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IN THE SUPREME COURT OF THE STATE OF IDAHO

AGRISOURCE, INC., an Idaho corporation,

Plaintiff/Respondent,

vs.

ROBERT JOHNSON,

Defendant/Cross-Defendant/Appellant,

and

NEIL BROWN, INC., an administratively dissolved Idaho corporation, NEIL EDWIN BROWN and VERLIE BROWN,

Defendants/Cross-Claimants,

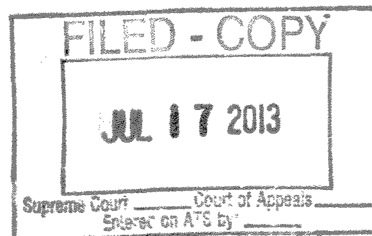
and

KRISTINE JOHNSON, individually, and d.b.a. JOHNSON GRAIN, and JOHNSON GRAIN, INC., an Idaho corporation,

Defendants/Cross-Defendants.

SUPREME COURT # 40340-2012

Bonneville County Case No. CV-2010-3066



APPELLANT'S BRIEF

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

Honorable Joel E. Tingey, District Judge, Presiding

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STATEMENT OF THE CASE

This appeal arises from the district court's summary judgment in favor of Agrisource, Inc., determining it had no notice that when Robert Johnson entered into a grain contract he was acting as agent for Neil Brown's corporation, Johnson Grain, Inc.

This appeal followed the district court's denial of Robert Johnson's Motion for Reconsideration and Alternative Motion for Relief.

Course of the Proceedings

Agrisource filed a Complaint in Cassia County against Neil Brown, his wife, Verlie Brown, and the Browns' corporation, Neil Brown, Inc., (collectively the Browns), alleging breach of contract arising from a grain contract for 50,000 bushels of durum wheat. (*Clerk's Record,* Vol. I, pp. 20-24).

Order changing venue from Cassia County to Bonneville County was entered May 21, 2010. (*Clerk's Record,* Vol. I, p. 1 – Registry entry).

Responding to the Browns' position that Robert Johnson was the real party to the contract, Agrisource and the Browns on January 13, 2011 filed a stipulation allowing Agrisource to file an amended complaint. (*Clerk's Record,* Vol. I, pp. 25-26).

On January 19, 2011 Agrisource filed its Amended Complaint against the Browns and Robert Johnson, his wife Kristine Johnson, and their corporation, Johnson Grain, Inc. (*Clerk's Record*, Vol. I, p. 27-31).

On February 4, 2011 the Johnsons filed an Answer to Agrisource's Amended Complaint and made cross claims against the Browns. (*Clerk's Record*, Vol. I, p. 32).

On February 24, 2011 the Browns filed their Answer and Crossclaim. (*Clerk's Record,* Vol. I, p. 42). On the same date, the Browns replied to the Johnsons' Crossclaim. (*Clerk's Record,* Vol. I, p. 37).

Trial by jury on all issues was timely requested by the Johnsons and the Browns. (*Clerk's Record,* Vol. I, pp. 32, 42).

The Browns filed for summary judgment against Agrisource's Amended Complaint on December 29, 2011 supported by the Affidavit of Bryan Zollinger. (*Clerk's Record*, Vol. I, p. 78a).

Robert Johnson filed his first affidavit on January 12, 2012. (*Clerk's Record,* Vol. I, p. 79).

The Johnsons filed their Motion for Summary Judgment on February 1, 2012. (*Clerk's Record,* Vol. I, p. 93). A memorandum in support of that motion was filed the same date. (*Clerk's Record,* Vol. I, p. 95).

Together with the earlier filed Affidavit of Robert Johnson, the Johnsons on February 1, 2012 filed the Affidavit of David Smith, and Affidavit of Counsel in support of their motion for summary judgment. (*Clerk's Record,* Vol. I, pp. 110, 112a-112www, 113-138).

The Johnsons filed their Amended Answer, Cross-claim, and Third-party Claim on February 2, 2012. (*Clerk's Record,* Vol. I, p. 139).

Summary judgment in favor of the Browns dismissing Agrisource's Amended Complaint against them was entered February 7, 2012. (*Clerk's Record,* Vol. I, p. 148).

On February 23, 2012 the Browns filed their reply to the Johnsons' Amended Cross-Claim on Third-Party Claim. (*Clerk's Record,* Vol. I, p. 150).

Agrisource filed for summary judgment against the Johnsons on March 5, 2012. (*Clerk's Record,* Vol. I, p. 156). Its memorandum in support of its motion was filed the same date. (*Clerk's Record,* Vol. I, p. 159).

To support its Motion for Summary Judgment, Agrisource filed the Affidavit of Kirk Carpenter and Affidavit of Scott Mallory on March 5, 2012. (*Clerk's Record,* Vol. I, p. 168; Vol. II, p. 228).

Robert Johnson and Kristine Johnson on March 15, 2012 filed their opposition to Agrisource's Motion for Summary Judgment. (*Clerk's Record,* Vol. II, p. 236).

Hearing before the district court on the parties' cross motions for summary judgment was held April 3, 2012. (*Transcript of Hearing, Motion for Summary Judgment*, pp. 1-20).

By memorandum decision and order filed April 6, 2012 the district court granted summary judgment in favor of Agrisource against Robert Johnson and granted summary judgment in favor of Kristine Johnson and Johnson Grain, Inc., against Agrisource. (*Clerk's Record,* Vol. II, p. 242).

The judgment in favor of Agrisource and against Robert Johnson was entered April 17, 2012. (*Clerk's Record,* Vol. II, p. 253).

On April 18, 2012 Robert Johnson filed his first Motion for Reconsideration of the Memorandum Opinion and Order entered April 6, 2012. (*Clerk's Record,* Vol. II, p. 256). In

support of that motion, Robert Johnson filed his Second Affidavit on April 18, 2012. (*Clerk's Record,* Vol. II, p. 259).

Judgment in favor of Kristine Johnson and Johnson Grain, Inc., dismissing Agrisource's claims against them was entered April 20, 2012. (*Clerk's Record,* Vol. II, p. 281).

On May 22, 2012 Johnson filed his reply brief to Agrisource's objection to Johnson's Motion for Reconsideration. (*Clerk's Record,* Vol. I, p. 112zzz).

Hearing on Johnson's Motion for Reconsideration before the district court was held May 25, 2012. (*Transcript of Hearing,* pp. 21-37).

On May 31, 2012 the district court entered its Order on Motion for Reconsideration and Motion to Certify, denying Johnson's motion for reconsideration and granting Agrisource's Motion to Certify its judgment as final. (*Clerk's Record,* Vol. II, p. 283).

On June 14, 2012 judgment was entered in favor of Agrisource and certified as final for purposes of I.R.C.P. 54(b). (*Clerk's Record,* Vol. II, p. 288).

