9-13-2013

Agrisource v. Johnson Appellant's Reply Brief Dckt. 40340

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 REPLY 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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ARGUMENT

A. 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.

Factual Disputes

Premising its entire argument on two false statements of fact, Agrisource maintains there were no genuine issues of material fact preventing summary judgment and as a matter of law it was entitled to summary judgment.

The false statements of fact are found in the first two paragraphs under the Statement of Facts on page 2 of the Respondent's Brief.

First, Agrisource states, "In 2006 Johnson opened an account at Agrisource. When it was opened, the account was opened in the name of 'Johnson Grain.'"

That statement comes from paragraph 4 of the Affidavit of Kirk Carpenter. Carpenter there made a bald assertion that a handwritten record he attached as an exhibit somehow proved Johnson "opened" a contract at Agrisource. Such an assertion is false. Nothing in the referenced exhibit established Johnson individually "opened" an account. Instead, the exhibit merely shows an account was created for "Johnson Grain." Of course, Johnson Grain was the name of Brown's Corp. for which Johnson was an agent.

Agrisource previously stated in its Response to Johnsons' Amended Third Motion for Reconsideration and Alternative Motion for Relief Under Rule 60(B) on pages 4-5, "Agrisource opened an account under the name of 'Johnson Grain.' AgriSource only dealt with Johnson concerning that account." (Respondent's Unopposed Motion to Augment, Exhibit D, pp. 4-5).

Agrisource's earlier position in its Response contradicts its factual assertions in its Respondent's Brief.

Moreover, directly opposing Carpenter's affidavit is Johnson's testimony. "At no time from August 2006 through February 2007 have I conducted business as Johnson Grain." (*Clerk's Record*, Vol. I, p. 81). "At no time did I tell [Agrisource] that I as operating the elevator on my own as Johnson Grain." (*Clerk's Record*, Vol. II, p. 261).

Second, Agrisource states that on November 8, 2006, December 13, 2006 and January 12. 2007 Johnson "entered into" contracts with Agrisource. Again, those statements are derived from the Affidavit of Kirk Carpenter. Those statements are false.

Johnson affirmatively testified that Agrisource created on its own preprinted form proposed contracts dated December 13, 2006 and January 12, 2007. (*Clerk's Record*, Vol. I, p. 81). Agrisource's listing of Johnson Grain as the contracting party was "solely done by Agrisource and not directed by [Johnson] or anyone else." (*Clerk's Record*, Vol. I, p. 81). Johnson had previously told Agrisource that Brown's Corp. could not enter into any commodity contracts until it had received proper license from the state of Idaho. (*Clerk's Record*, Vol. II, p. 261).

Noticeably absent from Agrisource's statement of facts in its Respondent's Brief is any explanation regarding its on-going business conducted with Brown's Corp. from August 2006 through December 2006. Agrisource's omission strains credibility in ignoring fully developed and regular business activity with Brown's Corp. related to the elevator's storage and shipment of commodities to Agrisource through the harvest season of 2006.

Johnson fully identified that relationship. (*Clerk's Record*, Vol. I, pp. 79-83; Vol. II, p. 261). Johnson testified that scale tickets and purchase contracts were printed in the full corporate name of Brown's Corp. (*Clerk's Record*, Vol. I, p. 80). Johnson testified that those preprinted scale tickets were delivered to Agrisource for purpose of obtaining payment for elevator services.

(*Clerk's Record*, Vol. II, p. 260-261). Further, Johnson testified that through telephone conversations he told Agrisource to make all payment checks payable to Brown's Corp. (*Clerk's Record*, Vol. II, p. 261).

All payments made by Agrisource for the elevator's services for the time period from September through December 2006 were made payable to "Johnson Grain"; each check was negotiated with the preprinted 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).

Agrisource made payments based upon invoices supplied from Brown's Corp. together with scale tickets and any train car logs. (*Clerk's Record*, Vol. II, p. 346). Johnson was able to trace Agrisource's payments in November and December 2006 through Brown's Corp. records and Agrisource's checks. (*Clerk's Record*, Vol. II, p. 346-347).

From its records of negotiated checks, Agrisource in December 2006 alone paid $19,962.00 to Brown's Corp. (*Clerk's Record, Clerk's Record*, Vol. II, pp. 327g-327d; Vol. I, pp. 78t-78u).

