurred in New Mexico, but at a mini-storage facility in Chandler, Arizona. Tr. I, 106. He went to the Chandler storage facility and found that the barrels had been moved from there at the very time Tarapaski was trying to gain access to the Lordsburg warehouse. Tr. I, 106.

U. <u>The Last Disbursement</u>. On August 28, 2003, Wallace sent a memo authorizing Cane O'Neill to take the remaining amount in the Thomas & Wong escrow account, $4,960. Tr. II, 7-8; Ex. 51. Tarapaski thought that this account had been closed in March and never authorized this transfer. Tr. II, 8.

V. **Litigation.** Thomas & Wong sued BDV Investments and affiliated parties including John Beardmore, Donald Nooe, Lee Wark, and William Cortegiano. Tr. I, 106. None of these defendants responded and Thomas & Wong took default judgments against them. Tr. I, 107; Ex. 64. Tarapaski has collected nothing from those defendants. Tr. I, 107. The shares in Founders Mezzanine and Superior Financial Holding Co. stock were eventually recovered, but proved to be worthless. Beardmore Depo. at 48, at 53. No safekeeping receipt or certificate of insurance in favor of Thomas & Wong were ever produced. The only recoveries that have been realized by Thomas & Wong were $433,000 of proceeds from the sale of Beardmore's Paradise Valley residence and $20,000 that was generated by the sale of forklifts and loaders found in the Lordsburg, New Mexico warehouse. Tr. II, 3; Tr. III, 110-112. Beardmore's home contained furniture, art and personal items which Wallace sold to a buyer named Gravinder for about $4,500. Tr. III, 114; Tr. III, 122-123; Tr. IV, 14; Ex. 59. Wallace kept this cash over Tarapaski's objection. Tr. IV, 14.

ISSUES PRESENTED FOR REVIEW

_____1. Whether Wallace bears the burden as appellee of persuading this court that the trial court did not abuse its discretion in granting Wallace's motion for new trial due to the trial court's failure to specify with particularity the grounds for granting the motion as required by Rule 59(m), Ariz. R. Civ. P.?

2. Whether there was sufficient evidence to support the jury's verdict that Wallace assumed fiduciary duties to Thomas & Wong by serving as its agent in releasing funds from trust and by serving as its representative on the BDV

Investments Board, and that Wallace breached her fiduciary duties by releasing funds of Thomas & Wong without authority and by concealing conflicts of interest based on her self-dealing with BDV Investments?

3. Whether there was sufficient evidence to support the jury's verdict that Thomas & Wong suffered total damages of $1,554,934 for which Wallace was 84% responsible based on its loss of principal amounts invested as well as lost profits and interest?

LEGAL ARGUMENT

1. Wallace bears the burden as appellee of persuading this court that the trial court did not err in granting Wallace's motion for new trial due to the trial court's failure to specify with particularity the grounds for granting the motion as required by Rule 59(m).[5]

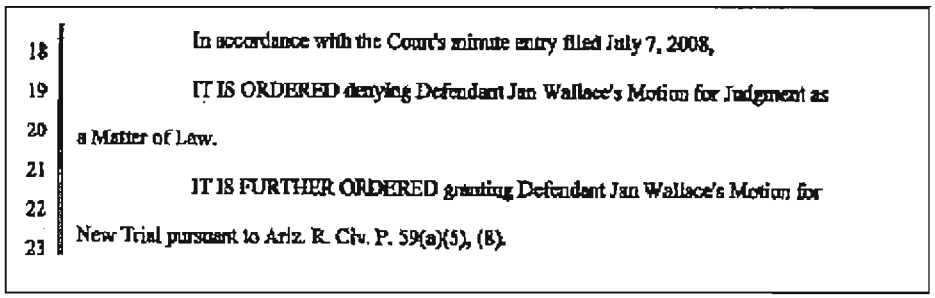
Rule 59(m), Ariz. R. Civ. P., provides as follows: "No order granting a new trial shall be made and entered unless the order specifies with particularity the ground or grounds on which the new trial is granted." Case law construing this rule holds that the particularity requirement is satisfied only if the trial court recites the reasons for granting the order "in a detail." *Yoo Thun Lim v. Crespin*, 100 Ariz. 80, 83, 411 P.2d 809, 811 (1966). *See also Brooks v. De La Cruz*, 12 Ariz. App. 591, 593, 473 P.2d 793, 795 (1970). The grounds are stated with sufficient particularity when the reviewing court is provided "an adequately detailed idea of the specific factor or factors which prompted the trial judge to exercise his discretion on this ground."

[5] Whether the trial court complied with the requirements of the rule is a question of law and the standard of review is de novo. *Fragoso v. Fell*, 210, Ariz. 427, 420, 111 P.3d 1027, 1030 (Ct. App. 2005).

Brooks v. De La Cruz, 12 Ariz. App. at 593, 473 P.2d at 795. Conversely, if the parties must speculate as to the reasons for ordering a new trial, Rule 59(m) has not been satisfied. *Yoo Thun Lim*, 100 Ariz. at 83, 411 P.2d at 811; *Heaton v. Waters*, 8 Ariz. App. 256, 258, 445 P.2d 458, 460 (1968).