On June 18, 2012 Johnson filed his Second Motion for Reconsideration of the Order Denying Motion for Reconsideration filed May 31, 2012. (*Clerk's Record,* Vol. II, p. 292). Johnson's motion was supported by the Affidavit of Wydell Johnson. (*Clerk's Record,* Vol. II, p. 300).

By Memorandum Decision and Order entered June 28, 2012 the district court ruled on the Browns' Motion for Summary Judgment against Johnson. (*Clerk's Record,* Vol. II, p. 305).

Hearing on Johnson's Second Motion for Reconsideration before the district court was held August 14, 2012. (*Transcript of Hearing,* pp. 38-75).

On August 21, 2012 the district court filed its Order on Motions for Costs and Attorney Fees pertaining to all parties' motions and objections to costs and fees, and addressing Johnson's Second Motion for Reconsideration. (*Clerk's Record,* Vol. II, p. 314).

Amended Judgment for Agrisource against Johnson, including costs and fees, was entered August 21, 2012. (*Clerk's Record,* Vol. II, p. 312). On the same date, the district court entered judgments of costs and fees in favor of the Browns' against Agrisource, and in favor of Kristine Johnson and Johnson Grain, Inc., against Agrisource. (*Clerk's Record,* Vol. II, p. 322, 324).

On August 28, 2012 the district court entered judgment dismissing the Browns claims against Kristine Johnson and Johnson Grain, Inc. (*Clerk's Record,* Vol. II, p. 326).

Johnson filed his Notice of Appeal on August 29, 2012. (*Clerk's Record,* Vol. II, p. 328).

On August 29, 2012 Johnson filed his Third Motion for Reconsideration requesting the district court to reconsider its Order on Motions entered August 21, 2012 and alternatively moved the court for relief under Rule 60(b). (*Clerk's Record,* Vol. II, p. 327a). Johnson's motion was supported by and the Affidavit of Jeanne Harris. (*Clerk's Record,* Vol. II, p. 327d).

Johnson filed an amended third motion for reconsideration and alternative motion for relief on September 10, 2012 and supported the amended motion with his third affidavit. (*Clerk's Record,* Vol. II, pp. 341, 344).

Hearing before the district court on Johnson's third motion for reconsideration and alternative motion for relief was held October 9, 2012. (*Transcript of Hearing*, pp. 76-93).

The district court on October 15, 2012 entered its Order Denying in Part and Granting in Part Johnson's motion for reconsideration and motion for relief. (*Clerk's Record,* Vol. II, p. 359).

Johnson filed his Amended Notice of Appeal on October 23, 2012. (*Clerk's Record,* Vol. II, p. 370).

Meanwhile, Agrisource had circulated among counsel for all parties a stipulation for entry of amended certified judgment; counsel for the Johnsons signed the stipulation and returned it to counsel for Agrisource. (*Clerk's Record,* Vol. II, p. 376, 379-381).

Statement of the Facts

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

Agrisource, Inc., is an Idaho corporation engaged in the business of dealing in agricultural commodities. (*Clerk's Record*, Vol. I, pp. 20, 27).

For several years prior to and continuing through the first six months of 2006 Robert Johnson was an employee of Agrisource, operating an elevator Agrisource leased in Ririe, Idaho. (*Clerk's Record*, Vol I, p. 79-80).

The landlord of the elevator was B&J Elevators, Inc., a corporation owned by Johnson's father, Wydell Johnson. (*Clerk's Record*, Vol. I, pp. 79-80; Vol. II, pp. 300-303).

Agrisource terminated its lease of the Ririe elevator at the end of July 2006. (*Clerk's Record*, Vol. I, pp. 79-80).

While Johnson was an employee of Agrisource during the summer of 2006 he learned through conversations with other representatives of Agrisource that it was aware Neil Brown planned to purchase the Ririe elevator from B&J. (*Clerk's Record*, Vol. II, pp. 259-262; Vol. I, p. 78ggg).

During July 2006 representatives of Agrisource visited Wydell Johnson at the Ririe elevator. (*Clerk's Record*, Vol. II, pp. 300-303). The main purpose of Agrisource's representatives' visits was to determine how to store and transport anticipated harvested grain from local farmers on contract with Agrisource. (*Clerk's Record*, Vol. II, pp. 300-303).

During those visits with Agrisource's representatives, Wydell discussed his plan to sell the Ririe elevator to Brown. (*Clerk's Record*, Vol. II, pp. 300-303). Agrisource wanted to make arrangements to store its anticipated grain from local farmers at the elevator until it could be shipped at Agrisource's direction. (*Clerk's Record*, Vol. II, pp. 300-303). Wydell told the Agrisource representatives that they needed to contact Brown to make arrangements on storage and cost. (*Clerk's Record*, Vol. II, pp. 300-303).

During a personal visit by Agrisource's representative with Wydell in late July or early August 2006, that representative was introduced to Brown who was present at the elevator. (*Clerk's Record*, Vol. II, pp. 300-303). During that visit, Agrisource and Brown

discussed receipt and storage of grain for Agrisource at the elevator. (*Clerk's Record*, Vol. II, pp. 300-303).

In August 2006 Brown purchased the Ririe elevator. (*Clerk's Record*, Vol. I, pp. 79-80; Vol. II, pp. 300-303). By Articles of Amendment filed August 31, 2006 with a date of adoption as of August 15, 2006 Brown changed the name of his corporation from Ririe Growers Supply & Service, Inc., to Johnson Grain, Inc. (Brown's Corp.) (*Clerk's Record,* Vol. I, p. 78f).

Agrisource knew that Brown was purchasing the elevator and that Johnson would be operating the elevator for Brown. (*Clerk's Record*, Vol. I, pp. 79-80; Vol. II, pp. 300-303).

In August 2006 Brown deposited his own monies to open a business checking account for Brown's Corp. at the local Ririe Branch of the Bank of Commerce. (*Clerk's Record*, Vol. I, pp. 79-80, 110, 112a-112h, 112x). Both Brown and Johnson were signatories on that account. (*Clerk's Record*, Vol. I, pp. 79-80, 110, 112a-112h, 112x).

Johnson began in August 2006 to operate the elevator for Brown's Corp. (*Clerk's Record*, Vol. I, pp. 79-80, 110, 112a-112h).

Johnson had business forms, including scale tickets, warehouse and train car logs and grain purchase contracts, printed with the full corporate name of Brown's Corp. (*Clerk's Record*, Vol. I, pp. 80-81, 85, 110, 112a-112h, 112zz; Vol. II, pp. 327e, 344-349, 351, 354, 358).

In September 2006 Brown signed applications with the Idaho Department of Agriculture for a commodity dealer's license and seed buyer's license under the name of

Brown's Corp. (*Clerk's Record*, Vol. I, pp. 81, 86-87, 88-89, 110, 112a-112h, 112tt-112vv). Brown obtained a commodity dealer/seed buyer bond for Brown's Corp.

