8-23-2013

Agrisource v. Johnson Respondent's Brief Dckt. 40340

IN THE SUPREME COURT OF THE STATE OF IDAHO

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AGRISOURCE, INC., an Idaho corporation, Plaintiff/Respondent, vs. ROBERT JOHNSON, Defendant/Cross-Defendant/Appellant, and NEIL BROWN, INC., an administratively dissolved Idaho corporation, and 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 Docket No. 40340-2012 (Bonneville County Case No. CV 2010-3066)

RESPONDENT'S BRIEF

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APPEAL FROM THE DISTRICT COURT OF THE 7TH JUDICIAL DISTRICT FOR BONNEVILLE COUNTY
HONORABLE JOEL E. TINGEY, DISTRICT JUDGE, PRESIDING

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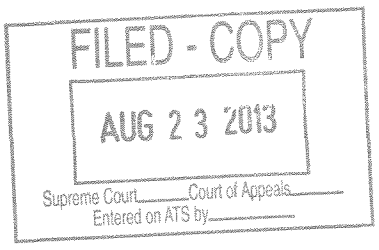

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STATEMENT OF THE CASE

Nature of the Case

This is an action initiated by AgriSource, Inc. (AgriSource) seeking to recover damages for breach of contract against Robert Johnson (Johnson) and other Defendants. Johnson did not deny that the contract was breached nor contest the amount of damages; rather, Johnson's primary defense is that he is not personally liable for the damages because at the time of contract, he claims that he acted as an agent. Summary judgment was entered against AgriSource and in favor of the other Defendants, including Johnson Grain, Inc., Johnson's purported principal, dismissing them from AgriSource's action. Summary judgment was entered against Johnson in favor of AgriSource for the damages incurred by AgriSource. Johnson filed three (3) motions for reconsideration of the order granting summary judgment and a motion for relief from judgment, all of which were denied.

Johnson appeals from the Judgment entered by the Court, as well as the denial of Johnson's post judgment motions.

Course of Proceedings Below

The course of proceedings below set forth in Johnson's Brief did not include the following:

- Memorandum of Plaintiff in Opposition to Johnson's Motion for Summary Judgment and in Reply to Johnson's Response, dated March 16, 2012, attached as Exhibit A to AgriSource's Unopposed Motion to Augment.

- Plaintiff's Response to Motion for Reconsideration and Objection, dated May 16, 2012, attached as Exhibit B to AgriSource's Unopposed Motion to Augment.

- Plaintiff's Response to Second Motion for Reconsideration, dated August 6, 2012, attached as Exhibit C to AgriSource's Unopposed Motion to Augment.

- Plaintiff's Response to Johnsons' Amended Third Motion for Reconsideration and Alternative Motion for Relief under Rule 60(b) and Objections to Affidavits, dated October 1, 2012, attached as Exhibit D to AgriSource's Unopposed Motion to Augment.

In addition, Johnson's Course of Proceedings Below does not mention that Johnson's counsel filed an Affidavit of Counsel to Augment Record dated December 10, 2012, R Vol. II, pp. 376-386 and attached as Exhibit A to AgriSource's Motion to Remove, and that AgriSource filed an Objection to Affidavit of Counsel to Augment Record and Motion to Strike dated December 13, 2012, attached as Exhibit F to AgriSource's Unopposed Motion to Augment.

Statement of the Facts

AgriSource asserts that the following material facts are uncontroverted and entitle AgriSource to judgment as a matter of law:

In 2006, Johnson opened an account at AgriSource. When it was opened, the account was opened in the name of "Johnson Grain." R Vol. I, pp. 168-169, 174.

On November 8, 2006, Johnson entered into a contract with AgriSource. The contract was signed by "Johnson Grain by Rob J." as seller. All grain described in the contract was delivered and payment was made to "Johnson Grain." R Vol. I, pp. 168-170, 176, 178.

On December 13, 2006, Johnson entered into a contract with AgriSource in which Johnson sold 50,000 bushels of Durum to AgriSource. Johnson did not object to the terms of the contract and signed the contract "Johnson Grain by Rob Johnson" as seller. R Vol. I, pp. 168, 170, 218, 220.

Johnson delivered all Durum required by the December contract and was paid by AgriSource. R Vol. I, pp. 168, 170.

Johnson entered into another contract with AgriSource dated January 12, 2007, agreeing to sell to AgriSource 50,000 bushels of Durum. Johnson did not object to the terms of the contract and signed the contract "Johnson Grain by Rob Johnson" as seller. R Vol. I, pp. 168, 170-171, 222, 224.

Johnson breached the contract and failed to deliver 15,527.87 bushels of Durum. R Vol. I, pp. 168, 171-172.

Johnson has not appealed the finding of breach of the contract, nor has Johnson appealed the amount of damages awarded. For informational purposes, AgriSource was required to cover the contract and the cost of cover exceeded the January contract price by $3.30 per bushel, resulting in AgriSource incurring damages in the amount of $51,241.97. See, generally, R Vol. I, pp. 168-227 and R Vol. II, pp. 228-235.

There is no evidence in the record that Johnson ever advised anyone at AgriSource that he was the agent for a corporation known as "Johnson Grain, Inc." Rather, following breach of the contract, Johnson advised Scott R. Mallory, an employee of AgriSource that "Johnson Grain was Neil Brown's company" and that Johnson was acting as an agent for "Johnson Grain." The only source for this information was Johnson. R Vol. II, pp. 228-229.

The first time that Johnson ever mentioned to Kirk Carpenter, another employee of AgriSource, that Neil Brown was involved in the transaction was after the contract was breached.

At that time, Johnson asked Kirk Carpenter if AgriSource "would be willing to transfer the contract to Neil Brown." R Vol. I, pp. 168, 171.

Johnson admits that he cannot recall ever telling anyone at AgriSource that he was acting as an agent for "Johnson Grain, Inc." Johnson asserts that he "did tell them [AgriSource] that Johnson Grain was Neil's company" but does not set forth any foundation for this statement as to the date or time the statement was made. R Vol. II, pp. 259, 261.

There is nothing in the record demonstrating that Neil Brown or any other officer or owner of "Johnson Grain, Inc." advised AgriSource that Johnson had authority to contract on behalf of "Johnson Grain, Inc."

