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Franklin Building Supply Co v. Hymas Respondent's Brief Dckt. 41041

IN THE SUPREME COURT OF THE STATE OF IDAHO

FRANKLIN BUILDING SUPPLY COMPANY, INC., Plaintiff-Respondent v. AARON MICHAEL HYMAS, Defendant-Appellant	Supreme Court Case No. 41041-2013

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County

Honorable Richard D. Greenwood, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a District Court decision granting summary judgment in favor of the Plaintiff/Respondent Franklin Building Supply Co., Inc. ("Franklin"). The Defendant/Appellant is Aaron Michael Hymas ("Hymas").

This case appears convoluted at first blush due primarily to Hymas repeatedly attempting to improperly enter exhibits into the record by attaching them to briefs rather than to sworn affidavits. The facts and procedural history of this case, however, are relatively straightforward.

Franklin sued Hymas for amounts owed under his guaranty of Crestwood Construction, Inc.'s debts to Franklin. Franklin moved for summary judgment based upon a properly executed affidavit. Hymas did not offer any facts in opposition to Franklin's motion, and the District Court correctly awarded summary judgment to Franklin. Hymas then moved to reconsider this ruling, but the facts offered by Hymas in support of his motion were "conclusory and speculative," and his motion was denied. Well after the date final judgment was entered, Hymas filed a second motion to reconsider, which the District Court denied on the grounds that it was procedurally improper. Hymas does not identify the denial of his second motion to reconsider as an issue on appeal; therefore, this appeal essentially involves the District Court's award of summary judgment to Franklin and denial of Hymas' first motion to reconsider. The denial of the second Motion for Reconsideration is not properly before this Court on appeal.

B. Procedural Background.

Franklin filed its Complaint on October 4, 2011. (R. pp. 6-8). Hymas filed his Answer on February 2, 2012, alleging as a single affirmative defense the statute of limitations. (R. pp. 9-10).

Franklin filed the Motion for Summary Judgment that is at issue in this appeal on October 29, 2012. (R. p. 11). In support of its Motion, Franklin filed the sworn affidavit of its Corporate Credit Manager, Richard C. Pietrucci, setting forth a prima facie case for breach of guaranty (hereinafter the "Pietrucci Affidavit"). (R. pp. 13-14). Hymas filed a Response to Franklin's Motion, but Hymas did not file any affidavits.[1] (Tr. p. 7, ll. 8-13).

Oral argument was heard on Franklin's Motion for Summary Judgment on January 14, 2013. (Tr. p. 6, ll. 1-2). After noting that the only facts in the record were those set forth in the Pietrucci Affidavit, (Tr. p. 19, ll. 10-24), the District Court granted Franklin's Motion orally from the bench stating, "it is clear to me that the debt is owed, it was guaranteed, and [Franklin] is entitled to summary judgment." (Tr. p. 20, ll. 4-7).

On January 22, 2013, Franklin filed a Motion to Correct Calculation of Amount Claimed Owed due to a typographical error in the Pietrucci Affidavit. (R. p. 85-88). The District Court granted this Motion from the bench on February 27, 2013, on the grounds that the typographical error was a "clerical oversight." (Tr. p. 62, ll. 15-21).

On February 8, 2013, Hymas filed a Motion to Reconsider that was supported by a Memorandum and the Affidavit of Aaron Hymas (the "First Hymas Affidavit"). (R. pp. 93-99).

[1] Hymas attempted to introduce exhibits into the record by attaching documents to his Response, (R. pp. 59-69), but the District Court did not consider those documents as they were not attached to a sworn affidavit. (Tr. p. 44. ll. 3-9).

The First Hymas Affidavit set forth certain testimony but did not attach any exhibits. (R. pp. 97-99). On February 21, 2013, Hymas filed a Reply brief in support of his Motion to Reconsideration,[2] in which Hymas first raised his "corporate status argument."[3] (R. pp. 137-39).

The District Court heard Hymas' Motion to Reconsider on February 27, 2013. (Tr. p. 37, ll. 2-8). At the hearing, the District Court refused to consider Hymas' "corporate status argument" because it was "raised for the first time in the reply brief." (Tr. p. 57, ll. 11-19). The District Court also correctly noted that the only facts properly in the record in support of the Motion were those facts set forth in the First Hymas Affidavit, which was only "three pages long" and did not include any exhibits. (Tr. p. 40, ll. 14-23). The District Court then allowed Hymas to supplement the record after the hearing, (Tr. p. 62, ll. 5-13), which Hymas did via a Notice RE: Affidavit of Aaron Hymas.[4] (R. p. 159-67).

The District Court denied Hymas' Motion to Reconsider on April 5, 2013. (R. p. 168-75). An Amended Judgment was then entered in favor of Franklin on April 8, 2013. (R. p. 176).

On April 26, 2013, Hymas filed a second Affidavit of Aaron Michael Hymas (the "Second Hymas Affidavit"), (R. p. 178), in support of a second Motion to Reconsider that Hymas did not file until May 17, 2013.[5] (R. pp. 216-17). The Second Hymas Affidavit attaches every exhibit that Hymas relies upon, including all the exhibits that form the basis of Hymas' "corporate status

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[2] Hymas next attempted to introduce exhibits by attaching them to his Reply rather than in a sworn affidavit, (R. pp. 137-55), but again, the District Court correctly noted that it could not consider "material . . . attached" to a brief because it is "not a sworn statement." (Tr. p. 44. l. 3-9).

[3] As more particularly discussed in Section IV., B, below, Hymas' "corporate status argument" is based upon the alleged dissolution and reformation of the principal debtor. (Appellant's Brief, p. 10).

[4] The Notice attached Franklin's written responses to Hymas' discovery requests but did not include any documents produced in discovery or other exhibits. (R. p. 161-67).

[5] The Court will note that Hymas' second Motion to Reconsider is only in the record due to it being attached to the

argument." (R. pp. 184-98). The District Court denied Hymas' second Motion to Reconsider on May 20, 2013, due to the Motion being procedurally improper. ("Second"[6] Tr. pp. 22-25).

