4-6-2012

Boise Mode, LLC v. Donahoe Pace & Partners Appellant's Reply Brief Dckt. 39229

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT NO. 39229-2011

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership,

Plaintiff-Respondent,

vs.

DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE,

Defendants-Appellants.

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District
for the County of Ada
Case No. CV 2009-11334

Honorable Ronald J. Wilper, District Judge

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I.

INTRODUCTION

This District Court abused its discretion in denying Appellants' Motion For Continuance. It then erred by hearing Plaintiff's Motion for Reconsideration and Further Consideration to address Plaintiff's motions for summary judgment on the merits after it had granted Defendant's Defendants'/Counter-Claimant's Motion to Amend Judgment Pursuant to I.R.C.P. 59(e). And finally, by granting Boise Mode's Motion for Reconsideration and Further Consideration, the District Court failed to appreciate both that questions of a material fact existed as to whether Boise Mode breached the Lease with DPP, and how Boise Mode's actions raised material questions of fact in regard to whether DPP's performance was excused and the Lease vitiated. Respondent's Brief both perverts and mischaracterizes those elementary issues.

II.

CLARIFICATION OF FACTS

The statement of facts contained in Appellants' Brief suffices for purposes of this Reply. Respondent's Brief, however, mischaracterizes the contents of the Affidavit of John Browder that was filed in support of DPP's Rule 56(f) Motion for Continuance ("Rule 56(f) Affidavit"). As stated in the Rule 56(f) Affidavit, DPP's discovery requested information related to Boise Mode's relationship with one of its main tenants, the North Face, and how construction incidental to the

North Face's build-out affected the rights of DPP. R., at 364.[1] A plain reading of the Rule 56(f) Affidavit shows that it satisfied the requirements of I.R.C.P. 56(f).

At the District Court, Boise Mode raised a litany of specious objections to DPP's discovery requests and failed to provide substantive responses thereto. The Rule 56(f) Affidavit clarified that much of that information, as well as information only in the hands of third parties, was essential to DPP's opposition to Boise Mode's two motions for summary judgment. Specifically, the evidence sought would have served to establish that Boise Mode (1) breached express and implied terms of the Lease; (2) breached duties implied by law; and (3) constructively evicted DPP by, without limitation: (i) failing to ensure that other tenants did not create improper noise or disturbance to interfere with DPP's rights; (ii) preventing access to lease premises; and (iii) allowing intrusions to DPP's computer and data processing systems. R. 365. To obtain that essential information, DPP thereafter served subpoena duces tecum on Boise Mode's property manager, Colliers Property Management, LLC and its key tenant, The North Face, on November 15, 2010, requesting that documents and information be provided on December 1, 2010. R. 365.[2] The North Face neither responded to nor attended the December 1, 2010 deposition as scheduled, and Colliers Idaho

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[1]In addition to supporting its breach of contract and other claims, DPP needed The North Face lease to establish or evaluate whether it was a third-party beneficiary to the same.

[2]DPP was well within its right to serve the subpoenas. Boise Mode's contention that DPP should have initiated a "meet and confer" letter is irrelevant and obfuscates the issue - DPP simply opted to go straight to the source for certain documents rather than engage Boise Mode in what it anticipated would lead to endless objections and lack of cooperation.

Property Management, LLC informed DPP that it previously had turned over the requested files to Boise Mode and would not attend its December 1, 2010 deposition. R., at 365-366.

While the subpoenas were outstanding, Boise Mode served its motion for summary judgment on its verified complaint and its motion for summary judgment on DPP's counterclaims on November 24, 2010. R., at 366. Again, at the time of those motions, discovery requests were outstanding, and pursuant to representations made by Mike Attiani of Colliers International, who told DPP that the files requested in the subpoena duces tecum were previously given to Boise Mode, Boise Mode had sole possession of some of the materials DPP was seeking. R., at 366. With DPP's opposition papers due December 8, 2010, the only way it could obtain information it needed to oppose Boise Mode's motions was to file a motion to compel against Boise Mode and serve another subpoena on The North Face. To do so in time to oppose Boise Mode's motions, it needed a continuance.

Discovery was still ongoing at the time DPP served the subpoenas. The trial was scheduled for February 23, 2011 and the final day to initiate discovery was 60 days before that date. R., at 141-142. Furthermore, on October 27, 2010, less than one month before it filed its Motion for Summary Judgment, Boise Mode noticed up a Rule 30(b)(6) deposition duces tecum to DPP that included twenty-three (23) separate, comprehensive topics. R., at 145-151. DDP's subpoenas duces tecum to Colliers Idaho Property Management and The North Face were served shortly thereafter. After that, Boise Mode filed its summary judgment motions.