Johnson asserts that "AgriSource stated in an email that it knew Johnson was acting as agent for Brown's corp." Johnson's Brief, p. 16. It then cites "Clerk's Record, Vol. II, pp. 113-114." It is believed that this is an error and that Johnson was attempting to cite R Vol. I, pp. 113, 137 and R Vol. II, pp. 228, 233. In any case, Johnson misstates what the email says. The email does not state that AgriSource "knew Johnson was an agent for Brown's corporation"; rather, the email says that the contract was not filled "by Neil Brown, dba Johnson Grain which Rob Johnson was the acting agent for the company." There is no mention of a corporation in this email. Further, Johnson's Brief fails to mention that this email was sent by Scott Mallory, employee of AgriSource, after breach of the contract, was based upon statements made by Johnson following breach, and that the only source for this information was Johnson. R Vol. II, pp. 229-230.

In Johnson's Brief, pp. 10-11, Johnson also asserts that Johnson "believes he told AgriSource prior to and during the contract discussion period in November through December, 2006 that he was working for Brown's corp." and cites to R Vol. I, pp. 79-83. The citation is to an Affidavit of Johnson dated January 11, 2012. There is no statement contained in that Affidavit alleging that Johnson told AgriSource that Johnson was acting as an agent for Johnson Grain, Inc.

In support of his argument that he properly disclosed his agency, Johnson makes conclusory statements in Johnson's Brief, p. 15, that do not reflect what is in the court record.

> * "Robert Johnson told AgriSource that he was working for Neil Brown's company, Johnson Grain. Johnson Grain may have told AgriSource that he was working for Johnson Grain, Inc." In support of these statements, Johnson cites R Vol. I, pp. 79-80; and Vol. II, pp. 259-262.

The first cite is to Robert Johnson's Affidavit dated January 11, 2012. There is no statement contained on pages 79 or 80 that Johnson advised AgriSource that he "was working for Neil Brown's company, Johnson Grain." Rather, Johnson admits in paragraphs 20 and 21 of the Affidavit that "AgriSource's contract listed Johnson Grain as the party" on two different contracts and in paragraph 22, Johnson admits that he "accepted those commodity contracts" from AgriSource. R Vol. I, p. 81.

The second cite is to the Second Affidavit of Robert Johnson. It should be noted that AgriSource objected to many portions of this affidavit on the grounds it did not set forth facts that would be admissible in evidence. I.R.C.P. 56(e); See AgriSource's Unopposed Motion to Augment, Exhibit B, pp. 2-3. No where in that Affidavit does Johnson state that he "may have

told AgriSource that he was working for Johnson Grain, Inc." Rather, in that Affidavit, Johnson states in paragraph 10 that he told an employee of AgriSource that Johnson "was operating the elevator for him [Neil Brown]." R Vol. II, p. 260. Johnson also asserts that he told representatives of AgriSource to make checks "payable to Neil's company, Johnson Grain." R Vol. II, p. 261. Most importantly, in paragraph 16 of that Affidavit, Johnson does not state that Johnson "may have told AgriSource that he was working for Johnson Grain, Inc." , but rather admits that "I do not recall if I specifically told them the company's name was Johnson Grain, Inc., but I did tell them that Johnson Grain was Neil's company." R Vol. II, p. 261. There is nothing in the record to show that Johnson was an agent for either Neil Brown or "Johnson Grain." There is nothing in the record to show that Neil Brown owned a company called "Johnson Grain." Johnson attempts to minimize the distinction between the name "Johnson Grain" and the true name of the corporation that Johnson alleges was the principal, "Johnson Grain, Inc." As is argued below, this distinction is significant and defeats Johnson's arguments.

> * Johnson argues that Johnson told AgriSource that "Neil Brown's company was not yet licensed and could not execute commodity contracts." Again, Johnson cites his Second Affidavit, R Vol. II, pp. 259-262.

The actual statement contained in paragraph 10 of the Affidavit states "I explained that Neil Brown has purchased the elevator and I was operating the elevator for him, but told both Bill and Scott that the company had not yet received its license as a commodity dealer." R. Vol. II, p. 260. If Johnson was making a disclosure of agency, he was disclosing that he was an agent

for Neil Brown, not Johnson Grain, Inc. There is no evidence that Johnson was ever an agent for Neil Brown.

> * Johnson's Brief, page 15, asserts "after Johnson Grain, Inc. received its commodity license in November, 2003 Johnson then informed AgriSource of the company's licensure and ability to contract." In support of this statement, Johnson cites to his First and Second Affidavits.

An examination of his First Affidavit, R Vol. I, pp. 79-83, shows that it contains no such statement.

An examination of the Second Affidavit, R Vol. II, pp. 259-262, also contains no such statement. The actual statement in the Second Affidavit, paragraph 20, states "in separate conversations with Bill and Scott [employees of AgriSource] as early as October, 2006 they each asked about entering into commodity contracts. I remember telling them that the company had not yet been licensed as a commodity dealer and could not contract." R Vol. II, p. 261. In paragraph 24 of the Second Affidavit, Johnson states "once the commodity and warehouse licensing requirements were completed, I spoke with Bill and Scott on various days in late November, 2006 and early December, 2006 concerning Durum wheat contracts." R Vol. II, p. 261. Contrary to Johnson's assertion, there is no statement contained in either Affidavit that Johnson told anyone at AgriSource that Johnson Grain, Inc. had received a commodity license and that Johnson Grain, Inc. had the ability to contract.

Most surprisingly, in Johnson's Second Affidavit, he then goes on to state, in paragraph 25, "after those conversations, AgriSource sent commodity contracts to Johnson Grain to be signed." In paragraph 26 he states "I signed those contracts as agent for Johnson Grain as listed

on AgriSource's contract." R Vol. II, p. 261. Contrary to other assertions made by Johnson, in this Affidavit he is admitting that the commodity contracts were sent to "Johnson Grain" and claims that he signed them as an agent for "Johnson Grain", and does not mention Johnson Grain, Inc.

Johnson summarizes additional facts in Johnson's Brief, pp. 22-23, that do not reflect what is in the court record nor do they support his position that he advised AgriSource that he was acting as an agent for Johnson Grain, Inc.

> * "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."

It is true that in his Second Affidavit and in the Affidavit of his father, Johnson asserts that he told AgriSource that he "would be managing the elevator for Brown." Contrary to supporting Johnson's position, this is another admission by Johnson that he did not tell AgriSource that he was an agent for Johnson Grain, Inc.

> * "After August 1, 2006 and prior to the January, 2007 contract AgriSource knew Neil Brown has purchased the Ririe elevator."