Rule 59(m) is grounded on an appellate posture unique to Rule 59 motions. Ordinarily a ruling of the trial court will be affirmed on appeal regardless of the trial court's reasoning if the record provides any basis to justify the decision of the trial court, i.e., the ruling will be affirmed if the trial court reaches the right result even if it is for the wrong reason. *See Guo v. Maricopa County Medical Center,* 992 P.2d 11, 15, 196 Ariz. 11, 16, (Ct. App. 1999); *Realty Assoc. v. VNB*, 153 Ariz. 514, 521, 738 P.2d 1121, 1128 (Ct. App. 1986). In reviewing an order to grant new trial under Rule 59, by contrast, this court's review is limited to the reasons specified by the trial court in its order: "We have held many times that review of an order granting a new trial is restricted to grounds on which the motion for new trial was granted, and the order cannot be supported by other grounds." *Rogers v. Mountain States Telephone & Telegraph Co.*, 100 Ariz. 154, 160, 412 P.2d 272, 278 (1966). *See also State ex rel. Morrison v. McMinn,* 188 Ariz. 261, 262, 355 P.2d 900, 90 (1960); Young Mines Co. v. Citizens' State Bank, 37 Ariz. 521, 524, 296 P. 247, 249 (1931). Rule 59(m) is thus designed to ensure that the trial court elaborates its reasoning to aid the parties and this tribunal on review. *See Powell v. Klein,* 11 Ariz. App. 360, 361, 464 P.2d 806, 807 (Ct. App. 1970).

Here, the trial court's July 11, 2008 order granting new trial (C.I. 153) did nothing more than identify the subsections of Rule 59(a) which it felt required new trial:



In accordance with the Court's minute entry filed July 7, 2008,

IT IS ORDERED denying Defendant Jan Wallace's Motion for Judgment as a Matter of Law.

IT IS FURTHER ORDERED granting Defendant Jan Wallace's Motion for New Trial pursuant to Ariz. R. Civ. P. 59(a)(5), (8).

The record provides no further elaboration on the trial court's reasoning, as the minute entry of June 20, 2008 in which the trial court announced its ruling identically recited that the motion was granted "pursuant to Ariz. R. Civ. P. 59(a)(5) and (8)." C.I. 149. It is thus impossible to determine from the record which of the many arguments advanced by Wallace in her motion for new trial were deemed persuasive by the trial court, leaving the parties and this court to speculate as to the trial court's reasoning. Arizona decisions have repeatedly held that orders granting new trial which merely cite to subsections of Rule 59(a) without elaboration do not comply with the particularity requirements of Rule 59(m):

> In the instant case, the Crespins' motion was granted 'on the grounds set forth in their motion for a new trial.' The motion was couched in the language of the statutory grounds for a new trial, Rule 59(a), Rules of Civil Procedure, 16 A.R.S.; namely, that the verdict was the result of passion and prejudice, that it was not justified by the evidence and contrary to law, that it was the result of the court's error admitting inadmissible evidence, and that it was the result of the court's error in refusing instructions of the plaintiff. Manifestly, the order for a new trial does not comply with Rule 59(m).

Yoo Thun Lim v. Crespin, 100 Ariz. at 81, 411 P.2d at 810. *See also Rogers v. Mountain States Tel. & Tel. Co.,* 100 Ariz. at 160-61, 412 P.2d at 278-79; *Brooks v.*

De La Cruz, 12 Ariz. App. at 592, 473 P.2d at 794-795; *Powell v. Klein,* 11 Ariz. App. at 361, 464 P.2d at 807.

The consequence is that the burden of proof shifts to Wallace as appellee. Ordinarily the party seeking to overturn a trial court's decision granting a motion for new trial has the burden of proving on appeal that the trial court abused its discretion in granting the motion. *Aegerter v. Duncan,* 7 Ariz. App. 239, 437 P.2d 991 (1968). However, where the trial court's order fails to specify the grounds for granting a new trial with particularity in compliance with Rule 59(m), the original jury verdict will be presumed correct on appeal and the burden shifts to the party who secured the new trial order to sustain that order. *Yoo Thun Lim,* 100 Ariz. at 83, 411 P.2d at 811; *Powell v. Klein,* 11 Ariz. App. at 361, 464 P.2d at 807; *Montalvo v. Hartford Fire Ins. Co.,* 5 Ariz. App. 419, 421, 427 P.2d 553, 555 (1967). Thus, the party who obtained the new trial order must "convince [the appellate court] that the trial court did not err in ordering a new trial." *Yoo Thun Lim,* 100 Ariz. at 83, 411 P.2d at 811. *See also Nordensson v. Nordensson,* 146 Ariz. 544, 546, 707 P.2d 948, 950 (Ct. App. 1985) ("When the trial court does not specify with particularity. . . the burden of proof shifts to appellee, on appeal, to prove that the trial court did not err in ordering a new trial.").

