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Fagen, Inc. v. Lava Beds Wind Park, LLC  
Appellant's Brief Dckt. 42592

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Docket No. 42592

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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LAVA BEDS WIND PARK, LLC, an Idaho limited liability company; EXERGY DEVELOPMENT GROUP OF IDAHO, L.L.C., an Idaho limited liability company; and XRG DEVELOPMENT PARTNERS, LLC, an Idaho limited liability company (Cross-Respondent Only),

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Defendants/Appellants/Cross-Respondent,

vs.

FAGEN, INC., a Minnesota corporation,

Plaintiff/Respondent/Cross-Appellant.

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**DEFENDANTS'/APPELLANTS' OPENING BRIEF**

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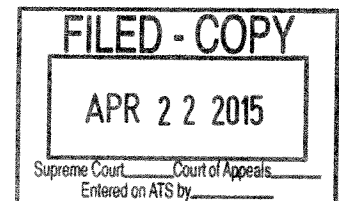
Appeal from the Seventh Judicial District Court in and for the County of Bingham  
The Honorable Darren B. Simpson, presiding.

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## **STATEMENT OF THE CASE**

This is an appeal from the Second Amended Judgment issued by Judge Darren B. Simpson of the Seventh Judicial District Court in and for the County of Bingham (the “District Court”) as well as the decisions entered by the District Court (a) denying Defendants’/Appellants’ (“Appellants”) Motion for Rule 56(f) Continuance, (b) denying Appellants’ Motion for Reconsideration of the District Court’s Order granting Plaintiff/Appellant, Fagen, Inc.’s (“Fagen”) Motion for Summary Judgment, and (c) granting Fagen’s Motion for Costs and Attorney’s Fees. All of the foregoing decisions in Fagen’s favor constituted an abuse of the District Court’s discretion. The Court’s failure to permit discovery of evidence germane to legitimate defenses against Fagen’s claims. Instead, the District Court took a punitive attitude to the presentation of late-discovered and late-presented evidence, however dispositive such evidence might be. While the timing of the presentment of the evidence may not have been preferable, its dispositive nature deserved more than the dismissive treatment given it by the District Court. For these reasons, the sequence of rulings leading up to and resulting from the judgment entered in Fagen’s favor are appealed as a matter of right pursuant to Idaho Appellate Rule (“I.A.R.”) 11(a).

## **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

Fagen filed the present action seeking to recover on breach of contract theory from multiple defendants arising out of an Engineering, Procurement and Construction agreement (“EPC”) covering six (6) wind power generation facilities in the State of Idaho (one located in Bingham County, four located in Twin Falls County, and one located in Lincoln County). The EPC was executed by Fagen and Defendant/Appellant Exergy Development Group of Idaho, L.L.C. Fagen

also filed a lien foreclosure claim. C.T. at 10-26. After various stages of discovery and law and motion, Fagen filed a Motion for Summary Judgment. C.T. 70. In the months leading up to the filing of the Motion, Appellants attempted to schedule the deposition of various Fagen representatives. C.T. 445-460. In response, counsel for Appellants deferred to Fagen's main counsel in Minnesota for that matter. This Minnesota counsel was not admitted to practice before the District Court. Appellants relied in good faith on Fagen's counsel's obligation to produce witnesses for deposition, but Fagen never did so. *Id.* Consequently, Appellants filed a Motion for Rule 56(f) Continuance and provided the District Court with supporting affidavits showing why a continuance was warranted and identifying Fagen's failure to provide witnesses for deposition. C.T. at 445-463. The District Court denied the Motion for Continuance and granted Fagen's Motion for Summary Judgment. C.T. 464-473. Appellants and Cross-Respondent, XRG Development Partners, LLC, had also filed a Motion for Summary Judgment on the basis that (a) no lien foreclosure cause of action existed, and (b) XRG Development Partners, LLC was not a party to any contract, held no interest in any real estate at issue, and was therefore not properly named in the action. C.T. at 429-444. The District Court agreed, granted summary judgment in XRG Development Partners, LLC's favor and dismissed the meritless lien foreclosure claim filed by Fagen as to all Appellants. C.T. at 474-476.