In addition to ignoring and misstating the substance of the Rule 56(f) Affidavit, Respondent's Brief contends that DPP failed to establish damages with respect to its breach of contract claim. As discussed below, the burden was not on DPP to establish its specific damages at the time it opposed Boise Mode's motions for summary judgment. Nevertheless, Boise Mode's own affidavits filed in support of its motions for summary judgment demonstrate that it had repeatedly breached the Lease. Having established questions of material fact as to whether Boise Mode breached the lease, the issue of damages should have been reserved for the jury.

Even though the issue of DPP's damages was at the time irrelevant, documents attached and incorporated into Boise Mode's affidavits show damages that include, for example, letters dated April 9, 2009 and May 20, 2009, from Tim Pace to Angela Aeschliman of Watermark Property Management informing her that because of reoccurring construction disruptions and repeated failures on the part of Boise Mode to address and alleviate various other disturbances to DPP's office space, DPP's ability to conduct a professional service business was inhibited. R., at 307-308. On July 23, 2009, Mr. Pace summarized those and other issues in a letter entitled "Summary of Tenant Dispute" that was sent to David Baum of Boise Mode, in which DPP lists a litany of disturbances that create a question of breach.[3] R., at 276-278. The letter clarifies that DPP was damaged by stating that it

[3]The Summary of Tenant Dispute letter should be read in its entirety because it evidences the ongoing, repeated disruptions DPP endured. Also, in a July 15, 2009 email from Tim Pace to David Baum (one of Boise Mode's affiants), Mr. Pace clarifies that such breaches were ongoing for the first 20 months of the Lease (well before DPP stopped paying rent) but were accommodated by DPP. After The North Fact construction issues occurred, however, DPP's ability to use its leased premises became at times impossible. R., at 267. The letter also clarifies that it was only after the 20-months

was forced to "shut down office operations completely." R., at 276. In a July 31, 2009 email exchange between David Baum and Tim Pace, Mr. Pace stated that DPP was losing $1,100 a month in income because of another tenant's disturbances and because of lost income from focus group meetings in the amount of $8,000. R., at 283. All of those letters were relied upon in Boise Mode's motions for summary judgment.[4] Additionally, as acknowledged in his own affidavit, counsel for Boise Mode received a letter from Tim Pace on October 12, 2009, stating that and explaining why Boise Mode's breaches had caused DPP $7,420 in lost income. R., at 337. Therefore, Boise Mode's contention that DPP failed to establish damages is disingenuous, irrelevant and controversial by its own affidavit.

III.

CLARIFICATION OF ISSUES

1. Did the District Court abuse its discretion by denying DPP's Rule 56(f) continuance when there was outstanding discovery that was sought within the court-ordered discovery deadline and before Boise Mode filed its motions for summary judgment?

2. Did the District Court err in considering Boise Mode's Motion for Reconsideration and Further Consideration?

3. Did the District Court improperly resolve questions of material fact in granting summary judgment in favor of Boise Mode with respect to DPP's counterclaims?

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of disturbances went unremedied did DPP begin withholding rent. R., at 278.

[4]Numerous discussions were initiated in regard to the rental disturbances DPP endured. As evidenced in February 9, 2009 letter from Mr. Pace to Angela Aeschliman, DPP understood that it was Boise Mode's intent to reduce rent in proportion to the disturbances sustained to the leased premises. R., at 305.

4. Did the District Court improperly resolve questions of material fact in granting summary judgment in favor of Boise Mode with respect to all claims in its Verified Complaint?

IV.

ARGUMENT

A. Denying DPP's Motion for Continuance Pursuant to I.R.C.P. 56(f) Was an Abuse of Discretion.

Failing to grant a continuance pursuant to I.R.C.P. 56(f) when there was outstanding discovery related to a material, possibly recalcitrant witness (or when the discovery was being withheld by Boise Mode) was a clear abuse of discretion. Contrary to representations in Respondent's Brief, a review of the Rule 56(f) Affidavit and the decision in *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 108 P.3d 380 (2005) advance that reality.

