

10-4-2012

Campbell v. Kvamme Appellant's Brief Dckt. 39650

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Campbell v. Kvamme Appellant's Brief Dckt. 39650" (2012). *Idaho Supreme Court Records & Briefs*. 1465.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/1465

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law.

IN THE SUPREME COURT OF THE STATE OF IDAHO

V. LEO CAMPBELL and KATHLEEN
CAMPBELL, husband and wife,

Plaintiffs/Appellant/Cross-Respondents,

vs.

JAMES C. KVAMME and DEBRA KVAMME,
husband and wife; and JOHN DOES I-X,

Defendants/Respondents/Cross-Appellants.

Docket # 39650-2012

Bonneville County Case No.
CV-2010-3879

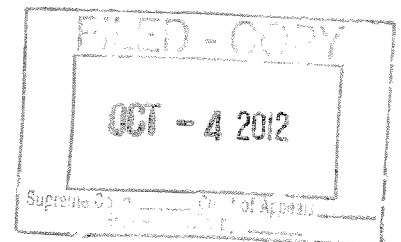
APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District
State of Idaho In and For the County of Bonneville

Honorable Jon J. Shindurling, District Court Judge, Presiding

Attorney for Appellants
Kipp L. Manwaring
Manwaring Law Office, P.A.
381 Shoup Ave., Ste. 210
Idaho Falls, Idaho 83402

Attorney for Respondents
Justin R. Seamons
Attorney at Law
414 Shoup Avenue
Idaho Falls, Idaho 83402



IN THE SUPREME COURT OF THE STATE OF IDAHO

V. LEO CAMPBELL and KATHLEEN
CAMPBELL, husband and wife,

Plaintiffs/Appellant/Cross-Respondents,

vs.

JAMES C. KVAMME and DEBRA KVAMME,
husband and wife; and JOHN DOES I-X,

Defendants/Respondents/Cross-Appellants.

Docket # 39650-2012

Bonneville County Case No.
CV-2010-3879

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District
State of Idaho In and For the County of Bonneville

Honorable Jon J. Shindurling, District Court Judge, Presiding

Attorney for Appellants
Kipp L. Manwaring
Manwaring Law Office, P.A.
381 Shoup Ave., Ste. 210
Idaho Falls, Idaho 83402

Attorney for Respondents
Justin R. Seamons
Attorney at Law
414 Shoup Avenue
Idaho Falls, Idaho 83402

TABLE OF CONTENTS

STATEMENT OF THE CASE	1
Course of the Proceedings	2
Statement of the Facts	4
<i>Identity of Parties</i>	4
<i>Chain of Title and History of Use</i>	5
ISSUE PRESENTED ON APPEAL	9
ARGUMENT	9
<u>A. The District Court abused its discretion in disregarding the affidavit of Kevin Thompson and denying the Campbells' motion for reconsideration of the court's memorandum decision on cross motions for summary judgment.</u>	9
<i>Standard of Review</i>	9
<i>Argument</i>	10
<u>B. The Campbells are entitled to an award of costs on appeal.</u>	14
CONCLUSION	14

TABLE OF CASES AND AUTHORITIES

CASES:

<i>Peterson v. Private Wilderness, LLC</i> , 152 Idaho 691, 694, 273 P.3d 1284, 1287 (2012)	
	10, 13
<i>Parkside Sch., Inc. v. Bronco Elite Arts & Athletics, LLC</i> , 145 Idaho 176, 178	
177 P.3d 390, 392 (2008)	10
<i>Coeur d'Alene Mining Co. v. First Nat. Bank of North Idaho</i> , 118 Idaho 812, 823	
800 P.2d 1026, 1037 (1990)	10
<i>J.I. Case Company v. McDonald</i> , 76 Idaho 223, 229,	
280 P.2d 1070, 1073 (1955)	10
<i>PHH Mortg. Services Corp. v. Perreira</i> , 146 Idaho 631, 635-636	
200 P.3d 1180, 1184-1185 (2009)	11, 13
<i>Kepler-Fleenor v. Fremont County</i> , 268 P.3d 1159, 152 Idaho 207 (2012).	11, 13
<i>Barmore v. Perrone</i> , 145 Idaho 340, 344, 179 P.3d 303, 307 (2008)	11
<i>State v. Rubbermaid Inc.</i> , 129 Idaho 353, 924 P.2d 615 (1996)	13