It is reasonable to infer from those facts alone that Agrisource knew or should have known it was engaged in business with Brown's Corp.

Agrisource suggested in its recitation of facts on page 5 of its Respondent's Brief that Johnson made factual claims not supported by the record. Johnson notes that his recitation of facts on pages 10-11 of the Appellant's Brief are supported by his affidavits. (*Clerk's Record*, Vol. I, pp. 79-83; Vol. II, p. 261).

Again, Agrisource failed to address critical information contained in Johnson's affidavits showing Agrisource knew or should have known it was contracting with Brown's Corp. through its agent Johnson prior to the January 2007 contract at issue.

For example, when Neil Brown was going to be short on his contract to deliver 20,000 bushels of wheat, Johnson called Agrisource. (*Clerk's Record*, Vol. I, p. 82). Agrisource agreed to allow Brown to produce the wheat in 2008 and fulfill the contract. (*Clerk's Record*, Vol. I, p. 82). If Johnson was in fact the contracting party, Agrisource contradicted its current position by accepting substitute performance from Brown in a subsequent growing season. That fact is relevant evidence showing Agrisource knew Johnson was not the contracting party.

Additionally, from September through December 2006 two specific employees of Agrisource had regular contact with Johnson. (*Clerk's Record*, Vol. II, p. 260). The main purpose of those contacts was to determine the status of Agrisource's commodities being received and stored at the elevator in the harvest season of 2006. (*Clerk's Record*, Vol. II, p. 260). Other discussions during those contacts related to potential contracts for delivery of wheat. (*Clerk's Record*, Vol. II, p. 260). In his conversations with Johnson, Bill Mendenhall stated he understood that Neil Brown owned the elevator, that Johnson was operating the elevator for Brown, and that Brown's Corp. had not yet received its commodity license. (*Clerk's Record*, Vol. II, p. 260).

Finally, Agrisource stated, "At all times material to this dispute, Johnson (sic) believed it was contracting with Johnson." (Respondent's Brief, p. 17). Johnson believes Agrisource meant to say, "At all times material to this dispute, Agrisource believed it was contracting with Johnson." Agrisource's position throughout its conduct with Brown and in this action belies its claim.

Agrisource first filed this action as a complaint against Neil Brown, his wife, and Brown's Corp. If Agrisource truly believed Johnson was the contracting party, one must wonder

why Agrisource first sued Brown. Only after Brown asserted Johnson was responsible for the contract at issue did Agrisource name Johnson, his wife, and his corporation.

Summary Judgment

In his Appellant's Brief Johnson fully addressed the issue of how the district court erred in granting summary judgment to Agrisource. Johnson believes the district court made two errors in granting summary judgment.

Agrisource argues that the district court properly applied the rule of agency disclosure because Johnson did not disclose his principal. Agrisource's argument misses the standard pertaining to reasonable inferences applied to motions for summary judgment and the law of notice applied in determining disclosure of a principal.

The reasonable inferences in favor of Johnson show at least a genuine issue of material fact regarding Agrisource's notice that Brown's Corp. was the principal in the ongoing business transactions and in the contract at issue.

Reasonable Inferences

Agrisource did not directly address the issue Johnson raised in his Appellant's Brief as to whether the district court incorrectly applied the standard in summary judgment of liberally construing the record in favor of Johnson.

Johnson requested a jury trial. Thus, the jury would be the ultimate trier of fact. 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, 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).

More recently, the Idaho Supreme Court has stated, "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. *Fuller v. Callister*, 150 Idaho 848, 851, 252 P.3d 1266, 1269 (2011) (quoting *Castorena v. Gen. Elec.*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010)). "However, the nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine issue of material fact." *Bollinger v. Fall River Rural Elec. Coop., Inc.*, 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012).

Johnson did more than present mere speculation or a scintilla of evidence. The three affidavits of Johnson, the Affidavit of Wydell Johnson, and the Affidavit of Jeanne Harris all present admissible evidence pertaining to Agrisource's notice. The facts not only establish a genuine dispute of fact as to Agrisource's knowledge or notice, but also create a substantial basis on which reasonable inferences of knowledge and notice may be based.

The district court appears to simply have made a determination there was no evidence that Johnson expressly stated he was agent for the exact legal name of "Johnson Grain, Inc.," and, thus, did not disclose his principal. Johnson believes the district court did not correctly apply the standard for summary judgment.