2. There was sufficient evidence to support the jury's verdict that Wallace assumed fiduciary duties to Thomas & Wong by serving as its agent in releasing funds from trust and by serving as its representative on the BDV Investments Board, and that Wallace breached her fiduciary duties by releasing funds of Thomas & Wong without authority and by concealing

conflicts of interest based on her self-dealing with BDV Investments.[6]

The trial court confronted a daunting standard in evaluating Wallace's motion under Rule 59(a)(8) that the jury's verdict was unjustified by the evidence or was contrary to the law:

> In ruling on a motion for new trial the judge sits as the "thirteenth juror" (the ninth juror in a civil case). The basic question he or she must ask is whether the jury verdict is so "manifestly unfair, unreasonable and outrageous as to shock the conscience."

Hutcherson v. City of Phoenix, 192 Ariz. 51, 55, 961 P.2d 449, 453 (1998) (*quoting Young Candy & Tobacco Co. v. Montoya,* 91 Ariz. 363, 370, 372 P.2d 703, 707 (1962)) (citation omitted).

A. Existence of Agency Relationship. The jury received the following instruction with regard to the existence of an agency relationship:

> Before you can find defendant liable to plaintiff on the breach of fiduciary duty claim, you must find the defendant was an agent of plaintiff.
>
> Agency is a fiduciary relationship that arises when one person, the principal, manifests assent to another person, the agent, that the agent shall act on the principal's behalf subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

Tr. IV, 157.

The above-quoted instruction, which was given without objection by Wallace (Tr. IV, 6), is consistent with Arizona law: "'Agency is a fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent')

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[6] With respect to the remaining issues on appeal, the standard of review should be to consider the evidence favorably in support of the verdict. *See Gonzales v. City of Phoenix*, 203 Ariz. 152, 156, P3d 184, 188 (2002).

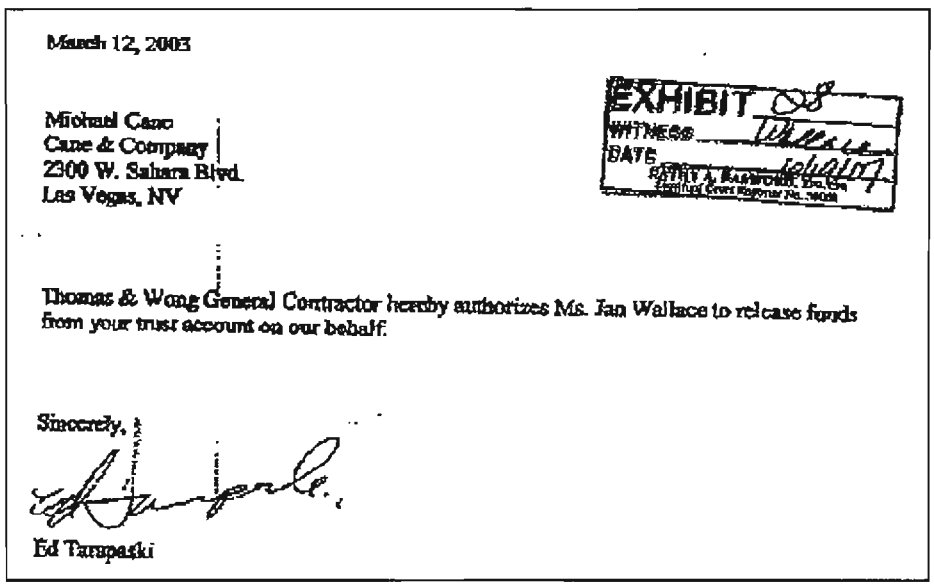
that the agent shall act on the principal's behalf with third parties subject to the principal's control, and the agent manifests assent or otherwise consents so to act.'" *Ruesga v. Kindred Nursing Centers, LLC*, 215 Ariz. 589, 597, 161 P.3d 1253, 1261 (Ct. App. 2008) (*quoting* Restatement (Third) of Agency § 1.01 (2006)). The sufficiency of the evidence regarding the existence of a fiduciary relationship thus turns on whether Thomas & Wong manifested asset that Wallace act on its behalf, and whether Wallace consented to do so.

The evidence at trial included the following. Jan Wallace introduced Ed Tarapaski to a business opportunity involving bridge financing of $1.5 million to BVD Investments while it waited for the closing of a substantial loan which was allegedly forthcoming from Dumaine Consulting. She shepherded him through the loan process, telling him in so many words that he should leave the business dealings to her because that was her expertise as a venture capitalist: "I live in a paper world, that's what I do for a living." Tr. I, 63. On numerous occasions Wallace proclaimed her experience with stock transactions and volunteered that she would do the paperwork while he looked after lending the money. Tr. I, 63-64; Tr. II, 60. Wallace designed a checklist of due diligence items and preconditions to loan closing and represented that she would ensure that these were satisfied before funds were released. Wallace introduced Tarapaski to her lawyers in Phoenix and Las Vegas to document the transaction and escrow the loan funds, and proposed that she join the Board of Directors of BVD Investments so that she could protect Thomas & Wong's interests. Tr. I, 64; Tr. II, 50. Wallace repeatedly urged Tarapaski to place his trust in her (Tr. II, 8-10) even as she pressured Tarapaski to fund the loan. Tr. I, 89; Tr. II, 10. Jan Wallace agreed to serve as Thomas & Wong's agent with regard to