RULES:

I.R.C.P. 11(a)(2)(B)	10, 13
I.R.C.P. 56(d)	10, 13
I.R.C.P. 60(b)(2)	12, 13
I.A.R. 41 and 35(b)(5)	13

STATEMENT OF THE CASE

Adjoining landowners dispute whether a fence constitutes the true boundary of their coterminous agricultural lands in Bonneville County, Idaho. The Campbells contend the fence, which rests entirely within land described in their deed, was never agreed upon or treated as the property boundary. The Kvammes maintain the fence is positioned in a point equidistant of a nominal quarter section manifesting creation of a partition fence and, alternatively, was the agreed upon boundary.

On cross motions for summary judgment, the district court determined a survey submitted by the Campbells lacked adequate foundation to be admissible. Accordingly, the district court determined that the only admissible evidence regarding the fence was the affidavit from the surveyor retained by the Kvammes. Where the record of survey relied upon by the Campbells was inadmissible, the Campbells failed to meet the requirements of the rule governing summary judgment. Accordingly, the district court issued its opinion and order granting the Kvammes' motion for summary judgment declaring the fence was the boundary. (*Clerk's Record Vol. III*, p. 603).

The Campbells timely filed a motion to reconsider together with the affidavit of their surveyor, Kevin Thompson, which affidavit provided foundation for the survey and added new facts bearing on the court's decision.

This appeal followed the district court's denial of the Campbells' motion for reconsideration.

Course of the Proceedings

The Campbells filed a Complaint to quiet title on June 30, 2010. (*Clerk's Record Vol. I*, pp. 11-18).

The Kvammes filed an Answer and Counterclaim on July 27, 2010. (*Clerk's Record Vol. I*, pp. 19-29).

On August 17, 2010 the Campbells filed their reply to the Kvammes' Counterclaim. (*Clerk's Record Vol. I*, pp. 30-33).

On May 17, 2011 the Campbells filed their motion for summary judgment together with supporting affidavits. (*Clerk's Record Vol. I*, pp. 68-140).

On June 7, 2011 the Kvammes filed their motion for summary judgment. (*Clerk's Record Vol. I*, pp. 143-161).

On June 21, 2011 the Kvammes filed their opposition to the Campbells' motion for summary judgment. (*Clerk's Record Vol. II*, p. 390).

The Campbells on August 26, 2011 filed their response in opposition to the Kvammes' motion for summary judgment. (*Clerk's Record Vol. III*, pp. 474-477).

Hearing before the district court on the cross motions for summary judgment was held September 12, 2011. (*Transcript*, pp. 5-69).

The district court on October 28, 2011 entered its Opinion and Order on the parties' cross motions for summary judgment. (*Clerk's Record Vol. III*, p. 603).

Judgment was entered November 4, 2011. (*Clerk's Record Vol. III*, p. 608).

On November 4, 2011 the Kvammes filed a motion and memorandum for costs and fees. (*Clerk's Record Vol. III*, p. 612).

On November 15, 2011 the Campbells filed a motion for reconsideration together with an affidavit of Kevin Thompson in support of the motion. (*Clerk's Record Vol. IV*, pp. 664-669).

Hearing on the Campbells' motion for reconsideration was held November 29, 2011. (*Transcript*, pp. 70-114).

On December 21, 2011 the district court filed its Opinion and Order denying the Campbells' motion for reconsideration. (*Clerk's Record Vol. IV*, p. 771).

The Campbells filed on January 4, 2012 their objection to the Kvammes' amended motion for costs and fees. (*Clerk's Record Vol. IV*, p. 783).

The district court on January 27, 2012 entered its order and judgment for costs. (*Clerk's Record Vol. IV*, p. 785).

The Campbells timely filed notice of appeal on January 30, 2012. (*Clerk's Record Vol. IV*, p. 791). The Campbells filed an amended notice of appeal on March 2, 2012. (*Clerk's Record Vol. IV*, p. 809).

On February 2, 2012 the Campbells filed a motion to stay and posted cash security in the amount of \$2,023.29.

On February 15, 2012 the Kvammes' filed notice of cross appeal. (*Clerk's Record Vol. IV*, p. 796).