Hymas then filed his Notice of Appeal on May 20, 2013 (R. p. 220), which he amended on two separate occasions. (R. pp. 224, 230).

C. Concise Statement of Facts

The only material facts properly of record are those set forth in the Pietrucci Affidavit and the First Hymas Affidavit. The only exhibits properly of record are those attached to the Pietrucci Affidavit and Franklin's written responses to Hymas' discovery (without exhibits) attached to Hymas' Notice RE: Affidavit of Aaron Hymas. The exhibits attached to Hymas' briefs are not properly of record, nor are the documents attached to the Second Hymas Affidavit because it was not timely filed under Idaho Rule of Civil Procedure 11(a)(2)(B).

According to the exhibits properly of record, on June 22, 2004, Hymas submitted a Credit Application to Franklin on behalf of Crestwood Construction, Inc., ("Crestwood"). (R. pp. 16-17). Hymas represented in the Credit Application that he was an owner and the "CEO" of Crestwood. (R. p. 16). Hymas also "personally, jointly, severally and unconditionally" guaranteed payment to Franklin for "any and all indebtedness" of Crestwood "now of hereafter owing." (R. p. 17). This agreement was reaffirmed by Hymas in the Continuing Guaranty that Hymas executed on June 29, 2004. (R. pp. 18-21). After Hymas executed the Credit Application and Continuing Guaranty, Franklin began supplying credit to Crestwood by way of

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Affidavit of David M. Swartley, which supports Franklin's submission that this motion is not an issue on appeal.

[6] The transcript of the hearing held on May 20, 2013, is numbered pages 5 through 26, which pages are duplicative

materials from December 22, 2006 through July 25, 2007. (R. pp. 14, 22-51). Crestwood and Hymas have failed to pay for materials valuing $671,667.05, excluding interest, which amount remains unpaid. (R. p. 14). Interest accrues on this principal amount at the contractual rate of eighteen percent (18%) per annum. (R. p. 17). Each of these facts are testified to by the affiant of the Pietrucci Affidavit and supported by exhibits attached to the affidavit. (R. pp. 13-51).

At no time did Hymas refute any of these facts or offer any evidence contradicting these facts. (R. p. 59; Tr. p. 7, ll. 9-13). Instead, Hymas filed a three page affidavit with no attachments that supplemented the above facts with the following information: (1) that only Hymas, Justin Walker or Chris Jorgensen had authority to order materials from Franklin; (2) that none of the invoices produced in discovery were signed; and (3) that Crestwood "had many issues with framers and other subcontractors calling [Franklin] and ordering products for Crestwood's job sites." (R. p. 98). None of these facts assist Hymas on summary judgment.

While only Hymas, Justin Walker and Chris Jorgensen were identified as "authorized purchasers" in the Credit Application, (R. p. 17), there are no facts of record supporting any inference that anybody other than these individuals ordered materials from Franklin. With respect to Hymas' self-serving testimony that Crestwood had issues with Crestwood's subcontractors ordering materials, Hymas does not reference a single instance or invoice whereby a Crestwood subcontractor wrongfully ordered materials. (R. p. 98). Hymas' lack of supporting exhibits and self-serving testimony was found by the District Court to be "conclusory

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of earlier hearings. To avoid confusion, Franklin refers to the May 20, 2013 transcript as "Second."

and speculative" and therefore insufficient to defeat Franklin's Motion for Summary Judgment. (R. p. 172).

It should also be noted that the only exhibits that Hymas properly entered into the record were Franklin's written discovery responses. (R. pp. 161-67). A review of the written discovery responses establishes that they do not alter or supplement the above facts in any way. Further, Hymas did not enter into evidence the documents produced with the written discovery responses, which would include the invoices Hymas referenced. (R. p. 98).

II. ADDITIONAL ISSUES ON APPEAL

1. Whether Franklin is entitled to attorneys' fees on appeal?

III. ATTORNEY FEES

Franklin requests attorneys' fees on appeal under Idaho Appellate Rule 41, Idaho Rule of Civil Procedure 54(e)(1), the guaranty, Idaho Code § 12-120(3) and Idaho Code § 12-121.

Idaho Appellate Rule 41 requires a party seeking attorney's fees on appeal to assert such a claim in the first brief filed with the Court. I.A.R. 41(a). It is also established that a "party is entitled to attorney fees on appeal only if fees are authorized by statute, contract, or court rule." *Kootenai County v. Harriman-Sayler*, 154 Idaho 13, 20, 293 P.3d 637, 644 (2012); I.R.C.P. 54(e)(1) ("In any civil action the court may award reasonable attorney fees . . . when provided for by any statute or contract."). Franklin submits that it is entitled to attorneys' fees under Idaho Code § 12-120(3), its contract with Hymas, and Idaho Code § 12-121.

Idaho Code § 12-120(3) provides that a party is entitled to attorneys' fees to recover on a "**guaranty**, or contract relating to the purchase or sale of goods, . . . and in any commercial transaction." Idaho Code § 12-120(3) (emphasis added). Here, Franklin seeks recovery from Hymas under a guaranty, thus Franklin is entitled to attorneys' fees pursuant to the express language of section 12-120(3). Franklin is also entitled to attorneys' fees under section 12-120(3) because a commercial transaction compromises the gravamen of this lawsuit since Franklin is seeking to recover for building materials provided to a company (Crestwood) at the direction of Hymas and for which Hymas personally guaranteed. *E.g.*, *Clayson v. Zebe*, 153 Idaho 228, 236, 280 P.3d 731, 739 (2012).

Franklin is also entitled to attorneys' fees under the express terms of the guaranty at issue in this case because Hymas promised to reimburse Franklin for "all costs, fees and expenses of collection," (R. p. 17), including all attorneys' fees that Franklin incurs. (R. p. 18).

Franklin finally submits that it is entitled to attorneys' fees on the grounds that this appeal is frivolous. "Idaho Code § 12-121[7] and Idaho Appellate Rule 41(a) authorize such an award if the Court 'is left with an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation.'" *McDavid v. Kiroglu*, 155 Idaho 49, 54, 304 P.3d 1215, 1220 (App. 2013) (citations omitted). The Idaho Supreme Court has recently awarded attorneys' fees for a frivolous appeal when the appellant's arguments were not persuasive, unsupported by authority, and/or were clearly contrary to prior decisions rendered the Court. *Grazer v. Jones*, 154 Idaho 58, 71, 294 P.3d 184, 197 (2013). Each of these elements is present in this case.