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). Brown's Corp. used 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).

Those preprinted scale tickets and train car logs were sent to Agrisource for billing purposes. (*Clerk's Record*, Vol. II, pp. 327g-327d). Invoices preprinted with Brown's Corp. name were sent to Agrisource for payment of elevator services. (*Clerk's Record*, Vol. II, pp. 327g-327d, 344-349).

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

Narrowly focused upon the absence of a specific declaration from Johnson that he unequivocally disclosed the full name of Brown's Corp. to Agrisource, the district court held Johnson did not disclose his principal. The district court did not construe all facts in favor of Johnson nor draw all reasonable inferences that could be drawn from the facts in favor of Johnson.

The facts noted above together with the reasonable inferences from those facts demonstrate at least a dispute of material fact. Reasonable minds could certainly reach differing conclusions on the facts contained in the record before the district court.

Disclosure of Principal

The facts show Agrisource entered into an ongoing business relationship with Brown's Corp. from September through January 2007 with notice, if not actual knowledge, that Johnson was agent for Brown's Corp. Agrisource pins its position of lack of disclosure on the dispute of fact regarding whether Johnson actually said he was working for Brown's Corp. In so doing, Agrisource ignores the weightier facts demonstrating it had notice of the principal.

To sustain its position, Agrisource urges without authority that a heightened standard applies to Johnson. Agrisource asserts on page 19 of its Respondent's Brief: "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."

The issue of Johnson's duty to disclose under the UCC and grain trade rules was not presented to the district court and should not be considered on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). Nor is there any authority to sustain Agrisource's argument of a heightened duty applicable to Johnson. Agrisource's reliance on I.C. § 28-2-201 is misplaced. The issue here is not formation of a contract. Nor does the NGFA Grain Trade Rules on formation of contracts apply. Those are purely red herrings.

To the contrary, the law of agency does not impose a heightened duty on Johnson. Idaho follows the Restatement pertaining to agency. The Restatement (Third) of Agency § 1.04(2) (2006) provides a principal is disclosed if the other party has notice of the fact that an agent is acting for a principal and the principal's identity. Further, the Restatement illuminates the standard of notice by explaining, "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).

During the four to five months prior to the January 2007 contract at issue, Agrisource knew or had reason to know that it was doing business with Brown's Corp. Agrisource received invoices from Brown's Corp. for the commodities received, stored and shipped by Brown's Corp. Agrisource paid for the service performed by Brown's Corp. Agrisource had no reason to believe it was doing business with Johnson individually.

Curiously, Agrisource never fully addressed Johnson's argument on notice other than to state that "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." Respondent's Brief, p. 22. Merely discounting authority from other jurisdictions does not answer the prevailing law on disclosure governed by the Restatement followed in Idaho.

However, pertinent to Agrisource's position on the UCC, is the decision of 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). Applying U.C.C. 3-402 to the question of liability of party under a contract, the Ohio Appellate Court observed, "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.* at 150 Ohio App.3d 481 (emphasis added).

Under that analysis, even assuming Johnson did not disclose the exact legal name of Brown's Corp., such failure is not fatal to Johnson's position. Notice to Agrisource from other sources beside Johnson, and Agrisource's knowledge or presumed knowledge demonstrates there was disclosure of the principal Brown's Corp.

Agrisource meets the criteria under the Restatement of being a party with superior intelligence for purposes of examining what it knew or should have known because it is in the business of commodity contracts. Restatement (Second) of Agency § 9(1) official comments.

Johnson specifically told Agrisource that Brown's Corp. could not enter intc commodity contracts until it was properly licensed. Only after Brown's Corp. became licensed, and knowledge of that licensing was given to Agrisource, did Agrisource create the December and

January contracts. Agrisource is in the business of commodity contracts. Superior intelligence is imposed upon Agrisource due to its course of business dealings and understanding of commodity licensing. Under the imposed superior intelligence, Agrisource should have known that only a licensed dealer could enter into commodity contracts and that licensed dealer was Brown's Corp.

Further, prior to the December and January contracts, Agrisource admittedly was conducting business with Brown's Corp. for the receipt, storage, and shipment of commodities received on behalf of Agrisource at the elevator. Therefore, Agrisource knew or should have known that it was contracting with Brown's Corp. and not Johnson.