Beginning in August or September 2006 Jeanne Harris started working for Brown at the elevator. (*Clerk's Record*, Vol. II, pp. 327g-327d). Harris was the bookkeeper for Brown's Corp. and other business interests owned by Brown. (*Clerk's Record*, Vol. II, 327g-327d).

Harris answered the telephone for the elevator during the fall and winter of 2006. (*Clerk's Record*, Vol. II, pp. 327g-327d). She would answer the telephone by saying, "Johnson Grain." (*Clerk's Record*, Vol. II, pp. 327g-327d).

Several representative of Agrisource called when Harris was answering the telephones for the elevator. (*Clerk's Record*, Vol. II, pp. 327g-327d). Those representatives would always ask to speak with Johnson. (*Clerk's Record*, Vol. II, pp. 327g-327d).

When local farmers would bring their grain for Agrisource to the elevator, Johnson or another elevator employee would prepare a scale ticket for each load. (*Clerk's Record*, Vol. II, pp. 327g-327d, 344-349). Harris kept and maintained the scale ticket records. (*Clerk's Record*, Vol. II, pp. 327g-327d).

Harris recalled sending copies of the scale tickets together with train car logs to Agrisource for billing purposes. (*Clerk's Record*, Vol. II, pp. 327g-327d). The scale tickets and train car logs were preprinted with the name Johnson Grain, Inc. (*Clerk's Record*, Vol. II, pp. 327g-327d).

Invoices preprinted with the name Johnson Grain, Inc., were sent by Harris to Agrisource for payment of elevator services. (*Clerk's Record*, Vol. II, pp. 327g-327d, 344-349).

Following entry of judgment in favor of Agrisource, Johnson's wife while cleaning an office in the elevator discovered for the first time six original invoices from Brown's Corp. (*Clerk's Record*, Vol. II, pp. 344-349). Each of those invoices was made out to Agrisource. (*Clerk's Record*, Vol. II, pp. 344-349).

Agrisource stated in an email that it knew Johnson was agent for Brown's Corp. (*Clerk's Record*, Vol. II, pp. 113-114).

Agrisource paid invoices and billings by making its own adjustment on offsets and then delivering a check made payable to Johnson Grain. (*Clerk's Record*, Vol. II, pp. 327g-327d, 344-349; Vol. I, pp. 78t-78y). All payment checks from Agrisource for the time period from September through December 2006 were stamped with the endorsement stamp for Brown's Corp. bank account and deposited into that account. (*Clerk's Record*, *Clerk's Record*, Vol. II, pp. 327g-327d; Vol. I, pp. 78t-78u).

In November 2006 Agrisource contacted Johnson seeking grain contracts for 100,000 bushels of durum wheat. (*Clerk's Record*, Vol. I, pp. 79-83). Johnson explained to Agrisource that Brown's Corp. had not yet received its commodity license and could not enter into any contracts until the license was issued. (*Clerk's Record*, Vol. I, pp. 79-83).

When Brown's Corp. received its license, Johnson contacted Agrisource to explain that contracts could now be initiated. (*Clerk's Record*, Vol. I, pp. 79-83). Johnson believed

he told Agrisource that he was the agent for Brown's Corp. (*Clerk's Record*, Vol. I, pp. 79-83).

On or about December 13, 2006 Agrisource prepared on its form commodity contract a contract for 50,000 bushels of durum wheat. (*Clerk's Record*, Vol. I, pp. 79-83). Agrisource had typed in the name of "Johnson Grain" as the party to its contract. (*Clerk's Record*, Vol. I, pp. 79-83).

Johnson accepted and signed that contract as an agent for Brown's Corp. (*Clerk's Record*, Vol. I, pp. 79-83). Johnson believes he told Agrisource prior to and during that contract discussion period in November through December 2006 that he was working for Brown's Corp. (*Clerk's Record*, Vol. I, pp. 79-83).

On or about January 12, 2007 Agrisource prepared on its form commodity contract a second contract for 50,000 bushels of durum wheat. (*Clerk's Record*, Vol. I, pp. 79-83). Agrisource had typed in the name of "Johnson Grain" as the party to its contract. (*Clerk's Record*, Vol. I, pp. 79-83).

Johnson accepted and signed that second contract as an agent for Brown's Corp. (*Clerk's Record*, Vol. I, pp. 79-83).

To fulfill the contracts with Agrisource, Johnson in turn as agent for Brown's Corp. entered into grain purchase contracts with supplying farmers, including Wilcox & Sons, and Brown. (*Clerk's Record*, Vol. I, pp. 79-83, 91, 92). Wilcox & Son's agreed to deliver 80,000 bushels and Brown agreed to deliver 20,000 bushels. (*Clerk's Record*, Vol. I, pp. 79-83, 91,

92). Wilcox fully performed; Brown only delivered just over 5,000 bushels of wheat. (*Clerk's Record*, Vol. I, pp. 79-83, Vol. II, pp. 344-349).

Agrisource acknowledged receipt of 50,000 bushels of durum by rail and showed two checks were issued for payment of that contract: one check in October 2007 and another check in December 2007. (*Clerk's Record,* Vol. I, p. 218). That receipt fulfilled the December 2006 contract. (*Clerk's Record,* Vol. I, p. 218).

Agrisource acknowledged receipt of 34,472.13 bushels of durum by rail and showed two checks were issued for payment of that contract: one check in October 2007 and another check in December 2007. (*Clerk's Record,* Vol. I, p. 219). Accordingly, the wheat delivered was less than the bushels required in the January 2007 contract. (*Clerk's Record,* Vol. I, p. 219).

Brown failed to perform in full his grain purchase contract in 2007 resulting in Brown's Corp. breach of its contract with Agrisource. (*Clerk's Record*, Vol. I, pp. 79-83; Vol. II, pp. 344-349).

By Articles of Amendment filed December 13, 2007 with a date of adoption as of December 3, 2007 Brown changed the name of his corporation from Johnson Grain, Inc., to Neil Brown, Inc. (*Clerk's Record,* Vol. I, p. 78mmm).

Agrisource demanded performance of the January 2007 contract and ultimately reached an agreement with Brown and/or Brown's Corp. to accept delayed performance upon Brown's representation that he would deliver the durum wheat during the 2008 crop season. (*Clerk's Record*, Vol. I, pp. 79-83; Vol. II, pp. 230, 344-349). Agrisource's agreement with

Brown was in accordance with the NGFA Grain Trade Rules it ascribed to. (*Clerk's Record*, Vol. I, p. 227).

Brown again failed to perform. (*Clerk's Record*, Vol. I, pp. 79-83; Vol. II, pp. 344-349). Agrisource filed this action.

ISSUES PRESENTED ON APPEAL

Did the district court err as a matter of law in determining that Agrisource had no notice that Robert Johnson was an agent for Johnson Grain, Inc.?

Did the district court abuse its discretion in failing to consider the Affidavits of Jeanne Harris and Robert Johnson filed as part of Johnson's third motion to reconsider and alternative motion for relief?