releasing the loan funds from the escrow account upon confirming that the conditions to funding she herself recommended had been satisfied, including viewing of the gold collateral. Tr. I, 90-91. After the loan went into default, Tarapaski appointed Wallace as Thomas & Wong's representative with regard to collection of the debt at Wallace's request (Tr. I, 98) and Wallace actively participated in collection efforts. Tr. I, 101; Tr. I, 104-105; Tr. III, 106. Tarapaski testified that Wallace was acting as Thomas & Wong's representative to ensure that necessary paperwork was completed and that funds were released from escrow only when the items on the due diligence checklist had been completed (Tr. II, 51; Tr. II, 60-61), and that Wallace was also responsible to provide truthful information about the financial status of BDV Investments to protect Thomas & Wong's right to secure repayment by melting down gold in accordance with the terms of the promissory note. Tr. II, 94-96. This was corroborated by other Directors of BDV Investments including John Beardmore, who testified that Wallace was representing Thomas & Wong's interests on the BDV Investments Board (Beardmore Depo. at 37, at 55), and William Cortegiano, who testified that Wallace was acting as the representative of Thomas & Wong on the Board of BDV Investments (Tr. II, 105-106) and that Wallace was to approve the release of the funds from the Cane O'Neill trust account and to ensure that certain conditions were satisfied before Thomas & Wong's funds were released to BDV. Tr. II, 107-108; Tr. II, 116.

Beyond witness testimony, the jury was presented written documentation in proof of these facts including the partial list of the conditions to funding of the loan in Wallace's handwriting (Exhibit 10), resolutions reflecting her election to the BDV Investments Board on March 6, 2003, and her vote to approve the Thomas & Wong

loan that day. Exhibits 15, 17. Two documents were admitted in evidence in which Wallace was expressly delegated responsibility to serve as Thomas & Wong's agent. By correspondence dated March 12, 2003, Tarapaski granted written authority for Wallace to release funds from the Cane O'Neill trust account:



March 12, 2003

EXHIBIT 28
WITNESS
DATE

Michael Cane
Cane & Company
2300 W. Sahara Blvd.
Las Vegas, NV

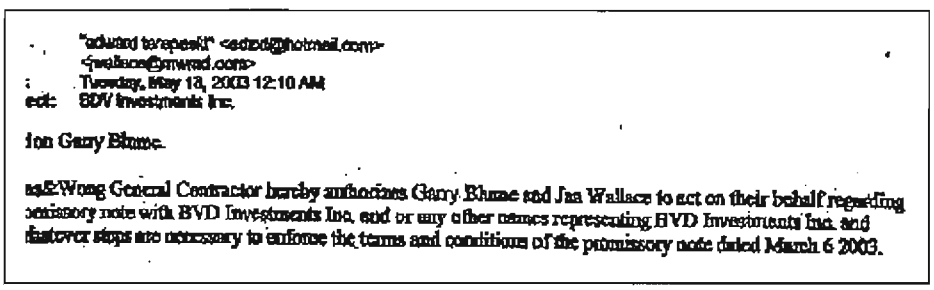
Thomas & Wong General Contractor hereby authorizes Ms. Jan Wallace to release funds from your trust account on our behalf.

Sincerely,

Ed Tarapaski

Exhibit 28.

After BDV Investments defaulted, Tarapaski sent an e-mail from abroad appointing Wallace as Thomas & Wong's representative with regard to loan collection efforts:



"edward tarapaski" <edtar@hotmail.com>
<jwallace@nvbell.com>
Tuesday, May 13, 2003 12:10 AM
edt: BDV Investments Inc.

Jan Gary Blume.

T&W Wong General Contractor hereby authorizes Gary Blume and Jan Wallace to act on their behalf regarding promissory note with BVD Investments Inc. and or any other names representing BVD Investments Inc. and whatever steps are necessary to enforce the terms and conditions of the promissory note dated March 6 2003.

Exhibit 45.

That Wallace manifested assent to serve as Thomas & Wong's agent is reflected not only by her conduct in managing the entire loan transaction, but by documentary proof that she in fact acted as Thomas & Wong's agent by taking a seat on the BDV Investments Board (Ex. 15) and that she authorized the release of Thomas & Wong's funds from the Cane O'Neill trust account on numerous occasions in 2003 (Exs. 19, 29, 34, 35), as well as by testimony that she engaged in efforts as Thomas & Wong's representative to recover the gold dore collateral in New Mexico.

The existence of a fiduciary duty is generally a question of fact. *Eagerton v. Fleming*, 145 Ariz. 289, 292, 700 P.2d 1389, 1392 (Ct. App. 1985); *In re Guardianship of Chandos*, 18 Ariz. App. 583, 585, 504 P.2d 524, 526 (Ct. App. 1972). That Wallace served as Thomas & Wong's agent is arguably beyond dispute in light of the above evidence. For present purposes, however, the burden falls on Wallace to prove that any finding of agency based on this evidence was so "manifestly unfair, unreasonable and outrageous as to shock the conscience." *Hutcherson v. City of Phoenix,* 192 Ariz. at 55, 961 P.2d 453. No such finding can be countenanced on these facts.