Agrisource failed to fully distinguish or address the Idaho and other authorities cited by Johnson. Unquestionably, Idaho has applied and follows the Restatement of Agency. Under the authorities Johnson cited in his Appellant's Brief, the law supports Johnson's position and demonstrates the district court erred in granting summary judgment.

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.

Third Motion for Reconsideration

Agrisource argues Johnson's third motion for reconsideration was properly denied as untimely or otherwise not in compliance with I.R.C.P. 11(a)(2). Agrisource submits that Johnson's second motion for reconsideration was denied in open court on August 14, 2012 instead of by order entered August 21, 2012. It is the entry of an instrument substantively constituting an order controls and not an in court statement on the record.

A court may make an order on the record in open court, but until that order is condensed into written form it does not constitute an order for purposes of determining application of timing under civil rules for motions for reconsideration, motions for relief, or notice of appeal. *Capstar Radio Operating Co. v. Lawrence*, 149 Idaho 623, 238 P.3d 223 (2010); *Camp v. East Fork Ditch Co.,* 137 Idaho 850, 55 P.3d 304 (2002); *Idah Best, Inc. v. First Security Bank of Idaho, N.A.,* 99 Idaho 517, 584 P.2d 1242 (1978).

Therefore, August 21, 2012 became the effective date of the district court's order denying Johnson's second motion for reconsideration.

In light of this court's order deleting from the record the Affidavit Of Consel, containing Agrisource's Stipulation To Certify as final the amended Judgments, Johnson sees no point in further arguing the issue of estoppel.

Motion for Relief

Of greatest concern was the district court's treatment of Johnson's alternative motion for relief under I.R.C.P. 60(b).

Agrisource suggests the district court did analyze Johnson's Third Affidavit in denying Johnson's motion for relief. However, there is nothing in the record to support Agrisource's position. Although the district court's Memorandum Decision on Johnson's Third Motion for Reconsideration states the motion was supported by Johnson's Third Affidavit, the court's analysis of Johnson's motion showed it focused solely on Harris' affidavit and gave no consideration to the new evidence disclosed in Johnson's Third Affidavit. (Clerk's Record, Vol. II, pp. 360, 365).

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).

Agrisource maintains that Johnson's argument framed by *Dawson* is a misstatement of the holding in *Dawson*. Johnson summarized the following determinative authorities as quoted in *Dawson* for the standard applied in ruling on a Rule 60(b)(6) motion:

> The district court erred by failing to issue a ruling on Dawson's Rule 60(b)(6) motion. *See Montgomery v. Montgomery,* 147 Idaho 1, 6-7, 205 P.3d 650, 655-56 (2009) (holding that the trial court abused its discretion by failing to rule on the admissibility of certain evidence prior to granting summary judgment); *see also Miramar Hotel Corp. v. Frank B. Hall & Co. of California,* 163 Cal.App.3d 1126, 210 Cal.Rptr. 114, 115 (1985) (holding that "a trial court's failure to issue a [ruling] when there has been a timely request therefor is per se reversible error"). Even were this Court to deem the district court's silence as a tacit denial of Dawson's Rule 60(b)(6) motion, the district court's unsupported denial is still an abuse of discretion. *See, e.g., Gutierrez v. Mass. Bay Transp. Auth.,* 437 Mass. 396, 772 N.E.2d 552, 560 (2002) (explaining that a trial court's failure to rule on a motion is effectively a denial of the motion). The district court's failure to rule on the motion leaves this Court without an adequate basis upon which to understand the premise behind the district court's determination, and thus the district court abused its discretion by failing to issue a ruling on Dawson's Rule 60(b)(6) motion.

Dawson, 149 Idaho at 380.

Johnson believes he correctly identified the applicable standard and did not misstate the rule announced in *Dawson*.

The district court did not address one shred of evidence presented in Johnson's Third Affidavit. Of paramount relevance were newly discovered original invoices Brown's Corp. used to bill Agrisource for elevator services during 2006. Such invoices constitute evidence of Agrisource's notice that it was dealing with Brown's Corp. as the principal contracting party and not Johnson individually.

Agrisource asserts that the district court's failure to examine Johnson's Third Affidavit was harmless error because "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)." (Respondent's Brief, p. 31). Further, Agrisource attempts to discredit Johnson's third affidavit by challenging the admissibility of Johnson's testimony.