The District Court granted summary judgment to Franklin in large part because Hymas did not enter any facts in the record disputing the Pietrucci Affidavit. Therefore, Hymas is challenging the District Court's award of summary judgment even though he offers no facts in support of his position. When Hymas submitted facts in the record via the First Hymas Affidavit, such facts were, according to the District Court, purely "conclusory and speculative." (R. p. 172) ("The Hymas affidavit is conclusory and speculative. It lacks the specificity necessary to establish that improper charges exist on the account guaranteed."). Hymas then submitted a final affidavit in support of his second Motion to Reconsider that did not comply with the Idaho Rules of Civil Procedure because it was filed more than fourteen (14) days after entry of final judgment. I.R.C.P. 11(a)(2)(B) (a motion to reconsider may not be made "later than fourteen (14) days after the entry of final judgment"). Based upon this undisputed procedural history, Hymas' arguments on appeal are not persuasive. This determination is supported by the fact that Hymas offers almost no authority in support of his arguments. In fact, Hymas only cites to two cases: one discussing the standard of review, and the other discussing Idaho Rule of Civil Procedure 56(e). (Appellant's Brief, pp. 7, 9). Many of Hymas' arguments are also patently contrary to prior decisions rendered this Court, as discussed throughout this brief. It is therefore respectfully submitted that Hymas has brought this appeal frivolously.

For each of the above reasons, Franklin respectfully requests that this Court award it attorneys' fees on appeal.

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[7] The relevant text of Idaho Code § 12-121 provides that "[i]n any civil action, the judge may award reasonable attorney's fees to the prevailing party."

IV. ARGUMENT

The record establishes that Franklin complied with the Idaho Rules of Civil Procedure throughout the litigation of this case. Likewise, the District Court correctly applied the Rules in deciding this case. Hymas, on the other hand, completely ignored the Rules by filing untimely motions and attempting to introduce facts through briefing rather than sworn affidavits. Franklin cannot fathom why Hymas continually and repeatedly ignored the Rules of Civil Procedure, but Hymas' reasoning is not relevant to this appeal. What is relevant is that Hymas has not created a question of material fact, and the District Court's decision should be upheld.

A. The District Court Correctly Entered Summary Judgment in Favor of Franklin and Denied Hymas' Motion for Reconsideration.

Hymas' appeal essentially revolves around whether the District Court correctly awarded summary judgment to Franklin, and if so, whether the District Court correctly denied Hymas' Motion for Reconsideration. Since Hymas only submitted one admissible affidavit,[8] this case primarily turns on whether the Pietrucci Affidavit sets forth a prima facie case.

1. Standard of Review.

The Idaho Supreme Court "reviews appeals from an order of summary judgment *de novo*, and the 'standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment.'" *Stonebrook Const., LLC, v. Chase Home Finance, LLC*, 152 Idaho 927, 929, 277 P.3d 374, 376 (2012) (citing *Curlee v. Kootenai Cnty. Fire & Rescue*, 148

[8] As discussed in Section IV., B, below, Franklin disputes that the Second Hymas Affidavit was properly before the District Court.

Idaho 391, 224 P.3d 458 (2008)). Summary judgment is proper 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 judgment as a matter of law." I.R.C.P. 56(c). When applying the standard set forth in Rule 56(c), the Court construes disputed facts "in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." *Curlee*, 148 Idaho at 394, 224 P.3d at 461. "However, to survive summary judgment, 'an adverse party may not rest upon mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise . . ., must set forth specific facts showing that there is a genuine issue for trial.'" *AED, Inc., v. KDC Investments, LLC*, 155 Idaho 159, 163, 307 P.3d 176, 180 (2013) (citing I.R.C.P. 56(c)). "Therefore, 'the nonmoving party must submit more than just conclusory assertions that an issue of material fact exists.'" *Id.* (citations omitted). "'A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for purposes of summary judgment.'" *Id.* (citations omitted).

This case also involves the District Court's denial of Hymas' first Motion for Reconsideration. When reviewing a "trial court's decision to grant or deny a motion for reconsideration, this Court utilizes the same standard of review used by the lower court in deciding the motion for reconsideration." *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). Therefore, "when reviewing the grant or denial of a motion for reconsideration following the grant of summary judgment, this Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment." *Id.*

2. Franklin made a prima facie showing on summary judgment.

In order to make a prima facie case for breach of contract, Franklin must prove "(a) the existence of the contract, (b) [Hymas'] breach of the contract, (c) the breach caused damages, and (d) the amount of those damages." *Mosell Equities, LLC, v. Berryhill & Co., Inc.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013).

Franklin filed its Motion for Summary Judgment on October 29, 2012. (R. pp. 11-12). In support of its Motion, Franklin filed the Pietrucci Affidavit. (R. p. 13). Hymas did not file a single affidavit in response to Franklin's Motion, (Tr. p. 7, ll. 8-13), but Hymas did submit a response brief questioning whether Franklin had met its burden under Rule 56(c).[9] (R. pp. 59-60). Based upon this defense, the District Court was correct in awarding summary judgment to Franklin if Franklin met its burden of proof under Rule 56(c).

Idaho Rule of Civil Procedure 56(e) states, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." I.R.C.P. 56(e). "A trial court has the discretion to decide whether an affidavit offered in support of or opposition to a motion for summary judgment is admissible under Rule 56(e)." *Esser Electric v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 917, 188 P.3d 854, 859 (2008). Further when a party does not object to the admissibility of an affidavit, a district court

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[9] Hymas' response also asserted a statute of limitations defense, (R. p. 59), which Hymas has since withdrawn. (Appellant's Brief, p. 7) (this lawsuit is "not barred by the Statute of Limitations"). Hymas also does not raise the statute of limitations as an issue on appeal, (*Id.* at p. 8), or otherwise argue the statute of limitations in his Appellant's Brief. (*See generally id.*)

will "not err in relying upon it when granting [a] motion for summary judgment" even if the "affidavit does not comply with Rule 56(e)." *Id.* at 917-18, 188 P. 3d at 859-60.