On February 16, 2012 a stipulation to stay execution was filed and on February 28, 2012 an order for stay of execution was entered.

On March 1, 2012 the Supreme Court entered its order conditionally dismissing the Campbells' appeal.

On March 29, 2012 the Supreme Court entered its order reinstating the Campbell's appeal.

Statement of the Facts

The following salient facts are derived from the affidavits and pleadings of record.

Identity of Parties and their Properties

V. Leo Campbell and Kathleen Campbell (the Campbells) are husband and wife and were the holders of record title to the subject property. (*Clerk's Record Vol. 1*, pp. 11-18).

The Campbells own two contiguous parcels of real property: a small parcel where the Campbells' home is situated and a larger 22-acre farm parcel. (*Clerk's Record Vol. 1*, pp. 81-111; *Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. II, p. 166, ll. 14-20; p. 167, ll. 1-13; *Affidavit of Counsel, Exhibit B*).

James C. Kavmme and Debra Kvamme are husband and wife and owners of the N½ of the NE¼ of Section 17, which is adjacent to the north of the Campbells' property. (*Clerk's Record Vol. 1*, pp. 19-29).

Chain of Title and History of Use

Hyrum L. Campbell and Charlotte Campbell were the prior common owners of the NE¼ of Section 17, Township 3 North, Range 38 E.B.M., in Bonneville County, Idaho. (*Clerk's Record Vol. 1*, pp. 81-111; *Affidavit of Counsel, Exhibit B; Affidavit of Counsel, Exhibit A—Deposition of V. Leo Campbell*, Vol. II, p. 153, l. 25; p. 153, ll. 1-24).

While he was alive, Hyrum Campbell farmed, grazed cattle and raised animals on the entire NE¼ of Section 17. (*Clerk's Record Vol. 1*, pp. 81-98; *Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. II, p. 158, ll. 23-25; p. 159, ll. 1-17; p. 160, ll. 11-25; p. 161, ll. 1-2).

The property that is the subject of this action is approximately 1 acre of agricultural land comprised of a narrow strip of land about 15 feet wide by 2642 feet long. (*Clerk's Record Vol. 1*, p. 11-18, Vol. I, pp. 81-89). Either prior to or during Hyrum Campbell's ownership of the entire NE¼ of Section 17, the disputed fence was erected. (*Clerk's Record Vol. 1*, pp. 81-98-*Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. III, p. 218, ll. 7-25, p. 219, ll. 1-25, p. 220, ll. 1-4; *Clerk's Record Vol. 1*, p. 134-*Affidavit of Margy Spradling; Clerk's Record Vol. 1*, p. 127-*Affidavit of Jo Campbell*).

The disputed fence consists of wood and steel posts with about three to six strands of barbed wire. (*Clerk's Record Vol. 1*, pp. 81-98-*Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. III, p. 188, ll. 13-16; p. 189, ll. 1-4). The disputed fence was solely for convenience in controlling horses and livestock. (*Clerk's Record Vol. 1*, pp. 81-98-*Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. III, p. 191, ll. 22-24, p.

220, ll. 23-25, p. 221, ll. 1-6, p. 222, ll. 6-25, p. 223, ll. 23-25; p. 224, ll. 1-3, p. 227, ll. 11-20, p. 228, ll. 4-7, p. 229, ll. 1-18; *Clerk's Record Vol. 1*, p. 134-Affidavit of Margy Spradling; *Clerk's Record Vol. 1*, p. 127-Affidavit of Jo Campbell).

Following Hyrum Campbell's death, his widow Charlotte by warranty deed recorded as Instrument No. 305350 in the Recorder's Office for Bonneville County, Idaho conveyed the S½ of the NE¼ of Section 17 to Leo H. Campbell and his wife, Phyllis B. Campbell. (*Clerk's Record Vol. 1*, pp. 99-111-Affidavit of Counsel, Exhibit B; *Clerk's Record Vol. 1*, pp. 81-98-Affidavit of Counsel, Exhibit A—Deposition of V. Leo Campbell, Vol. II, p. 155, ll. 6-25, p. 156, ll. 1-25).