ARGUMENT

A. <u>The district court erred as a matter of law in determining that Agrisource had no notice that Robert Johnson was an agent for Johnson Grain, Inc.</u>

Standard of Review

When reviewing a district court's summary judgment, the standard of review on appeal is the same standard as that used by the district court in ruling on the motion. Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. The appellate court exercises free review over questions of law.

Castorena v. General Electric, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010).

Argument

In its decision denying Johnson's first motion for reconsideration, the court cited the authorities set forth below and then reached the following conclusions:

> "[T]he record is undisputed that Johnson never disclosed to that Plaintiff that he was acting as an agent of 'Johnson Brothers, Inc. (sic)'
>
> "At best, Johnson disclosed that he was acting on behalf of Neil Brown (which would have been inaccurate) or that he was acting on behalf of 'Neil Brown's company.'
>
> "Simply asserting that the record establishes that the (sic) Johnson was acting as an agent for somebody is insufficient to preclude liability."

> "Accordingly, even with the new evidence, the record does not support a claim that Johnson adequately disclosed his alleged principal and as such, Johnson is liable under the contract."

Johnson believes the court erred in two respects: 1) it reached an incorrect factual determination that the record was "undisputed that Johnson never disclosed ... that he was acting as an agent..."; and 2) it misapplied the law on agent disclosure by imposing an incorrect standard and otherwise not properly considering all elements pertaining to the question of notice.

First, the incorrect factual determination.

Contrary to the district court's findings on summary judgment, the record discloses the following pertinent facts regarding Johnson's disclosure of his agency.

- Robert Johnson told Agrisource that he was working for Neil Brown's company, Johnson Grain. Johnson may have told Agrisource that he was working for Johnson Grain, Inc. (*Clerk's Record*, Vol. I, pp. 79-80; Vol. II, pp. 259-262).
- Agrisource contacted Robert Johnson in fall 2006 to discuss grain contracts and Johnson told Agrisource that Neil Brown's company was not yet licensed and could not execute commodity contracts. (*Clerk's Record*, Vol. II, pp. 259-262).
- After Johnson Grain, Inc., received its commodity license in November 2006 Johnson then informed Agrisource of the company's licensure and ability to contract. (*Clerk's Record*, Vo. I, pp. 79-83; Vol. II, pp. 259-262).

In Johnson's first affidavit where he states he told Agrisource he was working for "Brown's company", the district court made a factual determination that Johnson did not actually state the company name "Johnson Grain, Inc." That is an incorrect and pure

assumption on the part of the district court. One reasonable inference from Johnson's statement is that he told Agrisource he was working for Brown's Corporation.

Reasonable inferences drawn from the above facts permit the determination that Johnson in fact disclosed to Agrisource his status as agent for Brown's Corp. The only contrary evidence is Agrisource's admission that it believed it was contracting with Johnson dba Johnson Grain.

Thus, the district court incorrectly made factual determinations not supported by the record. Applied to the standard for summary judgment, the district court impermissibly invaded the province of the jury in making factual determinations based upon genuine disputes of material fact. See *Montgomery v. Montgomery*, 147 Idaho 1, 205 P.3d 650 (2009).

When a jury will be the ultimate trier of fact and the trial court is considering a motion for summary judgment, it must liberally construe the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982); *Farmer's Ins. Co. of Idaho v. Brown*, 97 Idaho 380, 544 P.2d 1150 (1976). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions. *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 808 P.2d 851 (1991).

Despite the dispute in facts regarding Johnson's disclosure and Agrisource's notice, the district court reached a finding that Johnson had not disclosed his principal. Reasonable minds could reach different conclusions on those same facts. The district court erred in granting summary judgment where genuine issues of material fact exist requiring a jury to make the ultimate factual determination.

Second, misapplication of the law of disclosure and notice.

The district court ruled that an agent must disclose with precision the full name and exact nature of his principal in order to avoid personal liability on a contract. Idaho's case law and the law of agency do not support such a rule.

Moreover, the law of disclosure incorporates in its analysis the notice and knowledge of the other party to the contract and is not limited solely to what the agent discloses.

Quoting *Western Seeds, Inc. v. Bartu*, 109 Idaho 70, 704 P.2d 974 (Ct. App. 1985), the district court noted the general rule concerning a "partially disclosed" principal. However, the Court of Appeals in *Western Seeds* instructed that "The factual question--whether Western Seeds knew of the relationship between Farmers Feed and Seed and Pocatello Cold Storage, Inc., before part or all of the open account debt was incurred--was not resolved by the trial court, because of the court's erroneous assumption." *Id.* 109 Idaho at 72. The case was remanded to determine the facts of whether the agent had fully disclosed or partially disclosed its principal.

Furthermore, *Western Seeds* relied upon *McCluskey Commissary, Inc. v. Sullivan*, 96 Idaho 91, 524 P.2d 1063 (1974) and the Restatement of the Law of Agency. The Idaho

Supreme Court in *McCluskey* examined the facts as found at trial concerning whether McCluskey knew it was dealing with a partnership or joint venture, or a corporation. A review of the testimony of the contracting party showed it had a prior business relationship with both men who were known to be the principals in a restaurant enterprise. However, the contracting party was unaware – indeed, totally ignorant of – the fact that both men were now contracting as officers or agents of a newly formed corporation. Neither the fact of the business relationship of the men to the new company nor the existence of the new company was disclosed. Then the court made the following pertinent statements:

> It is a basic principle that an agent who enters into a contract on behalf of a corporation, but who neither discloses his agency nor the existence of that corporation to the third party, is personally liable to the third party.
> "The rule that where an agent enters into a contract in his own name for an undisclosed principal, the other party to the contract may hold the agent personally liable, applies equally well to corporate officers or agents. It has been held that the managing officer of a corporation, even though acting for the company, becomes liable as a principal where he deals with one ignorant of the company's existence and of his relation to it, and fails to inform the latter of the facts."

Id. 96 Idaho at 93.

Notably, the Court in *McCluskey* recognized the rule of disclosure: an agent acting on behalf of a corporation must either disclose his agency or the existence of the corporation. As part of that disclosure, the factual inquiry includes determining whether the other contracting party was "ignorant of the company's existence and of [the agent's] relationship to it."

Subsequently, in *Keller Lorenz Co., Inc. v. Insurance Associates Corp.*, 98 Idaho 678, 681, 570 P.2d 1366, 1369 (1977) the Idaho Supreme Court examined the liability of an

insurance agent under the rule of a partially disclosed principal. The Court noted the following rules pertinent to the present action:

> In Benner we held that an insurance agent who agreed to insure the plaintiff on behalf of a disclosed principal was not liable for the plaintiff's losses because he had apparent authority to bind the principal to an insurance contract. *This was based upon the familiar agency rule that an agent for a disclosed principal who actually binds the principal is not personally liable for breach of the insuring agreement by the insurer*. In this case, although the defendants denied that they agreed orally to bind the insurance coverage with any company, the jury found that they did orally agree to bind the coverage. *Thus, the defendant was acting as the agent of a partially disclosed principal, i. e., Keller Lorenz knew the defendant was acting as agent for some principal, but did not necessarily know for which principal the agent was acting. Restatement (Second) of Agency § 4(2) (1957). In this situation, the agent is party to the contract as a principal and liable under it.* Restatement (Second) of Agency § 321 (1957).