In the meantime, a parallel action on the same EPC contract was underway in Twin Falls County, addressing the other five projects (the "Twin Falls Consolidated Matter"). With summary judgment already decided by the District Court in this matter, but given the likelihood of obtaining evidence that would establish the legitimacy of Appellants' reasons for seeking a continuance from

the District Court in this proceeding, Appellants timely filed a Motion for Reconsideration. C.T. at 536-538. Appellants also provided proof of the offsets as soon as such proof was available by way of discovery in the Twin Falls Consolidated Matter. C.T. 539-554. In the Twin Falls Consolidated Matter, Appellants succeeded in that matter in obtaining discovery of key Fagen personnel and Fagen, in turn, obtained key testimony from Appellants' principal, Mr. James Carkulis ("Mr. Carkulis"). At the hearing on Appellants' Motion for Reconsideration, counsel for Appellants presented the findings obtained in discovery in the Twin Falls Consolidated Matter and the significant bearing it had on a determination of offsets to the damages claimed by Fagen in the District Court proceeding. R.T. at pp. 96:1-99:2. The District Court took the matter under advisement along with Fagen's Motion for Attorney's Fees and Costs. R.T. at pp. 99:15-17. Subsequently, the Court issued a ruling denying Appellants' Motion for Reconsideration. C.T. at 571-574. The District Court cited as its basis for denying reconsideration the contention that Appellants had ample time to conduct discovery but did not do so. *Id.* By the language of the Order it issued, the District Court did not consider the explicit fact that Fagen had been blockading discovery (by local counsel deferring to Fagen's lead counsel in Minnesota) and that it was only through sheer force of will that Appellants were able to obtain key fact-finding in a compressed timeframe in the hopes of being able to demonstrate to the District Court in the Twin Falls Consolidated Matter that offsets to damages were appropriate. *Id.* The District Court also entered orders granting Cross-Respondent, XRG Development Partners, LLC an award of fees and costs and partially granting Fagen's Motion for Fees and Costs. C.T. at pp. 564-570 and



575-580. This appeal followed. C.T. at 559-563.<sup>1</sup>

### **ISSUES PRESENTED**

1. Whether the District Court abused its discretion by denying Defendants' Motion for a Rule 56(f) Motion.
2. Whether the District Court abused its discretion by refusing to permit reconsideration of its summary judgment ruling on the basis of late-acquired evidence.
3. If the Court finds the District Court abused its discretion per Questions 1 and 2 above, whether the Court's an award of attorney's fees and costs in Fagen's favor should be similarly reversed.

### **STANDARD OF REVIEW**

In an appeal from a grant of summary judgment and related motions, this Court's standard of review is the same as the district court's standard in ruling upon the motion. *Sherer v. Pocatello Sch. Dist. No. 25*, 143 Idaho 486, 489, 148 P.3d 1232, 1235 (2006). Further, this Court is empowered to review the decisions of the District Court on appeal in this matter according to an "abuse of discretion" standard. *See Johnson v. N. Idaho Coll.*, 153 Idaho 58, 62, 278 P.3d 928, 932 (2012) (applying the standard to motions for reconsideration); *Bott v. Idaho State Bldg. Auth.*, 122 Idaho 471, 475, 835 P.2d 1282, 1286 (1992) (applying the standard to refusal to consider new

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<sup>1</sup> It should also be noted that the Twin Falls Consolidated Matter is also on appeal to this Honorable Court and bears Docket No. 42684. The parties to that action stipulated to entry of judgment for the express purpose of avoiding the need for trial and with the express understanding that an appeal would be taken.

evidence).

## ARGUMENT

### **I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR A CONTINUANCE UNDER I.R.C.P. 56(F).**

The District Court denied Appellants' right to present all discoverable evidence relevant to a response to Fagen's Motion for Summary Judgment. The policy behind I.R.C.P. 56(f) is that party should be allowed to complete discovery before being required to respond to a motion for summary judgment. *See, e.g., Doe v. Garcia*, 126 Idaho 1036, 895 P.2d 1229 (Ct.App. 1995). Appellants attempted in good faith to schedule depositions over several months with Fagen. That discovery was obstructed, with Fagen's counsel of record deferring to his betters in Minnesota, who were neither admitted to practice in this action nor had participated substantively in any official capacity. Appellants exercised an abundance of good faith (in retrospect, perhaps too much good faith) and continued to attempt to schedule depositions of key Fagen personnel, without success. C.T. 445-460. After filing its Motion for Summary Judgment, it was clear that Fagen did not intend to cooperate with its discovery obligations. Appellants sought the District Court's assistance in seeking a continuance by which to conduct essential discovery in this matter that would have led to corroboration of Appellants' defenses. C.T. at 445-463. In that Motion, Appellants provided the information and affidavits necessary to corroborate certain offsets and the need to conduct additional discovery to further establish other defenses. *Id.* The Court denied the Motion on the grounds that Appellants had ample opportunity to conduct discovery. *Id.*