Charlotte Campbell by warranty deed recorded as Instrument No. 380830 in the Recorder's Office for Bonneville County, Idaho conveyed the N½ of the NE¼ of Section 17 to her daughter and son-in-law, Mary Killian and Delbert H. Killian. (*Clerk's Record Vol. 1*, pp. 99-111-Affidavit of Counsel, Exhibit B; *Clerk's Record Vol. 1*, pp. 81-98-Affidavit of Counsel, Exhibit A—Deposition of V. Leo Campbell, Vol. II, p. 162, ll. 9-25; p. 163, ll. 1-17).

Prior to the Killians occupying the N½ of the NE¼ of Section 17, Leo H. Campbell farmed and kept animals on the entire NE¼. (*Clerk's Record Vol. 1*, pp. 81-98-Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell, Vol. II, p. 157, ll. 7-25; p. 158, ll. 1-11; p. 160, ll. 9-25; p. 161, ll. 1-10).

After Hyrum Campbell's death, the disputed fence continued to stand, but the neighboring family members did not treat or consider that fence to be the boundary of their properties. (*Clerk's Record Vol. 1*, pp. 81-98-Affidavit of Counsel, Exhibit A – Deposition of

V. Leo Campbell, Vol. III, p. 224, ll. 23-25; p. 225, ll. 1-6; *Clerk's Record Vol. 1*, pp. 134-*Affidavit of Margy Spradling*; *Clerk's Record Vol. 1*, pp. 127-*Affidavit of Jo Campbell*).

Leo H. Campbell and Phyllis B. Campbell partitioned the S½ of the NE¼ of Section 17 and conveyed separate parcels to their three children. (*Clerk's Record Vol. 1*, pp. 99-111-*Affidavit of Counsel, Exhibit B*). By gift deed recorded as Instrument No. 774870 in the Recorder's Office for Bonneville County, Idaho Leo H. Campbell and Phyllis B. Campbell conveyed title to 22.3 acres to V. Leo Campbell. (*Clerk's Record Vol. 1*, pp. 99-111-*Affidavit of Counsel, Exhibit B*; *Clerk's Record Vol. 1*, pp. 81-98-*Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. II, p. 166, ll. 14-20; p. 167, ll. 1-13).

In turn, through various recorded deeds, V. Leo Campbell conveyed to himself and his wife Kathleen Campbell title to their portion of the S½ of the NE¼ of Section 17. (*Clerk's Record Vol. 1*, pp. 99-111-*Affidavit of Counsel, Exhibit B*). By warranty deed recorded as Instrument No. 607254 in the Recorder's Office for Bonneville County, Idaho Leo H. Campbell and Phyllis B. Campbell conveyed title to approximately 1.14 acres to the Campbells. (*Clerk's Record Vol. 1*, pp. 99-111-*Affidavit of Counsel, Exhibit B*; *Clerk's Record Vol. 1*, pp. 81-98-*Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. II, p. 163, ll. 23-25; p. 164, ll. 1-15).

By Personal Representative's Deed recorded as Instrument No. 1122583 in the Recorder's Office for Bonneville County, Idaho the Estate of Delbert Killian conveyed title to the Kvammes. (*Clerk's Record Vol. 1*, pp. 114-*Affidavit of Counsel, Exhibit C*).

Leo H. Campbell knew the fence was not on the property line and knew his property boundary was some few feet north of the fence. (*Clerk's Record Vol. 1*, pp. 81-98-*Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. III, p. 239, ll. 4-11; *Clerk's Record Vol. 1*, pp. 134-*Affidavit of Margy Spradling*; *Clerk's Record Vol. 1*, pp. 127-*Affidavit of Jo Campbell*). Leo H. Campbell had lived on his property for over 40 years. (*Clerk's Record Vol. 1*, pp. 81-98-*Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. II, p. 130, ll. 9-13).

V. Leo Campbell knew the disputed fence was not the boundary between the Campbells' property and what is now the Kvammes' property. (*Clerk's Record Vol. 1*, pp. 81-98-*Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. 1, p. 82, ll. 5-25; Vol. II, p. 130, ll. 6-8). V. Leo Campbell has known the true boundary of the property was several feet north of the disputed fence. (*Clerk's Record Vol. 1*, pp. 81-98-*Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. 1, p. 82, ll. 5-25; p. 83, ll. 1-12; Vol. III, p. 225, ll. 4-7).