Id. (Emphasis added.)

The Idaho Supreme Court's reliance on Restatement (Second) of Agency is instructive. Section 4 of the Restatement analyzes the rules relating to a disclosed principal, partially disclosed principal, and undisclosed principal. It states, with emphasis added:

> (1) If, at the time of a transaction conducted by the agent, the other party thereto has *notice* that the agent is acting for a principal and of the principal's identity, the principal is disclosed.
>
> (2) If the other party has *notice* that the agent is or may be acting for a principal but has no notice of the principal's identity, the principal for whom the agent is acting is partially disclosed.
>
> (3) If the other party has no *notice* that the agent is acting for a principal, the principal is undisclosed.

In the official comments to Section 4 are found the following explanations. "The other party has notice of the existence and identity of the principal if he knows, has reason to

know, or should know of it, or has been given notification of the fact. See § 9 for the meaning of the word 'notice.'"

"Whether a principal is a disclosed principal, a partially disclosed principal or an undisclosed principal depends upon the manifestations of the principal or agent and the knowledge of the other party at the time of the transaction."

The official comments further discuss the sources of the other party's knowledge. "If the manifestations of the principal or agent are such as reasonably indicate to the other party the identity or existence of the principal, the latter is disclosed or partially disclosed, and this is true although the other party believes that he is dealing with the agent alone."

Section 9 of the Restatement (Second) addresses notice and states in relevant part, "(1) A person has notice of a fact if he or his agent knows the fact, has reason to know it, should know it, or has been given notification of it." The official comments further illustrate the rule.

> "Under the definition in this Section a person has notice of a fact if he has knowledge or reason to know of it, should know of it, or has been given notification of it... A person has reason to know of a fact if he has information from which a person of ordinary intelligence, or of the superior intelligence which such person may have, would infer that the fact in question exists or that there is such a substantial chance of its existence that, if exercising reasonable care with reference to the matter in question, his actions would be predicated upon the assumption of its possible existence. ...A person should know of a fact if a person of ordinary prudence and intelligence, or the intelligence which such person has or professes to have, would ascertain, in the performance of his duty to another, that such fact exists or that there is such a substantial chance of its existence that his action would be predicated upon its possible existence.

The Idaho Court of Appeals applied reasoning similar to that found in the comments above to the question of whether an agent disclosed his principal in *Interlode Constructors, Inc. v. Bryant*, 132 Idaho 443, 447, 974 P.2d 89, 93 (Ct. App. 1999). There the Court examined whether a contracting party with ordinary prudence and conversant with particular business practices would know under the circumstances he was dealing with an agent of principal. The court specifically noted that it "was not apparent to York (contracting party) at anytime that there was a corporate entity involved." Accordingly, the court found that the agent neither disclosed his agency nor the existence of the corporation. Thus, the principal was undisclosed and the agent was personally liable on the contract.

Here, the facts show Johnson never represented to Agrisource that he was doing business personally as Johnson Grain. Prior to the January 2007 contract, Agrisource knew or had notice that Neil Brown, and not Johnson, was the owner of the Ririe elevator. Johnson believed he told Agrisource he was working for Brown's Corp. Agrisource had notice that it was dealing with Brown's Corp. When billing Agrisource in 2006 for elevator storage and handling costs, Brown's Corp. sent invoices preprinted with its full corporate name along with scale tickets and logs also preprinted with the full corporate name. Agrisource sent checks payable to Johnson Grain that were all endorsed with Brown's Corp.'s stamp and deposited in that corporation's business account. Agrisource had notice that Brown's Corp. was not licensed as a commodity dealer until November 2006. After Johnson told Agrisource in November 2006 that Brown's Corp. was licensed as a commodity dealer, Agrisource then entered into the December and January contracts. Agrisource is in a position of superior

intelligence for purposes of notice where it is in the business of commodity contracts and knows the licensing requirements, knows Brown to be the owner of the elevator and knows Johnson to be Brown's manager. Pertinent to Agrisource's notice are the following facts:

- Agrisource knew prior to August 2006 that Neil Brown was purchasing the Ririe elevator from Wydell Johnson and Robert Johnson would be managing the elevator for Brown. (*Clerk's Record*, Vol. I, pp. 79-80; Vol. II, pp. 300-303).
- After August 1, 2006 and prior to the January 2007 contract Agrisource knew Neil Brown had purchased the Ririe elevator. (*Clerk's Record*, Vol. I, pp. 79-80; Vol. II, pp. 259-262, 300-303).
- After August 1, 2006 and prior to December 2006 Agrisource's agents Bill Mendenhall, Scott Mallory, Mike Allen and Bruce Beck had knowledge that Robert Johnson was managing the elevator for Neil Brown. (*Clerk's Record*, Vol. I, pp. 79-80; Vol. II, pp. 259-262, 300-303).
- Agrisource in spring 2006 had made contracts with local farmers for grain that would be fulfilled during the harvest of 2006. (*Clerk's Record*, Vol. II, pp. 259-262, 300-303).
- Johnson Grain, Inc., from September through December 2006 sent its invoices containing its preprinted corporate name together with elevator and train car logs to Agrisource for payment. (*Clerk's Record*, Vol. I, pp. 79-83, 110, 112a-112h, 112zz; Vol. II, pp. 259-262, 327e, 344-349, 351, 354, 358).
- Agrisource from September through December 2006 made checks payable to Johnson Grain for storage and shipping costs incurred for Agrisource's grain. (*Clerk's Record*, Vol. II, pp. 327g-327d, 344-349; Vol. I, pp. 78a-78ccc).
- All of Agrisource's payment checks were endorsed with a stamp for Johnson Grain, Inc., and deposited into the business account of Johnson Grain, Inc. (*Clerk's Record*, Vol. I, pp. 79-83; Vol. II, pp. 327g-327d, 344-349; Vol. I, pp. 78a-78ccc).

- Agrisource in July, August and September 2006 made arrangements with Neil Brown to store grain at the Ririe elevator. (*Clerk's Record*, Vol. II, pp. 259-262, 300-303).
- Scott Mallory of Agrisource admitted that Robert Johnson was an agent of Neil Brown. Mallory makes no statement in his email admission that he learned of Johnson's agency only after the contract at issue. (*Clerk's Record*, Vol. I, pp. 113, Exhibit B).