Keeping the aforementioned rules in mind, the Pietrucci Affidavit begins with an affirmation that the affiant is the Corporate Credit Manager of Franklin, and that he has "personal knowledge of the matters stated" in the affidavit. (R. p. 13). The Pietrucci Affidavit then attaches the Credit Application and Continuing Guaranty that Hymas executed. (R. pp. 13, 16). The Pietrucci Affidavit finally provides that: (1) both Crestwood and Hymas failed to pay for materials Franklin supplied; and (2) Franklin was damaged in the exact principal amount of $671,667.05 due to Hymas' breach of guaranty. (R. p. 14). The affidavit concludes by attaching Franklin's "Transaction Reports showing the amounts billed by Franklin to Crestwood . . ., the dates when invoiced, and the total amount due." (R. pp. 14, 22-51).

It is clear that Pietrucci Affidavit fully complies with rule 56(e). The affidavit was made on personal knowledge and establishes that the affiant is competent to testify to the matters contained in the affidavit. The affidavit also sets forth facts that would be admissible at trial. The District Court was therefore correct in relying upon the Pietrucci Affidavit in deciding Franklin's Motion for Summary Judgment. *Esser Electric*, 145 Idaho at 918, 188 P.3d at 860. More importantly, Hymas never objected to the Pietrucci Affidavit, which conclusively establishes that the District Court did not err in relying upon the affidavit. *Id.*

The Pietrucci Affidavit also clearly establishes a prima facie case. The contracts at issue were attached to the affidavit, and the affiant testifies that the contracts were breached due to Hymas not paying for the materials ordered by and supplied to Crestwood. Finally, the affidavit,

both via testimony and exhibits, establishes the precise amount of those damages. As the District Court correctly found: "The plaintiff has made a prima facie case here for the existence of a contract – that being the guarantee – and the existence of underlying debt and the amount of the underlying debt." (Tr. p. 19, ll. 10-14). Summary judgment was therefore properly entered in favor of Franklin.

3. Hymas did not show a genuine issue for trial.

Since Franklin established a prima facie case, "the burden shifts to [Hymas] to show that a genuine issue of material fact" exists. *Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 250, 109 P.3d 392, 397 (2005). To show that a genuine issue of material fact exists, Hymas "'may not rest upon the mere allegations or denial of his pleadings, but his response, by affidavits or as otherwise . . ., must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (citing I.R.C.P. 56(e)).

Hymas does not comply with the rule set forth in *Venters* because Hymas fails to "set forth specific facts showing that there is a genuine issue for trial."[10] Instead, Hymas attempts to argue that Franklin did not establish a prima facie case. Hymas makes this argument through four general points: (1) that Hymas should be allowed the opportunity to depose the affiant of the Pietrucci Affidavit; (2) that the Pietrucci Affidavit is insufficient; (3) that Franklin did not timely respond to Hymas' discovery requests; and (4) allegations related to the corporate status of Crestwood. (Appellant's Brief, pp. 8-10). Arguments one through three will be addressed immediately below. Argument four, however, is addressed in Section IV., B.

a) Hymas should not be granted the opportunity to depose the affiant of the Pietrucci Affidavit.

There are numerous problems with Hymas' argument that he should be granted the opportunity to depose the affiant of the Pietrucci Affidavit, the first of which being that Hymas did not identify this as an issue on appeal.

"This Court has quite consistently adhered to the principle that an issue not raised below will not be considered when raised for the first time on appeal." *McNeil v. Gisler*, 100 Idaho 693, 696, 604 P.2d 707, 710 (1980). Here, there is no doubt that Hymas did not move for a continuance to depose the affiant of the Pietrucci Affidavit. In fact, at the hearing on Franklin's Motion for Summary Judgment, the District Court stated on two separate occasions that Hymas failed to file a Rule 56(f) motion for continuance. (Tr. p. 9, ll. 14-17; Tr. p. 18, ll. 2-6). Hymas' counsel never questioned these statements by the District Court. (*See* Tr. pp. 12-16). Hymas cannot now truthfully assert that he asked the District Court for a Rule 56(f) continuance. Since Hymas "did not ask the district court for a continuance under Rule 56(f) . . . it is therefore too late to assert that he needed more time to respond." *Stapleton v. Jack Cushman Drilling and Pump Co. Inc.*, 153 Idaho 735, 742, 291 P.3d 418, 425 (2012).

In the event that Hymas argues that he made a Rule 56(f) motion for continuance below, such argument would fail based upon the express language of Rule 56(f), which provides:

> **When affidavits are unavailable in summary judgment proceedings.**

[10] This in itself is sufficient to uphold the District Court's decision.

> *Should it appear from the affidavits of a party* opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

I.R.C.P. 56(f) (emphasis added). Rule 56(f) clearly requires as a condition precedent that an affidavit be filed showing why the party requesting the continuance could not present facts essential to his or her position. Here, Hymas did not file **any** affidavits in response to Franklin's Motion for Summary Judgment, let alone an affidavit supporting a purported motion for continuation. Any argument that the District Court erred by not granting Hymas a continuance is therefore misplaced.

Finally, even assuming without conceding that Hymas properly asserted a motion for continuance, it must be noted that the "decision to grant or deny a Rule 56(f) continuance is within the sound discretion of the trial court." *Taylor v. AIA Services Corp.*, 151 Idaho 552, 572, 261 P.3d 829, 849 (2011). "A trial court does not abuse its discretion if it (1) recognizes the issue as one of discretion, (2) acts within the boundaries of its discretion and applies the applicable legal standards, and (3) reaches the decision through an exercise of reason." *Johannsen v. Utterbeck*, 146 Idaho 423, 429, 196 P.3d 341, 347 (2008). The District Court in this case, when presented with Hymas' purported continuance, stated: "I do not have a Rule 56(f) motion to continue the hearing pending further discovery. If I had one, I'd be inclined to decline – to deny it, given the amount of time that has passed in this case." (Tr. p. 18, ll. 2-6). This

statement shows that the District Court clearly did not abuse its discretion. Accordingly, even if Hymas properly filed a motion for continuance, such motion was appropriately denied.