It is true that Johnson asserts that he told AgriSource that Neil Brown was purchasing the Ririe elevator. However, this is another admission by Johnson that he did not disclose an agency relationship with Johnson Grain, Inc.

> * "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."

Even if this statement were true, the fact that Bill Mendenhall, Scott Mallory, Mike Allen, and Bruce Beck "had knowledge that Robert Johnson was managing the elevator for Neil Brown" would not support Johnson's position. Johnson's position in this action is that he was an agent for Johnson Grain, Inc. There is no evidence in the record to support an allegation that Johnson was acting as an agent for Neil Brown.

> * "Johnson Grain, Inc., from September through December, 2006 sent its invoices containing its preprinting corporate name together with elevator and train car logs to AgriSource for payment." In support of this allegation, Johnson cites to his first Affidavit, R Vol. I, pp. 79-83, the Affidavit of David Brown, an accountant, and a report prepared by David Brown, R Vol. I, pp. 110, 112a-112h, 112zz, Johnson's Second Affidavit, R Vol. II, pp. 259-262, an Affidavit of Jeanne Harris, a former employee of Neil Brown, R Vol. II, pp. 327e, and the Third Affidavit of Johnson, R Vol. II, pp. 344-349, 351, 354, and 358.

In the first Affidavit of Johnson, there is no statement pertaining to Johnson Grain, Inc. sending invoices together with elevator and train car logs to AgriSource. In the Affidavit of David Smith and the accompanying report, there is also no such statement. The exhibit cited by Johnson, R Vol. I, p. 112zz, is a contract entered into between Johnson Grain, Inc. and "Brown's Antelope Neil Brown" dated February 5, 2007. AgriSource is not a party to this contract and the contract was entered into after the date of the January, 2012 contract entered into between Johnson and AgriSource.

The Second Affidavit of Johnson contains no statement about mailing Johnson Grain, Inc. invoices, elevator logs or train car logs to AgriSource. In paragraph 16 of the Affidavit, Johnson asserts that he told representatives of AgriSource "to make the checks payable to Neil's

company, Johnson Grain" and goes on to admit that he cannot recall if he ever told them that the name of the company was Johnson Grain, Inc. R Vol. II, p. 261.

The Affidavit of Jeanne Harris was not considered by the court since the court determined that it was not properly filed for the purposes of a motion for reconsideration and that Johnson had not established proper grounds to file it in support of a motion to set aside judgment, discussed below. Even if the court had considered the Affidavit, it does not support Johnson's position. In her Affidavit, Ms. Harris asserts that she answered the phone "Johnson Grain" not Johnson Grain, Inc. R Vol. II, p. 327e. She asserts that scale tickets were printed with the business name "Johnson Grain, Inc." and that the fax machine would insert the name "Johnson Grain, Inc." on any fax sent from the office. She also said that a warehouse log "had the name Johnson Grain, Inc." However, Ms. Harris states, without any foundation "as I recall, the scale tickets and the train car logs would be sent to AgriSource by mail or by fax." R Vol. II, p. 327e. Not only does her statement lack certainty, there is no statement of when a scale ticket or train car log was sent to AgriSource and no reference to any record that would indicate the date that any of these items were delivered to AgriSource.

Ms. Harris goes on the admit that when AgriSource paid a bill, it paid by check made out to "Johnson Grain", not Johnson Grain, Inc. R Vol. II, p. 327e.

> * "AgriSource from September through December, 2006 made checks payable to Johnson Grain for storage and shipping costs incurred for AgriSource's grain."

This statement does not support Johnson's position. The checks were not made payable to "Johnson Grain, Inc.", but rather were made to the name used by Johnson when contracting with AgriSource - "Johnson Grain."

The final cite for this statement by Johnson is to Johnson's Third Affidavit. The Third Affidavit was filed by Johnson in support of Johnson's Third Motion for Reconsideration and Motion for Relief from Judgment but was not considered by the court for the same reasons Ms. Harris' Affidavit was not considered. The Affidavit repeats some of the statements made by Ms. Harris concerning scale tickets and train car logs printed with the business name "Johnson Grain, Inc." and describes six (6) "original invoices from Johnson Grain, Inc. to AgriSource." R Vol. II, p. 345.

When addressing the scale tickets, in paragraph 6 of his Third Affidavit, Johnson asserts "copies of the scale tickets would be kept to show the actual amount of grain received from a farmer and applied to the account of that farmer and any grain purchaser such as AgriSource." R Vol. II, p. 345 (emphasis added). Later, Johnson asserts "copies of the train car logs and copies of the scale tickets would be provided to AgriSource." R Vol. II, p. 346. Johnson goes on to state "I believe that invoice was sent to AgriSource, Inc." Again, these statements lack foundation and do not establish that any of these documents were ever provided to AgriSource. Johnson fails to state when or how these documents were delivered or sent to AgriSource. Later in the Affidavit, Johnson attempts to establish that AgriSource paid one of the invoices, but cannot find any check that ties to any invoice referenced by Johnson. R Vol. II, p. 346. ("The deposit amount differs from the invoice amount by $63.99. I have no explanation for that

difference other than an adjustment by AgriSource."). None of the invoices referenced by Johnson have any indication of how they were delivered to AgriSource and the invoice attached as Exhibit H to the Affidavit, R Vol. II, p. 358, does not state a date or address.

> * "All of AgriSources's payment checks were endorsed with a stamp for Johnson Grain, Inc. and deposited into the business account as Johnson Grain, Inc."

This assertion made be true, but has nothing to do with disclosing agency to AgriSource.

> * "AgriSource in July, August, and September, 2006 made arrangements with Neil Brown to store grain at the Ririe elevator. In support of this statement, Johnson cites to Johnson's Third Affidavit and the Affidavit of Johnson's father, Wydell Johnson."

There is no statement contained in Robert Johnson's Second Affidavit concerning AgriSource making arrangements with Neil Brown to store grain at the Ririe elevator. R Vol. II, p. 259. There is no statement in the Affidavit of Wydell Johnson stating AgriSource in July, August, and September, 2006 made arrangements with Neil Brown to store grain at the Ririe elevator. R Vol. II, pp. 300-304. The only statement in Wydell Johnson's Affidavit concerning any discussion between Neil Brown and representatives of AgriSource is contained in paragraph 25: "On one occasion in late July or early August, 2006 Mendenhall [an employee of AgriSource] came personally to the Ririe elevator. He and I were sitting in the office when Brown came into the office. All three of us discussed Brown's purchase of the Ririe elevator. Mendenhall and Brown spoke about AgriSource's contract with local farmers and the storage of grain for AgriSource at the elevator." There is no mention in this paragraph of AgriSource making any arrangements with Neil Brown to store grain at the Ririe elevator nor is there is any

mention in this paragraph that Neil Brown told AgriSource that Robert Johnson would be an agent for Johnson Grain, Inc.