Other jurisdictions applying the Restatement of Agency to the issue of whether a principal was disclosed have relied heavily upon the comments to the Restatement in determining the legal standards for notice of the principal's identity.

In *Northland Temporaries, Inc. v. Turpin*, 744 N.W.2d 398 (Minn.App. 2008), the Minnesota Appellate Court applied the Restatement of Agency to the following facts. A salesman for a third party sought out the principal as an entity with which the third party wanted to do business. Through the salesman, the third party knew the location of the principal and the names of its owners. The salesman obtained sufficient knowledge to understand the principal's basic operations and ability to perform under a contract. Although the third party argued that the agent for the principal did not disclose the precise name of the principal, the Court applied the above facts to the Restatement as follows and held the third party had notice of the principal sufficient to find the principal was disclosed:

> A principal is deemed "disclosed" if the other party has notice of two facts: first, the fact "that the agent is acting for a principal," and second, "the principal's identity." Restatement (Third) of Agency § 1.04(2) (2006). "A third party will be treated as having notice of an agency relationship if the third party has actual knowledge of it or reason to know of it or if the third party has been given a notification of it." Restatement (Third) of Agency § 6.01 cmt. c (2006). "Absent explicit disclosure to the third party, an agent may argue that the circumstances surrounding the agent's dealings with the

> third party gave the third party reason to know that the agent dealt only as the principal's representative." Restatement (Third) of Agency § 6.01 cmt. c.

Id. 744 N.W.2d at 404 (Minn.App. 2008).

With facts substantially similar to those in this action, the Ohio Appellate Court in *The Promotion Co., Inc./Special Events Div. v. Sweeney*, 150 Ohio App.3d 471, 782 N.E.2d 117 (Ohio App. 7 Dist. 2002) held that in accordance with the rules set forth in the Restatement, a principal was disclosed and the agent was not liable on a contract. The contract at issue was drafted by the third party. It named the contracting party as "State Chevrolet", a business corporation owned by Sweeney. However, in its contract the third party did not include the corporate designation "Inc." after the name of the company. In analyzing whether the third party had notice of the principal, the Ohio Court ruled:

> "We have a car dealership that is referred to in the contract as its common fictitious name rather than its proper legal name which includes 'Inc.' We have a contract that, on the very first line, explicitly states that the contract is between The Promotion Company, Inc. and State Chevrolet, rather than between plaintiff and Sweeney. We can infer no desire to hide the existence of a corporation."

Id. at 150 Ohio App.3d 481.

Examining the Restatement, the Court held, "However, an authorized agent with power to bind a disclosed or partially disclosed principal does not become liable for nonperformance of a contract made only on behalf of that principal." *Id.* at 480.

> "As for naming the represented person, appellant seems to argue that without the word 'Inc.,' the principal was not actually disclosed. However, a principal was disclosed; the omission of 'Inc.' by the plaintiff-drafter of the contract did not make the principal undisclosed or partially disclosed under the terms of the above Restatement sections. *Id.*

Further buttressing its decision and reliance on the Restatement, the Ohio Court turned to the Uniform Commercial Code.

> Although the U.C.C. deals with commercial paper and negotiable instruments, the rules on liability of a representative contained in the U.C.C. have been used by courts as persuasive authority in dealing with regular or simple contractual dealings. Under the present version of U.C.C. 3-402, the following rules govern: if the form of the signature unambiguously shows that the signature is made in a representative capacity and the represented person is identified, then the representative is not liable on the instrument; if the form of the signature does not unambiguously show that the signature is made in a representative capacity or if the represented person is not identified, the representative is liable to a holder in due course without notice but as to other persons, the representative will not be liable if he can prove that the original parties did not intend for him to be personally liable.
>
> ***
>
> The Official Comment to U.C.C. 3-402 notes how the former version (U.C.C. 3-403) caused courts to refuse to allow an agent to attempt to prove intent where he signed his name but did not mention his principal. The comment then states that U.C.C. 3-402(b)(2) changes this result. The comment also notes, "Former Section 3-403 spoke of the represented person being 'named' in the instrument. Section 3-402 speaks of the represented person being 'identified' in the instrument. This change in terminology is intended to reject decisions under former Section 3-403(2) requiring that the instrument state the *legal name* of the represented person." (Emphasis added.) Thus, not only does this section establish that failure to use the exact legal name of the represented person is not fatal to the agent, it also establishes that extrinsic evidence on intent is admissible in a dispute between the original parties in a situation such as the one before us.

Id.

The Nebraska Supreme Court has ruled that "express notice of the agent's status and the principal's identity is unnecessary if the circumstances surrounding the transaction demonstrate that *the third person should be charged with notice* of the relationship." *Purbaugh v. Jurgensmeier*, 483 N.W.2d 757, 760 (Neb. 1992)(emphasis added) citing Restatement (Second) of Agency § 4(1) at 17 (1958) ("[i]f, at the time of a transaction

conducted by an agent, the other party thereto has notice that the agent is acting for a principal and of the principal's identity, the principal is a disclosed principal"); id. § 320 at 67 ("[u]nless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.")

The federal 5th Circuit likewise applied the Restatement in determining whether a third party had notice of the principal's identity.

> The Restatement makes it clear that it is the agent's duty to disclose the principal's identity, not the third party's duty to ascertain that identity. A third party such as Port Ship, however, need only receive notice of the identity of the principal, which may come from any source. Restatement at Sec. 4, Comment (d). Furthermore, the identity of the principal can be sufficiently disclosed even when the third party has no actual knowledge of it; "the [third party] has notice of the existence or identity of the principal if he knows, has reason to know, or should know of it, or has been given a notification of the fact."

Port Ship Service, Inc. v. International Ship Management & Agencies Service, Inc., 800 F.2d 1418 (5th Cir. 1986).

"The agent is not required to identify, explicitly, its principal, and the third party may even lack actual notice." *Port Ship Service, Inc. v. Norton, Lilly & Co., Inc.*, 883 F.2d 23 (5th Cir. 1989).

The following provisions of the Restatement (Third) of Agency (2006) and associated comments amplify the rules of notice applied to a third party's dealings with an agent.

"Absent explicit disclosure to the third party, an agent may argue that the circumstances surrounding the agent's dealings with the third party gave the third party

reason to know that the agent dealt only as the principal's representative." Restatement (Third) of Agency § 6.01 cmt. c.

A principal is considered "disclosed when the third party has notice that [the] agent is acting for a principal and has notice of the principal's identity." Restatement § 6.01 cmt. a. A third party has notice if it "knows the fact, has reason to know the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person." Restatement § 1.04(4). A third party has notice of the principal's identity when it "has notice of facts reasonably sufficient to identify the principal." Restatement § 6.02 cmt. d. The source of the notice is irrelevant. *Id.*

Johnson presented evidence through his three affidavits, the affidavit of Wydell Johnson and the affidavit of Jeanne Harris comporting with the Restatement's standard for disclosure. The factual questions of whether Agrisource knew, had reason to know, or should have known of Brown's Corp.'s identity as principal are issues to be decided by a jury and not by the district court.