As shown above, the Rule 56(f) Affidavit clearly articulates what and how additional discovery was necessary. DPP needed to obtain information from The North Face to evidence how the construction of its build-out interfered with DPP's Lease such that it caused a substantial breach that either nullified contractual obligations or constituted constructive eviction, or to determine whether DPP was a third-party beneficiary to the lease between Boise Mode and The North Face - essential elements to DPP's opposition to Boise Mode's pending motions for summary judgment. Notably, the District Court's ruling did not question the adequacy of the Rule 56(f) Affidavit, or DPP's need for additional discovery to oppose Boise Mode's Motion for Summary Judgment. R., at 452.

Respondent's analysis of *Jenkins* is misleading. A careful reading of *Jenkins* shows that it is harmonious with the authority cited in Appellants' Brief and does not undermine the arguments therein.

Jenkins involved a wrongful termination suit between Larry Jenkins (employee) and Boise Cascade (employer). On June 18, 2003 Boise Cascade filed a motion for summary judgement on the few claims that remained pending. *Id.*, at 237, 108 P.3d at 384. Then, after the motion for summary judgment had been filed, "on July 1, 2003, the last day to initiate discovery within the court-ordered deadline, the Jenkins noticed up twelve depositions and served a voluminous number of interrogatories and requests for production." *Id.* (Underline added). The affidavit of Jenkin's attorney merely stated that additional discovery was pending, but failed to specify what discovery was needed or state how the additional discovery was relevant to avert summary judgment. *Id.*, at 239, 108 P.3d 386.[5] The Court focused on the nondescript affidavit with a lower court opinion "that recognized it had the discretion to deny the motion, articulated the reasons for so doing and exercised reason in making the decision." *Id.* Therefore, the Court failed to find an abuse of discretion.[6]

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[5]Respondent's Brief states incorrectly that DPP fails to argue that its 56(f) Motion met the burden established in *Jenkins*. The Rule 56(f) Affidavit was well drafted and undeniably sufficient to show what information DPP needed and why such documents were necessary to support its opposition to Boise Mode's motions for summary judgment. Therefore, to refute that assertion, DPP simply asks the Court to review the Rule 56(f) Affidavit to see how well it comports to the standards cited or described in *Jenkins* and other authority cited therein and in Appellants' Brief. R., at 363-367.

[6]The *Jenkin's* Court cited two cases in its discussion of Rule 56(f): *Allen v. Bridgestone/Firestone, Inc.*, 81 F.3d 793, 797 (8th Cir. 1996) (noting that for a party to invoke the

In this case, the Rule 56(f) Affidavit specified exactly what additional discovery was needed, including why it was needed, and how it would create a question of material fact. Furthermore, unlike the party who attempted to propound discovery in *Jenkins*, DPP did not serve its subpoena duces tecums at the 11th hour to initiate discovery but served them before Boise Mode filed its motions. Respondent's Brief ignores that reality and the fact that the District Court did not question the technical sufficiency of the Rule 56(f) Affidavit.

Admittedly, DPP did not serve the serve subpoenas to The North Face and Colliers Idaho Property Management, LLC, until six months after receiving Boise Mode's discovery responses.[7] (Note, Boise Mode had an ongoing duty to supplement its discovery responses and at this point, DPP

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protection of Rule 56(f) he must "do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits . . . and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact."); and *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088-89 (9th Cir. 2001) (to obtain additional discovery before a motion for summary judgment hearing, the party has the burden of showing "what further discovery would reveal that is essential to justify their opposition," making clear "what information is sought and how it would preclude summary judgment." *Jenkins*, at 239, 108 P.3d 386.

Respondent's Brief is incorrect in stating that DPP went outside of Idaho to cite cases regardless of the fact that there is on-point authority that is inconsistent with *Jenkins*. Respondent's Brief, 17. In addition to the fact that *Jenkins* is consistent with the cases cited by DPP, it did not born a new rule on what a 56(f) movant must establish to prevail but, rather, cited inherent rules from the 8th and 9th Circuit. Similarly, the cases cited Appellants' Brief were from Circuit Courts, including the 9th Circuit.

[7]Boise Mode raised objections and did not respond to numerous, relevant DPP discovery requests. R., at 370-395. As a result, DPP decided to go straight to the source and request the information from Boise Mode's former property manager and The North Face. That was a course of action to which DPP was entitled as a matter of right.

has no way of knowing whether Boise Mode's objections to certain discovery requests or failure to respond to certain discovery responses were made in good faith.) However, Boise Mode noticed up a comprehensive, twenty-three (23) topic Rule 30(b)(6) subpoena duces tecum around that time. R., at 145-151. Furthermore, the deadline to initiate discovery was not until the end of December, 2010. Disregarding those facts, the only articulated basis for the District Court's denial of the Motion for Continuance was that DPP "did not provide sufficient reasoning as to why six months intervened between the receipt of initial discovery answers" which DPP alleged were unsatisfactory, and "any attempt to discover additional relevant information." R., at 452.