B. Breach of Fiduciary Duty. The jury was instructed as follows with regard to the fiduciary duties owed to the principal by an agent:

> An agent owes a special duty to the principal, which is called a fiduciary duty.
>
> This duty requires the agent to represent the principal with loyalty and utmost good faith in the conduct of the agency and to make full disclosure of all material facts relevant to the agency.

Tr. IV, 157.

This instruction, which was given without objection by Wallace (Tr. IV, 6), is consistent with Arizona precedent describing the nature of the fiduciary duties owed by an agent. *See Chemical Bank v. Security Pacific Nat. Bank*, 20 F.3d 375, 376 (9th Cir. 1994) ("The very meaning of being an agent is assuming fiduciary duties to one's principal"); *Barrage v. Valentine*, 210 Ariz. 270, 275, 110 P.3d 371, 376 (Ct. App. 2005) (the principal-agent relationship "carries a fiduciary responsibility") (*quoting Equitable Life & Cas. Ins. Co. v. Rutledge*, 9 Ariz. App. 551, 555, 454 P.2d 869, 873 (1969)); *Taeger v. Catholic Family & Community Services*, 196 Ariz. 285, 293, 995 P.2d 721, 729 (Ct. App. 1999) (a fiduciary owes a duty of undivided loyalty and a duty to make full and fair disclosure of any self-interest the fiduciary has in the transaction).

The jury here was presented with compelling evidence that Wallace violated her duties of loyalty and of full disclosure from the inception of her relationship with Thomas & Wong. Wallace had signed a contract with John Beardmore in December of 2002 to sell M W Asia for $250,000, and a deposit obligation of $50,000 due in January for 2003 under this contract was already in default. Tr. II, 138-139; Beardmore Depo. at 20-21; Ex. 3. If this contract had been consummated, Wallace would have been paid $250,000 and would have had valuable stock in a publically-traded company. Tr. II, 138-139; Tr. II, 143. In addition, Wallace reached an agreement under which Wallace Black LLC, in which she was co-owner, would be paid one percent of the funds raised for BDV Investments. Tr. IV, 31-32. Wallace testified that BDV Investments was her client as a result of these dealings. Tr. III, 133; Tr. IV, 32. Tarapaski testified that he knew nothing of Wallace's existing contractual relationships with BDV Investments and had no idea of the her

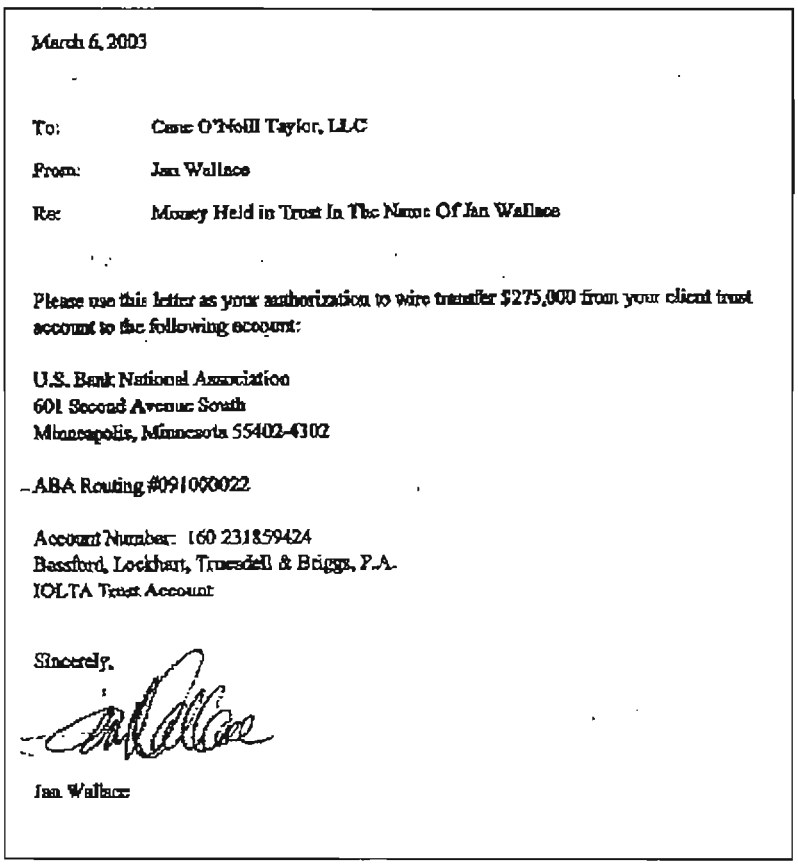
conflicting loyalties or of her selfish interest in securing funding for BDV Investments as he agreed that Wallace would represent Thomas & Wong's interests. Tr. II, 88; Tr. III, 96; Tr. III, 100. Tarapaski learned of this only in 2005, when Wallace informed Tarapaski that she had been paid $50,000 as a result of the Thomas & Wong loan. Tr. III, 99. This represents an obvious breach of fiduciary duty:

> It is clear that a fiduciary relationship arose between Solot and the Southern Arizona Bank & Trust Company as executor-trustee. Having undertaken to sell the property for its principal, Solot was obliged to effect a sale to the best advantage of the seller, i.e., on the best terms and at the best price obtainable. *Vivian Arnold Realty Co. v. McCormick*, 19 Ariz. App. 289, 506 P.2d 1074 (1973). Yet, Chaparral contended Solot's position as a fiduciary was compromised and it attempted to serve two masters by entering a fiduciary relationship with Chaparral, a prospective buyer. ***The undertaking of such a dual representation of conflicting interests, without the knowledge or approval of the competing principals, would, of course, not be countenanced.***

Marmis v. Solot Co., 117 Ariz. 499, 502, 573 P.2d 899, 902 (Ct. App. 1977) (emphasis added).