For purposes of summary judgment, the district court erred in granting summary judgment to Agrisource. The district court first made an finding of fact that Johnson did not disclose his principal, a finding not supported by the record; second the court misapplied the legal standards determining that Agrisource had no notice that Johnson was agent for Johnson Grain, Inc.

The district court's summary judgment must be vacated and the case remanded.

B. The District Court abused its discretion in failing to consider the affidavits of Jeanne Harris and Robert Johnson filed as part of Johnson's Third Motion for Reconsideration and Alternative Motion for Relief.

Standard of Review

"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).

On review of the trial court's application of law to the facts found on a motion to set aside a judgment upon the grounds set forth in Rule 60(b), the reviewing court will consider whether appropriate criteria were applied and whether the result is one that logically follows. Thus, if: (a) the trial court makes findings of fact which are not clearly erroneous; (b) the court applies to those facts the proper criteria under Rule 60(b); and (c) the trial court's decision follows logically from the application of such criteria to the facts found, while keeping in mind the policy favoring relief in doubtful cases, then the trial court will be deemed to have acted within its sound discretion, and its decision will not be overturned on appeal. *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 449-450, 283

P.3d 757, 765-766 (2012); *Cuevas v. Barraza*, 146 Idaho 511, 514, 198 P.3d 740, 743 (Ct. App. 2008).

Where a district court fails to apply a correct legal standard in reaching its decision under I.R.C.P. 60(b), an abuse of discretion is manifest. *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 449-450, 283 P.3d 757, 765-766 (2012).

The interpretation of the Rules of Civil Procedure is a matter of law over which the Supreme Court has free review. *Eby v. State*, 148 Idaho 731, 734, 228 P.3d 998, 1001 (2010).

Argument

Third Motion for Reconsideration

In denying Johnson's third motion for reconsideration, the district court ruled the Judgment certified as final on June 14, 2012 was the operative judgment for purposes of applying the time periods under Rule 11(a)(2)(B). Although that judgment was amended for all parties through separate judgments on costs and fees entered August 21, 2012, the district court determined the amended judgments did not create an additional 14-day window of opportunity for filing motions for reconsideration.

Consequently, the district court concluded Johnson's third motion for reconsideration was untimely and the Affidavit of Jeanne Harris would not be considered under Rule 11(a)(2)(B). However, the district court did not consider whether its Memorandum and Order denying in part and granting in part Johnson's second motion for reconsideration was an order entered after final judgment that may be reconsidered upon timely motion under Rule 11(a)(2)(B).

Thus, on appeal the question is whether Johnson's third motion for reconsideration of the district court's Memorandum and Order was allowable and timely under Rule 11(a)(2)(B). Review of the procedural posture of the action before the district court helps illuminate application of the rules.

The district court's Order Denying Motion for Reconsideration filed May 31, 2012 was an interlocutory order. Johnson's Second Motion for Reconsideration of the district court's Order Denying Motion for Reconsideration was timely where it was filed on June 18, 2012, a time period not later than 14 days after entry of the judgment entered June 14, 2012. Accordingly, Johnson's second motion for reconsideration was properly before the district court.

At the hearing on Johnson's second motion for reconsideration, the district court determined in open court that it would deny Johnson's second motion. By Order entered August 21, 2012 the district court confirmed its denial of Johnson's second motion for reconsideration. (*Clerk's Record,* Vol. II, p. 314). The district court's Order denying Johnson's second motion for reconsideration falls within the description of "any order of the trial court made after entry of final judgment" under Rule 11(a)(2)(B). That Order specifically was not an order entered on a motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).

Johnson filed his third motion for reconsideration on August 29, 2012, asking the district court to reconsider its decision as confirmed in its Order entered August 21, 2012. Johnson's motion was filed within 14 days of the entry of that Order. Supporting Johnson's

motion was the Affidavit of Jeanne Harris. Under Rule 11(a)(2)(B), Johnson's third motion for reconsideration was timely and allowable.

On September 10, 2012 Johnson filed an amended third motion supported by his third affidavit. Johnson's amended third motion was filed more than 14 days after the Order entered August 21, 2012. Where Johnson's initial third motion was timely filed and no judicial determination had been made of that motion, his amended third motion was a proper amendment of an existing motion and was likewise timely and should be considered by the district court. See, e.g., *Puphal v. Puphal,* 105 Idaho 302, 669 P.2d 191 (1983); *Laurance v. Laurance*, 112 Idaho 635, 733 P.2d 1260 (Ct. App. 1987).

The district court determined Johnson's third motion for reconsideration was untimely under Rule 11(a)(2)(B), and, thus, would not consider either Jeanne Harris' affidavit or Johnson's third affidavit. In doing so, the district court erred. Where Johnson's motion was timely, the district court was obligated to examine any new evidence bearing on the correctness of its earlier decision. "The trial court must consider new evidence that bears on the correctness of an interlocutory order if requested to do so by a timely motion under Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure." *PHH Mortg. Serv. Corp. v. Perreira,* 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009).

Where the district court erroneously determined Johnson's third motion for reconsideration and supporting affidavits was untimely under Rule 11(a)(2)(B), there is a manifest abuse of discretion. See *Peterson v. Private Wilderness, LLC*, 273 P.3d 1284, 152 Idaho 691 (2012).

The district court's Memorandum and Order denying Johnson's third motion for reconsideration must be vacated and the case remanded for consideration of the new evidence presented through the affidavits of Jeanne Harris and Johnson.

Final Judgment

Additionally and alternatively, Johnson argues that the amended judgment entered August 21, 2012 was a final judgment requiring the district court to once again certify the judgment as final. Agrisource likewise believed the amended judgment was the final judgment as shown by its request for stipulation of the parties to have the district court certify the amended judgments as final judgments.

If the amended judgment was the final judgment, Johnson's motion for reconsideration of the district court's Memorandum and Order was timely. Although there is dicta in *Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc.*, 148 Idaho 588, 591, 226 P.3d 530, 533 (2010), suggesting an amended judgment entered to award attorney fees and costs does not change the finality of an earlier judgment for purposes of filing notice of appeal, the rules of procedure give direction on the effect of amended judgments.

Rule 58(a), I.R.C.P., defines entry of judgment. Upon "a decision by the court that a party shall recovery only a sum certain *or costs*" the judgment shall be signed and entered by the judge or clerk. (Emphasis added). Further, "[e]very judgment and *amended judgment* shall be set forth on a separate document...." (Emphasis added). Finally, the rule states "entry of judgment shall not be delayed for the taxing of costs."

Viewed in its entirety, the Rule's concluding statement about "taxing of costs" can not mean an amended judgment awarding fees and costs has no effect on timing for motions for relief under the rules of procedure. Inherent in the rule's definition is the fact that a judgment "and amended judgment" may involve costs. Placing the clerk's filing stamp on the judgment or amended judgment constitutes "entry of judgment."