For each reason set forth above, it is respectfully submitted that this Court reject Hymas' argument that he be granted the opportunity to depose the Pietrucci Affidavit affiant.

b) The Pietrucci Affidavit was sufficient under Rule 56.

Hymas attacks the sufficiency of the Pietrucci Affidavit by arguing (1) that the Pietrucci Affidavit is not based upon personal knowledge, and (2) that the Pietrucci Affidavit is deficient because it does not prove that "authorized purchasers" ordered the materials provided by Franklin. (Appellant's Brief, pp. 8-9). Neither of these arguments creates a question of fact.

A "moving party is not required to negate the nonmoving party's claim." *See Chandler v. Hayden*, 147 Idaho 765, 770-71, 215 P.3d 485, 490-91 (2009) ("'Placing an initial burden on the plaintiff to 'disprove every affirmative defense asserted against it' has several practical effects, none of which appear . . . to be helpful in promoting the speedy and economical disposition of non-viable issues.'") (quoting *GECC Financial Corp. v. Jaffarian*, 79 Hawai'i, 516, 904 P.2d, 540 (Ct. App. 1995)) (citations omitted). Furthermore, in order to show a genuine issue of material fact, Hymas must submit more than just conclusory assertions and a "mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact." *AED, Inc.*, 155 Idaho at 163, 307 P.3d at 180.

Hymas' arguments in relation to the Pietrucci Affidavit are an attempt to turn the well-settled law set forth in *Chandler* and *AED* on its head. Hymas did not move to strike or otherwise challenge the Pietrucci Affidavit, which conclusively establishes that the District Court did not err

in relying upon the affidavit. *Esser Electric*, 145 Idaho at 917, 188 P.3d at 859. Hymas also admits that Crestwood "received products from Franklin." (R. p. 94). Hymas never denied that Crestwood failed to pay for the materials it received. (R. p. 94). Hymas also never challenged the amount owed. These facts and admissions establish that the District Court was correct in awarding summary judgment to Franklin.

Hymas' argument regarding the sufficiency of the Pietrucci Affidavit is both legally and factually incorrect. Under Rule 56(e), affidavits "shall show affirmatively that the affiant is competent to testify to the mattes stated therein." I.R.C.P. 56(e). The Pietrucci Affidavit fully complies with this rule because it includes an affirmation that the affiant is the Corporate Credit Manager of Franklin and that he has "personal knowledge of the matters stated" in the affidavit. (R. p. 13). Nothing more is legally required of the Pietrucci Affidavit under Rule 56. More importantly, the District Court relied upon the Pietrucci Affidavit in ruling on Franklin's motion for summary judgment, which determination is reviewed under an abuse of discretion standard. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15, 175 P.3d 172, 177 (2007). Since Hymas has not challenged whether the District Court abused its discretion, the District Court's reliance on the affidavit was proper.

Despite the fact that the Pietrucci Affidavit meets the legal requirements of Rule 56, Hymas somehow argues that nothing in the Affidavit "indicates that Mr. Pietrucci (the affiant) has personal knowledge that the items listed on the Customer Transaction Report actually

correspond to goods that were actually delivered to" Crestwood[11] and that the Affidavit failed to demonstrate "that the invoices in question were authorized by" Chris Jorgensen, Justin Walker, or Hymas. (Appellant's Brief, p. 9). These statements ignore the affirmation contained in the Affidavit (discussed above), basic contract law, and law holding that Franklin is not required to negate Hymas' claims.

To establish a prima facie case, the Pietrucci Affidavit only had to set forth (1) the existence of a contract, (2), its breach, and (3) damages. *Mosell Equities, LLC,* 154 Idaho at 278, 297 P.3d at 241. Franklin met this burden by filing an affidavit setting forth each *Mosell* element, including the amount Franklin claimed was due. If Hymas believed he was not liable to Franklin for some reason, including that the purchases were not authorized, Hymas must present and support his defenses. Moreover, the burden of any defense lies with Hymas, not Franklin. *Chandler*, 147 Idaho at 771, 215 P.3d at 491. Here, Hymas never denied that $671,667.05 worth of materials was provided to Crestwood. Hymas did not challenge that either he or Crestwood paid any monies to reduce this amount. Hymas did not identify a single invoice that was not due. Hymas also never entered any facts in the record questioning whether the invoices were properly authorized. Hymas instead offered only purely speculative statements supporting his claims, such as: Crestwood "had many issues with framers and other subcontractors calling [Franklin] and ordering products." (R. p. 98). These self-serving statements lack "the specificity necessary to establish that improper charges exist on the account guaranteed." (R. p. 172).

[11] This is similar to Hymas' argument below wherein he argued that the Pietrucci Affidavit was deficient because it did not include certain unidentified "supporting information" establishing that the work was done. (R. p. 60). Hymas later admitted that Franklin delivered material to Crestwood. (R. p. 94). By this admission, Hymas

Hymas' attempts to establish a question of fact based upon the Pietrucci Affidavit are misplaced. Hymas never objected to the Pietrucci Affidavit, and the District Court rightfully relied upon it in awarding summary judgment to Franklin. The Pietrucci Affidavit also fully complied with Rule 56 and set forth a prima facie case. The burden then shifted to Hymas to show a genuine issue of material fact, which he did not do. Hymas instead relies upon pure hyperbole and conjecture. This is simply not sufficient under Rule 56.

c) Franklin's discovery responses are a red herring.

Several times in his Appellant's Brief, Hymas mentions Franklin's alleged untimely responses to his discovery requests. To the extent that Hymas believes Franklin's discovery responses are sufficient to overturn the District Court's decision, this argument is a red herring.

Hymas served his discovery requests or April 12, 2012. (R. pp. 68-69). Thereafter, Hymas' counsel notified Franklin's counsel that discovery responses would not be necessary due to a number of reasons, including the fact that Hymas was involved in bankruptcy adjudication and multiple civil and criminal lawsuits. (R. p. 80). At no time did Hymas seek to compel Franklin to respond to discovery. In fact, the first time Hymas mentioned his discovery requests was in response to Franklin's Motion for Summary Judgment on December 3, 2012. (R. p. 60).