In 2008 the Kvammes installed a center pivot irrigation system. A portion of the Kvammes' center pivot pad together with a pump and mainline encroach upon the Campbells' land. (*Clerk's Record Vol. 1*, p. 116-*Affidavit of Counsel, Exhibit D*).

As part of the Campbells' plans to sell their property, they obtained a survey in October 2009 to confirm the described dimensions of their land and adjoining land to the south owned by V. Leo Campbell's siblings. (*Clerk's Record Vol. 1*, pp. 81-98-*Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. III, p. 213, ll. 20-25, p. 214, ll. 1-

2). That survey confirmed the northern boundary of the property described in the Campbells' deed extends about 15 feet beyond the fence. (*Clerk's Record Vol. 1*, pp. 81-98-*Affidavit of Counsel, Exhibit A – Deposition of V. Leo Campbell*, Vol. III, p. 213, ll. 20-25, p. 214, ll. 1-2; *Clerk's Record Vol. 1*, p. 116-*Affidavit of Counsel, Exhibit D*).

Based upon the survey, the Campbells requested the Kvammes move their encroachments. The Kvammes declined and the Campbells filed an action to quiet title.

ISSUE PRESENTED ON APPEAL

Did the district court abuse its discretion in disregarding the affidavit of Kevin Thompson and denying the Campbells' motion for reconsideration?

ARGUMENT

A. The District Court abused its discretion in disregarding the affidavit of Kevin Thompson and denying the Campbells' motion for reconsideration of the court's memorandum decision on cross motions for summary judgment.

Standard of Review

A district court's decision to grant or deny a motion for reconsideration is reviewed under an abuse of discretion standard. "In considering whether a district court has abused its discretion this Court examines three issues: (1) whether the court correctly perceived that issue as discretionary; (2) whether the court acted within the boundaries of its discretion and consistent with applicable legal standards; and (3) whether the court reached its decision

through an exercise of reason.” *Peterson v. Private Wilderness, LLC*, 152 Idaho 691, 694, 273 P.3d 1284, 1287 (2012), citing *Parkside Sch., Inc. v. Bronco Elite Arts & Athletics, LLC*, 145 Idaho 176, 178, 177 P.3d 390, 392 (2008).

Argument

Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure states in relevant part: “A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment.”

Where the Campbells filed their motion for reconsideration within 14 days from entry of the final judgment, their motion was timely filed. Accordingly, the district court could reconsider its decision granting summary judgment in light of any new facts the Campbells presented.

“On a motion for reconsideration of the specification of facts deemed established pursuant to I.R.C.P. 56(d), the trial court should reconsider those facts in light of any new or additional facts that are submitted in support of the motion.” *Coeur d'Alene Mining Co. v. First Nat. Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

Id., quoting, *J.I. Case Company v. McDonald*, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955).

The function of the trial court is different when presented with a motion for reconsideration of an interlocutory order in accordance with I.R.C.P. 11(a)(2)(B). When considering that type of motion, the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order. When presented with a timely motion for reconsideration, a trial court must consider new evidence relevant to the summary judgment motion. *PHH Mortg. Services Corp. v. Perreira*, 146 Idaho 631, 635-636, 200 P.3d 1180, 1184-1185 (2009); *Kepler-Fleenor v. Fremont County*, 268 P.3d 1159, 152 Idaho 207 (2012).

Furthermore, when a timely motion for reconsideration is accompanied by an affidavit setting forth new evidence not previously considered by the trial court, the trial court is obligated to consider such new evidence. *Kepler-Fleenor v. Fremont County*, 268 P.3d 1159, 152 Idaho 207 (2012). Failure to consider timely presented new evidence is an abuse of discretion. *Id.*; *Barmore v. Perrone*, 145 Idaho 340, 344, 179 P.3d 303, 307 (2008).

It is memorandum decision denying the Campbells' motion for summary judgment and granting the Kvammes' motion for summary judgment, the district court determined that a survey relied upon by the Campbells did not have adequate foundation and was thus inadmissible and could not be considered by the court. In support of their timely motion for reconsideration, the Campbells filed the affidavit of Kevin Thompson.

Thompson was the surveyor who performed the survey for the Campbells. Thompson's record of survey was reviewed by and attached as an exhibit to the Affidavit of Kim Leavitt, the Kvammes' retained expert. In fact, Thompson's record of survey was the

only record of survey presented to the district court as part of the cross motions for summary judgment.