Rule 54, I.R.C.P., defines judgment as "final if either it has been certified as final pursuant to subsection (b)(1) of this rule or judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties in the action." Accordingly, judgments are deemed final when (1) certified as final, or (2) excepting costs and fees, judgment was entered on all claims for relief asserted by or against all parties to the action.

Thus, as here, when a partial judgment is entered on less than all of the claims raised, it becomes final only upon certification. Such certification would also be necessary for any amended judgment that sets forth recovery of a sum certain or costs.

Agrisource recognized the need for certification of the amended judgment. Consequently, it circulated to all parties a stipulation for the court to certify the amended judgment in accordance with Rule 54. Johnson signed the stipulation and returned it to Agrisource. The question of whether the amended judgment was final was argued at the hearing on Johnson's third motion for reconsideration. Agrisource's stipulation was referenced by Johnson's counsel at that hearing. Agrisource is judicially estopped or otherwise estopped from asserting that the amended judgment need not be certified as final in

order for it to become the final judgment. *See Garner v. Bartschi,* 139 Idaho 430, 80 P.3d 1031 (2003).

The district court erred in concluding the amended judgment was not an interlocutory order or final judgment for purposes of applying Rule 11(a)(2)(B).

Johnson's third motion for reconsideration was timely. Where Johnson's motion for reconsideration was timely, the district court was obligated to consider the additional facts set forth in the Affidavit of Jeanne Harris and the Third Affidavit of Robert Johnson.

The district court abused its discretion when it failed to consider affidavits submitted as part of a timely motion for reconsideration. *Kepler-Fleenor v. Fremont County*, 268 P.3d 1159, 152 Idaho 207 (2012); *Barmore v. Perrone*, 145 Idaho 340, 344, 179 P.3d 303, 307 (2008).

Rule 60(b) Relief

Finally, the district court abused its discretion first in failing to consider the Affidavit of Jeanne Harris and second in ignoring the newly discovered evidence of original invoices attached to Johnsons' Third Affidavit.

First, the district court determined the facts in Harris' affidavit did not constitute new facts that through due diligence could not have been earlier discovered. In reaching that determination, the district court did not give any weight to Harris' own positive testimony that she had not made herself available as a witness prior to late August 2012. Under the circumstances of Harris' prior employment with Brown, her admitted unwillingness to give

information and testimony should be heavily weighed in considering whether her testimony constitutes new evidence under Rule 60(b).

Harris' affidavit sets forth her position that she would not have come forward or presented evidence until the time she finally met with Johnson's counsel to discuss her knowledge of the issues. The district court concluded Harris' testimony was not newly discovered evidence because her identity had been known and she could have been subjected to a subpoena for deposition. Existence of a potential witness differs dramatically from evidence actually produced by that witness. Harris testified she would not have provided her evidence earlier. Her position made any evidence contained in her affidavit newly discovered evidence not previously known or available. See *Cahaly v. Benistar Property Exchange Trust Co.*, Inc., 451 Mass. 343, 367-368 (2008); but compare *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 19-20 (1st Cir. 2002).

Harris' affidavit contains evidence that will probably change the result of the summary judgment in favor of Agrisource. Harris' evidence was discovered after the summary judgment had been entered. Due to Harris' admitted refusal to earlier disclose information or provide testimony, her evidence could not have been discovered through any due diligence. Harris' testimony is material to the outcome of the issues on whether Agrisource had notice Johnson was working for Brown's Corp. Harris' testimony is not merely cumulative or impeaching. See *Hanf v. Syringa Realty, Inc.,* 120 Idaho 364, 368, 816 P.2d 320, 324 (1991).

Where Johnson has shown Harris' testimony complies with Rule 60(b)(2), the district court should have considered the affidavit. Failure to consider the affidavit constituted an abuse of discretion. *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 449-450, 283 P.3d 757, 765-766 (2012).

Second, although in its memorandum decision the district court cites the evidence found in Harris' affidavit, the court makes no reference to the evidence in Johnson's affidavit. Wholly ignoring the evidence of original invoices attached to and referenced in Johnson's affidavit shows the court did not act within the boundaries of its discretion and consistent with applicable legal standards.

A timely motion under Rule 60(b) requires the district court to examine the evidence presented, rule on its admissibility, and issue a ruling based on analysis of that evidence. *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 234 P.3d 699 (2010). When the district court fails to explain its decision process or identify why a party is or is not entitled to relief, abuse of discretion is manifest. *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 449-450, 283 P.3d 757, 765-766 (2012).

Most important, Johnson's affidavit produced additional newly discovered evidence in the form of original invoices from Brown's Corp. to Agrisource. Those invoices were prepared on preprinted forms with the full name of the corporation notably evident on the face of the invoices. The invoices related to grain storage – indeed the very grain storage Agrisource initially contacted Brown about in August 2006 – for the months prior to the grain contracts at issue in this action. Moreover, Johnson was able to directly tie at least one

invoice to a check Agrisource issued to Brown's Corp. for payment of services. Yet, the district court either ignored or overlooked that evidence in ruling on Johnson's Rule 60(b) motion. Absence of any judicial comment or analysis regarding Johnson's evidence leads to the conclusion that the district court did not reach its decision through an exercise of reason.

Facially, the invoices Johnson testified about are strong evidence that Agrisource had notice prior to the contracts in question that it was dealing with Brown's Corp. and not Johnson individually. Such evidence is likely to change the outcome of Agrisource's summary judgment against Johnson.

Accordingly, the district abused its discretion in denying Johnson's Rule 60(b) motion for relief. The certified final judgment and amended judgment entered in favor of Agrisource must be vacated and the case remanded for trial.

C. Johnson is entitled to an award of costs and attorney fees on appeal.

In accordance with I.A.R. 40, Johnson requests on appeal an award of his costs.

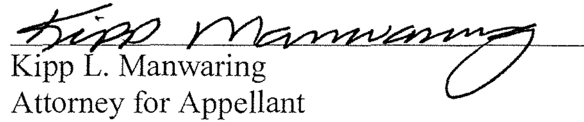
In accordance with I.A.R. 41, Johnson requests an award of his attorney fees on appeal. Under I.C. 312-120(3), attorney fees are allowable where the underlying transaction is a commercial transaction, and where Agrisource contends a contract exists with Johnson.

CONCLUSION

The certified Final Judgment and subsequent Amended Judgment awarding fees should be vacated.

The case should be remanded to the district court for further proceedings on the claims between Agrisource and Johnson.

Dated this 10 day of July 2013.



Kipp L. Manwaring
Attorney for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 10 day of July 2013, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

Kent Fletcher PO Box 248 Burley, Idaho 83318-0248	[ ] Hand Delivered [X] U.S. Mail, Postage Prepaid [ ] Facsimile [ ] Other ____________________

Kipp L. Manwaring