Franklin responded to Hymas' discovery responses on December 5, 2012. (R. p. 123-24). Delivery of Franklin's discovery responses was completed on December 6, 2012. (R. p. 124). The hearing date on Franklin's Motion for Summary Judgment was not until January 14, 2013. Therefore, Hymas was in possession of Franklin's discovery responses for thirty-nine (39) days

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disproved his own speculative argument.

prior to the date of the summary judgment hearing. Despite this, Hymas did not offer Franklin's responses into the record prior to the date the District Court awarded summary judgment to Franklin, even though he could have done so up until December 31, 2012 under Rule 56. In fact, Hymas waited until March 5, 2013, to offer Franklin's discovery responses into the record.

It is respectfully submitted that to the extent Hymas questions whether the service of Franklin's discovery requests was timely, such assertion is both incorrect and a red herring. Hymas granted Franklin an extension to respond to his discovery requests, which is evidenced by the fact that Hymas never sought to compel a response. Moreover, Hymas did not enter Franklin's discovery into the record until three (3) months after service of the same. Finally, it should be noted that the District Court was in possession of Franklin's discovery responses when it denied Hymas' Motion to Reconsider; thus, Hymas was not prejudiced by Franklin's alleged delay in responding to Hymas' discovery.

B. The "Corporate Status Argument" Should Not be Considered on Appeal.

Hymas argues that the District Court erred by not analyzing what effect the dissolution of Crestwood had on Hymas' personal guaranty (hereinafter referred to as the "corporate status argument"). (Appellant's Brief, pp. 10-11). This argument, however, was not properly raised by Hymas below. Accordingly, Hymas' corporate status argument is improper on appeal.

It must first be noted that Hymas failed to properly plead his corporate status argument as an affirmative defense. Idaho Rule of Civil Procedure 8(c) provides that a "party shall set forth affirmatively . . . failure of consideration, . . . statute of frauds, . . . and any other matter constituting an avoidance or affirmative defense." I.R.C.P. 8(c). Hymas' Answer to Franklin's

Complaint sets forth a single affirmative defense that the statute of limitations had expired. (R. pp. 9-10). Despite this sole affirmative defense, Hymas argues that the District Court erred when it did not consider his corporate status argument because it potentially negates his liability under the theory that there was "no guaranty of the obligation." (Appellant's Brief, p. 10). This argument would clearly be an affirmative defense under Rule 8, and since it was not pled by Hymas, it should be rejected by this Court.

1. The corporate status argument was not properly raised in Hymas' first Motion to Reconsider.

Hymas waited to raise his corporate status argument until he filed his Reply brief in support of his first Motion to Reconsider. (R. pp. 157-58, 170). Hymas could have raised this argument on no less than three (3) occasions prior to this time.[12] Hymas also improperly attached supporting documents to his Reply brief instead of to a properly sworn affidavit. (*See* R. pp. 137-55). For both of these reasons, Hymas' corporate status argument was improperly raised in his first Motion to Reconsider.

Idaho Rule of Civil Procedure 7(b)(3) governs the time limits for filing and serving motions and affidavits, which reads in relevant part:

> Time Limits for Filing and Serving Motions, Affidavits and Briefs.
>
> (A) A written motion, other than one which may be heard ex parte, and notice of the hearing thereon shall be filed with the court, and served so that it is received by the parties no later than fourteen (14) days before the time specified for the hearing.

[12] These three occasions include, at a minimum, Hymas' Answer, his response to Franklin's Motion for Summary Judgment, and in Hymas' initial memorandum in support of his Motion to Reconsider. The District Court specifically discussed the failure of Hymas to raise his corporate status argument previously. (Tr. p. 21, ll. 8-20).

> (B) When a motion is supported by affidavit(s), **the affidavit(s) shall be served with the motion,** and any opposing affidavit(s) shall be filed with the court and served so that it is received by the parties no later than seven (7) days before the hearing.

I.R.C.P. 7(b)(3) (emphasis added). Based upon Rule 7(b)(3), the exhibits attached to Hymas' Reply brief must be disregarded for two reasons. First, Hymas did not serve the exhibits he relied upon in making his corporate status argument at the time he filed his Motion to Reconsider. (R. pp. 97-99). Hymas instead waited thirteen (13) days after he filed his Motion to serve the exhibits. (R. pp. 137-55). This was clearly improper under Rule 7(b)(3), which mandates that affidavits supporting a motion "be served with the motion." Secondly, the exhibits were not properly entered into the record because Hymas merely attached them to a Reply brief.

It is well established that a "party who wants to have information in the record" carries the burden to ensure "that the information is, indeed, properly made part of the record." *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 821, 979 P.2d 1174, 1179 (1999). Exhibits offered in support of or in opposition to a motion "must be attached to the party's affidavit verifying the items' authenticity." *Id.* at 820; 979 P.2d at 1178. Finally, a party cannot supplant the necessity of an affidavit or sworn statement by merely attaching documents to a memorandum in support of a motion. *Id.* at 820-21; 979 P.2d at 1178-79 (submitting items "merely as attachments to [a] memorandum" is improper). Based upon these rules, it is clear that the exhibits Hymas relies upon in support of his corporate status argument were not part of the record at the time the District Court ruled on Hymas' first Motion to Reconsider.

Hymas also improperly waited until his Reply before first making his corporate status argument. (R. p. 170; Tr. p. 57, ll. 11-19). It is well established that arguments raised for the first time in a reply brief before the Idaho Supreme Court will not be considered. *E.g.*, *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005). This same law has been applied in district courts in many other jurisdictions. *E.g.*, *Sogeti USA, LLC, v. Scariano*, 606 F.Supp.2d 1080, 1086 (D. Ariz. 2009) ("The Court will not grant a motion to dismiss on the basis of argument first raised in a reply."); *ADT Sec. Services, Inc., v. Van Peterson Fine Jewelers*, 390 S.W.3d 603, 606 (Ct. App. Tex. 2012) (The plaintiff "was not entitled to raise a new grounds for summary judgment in its reply to [defendant's] response"). Accordingly, Hymas' corporate status argument both lacked proper support and was untimely under well-established rules.