The jury also was presented alarming evidence that Wallace betrayed Thomas & Wong's interests for the benefit of herself and of BDV Investments, her other client. Tarapaski testified that Wallace assured him that all of the conditions to closing they had agreed upon had been satisfied as she pressured him on March 12, 2003, to approve the funding of the BDV Investments loan. Tr. I, 88-90. She did not tell him a crucial fact as this conversation progressed: that she had already released $275,000 of Thomas & Wong's funds from the Cane O'Neill trust account on March 6, 2003, without Tarapaski's knowledge or permission, before the $1.5 million promissory note to Thomas & Wong (Ex. 21) had even been drafted. This occurred on the very day that Wallace was elected a Director of BDV Investments (Ex. 15),

following which Wallace voted to approve a loan from Thomas & Wong that included two promissory notes, including the "mystery note " for $275,000 signed by John Beardmore and his girlfriend (Ex. 18), whose origin has never been established. Wallace admitted making the transfer on March 6, 2003, claiming that she did so with Tarapaski's consent (Tr. II, 172), and Cane O'Neill produced Wallace's March 6, 2003 written authorization to make this transfer:



March 6, 2003

To: Cane O'Neill Taylor, LLC

From: Jan Wallace

Re: Money Held in Trust In The Name Of Jan Wallace

Please use this letter as your authorization to wire transfer $275,000 from your client trust account to the following account:

U.S. Bank National Association
601 Second Avenue South
Minneapolis, Minnesota 55402-4302

ABA Routing #091000022

Account Number: 160 231859424
Bassford, Lockhart, Truesdell & Briggs, P.A.
IOLTA Trust Account

Sincerely,

Jan Wallace

Exhibit 19.

An unauthorized transfer of trust funds represents a breach of fiduciary duty *per se.* Here the jury could additionally infer that Wallace collaborated with her

client, BDV Investments, to conceal a promissory note which documented John Beardmore's acquisition of a condominium for his girlfriend. This is complemented by testimony that, as Tarapaski vacillated at Wallace's home on March 12, 2003, Wallace became angry and pressured him to close the loan, claiming that she had effectively protected Tarapaski interests. Tr. II, 10. Having already orchestrated a clandestine disbursement of funds from the Cane O'Neill trust account, Wallace had to ensure that the loan was funded to prevent the revelation of her misconduct which inevitably would have followed if Tarapaski had cancelled the transaction and demanded the return of Thomas & Wong's funds.

This evidence is further buttressed by testimony that Wallace engaged in unauthorized disbursements of funds from the Cane O'Neill trust account on two other occasions. On March 21, 2003, Wallace authorized the release of $20,000 from trust to L Trust, an entity owned by John Beardmore's girlfriend:

March 21, 2003

M E M O

TO: Cane O'Neill Taylor, LLC

FROM: Jan Wallace

RE: Money Held in Trust in The Name Of Jan Wallace

This letter will authorize Cane O'Neill Taylor, LLC to make a wire transfer in the amount of $20,000 USD from money being held in its trust account to Thomas Wong at the following account:

Wells Fargo Bank
ABA#: 0[illegible]
Account Name: L Trust
Account #: 207 2[illegible]

I further authorize Cane O'Neill Taylor to use the remaining proceeds as payment toward legal fees incurred.

Jan Wallace

March 21/2003
Date

Sikina Lach

Thomas
0324-29

Exhibit 35.

The jury was read Wallace's deposition testimony with regard to why this transfer had been made: "I have no idea." Tr. II, 181-182. Evidence was also presented that on August 28, 2003, Wallace sent a memo authorizing Cane O'Neill to take the remaining amount in the Thomas & Wong escrow account, $4,960. Tr. II, 7-8; Ex. 51. Tarapaski thought that this account had been closed in March and never authorized this transfer. Tr. II, 8. This evidence of a pattern of unauthorized trust disbursements in combination with evidence that Wallace concealed her existing client relationship with BDV Investments from Tarapaski from the inception justified the jury's verdict that Wallace was liable for breaching fiduciary duties – indeed, the self-dealing aspect of these breaches merited a presumption of fraud. *In re Estate of Thurston*, 199 Ariz. 215, 219, 16 P.3d 776, 780 (Ct. App. 2000).

3. There was sufficient evidence to support the jury's verdict that Thomas & Wong suffered total damages of $1,554,934 for which Wallace was 84% responsible based on its loss of principal amounts invested as well as lost profits and interest.

The trial court found that new trial also was merited under Rule 59(a)(5), Ariz. R. Civ. P., which allows new trial to be granted for "[e]xcessive or insufficient damages." Case law construing this subpart of Rule 59 establishes that an extraordinarily high threshold must be crossed before judicial intervention is justified for an award of excessive damages:

> The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line, for they have no standard by which to ascertain the excess.