Agrisource did not file a motion to strike any portion of Johnson's Third Affidavit. Agrisource made objections to foundation and argued the affidavit was untimely. (Respondent's Unopposed Motion to Augment, Exhibit D, pp. 5-6). Nowhere in the district court's decision is there any determination of admissibility of Johnson's testimony or ruling on Agrisource's objection.

Agrisource notably did not address *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 449-450, 283 P.3d 757, 765-766 (2012), cited by Johnson in his Appellant's Brief pertaining to a trial court's abuse of discretion in failing to address admissibility of evidence and rule on new evidence as found in Johnson's affidavit. The ruling in *Printcraft* applies to the district court's exercise of discretion and shows it abused its discretion.

Furthermore, the Idaho Supreme Court has addressed the question of admissibility of affidavit testimony offered in motion practice when presented with that issue on appeal.

> This Court is not free to determine the admissibility of Plott's testimony on appeal. The admissibility of expert testimony is a matter committed to the discretion of the trial court. This Court has held that when the discretion exercised by a trial court is affected by an error of law, our role is to note the error made and remand the case for appropriate findings. For that reason, the grant of summary judgment is vacated and the case remanded for the district court's determination of the admissibility of Plott's testimony before consideration of the merits of the motion for summary judgment.

Gem State Ins. Co. v. Hutchison, 145 Idaho 10, 15-16, 175 P.3d 172, 177-178 (2007).

Additionally, the Idaho Supreme Court has considered the differing evidentiary standards applicable to motions for summary judgment as contrasted with post judgment motions for relief.

> We are mindful, as was the district court, of the time constraints imposed by I.R.C.P. 59(b). We are also mindful of the admonition, contained in I.R.C.P. 1(a), that the rules of civil procedure "shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding." For these reasons, we conclude that an affidavit filed in connection with a motion for new trial need not meet the standards of admissibility prescribed by the Idaho Rules of Evidence.

Obendorf v. Terra Hug Spray Co., Inc., 145 Idaho 892, 900-901, 188 P.3d 834, 892-893 (2008).

Johnson's testimony in his third affidavit was relevant, properly authenticated the invoices and business records attached as exhibits, laid foundation based on personal knowledge, was corroborated by Agrisource's payment checks, and was positive evidence of business transactions between Brown's Corp. and Agrisource.

Even assuming arguendo that Johnson's third affidavit lacks all foundational requirements under the rules of evidence, there is no requirement under Rule 60(b) that affidavits filed in support of motions for relief must meet the same criteria for affidavits filed as part of motions for summary judgment. The *Obendorf* case permits consideration of affidavits not otherwise meeting standards of admissibility.

The original invoices attached to Johnson's third affidavit were compelling evidence of Agrisource's notice and knowledge pertaining to the identity of Brown's Corp. Johnson testified of facts supporting a showing that those invoices constituted newly discovered evidence. Furthermore, Johnson's third affidavit sets forth unique and compelling circumstances justifying relief. Brown kept all the records for Brown Corp. Johnson did not have access to those records and Brown claimed in discovery that all such records were destroyed or lost. The original invoices discovered by Johnson's wife are convincing evidence of notice to Agrisource. The

circumstances surrounding the discovery of those invoices together with Johnson's ability to use those invoices to trace payments by Agrisource are unique and compelling. See *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991).

Of utmost consideration on appeal, the district court did not evaluate Johnson's testimony and exhibits in his third affidavit; rule on admissibility; or make any determination as to whether such evidence justified relief from judgment. Consequently, the district court abused its discretion.

C. Agrisource is not entitled to an award of costs and attorney fees on appeal.

Agrisource seeks an award of its costs and attorney fees on appeal.

As already discussed in the preceding issues, Johnson believes the district court erred in granting summary judgment and abused its discretion in failing to grant relief. Johnson believes he will be the prevailing party on appeal and, consequently, Agrisource would not be entitled to an award of its attorney fees and costs and appeal.

On the other hand, Johnson as the prevailing party on appeal would be entitled to an award of his costs and attorney fees.

CONCLUSION

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

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

Dated this 11th day of September 2013.

Kipp L. Manwaring
Attorney for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 11th day of September 2013, a true and correct copy of the foregoing document was served upon the person or persons named below in the manner indicated.

DOCUMENT SERVED: APPELLANT'S REPLY BRIEF

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