> * "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." In support of this assertion, Johnson cites an email attached to the Affidavit of Johnson's counsel. R Vol. I, p. 113, Exhibit B.

Exhibit B to the subject affidavit appears to be a printout of a Idaho Secretary of State's record pertaining to "B & J Elevators, Inc." and Annual Report filed by B & J Elevators, Inc. in August, 2006. It is believed that Johnson was attempting to cite to Exhibit C of that Affidavit, which was an email dated January 29, 2009 sent by Scott Mallory, an employee of AgriSource, to Johnson. R Vol. I, p. 137. If that is the case, Johnson misstates the record concerning this assertion.

In his affidavit, Scott Mallory addresses this email. R Vol. II, pp. 228-231. Contrary to Johnson's assertion, in paragraph of his affidavit, Mallory states "Robert Johnson did not ever advise me that Johnson Grain was a corporation. Rather, following the breach, he indicated that Neil Brown was doing business as Johnson Grain and that Robert Johnson was acting as an agent for Johnson Grain. The only source for this information was Robert Johnson." R Vol. II, p. 229. (emphasis added).

In paragraph 6 of his affidavit Mallory goes on to state "On January 27, 2009, I sent an email to Robert Johnson, attached as Exhibit 1, repeating in effect what Robert Johnson has told me about the ownership of Johnson Grain." R Vol. II, p. 230.

Based upon the affidavit and the wording of the email, Mallory was told by Johnson that the entity AgriSource should be dealing with is "Neil Brown, d.b.a. Johnson Grain, which Robert Johnson was the acting agent for the company." There is nothing in the record showing Neil Brown was doing business as Johnson Grain. The only documents in the record signed by "Johnson Grain" were signed by Johnson.

STANDARD OF REVIEW

The standard of review on appeal from an order granting summary judgment is the same standard that is used by the district court in ruling on the motion. *Gibson v. Ada County*, 142 Idaho 746, 751, 133 P.3d 1211, 1216 (2006).

Summary Judgment is appropriate where "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 the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

Immaterial issues of fact do not preclude the granting of summary judgment. *J.R. Simplot Co. v. Dosen*, 144 Idaho 611, 615, 167 P.3d 748, 752 (2006). Conclusory assertions unsupported by specific facts do not create a genuine issue of material fact, *Mareci v. Coeur d'Alene School Dist. No. 271*, 150 Idaho 740, 744 250 P.3d 791, 795 (2011), nor does a mere scintilla of contrary evidence. *Wattenbarger v. A.G. Edwards and Sons, Inc.*, 150 Idaho 308, 317, 246 P.3d 961, 970 (2010). In the absence of genuine disputed issues of material fact, only a question of law remains, and the court exercises free review. *Stuard v. Jorgenson*, 150 Idaho 701, 704, 249 P.3d 1156, 1159 (2011).

When reviewing the denial of a Rule 60(b) motion for relief, the Court must examine: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. Where non-discretionary grounds are asserted, the question presented is one of law, upon which the court exercises free review. *Berg v. Kendall*, 147 Idaho 571, 576, 212 P.3d 1001, 1006 (2009).

ADDITIONAL ISSUE ON APPEAL

Is AgriSource entitled to an award of attorney's fees pursuant to the provisions of I.C. §§ 12-120(3), 12-121, and I.A.R. 41?

ATTORNEY'S FEES ON APPEAL

AgriSource requests an award of attorney's fees pursuant to the provisions of I.C. §§ 12-120 and 12-121. I.C. § 12-120(3) compels an award of attorney's fees to the prevailing party in any action to recover "in a commercial transaction." There is no dispute that this case involved a commercial transaction; this fact is acknowledged by Johnson when Johnson also asserts a right to an award of attorney's fees pursuant to the provisions of I.C. § 12-120(3). Since the underlying transaction involved in this case was not made for personal or household purposes, but rather was a business/commercial transaction, AgriSource is entitled to an award of fees based upon I.C. § 12-120(3). *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728, 152 P.3d 594, 599 (2007).

In addition, if the Court determines that Johnson is merely asking this Court to second guess the trial court, AgriSource is clearly the prevailing party, the appeal would be frivolous, unreasonable and without foundation, and Johnson would be entitled to an award of attorney's fees pursuant to I.C. § 12-121.

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT

Johnson argues that the trial court improperly granted summary judgment. Although Johnson in his testimony admitted that he could not recall telling AgriSource that Johnson was acting as an agent for Johnson Grain, Inc., Johnson argues that there are facts that would support inferences that Johnson was acting as an agent and therefore AgriSource knew that Johnson was acting as an agent.

Johnson also argues that Johnson's Third Motion for Reconsideration was not properly considered by the Court and that the Judgment entered by the Court and certified as final on June 14, 2012 was not a Final Judgment for the purposes of calculating deadlines and the timeliness for the filing of a motion for reconsideration.

In making his arguments concerning disclosure of agency, Johnson misstates the Idaho standard concerning disclosure of agency and relies upon facts that should not be considered by the Court, since many of the facts relied upon by Johnson lack proper foundation to be considered pursuant to I.R.C.P. 56(e). There are no facts in the record indicating that Johnson or any other person disclosed to AgriSource that Johnson was acting as an agent for Johnson Grain, Inc. There are no facts in the record showing that anyone with authority at Johnson Grain, Inc.

communicated to AgriSource that Johnson was acting as an agent for that corporation at the time the contract at issue was entered into. There being no express authority established by Johnson, Johnson apparently is arguing that Johnson had apparent authority to act on behalf of Johnson Grain, Inc. Apparent authority cannot be established by the statements of the agent alone.

Johnson argues that Johnson's Third Motion for Reconsideration was rejected by the Court as being "untimely." This is a misstatement of the trial court's findings. The trial court did not rule that the Third Motion for Reconsideration was untimely; rather, the trial court ruled that I.R.C.P. 11(a)(2) did not apply due to the fact that the judgment entered on June 14, 2012 was a final judgment and reconsideration can only be requested of an interlocutory order. However, even if the trial court is incorrect in this determination, the filing of the Third Motion for Reconsideration and materials filed in support of the Motion was untimely and should not have been considered by the Court.