United Verde Copper Co. v. Wiley, 20 Ariz. 525, 528, 183 P. 737, 738 (1919) (*quoting Coleman v. Southwick*, 9 Johns. 45, 6 Am. Dec. 253 (N.Y. Sup. Ct. 1812)). *See also Waqui v. Tanner Bros. Contracting Co., Inc.*, 121 Ariz. 323, 326, 589 P.2d 1355, 1358 (Ct. App. 1979); *McClain v. Sinclair,* 2 Ariz. App. 543, 544, 410 P.2d 500, 501 (Ct. App. 1966); *Hutcherson v. City of Phoenix,* 192 Ariz. 51, 57, 961 P.2d 449, 455 (1998) ("[T]he analysis must begin with a simple question: Is the award "so unreasonable and outrageous as to shock the conscience of this court?").

The jury was instructed as follows regarding causation of damages:

> Before you can find defendant liable on the breach of fiduciary duty claim, you must find that defendant's breach of fiduciary duty was a cause of plaintiff's damages. A breach of fiduciary duty is a cause of damages if it helps produce the damages and if the damages would not have occurred without the breach.

Tr. IV, 158.

This instruction, taken from RAJI (Civil) 4th Fault Instruction No. 2, represents an accurate characterization of proximate causation under Arizona law. Thomas & Wong did not have to prove that Wallace was the exclusive cause of its damages, but rather was one of the causes:

> Arizona law holds that cause-in-fact exists if the defendant's act helped cause the final result and if that result would not have happened without the defendant's act. *McDowell v. Davis*, 104 Ariz. 69, 72, 448 P.2d 869, 872 (1968). Defendant's act need not have been a "large" or "abundant" cause of the final result; there is liability if the result would not have occurred but for defendant's conduct, even if that conduct contributed "only a little" to plaintiff's injuries. *Markiewicz v. Salt River Valley Water Users' Association*, 118 Ariz. 329, 338 n. 6, 576 P.2d 517, 526 n. 6 (App.1978) (*citing McDowell v. Davis, supra*). Arizona also recognizes that more than one person may be liable for causing an injury and that a particular defendant may not avoid liability for his causative act by claiming

> that the conduct of some other person was also a contributing cause.

Ontiveros v. Borak, 136 Ariz. 500, 505, 667 P.2d 200, 205 (1983)

Arizona law recognizes concepts of comparative fault and allows allocation of fault to non-parties. *See* A.R.S. § 12-2506; Rule 26(b)(5), Ariz. R. Civ. P. The trial court did not instruct the jury here that fault could be allocated to non-parties due to Wallace's failure to identify non-parties at fault within 150 days of filing her answer in accordance with Rule 26(b)(5), Ariz. R. Civ. P. Wallace did not object to the trial court's refusal to instruct the jury with regard to non-parties at fault or to the trial court's submission of a verdict form that omitted fault allocation to non-parties. Tr. IV, 6-7.

The trial court did instruct the jury that fault could be allocated to Thomas & Wong (Tr. IV, 159-160), and the jury returned its verdict allocating 16% of the fault to Thomas & Wong and 84% of the fault to Wallace. C.I. 112 at 4-5. This allocation is entitled to deference unless the court finds it so "manifestly unfair, unreasonable and outrageous as to shock the conscience." *Hutcherson v. City of Phoenix,* 192 Ariz. 51, 55, 961 P.2d 449, 453 (1998) (*quoting Young Candy & Tobacco Co. v. Montoya,* 91 Ariz. 363, 370, 372 P.2d 703, 707 (1962)). In *Hutcherson*, for example, a murderer broke into his ex-girlfriend's apartment and killed her and her new boyfriend. Before doing so the murderer had called to threaten the ex-girlfriend, who called 911 to report the threat. The 911 operator dispatched an officer on Priority 3, the lowest priority rating, and the officer finally responded after the murders had already occurred. Survivors brought suit against the City of Phoenix alleging negligence by the 911 operator, and the City defended on grounds including that the fault lay primarily with the murderer. The jury returned a verdict against the City,

allocating 75% of the fault to the 911 operator and 25% to the murderer. The City appealed the trial court's refusal to grant new trial. The Supreme Court affirmed, noting that "[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Id.* at 56, 961 P.2d at 454 (*quoting Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944)).

Applying the *Hutcherson* standard to the instant case, the jury could readily have perceived that Wallace consciously manipulated Tarapaski with claims that she was acting in the best interests of Thomas & Wong while she was truly attending to her own interests, and that she did so by taking advantage of the disparity in business sophistication between Wallace and Tarapaski which rendered him vulnerable to such manipulation. If fault allocation played a role in the trial court's grant of a new trial here, such would represent an impermissible reweighing of the evidence contrary to the holding in *Hutcherson.*

The jury was instructed as follows regarding calculation of damages:

> If you find defendant is liable to plaintiff on the breach of fiduciary duty claim, you must then decide the full amount of money that will reasonably and fairly compensate for any of the following elements of damage proved by the evidence to have resulted from the defendant's breach of this duty:
>
> One, loss of money or other property; and two, the profit or proceeds that plaintiff would have received had defendant performed her duties.