That six month delay was not improper especially because the subpoenas were served before Boise Mode's motions for summary judgment and the court-ordered discovery deadline.[8] A continuance would not have prejudiced Boise Mode (other than by facilitating discovery harmful to its position) and would have permitted DPP to obtain discovery relating to the disturbances that it believed substantiated its arguments to oppose Boise Mode's summary judgment, including breach of lease.

Given that DPP was still within the confines of the time period in which parties were allowed to initiate discovery and served its subpoenas prior to Boise Mode's motions for summary judgment,

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[8]Respondent's Brief argues that the six month delay is fatal to DPP's argument. At what moment in time does the period between the time a party receives discovery responses until it serves subpoenas or initiate further become a fatal delay? Is it two months, four months, six months, etc.? To avoid drawing a subjective, seemingly arbitrary line in the sand as to when such delay becomes fatal, it is both more fair and practical to ask whether the later discovery requests and subpoenas were served within the court-ordered discovery schedule.

precluding it from obtaining documentation relevant to its claims and defenses prior to ruling on Boise Mode's motions for summary judgment was an abuse of discretion, particularly given that Boise Mode would not have been prejudiced by a continuance.

B. Boise Mode's Motion for Reconsideration and Further Consideration of a Rule 59(e) Motion Was Improper.

Ruling on Boise Mode's Motion for Reconsideration and Further Consideration was improper under the facts at bar. The District Court entered its order granting Boise Mode's motions for summary judgment on December 27, 2010; on January 5, 2011, Boise Mode already had obtained a final judgment. R., at 461-463. DPP filed a Motion to Amend Judgment Pursuant to I.R.C.P. 59(e) ("Rule 59(e) Motion") on January 19, 2011.[9] R., 481-482. On March 2, 2011, the District Court granted and entered an order on DPP's Rule 59(e) Motion, classifying it as both a motion for reconsideration under I.R.C.P. 11(a)(2)(B) and motion to alter or amend judgment under 59(e). R., at 517-525. Boise Mode then filed its Motion for Reconsideration and Further Consideration asking the court to review the March 2, 2011 Order. R., 560. DPP objected based on the plain and unequivocal language of I.R.C.P. 11(a)(2)(B), which does not permit motions for reconsideration of orders entered on a motion filed pursuant to I.R.C.P. 59(e). R., at 584-590, 639-641. The District Court rejected this argument, relying on *Elliot v. Darwin Neibaur Farms*, 138 Idaho 774, 785, 69

[9]Prior to its Rule 59(e) Motion, DPP was granted an order to stay the execution of the judgment "until such time as Defendants/Counter-Claimant file their Motion to Alter or Amend Judgment under Idaho Rule of Civil Procedure 59(e) and the Court reaches a decision thereon." *See* Order, R., at 478-480.

P.3d 1035, 1046 (2003), for the proposition that pursuant to I.R.C.P. 11(a)(2)(B), a court can reconsider "earlier rulings *sua sponte*." R., at 644.

The District Court erred in failing to follow the plain language of the Idaho Rules of Civil Procedure. Because a judgment, not an interlocutory order, had been entered by the District Court, DPP's Rule 59(e) Motion was properly filed under I.R.C.P. 59(e), which states:

> A motion to alter or amend the judgment shall be served not later than fourteen (14) days after entry of the judgment.

I.R.C.P. 11(a)(2)(B) unequivocally proscribes motions for reconsideration of an order entered on a motion filed pursuant to 59(e). It states in its entirety:

> (B) Motion For Reconsideration. A motion for reconsideration of any interlocutory orders of the District 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. A motion for reconsideration of any order of the District Court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; **provided, there shall be no motion for reconsideration of an order of the District Court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).**

(Emphasis added). The emphasized language above speaks for itself.

Eight days after the District Court entered an order granting Boise Mode's motions for summary judgment, Boise Mode obtained a judgment on that order, presumably to initiate the time period in which DPP had to file a notice of appeal and expedite execution on the judgment. Because of that decision on behalf of Boise Mode, DPP was able to file its Rule 59(e) Motion, rather than a motion under Rule 11(a)(2)(B).