Thompson's affidavit provided the foundation for his record of survey. Additionally, Thompson testified of and presented documentary evidence demonstrating that the opinion of the Kvammes' expert witness was incorrect. All such evidence was not previously presented to or considered by the district court.

However, in analyzing the Campbells' motion for reconsideration and its accompanying affidavit, the district court applied the wrong legal standard. It determined that the new evidence presented by Thompson's affidavit did not meet the criteria of I.R.C.P. 60(b)(2). The district court's following colloquy on reconsideration reveals the court's misapplication of rules of procedure:

So, Mr. Manwaring, what authority do you have that it's an abuse of discretion not to consider new evidence when it doesn't comply with 60(b)(2)? Rule 60(b)(2) gives me authority to grant relief if there is newly discovered evidence which was not available at the time of the prior proceedings. Nothing has been indicated to me to say that at any time it was impossible for the Campbells to seek out the affidavit of Mr. Thompson prior to the summary judgment. So that brings into question, in my mind, just how liberal am I to be in addressing the provisions of Rule 56(c), which sets forth the very specific schedule in hearings of summary judgment? And it's designed, if any rule is designed, to be rigid and to require compliance in order to obtain some finality in the case. If we willy-nilly allow the parties ad infinitum to augment the record as to what is submitted in regard to summary judgment, we would never get to the end. So I think I have to have some justification under the rules to take the extraordinary step to allow something into evidence now that was not presented under Rule 56(c) and the schedule that's set forth in that rule.

(*Transcript*, p. 89, ll. 15-25; p. 90, ll. 1-12).

Consequently the district court incorrectly focused on the newly discovered evidence standard of I.R.C.P. 60(b)(2) and the timing requirement of I.R.C.P. 56(c). The district court glossed over I.R.C.P. 11(a)(2)(B), by merely treating that rule as pertaining to an exclusively limited set of circumstances.

Instead of properly considering Rule 11(a)(2)(B), the district court narrowed its scope of reconsideration to newly discovered evidence that fell outside the strict time limitations for summary judgment. Indeed, the district court opined that if additional evidence could be presented in a motion for reconsideration, then summary judgments would never achieve finality.

Thus, the district court not only applied the wrong legal standard, but also it reached an incorrect conclusion on the purpose and effect of motions for reconsideration. Application of the wrong legal standard manifests an abuse of discretion. See *Peterson v. Private Wilderness, LLC*, 273 P.3d 1284, 152 Idaho 691 (2012).

Furthermore, the district court did not at all consider the affidavit of Kevin Thompson. It is an abuse of discretion to fail to consider additional evidence in the form of admissible testimony in an affidavit. See *Kepler-Fleenor v. Fremont County*, 268 P.3d 1159, 152 Idaho 207 (2012); *PHH Mortg. Services Corp. v. Perreira*, 146 Idaho 631, 635-636, 200 P.3d 1180, 1184-1185 (2009); *State v. Rubbermaid Inc.*, 129 Idaho 353, 924 P.2d 615 (1996).

Consequently, the district court abused its discretion in denying the Campbells' motion for reconsideration.

B. The Campbells are entitled to an award of costs on appeal.

In accordance with I.A.R. 41 and 35(b)(5), the Campbells request on appeal an award of their costs.

CONCLUSION

The district court's Memorandum Decision and Order on Summary Judgment should be vacated together with the subsequent Judgment based on the district court's order. The case should be remanded to the district court with directions to review the additional evidence and reconsider the cross motions for summary judgment.

Dated this 27 day of September 2012.

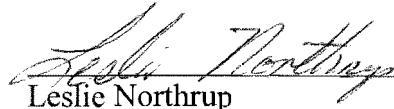

Kipp L. Manwaring
Attorney for the Appellants

CERTIFICATE OF MAILING

I **HEREBY CERTIFY** that on the 2nd day of October 2012, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

Justin R. Seamons
Attorney at Law
414 Shoup Avenue
Idaho Falls, Idaho 83402

☐ Hand Delivered
☒ U.S. Mail, Postage Prepaid
☐ Facsimile
☐ Other _____



Leslie Northrup
Paralegal