The Judgment certified as final by the trial court on June 14, 2012 is a final judgment as defined by the Idaho Rules of Civil Procedure.

If Johnson was an Agent, Johnson did not Disclose his Principal as Required by Law

As can be seen from an examination of Johnson's assertions, the facts in the record do not support the assertions made in Johnson's Brief. Rather, when one examines the actual facts that are alleged, it supports AgriSource's position that Johnson never established that he was an agent for Johnson Grain, Inc. and that if he was an agent, AgriSource was never told that Johnson was an agent for Johnson Grain, Inc. At all times material to this dispute, Johnson believed it was contracting with Johnson.

Johnson's position is that, because he claims that he told AgriSource that he was an agent or acting for someone (Neil Brown, Neil Brown's corporation, the elevator), the disclosure was sufficient to comply with Idaho law and that he should not be held personally liable for the damages in this action. This position is contrary to well settled Idaho law.

A person contracting with another as an agent is liable as a party to the contract unless he discloses, at or before the time of entering into the contract, the agency relationship and the identity of the principal. *Western Seeds, Inc. v. Bartu*, 109 Idaho 70, 71, 704 P.2d 974, 975 (Ct. App. 1985) (emphasis added). A principal is disclosed if, at the time of making the contract in question, the other party to it has notice that the agent is acting for a principal and of the principal's identity. *General Motors Acceptance Corp. v. Turner Ins. Agency, Inc.*, 96 Idaho 691, 697, 535 P.2d 664, 670 (1975) (emphasis added). The statements of a purported agent alone do not create an agency relationship and do not establish the authority of the agent. *Hieb v. Minnesota Farmers Union*, 105 Idaho 694, 672 P.2d 572 (Ct. App. 1983). It is a basic principal that an agent who enters into a contract on behalf of a corporation, but who neither discloses his agency nor the existence of the corporation to the third party, becomes personally liable to that third party. *Interlode Constructors v. Bryant*, 132 Idaho 443, 447, 974 P.2d 89, 93 (Ct. App. 1999).

The *Interlode Constructors* case has similar facts to the case at hand. Bryant, the manager of a corporation, both through his personal representations and through his agent, Pearson, dealt with Interlode as "Bryant and Associates," failing to reveal a corporate existence. Bryant led Interlode into believing it was dealing with Bryant individually. At all times relevant,

Interlode was ignorant of the corporation's existence. The Court went on to hold that the District Court was correct in holding Bryant personally liable for the obligation incurred. *Interlode Constructors v. Bryant*, 132 Idaho 443 447, 974 P.2d 89, 93 (Ct. App. 1999).

The party asserting agency as a defense to personal liability on a contract bears the burden of showing that the principal was adequately disclosed. *Keller Lorenz Co. v. Ins. Assocs. Corp.*, 98 Idaho 678, 570 P.2d 1366 (1997).

The duty of the agent to disclose must also be weighed in light of the duties placed upon Johnson by the Uniform Commercial Code and the applicable grain trade rules. Idaho Code § 28-2-201(1) requires that a contract for the sale of goods in excess of $500.00 must be evidenced by a writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. Once a contract is reached, if it is between merchants, a writing confirming the contract is sufficient if the written confirmation is sent within a reasonable time and the party receiving it has reason to know its contents. In such cases, if there is an objection to the terms, a party must give ten (10) days written notice of objection to its contents after a written confirmation is received. I.C. § 28-2-201(2).

In this case, I.C. § 28-2-201(1) was satisfied since the contract is in the name of Johnson Grain and was signed by Johnson. Johnson admits that Johnson did not object to the terms of the contract.

The NGFA grain trade rules are even more specific. NGFA Grain Trade Rule 3 requires both the buyer and seller to send a written confirmation not later than the close of the business

day following the date of the trade. Upon receipt of the confirmation, the parties shall carefully check all specifications and upon finding any material differences, shall immediately notify the other party to the contract, by telephone, and confirm by written communication. If either the buyer or the seller fails to send a confirmation, the confirmation sent by the other party will be binding upon both parties, unless the confirming party has been immediately notified by the non-confirming party of any disagreement with the confirmation received. NGFA Grain Trade Rule 3(A) and (B), R Vol. I, pp. 168, 172, 226-227.

Obviously the names of the parties to the contract is a material term of the contract. If Johnson believed that the name on the contract was improper, since the stated name was not Johnson Grain, Inc., Johnson had a duty to so notify AgriSource. It is uncontroverted that Johnson did not object to any of the terms of the contract.

An analysis of the facts relied upon by Johnson in supporting his contention that he disclosed his agency with Johnson Grain, Inc. is set forth in the Statement of the Facts section of this Brief. It is clear from an analysis of the facts, including Johnson's own affidavits, that he never disclosed to AgriSource that he as was acting as an agent for Johnson Grain, Inc. This failure to disclose agency hurt AgriSource in AgriSource's attempts to recover against the other Defendants. The trial court found that since AgriSource was never advised or informed of an agency relationship between Johnson and any other entity, did not believe an agency relationship existed, and was unaware of any purported agency with Johnson Grain, Inc. until after the breach of contract, it formed part of the basis for the trial court entering summary judgment against AgriSource in favor of Johnson Grain, Inc. R Vol. II, p. 247.

Although Johnson admits that he cannot recall ever advising AgriSource that he was the agent for Johnson Grain, Inc., he attempts to argue that he partially disclosed that agency by stating that he was the agent for Neil Brown or Neil Brown's corporation. A partially disclosed principal does not relieve the agent from liability. A person contracting with another for a partially disclosed principal is liable as a party to the contract. *Keller Lorenz Co. v. Ins. Assocs. Corp.*, 98 Idaho 678, 570 P.2d 1366 (1977); RESTATEMENT (Second) OF AGENCY § 321 (1957).

The party moving for summary judgment bears the burden of proving that no genuine issue of material fact exists. *Cramer v. Slater*, 146 Idaho 868, 873, 204 P.3d 508, 513 (2009). Once the moving party establishes the absence of a genuine issue of material fact, the burden then shifts to the non-moving party. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007). In order to survive a motion for summary judgment, the non-moving party must show that there is a triable issue. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991). A complete failure of proof concerning an essential element of the non-moving party's case necessary renders all other facts immaterial. *McGilvray v. Farmers New World Life Ins. Co.*, 136 Idaho 39, 42, 28 P.3d 380, 383 (2001). The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 960, 963 (1994).