Respondent's Brief disagrees with DPP's interpretation of Rules 11(a)(2)(B) and 59(e) on three grounds. First, it contends that the text of Rule 11(a)(2)(B) does not preclude reconsideration of an interlocutory order (irrespective of the fact that DPP's Rule 59(e) Motion was filed under 59(e)). The text of Rule 11(a)(2)(B) speaks for itself and clearly states that "there shall be no motion for reconsideration of an order of the District Court entered on any motion filed under Rule[]. . .59(e)." Thus, even if the matter being reconsidered was an interlocutory order, which it was not, Boise Mode's motion for reconsideration would be improper because the clause cited above still controls under a plain reading of the Rule. *See Ross v. State*, 141 Idaho 670, 115 P.3d 761 (App. 2005) (motion to reconsider dismissal order "properly should be treated as a motion to alter or amend a judgment under I.R.C.P. 59(e)"). As stated in Appellants' Brief, the issue is one of interpretation of I.R.C.P. 11(a)(2)(B) of which the Idaho Supreme Court exercises free review. The language of Rule 11(a)(2)(B) speaks for itself.

Nevertheless, DPP's Rule 59(e) Motion was filed to amend a judgment, not on an interlocutory order. That judgment was final. And this "Court has held that I.R.C.P. 11(a)(2)(B) provides the authority for a district court to reconsider and vacate interlocutory orders so long as a final judgment has not been ordered." *Telford v. Mart Produce, Inc.*, 130 Idaho 932, 934, 950 P.2d 1271, 1273 (1998) (underline added), citing *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997); *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994). Here, by contrast, the District Court had entered a final judgment; as such it acted outside its authority

when it reconsidered the "earlier ruling []*sua sponte*." *C.f. Telford,* at 934, 950 P.2d at 1273 (stating "[i]n this case, the district court reconsidered its ruling before the entry of final judgment and, therefore, acted with authority under the rule."). Again DPP filed its Rule 59(e) Motion under 59(e) after the District Court had entered a final judgment. Therefore, Boise Mode's Motion for Reconsideration and Further Consideration was improper.

Respondent's Brief also contends that even if DPP's of Rule 11(a)(2)(B) is correct, the District Court properly classified DPP's Rule 59(e) Motion as being under both Rules 11(a)(2)(B) and 59(e). As stated above and in Appellants' Brief, DPP's Rule 59(e) Motion was filed on the District Court's judgment, not an interlocutory order. Therefore, it was not a motion for reconsideration under Rule 11(a)(2)(B) but, rather, a motion to alter or amend the judgment of a final order under Rule 59(e).[10]

Finally, Boise Mode states that DDP's interpretation of Rule 11(a)(2)(B) leads to an absurd result because it would allow a party to use a Rule 59(e) motion to avoid subsequent reconsideration of a court's ruling of that motion. That argument is unconvincing in light of Boise Mode's chosen case strategy. Boise Mode obtained a judgement eight days after the court entered an order on its motions for summary judgment as a means to, presumably, expedite execution of the judgement and initiate the time period in which DPP could file a notice of appeal. Thus, the difference between Boise Mode's order granting its motions for summary judgment and the judgement on that order was

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[10]Even if the District Court properly deemed it as both a Rule 11(a)(2)(B) and 59(e) motion, the plain language of 11(a)(2)(B) still precludes reconsideration of orders filed under Rule 59(e).

not insignificant - with the judgment, certain rights and benefits accrued to Boise Mode that would not have accrued from the interlocutory order. Because of Boise Mode's decision, there was a final judgment on which DPP was entitled to file its Rule 59(e) Motion. It is hardly absurd to require Boise Mode to pay the piper for the dance it selected.[11]

C. The District Court Erred in Granting Summary Judgment to Boise Mode on DPP's Counterclaims.

1. Boise Mode Breached its Lease with DPP.

The pleadings show that Boise Mode was the first party to breach the Lease. As discussed above and in Appellants' Brief, Boise Mode's own affidavits created questions of material fact as to whether its initial and subsequent breaches were material and therefore operated to rescind the contract and/or excuse DPP's performance thereunder. *See, e.g., J. P. Stravens Planning Assoc., Inc. v. City of Wallace*, 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct. App. 1996) ("[i]f a breach of contract is material, the other party's performance is excused") (see also extensive authority cited therein); *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 874 P.2d 506, 511 (1993) ("[w]hether a breach of contract is material is a question of fact"). Thus, there was a triable issue of material fact as to whether a lease even existed upon which Boise Mode could predicate its causes of action.