The District Court refused to consider Hymas' corporate status argument for the same reasons set forth above. First, at the hearing on Hymas' Motion for Reconsideration, the District Court stated that the corporate status argument was not proper because it was "raised for the first time in the reply brief." (Tr. p. 57, ll. 11-19). The District Court further addressed the impropriety of Hymas' corporate status argument in its Memorandum Decision RE: Motion to Reconsider Motion for Summary Judgment:

> In his reply brief in support of the motion to reconsider Hymas makes arguments regarding the identity of the borrower in the guaranty agreement, alleging, in essence, that the account debtor is not the same entity as named in the guaranty agreement. **The court would not entertain this argument as it was raised for the first time in the reply brief. In any event it was without factual support in the record since the documents upon which the**

argument relied were attachments to the brief and material portions of them are not part of the evidentiary record.[13]

(R. p. 170) (emphasis added). It is respectfully submitted that the District Court's analysis on Hymas' corporate status argument is entirely correct and should be upheld by this Court.

2. Hymas' second Motion for Reconsideration was improper.

Hymas next attempted to raise his corporate status argument in his second Motion to Reconsider. (R. p. 217). In support of this second motion, Hymas properly attached his exhibits to a sworn affidavit, the Second Hymas Affidavit (R. p. 178), but Hymas' improperly filed his motion and affidavit under applicable Idaho Rules of Civil Procedure.

Motions to Reconsider are governed by Idaho Rule of Civil Procedure 11(a)(2)(B), which provides that motions for reconsideration "may be made at any time before the entry of final judgment **but not later than fourteen (14) days after the entry of final judgment.**" I.R.C.P. 11(a)(2)(B) (emphasis added). Any motion filed under Rule 11 is subject to Rule 7, which requires affidavits to "be served with the motion." I.R.C.P. 7(b)(3). Hymas failed to comply with both of these rules.

Final judgment was entered in this case on April 8, 2013. (R. p. 176). Under Rule 11, Hymas had until April 22, 2013 (fourteen days) in which to file a motion for reconsideration. Hymas, however, did not file his second Motion to Reconsider until May 17, 2013, (R. p. 217), which was well in excess of the fourteen day time limit imposed by Rule 11(a)(2)(B). Hymas

[13] Even if the District Court merely had "discretion to consider an argument raised in a reply brief," *Lane v. Department of Interior*, 523 F.3d 1128, 1140 (9th Cir.), this ruling clearly shows that the District Court did not abuse its discretion. This Court should therefore uphold the District Court's decision to not consider Hymas' corporate

also did not file the Second Hymas Affidavit attaching the alleged corporate records until April 26, 2013, which was still more than fourteen (14) days after entry of final judgment. If that was not enough, Hymas also violated Rule 7 by not filing the Second Hymas Affidavit with his second Motion for Reconsideration. It is respectfully submitted that Hymas' second Motion to Reconsider and the Second Hymas Affidavit were not properly filed under the Idaho Rules of Civil Procedure and should not be disregarded by this Court.

It should additionally be noted that Hymas has not raised the District Court's denial of his second Motion for Reconsideration as an issue on appeal, presumably because of the procedural inadequacies addressed above. (Appellant's Brief, p. 8). For this reason alone, the contents and denial of the second Motion, including the Second Hymas Affidavit, should not be considered by this Court. *See, e.g., Suitts*, 141 Idaho at 708, 117 P.3d at 122.

C. The District Court Correctly Granted Franklin's Motion to Correct Calculation of Amount Claimed Owed.

Hymas' *entire argument* with respect to the District Court granting Franklin's Motion to Correct Calculation of Amount Owed ("Motion to Correct") reads in full as follows:

> When summary judgment was sought, it was sought for the original amount and the Court granted that amount. Thereafter, it was improper for the Court to allow that amount to be corrected and add the interest. Once that interest was added, it should have been added only at the contract rate of 12% and not 18%. Idaho Code § 28-22-104.

(Appellant's Brief, p. 11). No part of this argument is factually or legally correct.

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status argument with respect to Hymas' first Motion to Reconsider.

Taking the last point first, Idaho Code § 28-22-104 provides, "When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of twelve cents." Here, there is no dispute that Hymas executed an express contract in writing fixing the amount of interest: "Past due invoices accrue finance charges at the rate of 1.5% per month (18% per annum)." (R. p. 17). Accordingly, interest properly accrued on the outstanding balance at the contractual rate of eighteen percent (18%).

Hymas' argument with respect to how much interest Franklin sought at summary judgment is also incorrect. Franklin's Complaint sought damages against Hymas in the principal amount of $671,666.97, with interest accruing from January 27, 2011 through September 30, 2011 at the contractual rate of eighteen percent (18%), for a total amount of principal and interest equal to $753,146.55. (R. p. 7). The Pietrucci Affidavit modifies the principal amount of damages by less than ten cents: "As of October 31, 2012, the reasonable value of the labor and materials supplied to Crestwood and [Hymas] by [Franklin] after deducting all offsets and credits, is $671,667.05, inclusive of interest, plus attorneys' fees and costs." (R. p. 14). The figure identified in the Pietrucci Affidavit—$671,667.05—is the same amount of the principal balance set forth on the transaction detail report attached to the Pietrucci Affidavit. (R. p. 22). The only problem with the Franklin Affidavit was that it included a typographical error because the word "inclusive" should have been "exclusive." This typographical error was the subject of Franklin's Motion to Correct.

Franklin filed its Motion to Correct on January 22, 2013, a mere eight (8) days after the District Court granted Franklin's Motion for Summary Judgment. (Tr. p. 20, ll. 8-9). In support

of its Motion to Correct, Franklin filed the Affidavit of Joey Enochson that explained the typographical errors in the Pietrucci Affidavit and set forth the correct amount of interest. (R. p. 90). It is important to note that Mr. Enochson's affidavit did not seek to modify the principal amount owed by Hymas. (*See* R. pp. 90-91). In fact, Franklin's Complaint, the Pietrucci Affidavit and the Affidavit of Joey Enochson all sought, to the nearest dollar, the same amount of principal. It is clear that the only issue on Franklin's Motion to Correct was simply the calculation of interest.