In this case, AgriSource established the absence of a genuine issue of material fact. The burden then shifted to Johnson requiring Johnson to show that there existed a triable fact. Johnson completely failed to prove two essentials elements of his case - that he was an agent for Johnson Grain, Inc. and that he properly disclosed that agency. By failing to prove these essential elements, all other facts were rendered immaterial.

Johnson's reliance upon decisions from mid-western states is misplaced. Idaho law is clear concerning the duty of the agent to properly disclose his principal. Even if the agent properly disclosed the principal, AgriSource could not have relied solely upon Johnson's statements; there would have to be a showing that the principal granted the agent the authority to perform the actions at issue. In this case, there is no showing by Johnson that he was the agent for Johnson Grain, Inc., there are no facts in the record indicating that Neil Brown or any other officer of Johnson Grain, Inc. gave Johnson authority to contract in the name of Johnson Grain, Inc. at the time the subject contract was entered into, and Johnson failed to object to the terms of the contract if Johnson believed that the contract should have been in the name of Johnson Grain, Inc. Pursuant to Idaho law, Johnson is personally liable to AgriSource for the damages incurred by AgriSource and summary judgment was properly entered.

The Trial Court Properly Denied Johnson's Third Motion for Reconsideration

The judgment in favor of AgriSource was certified as final on June 14, 2012. R Vol. II, pp. 288-291. On August 29, 2012 Johnson filed his Third Motion for Reconsideration and Alternative Motion for Relief. R Vol. II, pp. 327a-327c. In the Third Motion, Johnson "moves the court to reconsider its decision on summary judgment that AgriSource had no notice of

Robert Johnson's status as angst [*sic*] for Johnson Grain, Inc." R Vol. II, p. 327a. Johnson then filed an Amended Third Motion for Reconsideration which added an additional request for relief: "Further, Johnson moves the court to reconsider its Decision and Order filed September 7, 2012." R Vol. II, p. 341. Included with Johnson's Third Motion was the Affidavit of Jeanne Harris, R Vol. II, p. 327d, and, with the Amended Third Motion, the Third Affidavit of Johnson, R Vol. II, p. 344.

Contrary to Johnson's assertions, Johnson did not move the trial court to reconsider its decision on Johnson's Second Motion for Reconsideration. The Second Motion for Reconsideration was denied at hearing on the record on August 14, 2012. Tr, pp. 38-75, as reflected in that Order on Motions for Costs and Attorney's Fees filed August 21, 2012. R Vol. II, p. 314. The only "decision and order filed September 7, 2012" was that decision and order granting a motion for reconsideration filed by Neil Brown. R Vol. II, p. 332. AgriSource was not involved in that decision and order.

The trial court found that Johnson's Third Motion for Reconsideration was not permissible under I.R.C.P. 11(a)(2) and went on to hold that the Rule applies only to reconsideration of an interlocutory order and is not a vehicle for reconsideration of a final judgment. R Vol. II, p. 363.

The Idaho Supreme Court recently addressed this issue. The court held that in a case involving a dismissal pursuant to I.R.C.P. 40(c), the dismissal was "in effect a final judgment" and that therefore relief was not properly sought using I.R.C.P. 11(a)(2)(B). *Eby v. State*, 148 Idaho 731, 228 P.3d 1998 (2010).

In an earlier case, the Idaho Court of Appeals analyzed whether a motion was properly brought under Rule 11(a)(2)(B) and stated: "until a judgment has been entered or a certificate granted by the trial court pursuant to I.R.C.P. 54(b), the order dismissing DSA's counterclaim was not final and appealable" and went on to hold that the trial court should have considered a motion filed in that case as a motion to reconsider an interlocutory order and therefore properly brought pursuant I.R.C.P. 11(a)(2)(B). Although not explicitly stated, it is clear from the decision that once a final judgment is entered it is no longer interlocutory and no longer subject to reconsideration pursuant to I.R.C.P. 11(a)(2)(B). *Noreen v. Price Development Co. Ltd. Partnership*, 135 Idaho 816, 819-820, 25 P.3d 129, 132-133 (Ct. App. 2001).

In *Dunlap v. Cassia Memorial Hospital Medical Center*, 134 Idaho 233, 235-236, 999 P.2d 888, 890-891 (2000), the Idaho Supreme Court reaffirmed the principle that a summary judgment is not interlocutory once a final judgment is entered and that a motion for reconsideration of the judgment could not properly be considered.

In addition to being an improper motion for reconsideration of a final order as found by the trial court, Johnson's Third Motion for Reconsideration was untimely. The judgment was certified as final on June 14, 2012. The last day to file a motion for reconsideration was June 28, 2012. Johnson filed the Third Motion for Reconsideration on August 29, 2012 and filed the Amended Third Motion for Reconsideration on September 11, 2012.

I.R.C.P. 11(a)(2)(B) states:

> A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen days after the entry of the final

> judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen days from the entry of such order...

At first blush, Johnson's argument is, in effect, that Johnson could continually file motions for reconsideration of orders denying motions for reconsideration and that the court would have to consider all affidavits and other evidence presented. This is contrary to the intent of the Rule. The interlocutory decision that Johnson was attempting to have the court reconsider by the filing of his motions was that Memorandum Decision and Order filed on April 6, 2012, granting summary judgment in favor of AgriSource. R Vol. II, p. 242. Pursuant to that decision a judgment in favor of AgriSource against Johnson was filed on April 17, 2012. R Vol. II, p. 252. The judgment was certified as final on June 14, 2012. R Vol. II, p. 288. An amended judgment that added an award of fees and costs was entered on August 21, 2012. R Vol. II, p. 312.

Johnson did not file his Third Motion for Reconsideration until August 29, 2012, well after certification of the judgment on June 14, 2012. It would be improper for the court to consider multiple successive motions for reconsideration filed more than fourteen days after the entry of final judgment.

Johnson argues that "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)." Johnson's Brief, p. 29. This argument assumes that Johnson requested that the trial court reconsider the court's decision on Johnson's Second Motion for Reconsideration. The

record shows that Johnson never requested that the court reconsider its decision on Johnson's Second Motion.

In the Third Motion for Reconsideration, Johnson moved the court "to reconsider its decision on summary judgment that AgriSource had no notice of Robert Johnson's status as angst [*sic*] for Johnson Grain, Inc." R Vol. II, p. 327a. There is no mention in the Third Motion for Reconsideration of the court's decision denying Johnson's Second Motion for Reconsideration.