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[11]Furthermore, at the time the District Court heard Boise Mode's Motion For Reconsideration and Further Consideration, DPP had not been provided answers and responses its Interrogatory Nos. 18 and 19 and its Request for Production No. 3, which sought information related to complaints from other tenants regarding noise and other disturbances, whether Boise Mode and The North Face had an agreement in which Boise Mode would be penalized if improvements to The North Face were not completed by a specified date, and whether The North Face lease, like DPP's, had covenants against unreasonable noise and disturbances. R., at 380-381 and 388.

Notably, Respondent's Brief does not dispute the proposition that a party's first material and substantial breach of an agreement can operate to rescind it such that the other party's performance is excused. (See cases cited in preceding paragraph.) Instead, Boise Mode simply argues that Article 4.1 clearly and unambiguously stated that DPP was not entitled to withhold rent, that DPP withheld rent, and that therefore there is no genuine issue of fact as to whether it breached the contract. The issue is not whether DPP withheld rent - it did. The issue is whether Boise Mode's prior breaches excused Boise Mode's performance thereunder. Boise Mode fails to directly confront that issue.

At the time the District Court ruled on Boise Mode's Motion for Reconsideration and Further Consideration, it was presented with numerous questions of material fact as to whether Boise Mode breached the Lease prior to DPP's withholding of rent. Therefore, it erred in ruling in favor of Boise Mode or its claims, as there was the threshold issue of whether Boise Mode's actions excused DPP's performance.

2. Because a Material Question of Fact Existed with Respect to Boise Mode's Breach, Damages were for a Jury to Determine.

If Boise Mode made a convincing argument that there did not exist a question of material fact as to whether it breached the Lease - a difficult task given that questions of fact were presented by its own affidavits - then *a fortiori* the issue of damage would be moot and irrelevant. Instead of addressing the dispositive issue head-on, however, Boise Mode makes the irrelevant and incorrect argument that DPP failed to demonstrate how Boise Mode's breach caused it any damages. That

argument is wrong for two obvious reasons.

First, the burden is always on the party moving for summary judgment to prove the absence of a material fact. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996). Damages that flow from breach typically are questions of material fact that are within the province of a jury. Because (i) the record was replete with evidence that Boise Mode breached the Lease; and (ii) Boise Mode did not prove absence of a material fact as to DPP's damages-indeed proved damages with its own affidavits, DPP satisfied its burden, as the non-moving party, to survive summary judgment.

Second, DPP's damages are demonstrated in Boise Mode's own affidavits. In a letter to Boise Mode's counsel, for instance, Mr. Pace itemizes some of DPP's damages. Additionally, as discussed above, Boise Mode's affidavits are replete with instances in which DPP expressed damage to its business operations. R., at 276, 307-308. Thus, Boise Mode's contention that DPP failed to demonstrate how Boise Mode's breach caused it damage is without merit.

D. The District Erred in Granting Summary Judgment to Boise Mode on Its Causes of Action.

Respondent's Brief circumvents the issue of Boise Mode's prior breach by classifying it as a "red herring," confusing the burden of proof and stating that, in essence, it was impossible for Boise Mode to have breached the Lease based on its express language. This argument speciously conflates "set-off" with breach of lease. Again, DPP need not "prove" that Boise Mode breached the Lease but must merely, as the non-moving party, show that there is a genuine issue of material fact as to whether Boise Mode's actions, when construed most favorable to DPP, could constitute

breach. Based on the foregoing and the arguments in Appellants' Brief, there are questions of material fact as to whether Boise Mode breached the Lease by allowing and failing to alleviate ongoing disturbances that affected DPP's leased premises. The Lease's language regarding set-off is irrelevant to this issue.

V.

CONCLUSION

As analyzed here above and the opening brief, the District Court abused its discretion in denying the Motion for Continuance. The District Court erred a second time when it heard Boise Mode's Motion for Reconsideration and Further Consideration in direct contravention to the plain language of Rules 11(a)(2)(B) and 59(e).

Finally, the District Court erred in resolving material questions of fact which, depending on how they were resolved by a jury, would result in at least one of two outcomes: (1) Boise Mode's first breaches of the Lease were substantial enough so as to excuse DDP's attendant obligation to pay rent; or (2) DPP was entitled to prove damages based on Boise Mode's breaches. By granting Boise Mode's motions for summary judgment, the District Court invaded the province of the jury and committed reversible error.

Respectfully Submitted this 6 day of April, 2012.

Michael E. Kelly
Attorney for the Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 6 day of April, 2012, two true and correct copies of the foregoing RESPONDENTS' BRIEF were served upon the following:

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