Tr. IV., 158.

This instruction was given without any objection by the defendant. Tr. IV., 6. The jury was thus empowered to award damages based on "loss of money or other

property" suffered by Thomas & Wong, as well as "the profit or proceeds that plaintiff would have received had defendant performed her duties."

With regard to the loss of money suffered by Thomas & Wong, the evidence demonstrated concretely that Thomas & Wong transferred $800,000 of its funds into the Cane O'Neill trust account. Ex. 14; Ex. 22. Thomas & Wong wired the remaining $700,000 of the loan directly to the BDV Investments' account at Lake Bank (Tr. I, 94; Tr. III, 94; Tr. III, 96), and BDV Investments acknowledged its obligation to fully repay Thomas & Wong after its default in repayment. Ex. 46. The only recoveries by Thomas & Wong consisted of $433,000 generated by sale of John Beardmore's residence and $20,000 realized upon sale of forklifts and equipment found in the Lordsburg, New Mexico warehouse. Tr. II, 3; Tr. III, 110-112. Thomas & Wong thus suffered liquidated losses in the principal amount of $1,047,000.

With regard to damages based on the profit or proceeds that plaintiff would have received had Wallace performed her duties, no special interrogatories were requested or submitted that might provide admissible information respecting the jury's rationale, and post-trial statements by jurors explaining the basis for their damages verdict are inadmissible pursuant to Arizona Rule of Evidence 606(b). The basis for the jury's ruling that total damages were sustained of $1,554,934 thus must be addressed hypothetically.

The jury's verdict could readily be explained by Thomas & Wong's loss of the time value of money. The last of the funds that Thomas & Wong wire-transferred were sent in April of 2003 (Tr. I, 97), and the jury returned its verdict in February of 2008, nearly five years later. Applying the statutory interest rate of 10% would nearly double the principal amount over a period of five years; applying even a nominal

interest rate would justify an award in excess of $1.5 million accruing on a principal amount in excess of $1 million.

Alternatively, the jury may have focused on language from their instructions that they could award "the profit or proceeds that plaintiff would have received had defendant performed her duties." The $1.5 million promissory note in favor of Thomas & Wong called for repayment at an interest rate of 25%. Tr. II, 62-63; Tr. II, 65-66; Ex. 21. The note included provisions that Thomas & Wong could have gold melted to repay its debt if BDV Investments could not provide satisfactory evidence by April 20, 2003, that it would be able to fully repay the note by the May 6, 2003, due date. Tr. II, 9; Ex. 21. The note recited that a late fee of $1 million would be assessed if payment was not made by this due date. Tr. II, 66; Ex. 21. The evidence established that Wallace's responsibilities as agent for Thomas & Wong included ensuring that necessary paperwork to protect Thomas & Wong's interests was completed and that funds were released from escrow only when the conditions on the due diligence checklist had been satisfied, conditions which focused largely on securing repayment for Thomas & Wong in the event of default. Tr. II, 51; Tr. II, 60-61; Ex. 69 at 3. Wallace was also responsible to provide truthful information about the financial status of BDV Investments to protect Thomas & Wong's right to promptly melt down gold to secure repayment in accordance with the terms of the promissory note. Tr. II, 94-96. The jury could reasonably have concluded that, if Wallace had faithfully performed these duties, Thomas & Wong would have had collateral available when BDV Investments defaulted that would have sufficed to return its principal investment and some of the promised profits in a total amount of $1,554,934.

CONCLUSION

The trial court's decision to grant a new trial is shrouded in mystery because the court did not share the specific basis for its ruling. The jury's verdict is thus presumed correct on appeal and the burden shifts to Wallace as appellee to sustain the trial court's order. The evidence that Wallace acted as a fiduciary and breached her fiduciary duties is compelling. The jury's finding that Wallace's breaches proximately caused damage to Thomas & Wong in a total amount of some $1.55 million is equally defensible. Wallace cannot meet the burden of proving that the jury's verdict was unjustified, and Thomas & Wong requests that this court enter its order vacating the trial court's grant of new trial and reinstating the judgment filed in this matter on April 11, 2008. C.I. 126.

Thomas & Wong further requests an award of its attorneys fees on appeal pursuant to A.R.S. § 12-341.01(A). *See Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127 (1982) (attorneys' fees may be awarded under A.R.S. § 12-341.01(A) "based upon facts which show a breach of contract, the breach of which may also constitute a tort."). *See also Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 16, 6 P.3d 315, 321 (Ct. App. 2000), "[t]he test is whether the defendant would have a duty of care under the circumstances even in the absence of a contract." Jan Wallace owed fiduciary duties to Thomas & Wong only because she agreed to serve as its agent. As in *Sparks*, "the cause of action in tort could not exist but for the breach of the contract." *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. at 534, 647 P.2d at 1141.

RESPECTFULLY SUBMITTED this ____ day of December, 2008.

BURCH & CRACCHIOLO, P.A.
Bryan F. Murphy, SBA #006414
702 East Osborn Road, Suite 200
Phoenix, Arizona 85014

By _____
Attorneys for Plaintiff/
Appellant/Cross-Appellee