The District Court granted Franklin's Motion to Correct orally from the bench on February 27, 2103, stating:

> I have considered in the meantime the motion to reconsider by plaintiff. And having had the benefit of discussion today, I will grant that motion to the extent that I think it was a **clerical oversight**, and I will allow them to correct the record and request the additional interest.

(Tr. p. 62, ll. 15-21) (emphasis added). Hymas challenges this decision, but does not offer any authority in support of his argument.

While not explicitly stated in the Motion to Correct, the motion was made and granted pursuant to Idaho Rules of Civil Procedure 60(a) and/or 60(b). Rule 60(a) allows "'the court at any time of its own initiative or on the motion of any party" to correct errors "arising from oversight or omission." I.R.C.P. 60(a); *Dursteler v. Dursteler*, 112 Idaho 594, 597, 733 P.2d 815, 818 (App. 1987) (A clerical mistake does not have to be made by a clerk; it is a "'type of mistake or omission mechanical in nature which is apparent in the record and which does not involve a legal decision or judgment by an attorney'") (citations omitted). Rule 60(b) allows the

court to relieve a party from "mistake, inadvertence, surprise or excusable neglect" or "any other reason justifying relief from the operation of the judgment." I.R.C.P. 60(b). There is no dispute that Franklin's Motion to Correct was proper and timely under both rules.

The standard or review under Rule 60(b) is abuse of discretion. *McDavid*, 155 Idaho at 51, 304 P.3d at 1217 While Franklin could not locate any authority in Idaho describing the standard of review under Rule 60(a), Federal courts interpreting Federal Rule of Civil Procedure 60(a) have held that the standard of review is also abuse of discretion. *Garamendi v. Henin*, 683 F.3d 1069, 1077 (9th Cir. 2012). Here, Hymas does not argue that the District Court abused its discretion in granting Franklin's Motion to Correct. Further, it is apparent from the record that the District Court properly granted Franklin's Motion to Correct through an exercise of reason. *Johannsen*, 146 Idaho at 429, 196 P.3d at 347. For these reasons, this Court should uphold the District Court's decision.

D. Hymas is Not Entitled to Attorneys' Fees.

In the unlikely event that this Court remands this case, Hymas is not entitled to attorneys' fees on appeal. Hymas' request for fees is a single sentence that reads, "Since this is a commercial transaction, the Court should grant attorney fees under Idaho Code § 12-120." (Appellant's Brief, p. 11). This request is grossly inadequate under Idaho law.

The general rule with respect to a request for attorney's fees is that a party "'must cite to the statute, and if applicable, the specific subsection of the statute upon which the party relies.'" *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 529, 248 P.3d 1256, 1264 (2011) (emphasis added) (citations omitted). With respect to Idaho Code § 12-120, this Court has held

that "a general assertion to an award of attorney fees . . . is insufficient. . . where the specific portion of the statute relied upon is not identified and, if necessary, supported by argument as to why it is applicable." *Renshaw v. Mortgage Elec. Registration Systems, Inc.*, 155 Idaho 656, 658, 315 P.3d 844, 846 (2013). When asserting a claim for attorneys' fees based upon a commercial transaction under section 12-120(3), this Court has stated that "'the party should, to the extent necessary, provide facts, authority, and argument supporting the claim that the case involves a 'commercial transaction' and that such transaction is the gravamen of the lawsuit.'" *Stephen*, 150 at 529, 248 P.3d at 1264 (citations omitted).

In the present case, Hymas' request for attorneys' fees fails because Hymas is relying upon Idaho Code § 12-120(3)—attorneys' fees in a commercial transaction—but Hyams only cites to section 12-120. Thus, Hymas failed to site to the specific subsection of the statute upon which he relies upon. Hymas also does not provide any facts, authority, and argument supporting that the gravamen of this lawsuit involves a commercial transaction. *Carrol v. MBNA America Bank*, 148 Idaho 261, 270, 220 P.3d 1080, 1089 (2009) ("in order to be entitled to attorney fees on appeal, authority and argument establishing a right to fees must be presented in the first brief filed by a party with" the Court). Therefore, in the unlikely event that Hymas prevails in this appeal, Hymas is not entitled to attorneys' fees because his request for fees is insufficient under well-established law.

V. CONCLUSION

This case is straightforward. Franklin moved for summary judgment at the District Court level based upon the facts set forth in the Pietrucci Affidavit. Hymas did not offer any facts in

opposition to the Pietrucci Affidavit, and instead merely attached documents to his brief. Since no facts were of record in support of Hymas' argument, the District Court rightfully entered summary judgment in favor of Franklin.

Immediately after summary judgment was awarded, Franklin sought to correct a typographical error in the Pietrucci Affidavit. The District Court granted Franklin's motion, and there is no argument by Hymas that the District Court abused its discretion in that decision.

Hymas then moved the District Court to reconsider its award of summary judgment to Franklin. Hymas for the second time failed to offer any exhibits in support of his motion, and again merely attached documents to his brief. The District Court ultimately denied Hymas' first Motion to Reconsider when it found that the first Hymas Affidavit was "conclusory and speculative."

After the District Court denied Hymas' first Motion to Reconsider, Hymas tried to correct his previous mistakes by filing a second Motion to Reconsider and Hymas Affidavit. Hymas' Motion and Affidavit, however, were not timely under the Idaho Rules of Civil Procedure, and the District Court denied Hymas' second Motion to Reconsider.

It is respectfully submitted that the District Court correctly ruled on each of the aforementioned motions. This Court should therefore uphold the District Court's decision in full and award Franklin attorneys' fees on appeal.

DATED this 20th day of February, 2014.

EBERLE, BERLIN, KADING, TURNBOW
& McKLVEEN, CHARTERED

By _____
Samuel A. Diddle, of the firm
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February, 2014, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

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