In the Amended Third Motion for Reconsideration, Johnson moved the court "to reconsider its decision and order filed September 7, 2012." R Vol. II, p. 341. Again, there is no mention of the court's decision denying Johnson's Second Motion for Reconsideration, which was denied in open court on August 14, 2012. Tr, pp. 38-75.

If Johnson's Third Motion for Reconsideration was an attempt to have the court reconsider its decision on Johnson's Second Motion for Reconsideration, it was untimely under any interpretation of I.R.C.P. 11(a)(2). The Third Motion for Reconsideration was filed on August 29, 2012, more than fourteen (14) days after the certification of the judgment as final on June 14, 2012 and more than fourteen (14) days after denial of Johnson's Second Motion for Reconsideration on August 14, 2012. In addition, Johnson never asked for reconsideration of the court decision denying Johnson's Second Motion for Reconsideration. The court's denial of Johnson's Third Motion for Reconsideration was proper.

The Judgment Certified as Final on June 14, 2012 is the Final Judgment

Johnson attempts to argue that the Amended Judgment entered by the Court on August 21, 2012 "was a final judgment requiring the District Court to once again certify the judgment as final." Johnson's Brief, p. 32. As to Johnson and AgriSource, the only difference between the Judgment entered June 14, 2012 and certified as final, R Vol. II, p. 288, and the Amended Judgment entered on August 21, 2012, R Vol. II, p. 312, was the addition of an award of attorney's fees and costs to AgriSource. Johnson's position that the August 21, 2012 Judgment was the final judgment, requiring another certification, is contrary to Idaho law.

Although Johnson refers to the holding of an Idaho Supreme Court case as "*dicta*", Johnson's Brief, p. 32, the Court clearly stated its position concerning this issue:

> This court holds that the 42 day period to file a notice of appeal begins to run once an order is entered that resolves all issues, grants all relief to which the prevailing party is entitled other than attorney fees and costs, and brings to an end a lawsuit. *Goodman Oil Co. v. Scotty's Duro-Built Generator, Inc.*, 148 Idaho 588, 591, 226 P.3d 530, 533 (2010). (emphasis added).

Johnson's position is also contrary to the Idaho Rules of Civil Procedure. I.R.C.P. 54 states that the judgment is "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. (emphasis added). I.R.C.P. 58(a) states: "The entry of judgment shall not be delayed for the taxing of costs."

Johnson also argues that because counsel for AgriSource sent a letter and a proposed stipulation concerning certification of the amended judgment, 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. Johnson's Brief, pp. 33-34. Initially, AgriSource notes that AgriSource objected to the inclusion of the affidavit and attachments filed by Johnson on the grounds that they were not considered by the trial court in making its decisions and therefore should not be part of the record. See AgriSource's Unopposed Motion to Augment, Exhibit F. AgriSource also moved to remove the affidavit and attachments from the record on the same grounds. See AgriSource's Motion to Delete From the Record.

An examination of the documents submitted by Johnson show that the stipulation was never signed by all parties to the action, it was never filed with the court except as an attachment to Johnson's counsel's affidavit, and no order was entered pursuant to the stipulation. R Vol. II, pp. 379-386.

In support of his assertion, Johnson cites *Garner v. Bartschi*, 139 Idaho 430, 80 P.3d 1031 (2003), without citing any specific pages in that case. An examination of the *Garner* case shows that judicial estoppel is not mentioned in that case.

If the court considers Johnson's counsel's brief and attachments, it is clear that the doctrine of judicial estoppel does not apply to this case. Judicial estoppel applies when a litigant who obtains a judgment, advantage, or consideration from one party through means of sworn statements is judicially estopped from adopting inconsistent and contrary allegations or testimony, to obtain a recovery or a right against another party, arising out of the same transaction or subject matter. *Lomis v. Church*, 76 Idaho 87, 93-94, 277 P.2d 561, 565 (1954). The policies underlying judicial estoppel are general considerations of the orderly administration

of justice and regard for the dignity of judicial proceedings. Judicial estoppel is intended to prevent a litigant from playing fast and loose with the courts. *Heinze v. Bauer*, 145 Idaho 232, 235, 178 P.3d 597, 600 (2008).

Johnson's reliance upon the doctrine of judicial estoppel is misguided. In this case Johnson has failed to establish any sworn statement of AgriSource or AgriSource's counsel that allowed AgriSource to obtain a judgment, advantage, or consideration from Johnson. At best, the statements contained in counsel's letter were a mistake of law concerning the finality of the judgment certified on June 14, 2012, and Johnson has made no showing of a sworn statement or that AgriSource obtained any advantage or consideration as a result of the letter and proposed stipulation.

Johnson's argument that the addition of an award of attorney's fees and costs, as described in the Amended Judgment, somehow extended Johnson's filing deadlines and the finality of the judgment is misplaced in light of the provisions of the Idaho Rules of Civil Procedure and this Court's holding in *Goodman Oil*.

THE TRIAL COURT PROPERLY DENIED JOHNSON'S MOTION FOR RELIEF FROM JUDGMENT

Johnson asserts that the trial court abused its discretion when denying Johnson's Motion for Relief from Judgment pursuant to I.R.C.P. 60(b)(2), (3), and/or (6). R Vol. II, p. 327a. In support of this Motion Johnson relied upon the Third Affidavit of Johnson and the Affidavit of Jeanne Harris.

I.R.C.P. 60(b) allows the court to relieve a party from a final judgment, order or proceeding for certain specified reasons. The reasons cited by Johnson were: (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, whether heretofore denominated intrinsic or extrinsic, misrepresentation, or other misconduct or other misconduct of an adverse party; (6) any other reason justifying relief from the operation of the judgment.

In denying this motion, the trial court found that Johnson did not establish that the newly discovered evidence was not previously discoverable by due diligence. R Vol. II, p. 365. On appeal, Johnson asserts "Harris testified she would not have provided her evidence earlier." Johnson's Brief, p. 35. In reality, Harris, in paragraph 31 of her Affidavit, stated "Until about 10 days ago I have not volunteered any information to Rob and I have been reluctant to tell anyone about my knowledge." R Vol. II, p. 327g.

Johnson made no showing that he did not know about the existence of Jeanne Harris. In fact, Harris stated in her Affidavit that she began working at the grain elevator approximately two weeks after Johnson began working there. R Vol. II, p. 327e. Johnson also stated that he knew Harris was Neil Brown's bookkeeper and maintained records for Neil Brown's businesses. R Vol. II, p. 345. Although Ms. Harris may have been "reluctant" to discuss the situation with anyone, Johnson made no showing of why he did not subpoena her and take her deposition. As the trial court found: "There is nothing to indicate that Harris could not have been subpoenaed and required to sit for a deposition, even if she was unwilling to voluntarily provide information. There was ample time for Johnson to discover Harris' relevant knowledge." R Vol. II, p. 365.

Johnson also argues that because the trial court did not address the Third Affidavit of Johnson, the court abused its discretion. However, a review of the trial court's Memorandum Decision shows that the court recognized that Johnson's Third Motion relied upon the Third Affidavit of Johnson. R Vol. II, p. 360. If the trial court committed an error in failing to analyze the Third Affidavit of Johnson, the error is harmless when one considers the statements made in the Affidavit and the fact that most of the statements would be inadmissible.

In the Statement of the Facts, AgriSource reviewed the various assertions made by Johnson concerning this Third Affidavit and that Johnson, in his brief, has misstated the statements contained in the Affidavit. There is nothing set forth in the Third Affidavit of Johnson that would support a claim for relief pursuant to I.R.C.P. 60(b). In addition, the Third Affidavit of Johnson and the Affidavit of Harris do not comply with the provisions of I.R.C.P. 56(e) that requires all affidavits be made on personal knowledge, set forth facts as would be admissible into evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. AgriSource filed an objection to these affidavits on this basis. See AgriSource's Unopposed Motion to Augment, Exhibit D, pp. 5-6.

The Affidavit of Harris does not set forth any conversation that Harris had with any representative of AgriSource. As pointed out in the Statement of the Facts, the Harris Affidavit confirms that all checks made by AgriSource were made out to "Johnson Grain", not Johnson Grain, Inc. Almost all of the Affidavit of Harris pertains to dealings between herself, Johnson, and Neil Brown.

The Third Affidavit of Johnson describes office procedures conducted by Harris without laying foundation for those statements. Most of the Affidavit has nothing to do with Johnson's dealings with AgriSource but rather addresses Johnson's dealings with Neil Brown and are not relevant to the issue before the court. Johnson's primary argument is that, in a conclusory fashion, he states that "copies of train car logs and copies of the scale tickets would be provided to AgriSource." and "I believe that invoice was sent to AgriSource, Inc." R Vol. II, p. 346. Johnson makes no attempt to state when these documents were provided or sent to AgriSource or how the documents were provided or sent to AgriSource. Johnson attempts to tie one invoice to a check paid by AgriSource but is unable to do so - the amount of the invoice differs from the amount of any check that Johnson could produce.

When ruling upon Johnson's claim pursuant to I.R.C.P. 60(b)(3) the court found that the record did not support a claim of fraud, misrepresentation, or misconduct on the part of AgriSource. Johnson does not address this finding, nor is there any evidence in the record to contradict the finding of the court.

Addressing I.R.C.P. 60(b)(6), the trial court found that Johnson did not establish the requisite unique and compelling circumstances to support relief under that section. R Vol. II, p. 365. Johnson does not address this finding, nor is there any evidence in the record to contradict the finding of the court.

When reviewing the denial of a Rule 60(b) motion for relief, the court must examine: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistently with the legal standards

applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

In this matter, the trial court clearly recognized that it perceived the issue as one of discretion: "A decision to grant or to deny a motion for reconsideration generally rests in the sound discretion of the trial court." R Vol. II, p. 360. The court performed a thorough analysis of the cases that set out the factors the court should consider when considering relief under I.R.C.P. 60(b). R Vol. II, pp. 2-4. The court acted within the boundaries of its discretion and consistently with the legal standards applicable to the motion. Finally, the court applied the case law to the assertions of Johnson and, by exercising reason, denied Johnson's motion for relief.

Johnson attempts to argue that the trial court failed to explain its decision process or identify why Johnson was not entitled to relief. Johnson's Brief, p. 36. However, it is clear from a review of the court's decision that the court explained its decision process and explicitly stated why Johnson was not entitled to relief.

Johnson asserts "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." Johnson's Brief, p. 36. In support of this proposition, Johnson cites (without reference to a page number) *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 234 P.3d 699 (2010). Johnson's assertion is a misstatement of the holding of the *Dawson* case.

In *Dawson,* the trial court failed to rule on a 60(b)(6) motion. The Idaho Supreme Court held that by failing to issue a ruling on the motion, the trial court erred. *id.,* 149 Idaho 375, 380, 234 P.3d 699, 704. That is not the situation in this case. The trial court, in its decision, analyzed

applicable case law and the motion and affidavits filed by Johnson and made a ruling. The ruling of the trial court complied with the *Berg* standard. The court properly denied Johnson's Motion for Relief from Judgment.

JOHNSON IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES

Johnson requests an award attorney's fees on appeal pursuant to I.C. § 12-120(3) on the grounds that the underlying transaction is a commercial transaction and "where AgriSource contends a contract exists with Johnson." Johnson's Brief, p. 37.

Even if Johnson prevails on appeal, whether Johnson is the prevailing party would still need to be determined. Johnson is requesting that the final judgment and amended judgment be vacated and the case be remanded to the District Court for further proceedings on the claims between Johnson and AgriSource. Johnson's Brief, p. 38. If the judgment is vacated, the determination of a prevailing party would not be made until further proceedings take place before the trial court.

If Johnson's appeal is denied, AgriSource would be the prevailing party and entitled to an award of attorney's fees as set forth in this Brief.

CONCLUSION

Johnson did not establish any facts that an actual agency relationship exited between Johnson and Johnson Grain, Inc. Further, if Johnson was an agent for Johnson Grain, Inc., Johnson failed to properly disclose the existence of the agency to AgriSource. The existence of agency and the authority or the apparent authority of an agent cannot be established solely by the statements of the purported agent.

There are no material issues of fact in this case that would preclude the granting of summary judgment. The trial court properly granted summary judgment and properly denied Johnson's three motions for reconsideration and motion for relief from judgment.

The appeal of Johnson should be denied, and AgriSource should be awarded its attorney's fees incurred in the defense of the appeal.

Dated this 22 day of August, 2013.

W. Kent Fletcher
Attorney for AgriSource

CERTIFICATE OF SERVICE

I hereby certify that I have on this 22 day of August, 2013, caused a true and correct copy of the attached RESPONDENT'S' BRIEF, postage prepaid, to the following parties:

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