The District Court's decision in this regard was severely misguided. This Court has ruled clearly that when seeking a continuance under Rule 56(f), the moving party "must 'do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits ... and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.'" *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005) (emphasis added) (quoting *Allen v. Bridgestone/Firestone, Inc.*, 81 F.3d 793, 797 (8th Cir. 1996)). The Court also explained that the movant "has the burden of setting out 'what further discovery would reveal that is essential to justify their opposition,' making clear 'what information is sought and how it would preclude summary judgment.'" *Id.* (quoting *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088–89 (9th Cir. 2001)). As this Honorable Court can discern from the record, Appellants' Motion seeking a continuance met the aforementioned standard: it was brought in good faith and it identified several factors that provided factual substantiation justifying the continuance. Ultimately, those factors were proved out in the final stages of discovery in the Twin Falls Consolidated Case. However, in the instant case, instead of taking the well-reasoned approach to a factually substantive Motion for Continuance that this Court has established, the District Court in this matter punished Appellants for relying in good faith on the notion that Fagen and its counsel would cooperate in the discovery process. C.T. at 571-574. "*Shame on Defendants for not filing a motion to compel*" is essentially the subtext of the Court's ruling. Had the Motion been granted, the necessary fact-finding--to both support the argument of offsets to damages as well as the facts surrounding the later-developed theory that a force majeure event arguably precluded liability in total (as identified

to the court in the Twin Falls Consolidated Matter)—would have been obtained. The telling factor in this argument is that the evidence that was permitted to be discovered in the Twin Falls Consolidated Matter yielded substantive proof justifying offsets to the amounts due under the EPC, and the testimony of Appellant’s principal, Mr. James Carkulis, taken in that matter (after a long period of unavailability due to medical reasons) substantiated the presence and impact of a force majeure event.

Appellants should not be punished for exercising an abundance of good faith in seeking discovery and then asking for a continuance when Fagen refused to provide it. The District Court’s failure to remedy this deficiency when presented with a substantively and procedurally correct motion for continuance constitutes a reversible error that should not be allowed to stand.

**II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING RECONSIDERATION OF ITS RULING ON SUMMARY JUDGMENT.**

This Court considers three factors to determine whether a trial court abused its discretion: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of its discretion and consistently with applicable legal principles; and (3) whether the court reached its decision through an exercise of reason. *Edmunds v. Kraner*, 142 Idaho 867, 873, 136 P.3d 338, 344 (2006). As applied to the present facts, the aforementioned standard is appropriately analyzed as follows:

First, the District Court’s ruling on Appellants’ Motion for Reconsideration evidences its cognizance of its discretion in resolving the matter. C.T. at 571-574.

Second, the District Court failed to operate within the boundaries of its discretion when presented with real and substantive evidence that indicated reconsideration of its ruling on summary judgment was appropriate. The Court refused to do so, citing the lateness of the evidence presented, rather than the substantive nature of the evidence itself. The evidence presented to the Court indicated that evidence of force majeure events existed that directly affected the issue of liability as well as the offsets identified in the Motion for Rule 56(f) Continuance. The Court nevertheless ruled that the timing of the evidence was such that consideration of it was improper.

“On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order.” *See PHH Mortg. Servs. Corp. v. Pereira*, 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009) (citing *Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)). However, “a motion for reconsideration need not be supported by any new evidence or authority.” *Fragnella v. Petrovich*, 153 Idaho 266 (2012).

In the present case, late-discovered evidence supporting a legitimate defense to Fagen’s claims was shown. Discovery in the Twin Falls Consolidated Matter revealed additional evidence supporting offsets to the billings that gave rise to Fagen’s claim for breach of contract. In addition, though not explicitly mentioned on the record in this action, discovery in that matter established that a generic PURPA docket filed with the Idaho Public Utilities Commission resulted in a moratorium on development of the energy projects contemplated by the EPC that was not foreseeable and thus created a force majeure event providing a defense to liability. Appellants sought another chance at responding to Fagen’s Motion for Summary Judgment. In denying

Appellant's Motion for Reconsideration, the District Court foreclosed the consideration of legitimate evidence bearing on a full and fair adjudication of this matter, including notably liability after further discovery in its sister matter developed further evidence. After the evidence was more fully developed, a Motion for Reconsideration was filed with the Court to preserve Appellants' rights. C.T. at 536-538. At oral argument on that Motion for Reconsideration, Appellants' counsel attempted to persuade the District Court of the necessity of considering this evidence. However, after taking the matter under advisement, the District Court denied Appellants' Motion for Reconsideration. C.T. at pp. 571-574.

Fagen will likely argue that Appellants had access to the evidence indicating the presence of evidence such as the force majeure events and could have presented it for the Court's consideration. However, the District Court failed to consider (a) the incapacity and unavailability of Appellants' key witness, James Carkulis due to illness; (b) Appellants' constant blockading of discovery and refusal to provide witnesses for discovery due to constant deference by Idaho counsel to Minnesota counsel and Minnesota counsel's delay in providing discovery. Fagen is just as likely to claim that Appellants' counsel's stipulation to liability in the sister action (in Twin Falls County) was indicia of the lack of a defense. In reality, the full development of offset evidence and other evidence (such as the existence of force majeure factors only made possible through the participation of Mr. Carkulis in the Twin Falls action) regrettably occurred later than the action pending before the District Court would allow for inclusion in the record. Further, the parties in the Twin Falls Consolidated Action stipulated to judgment to avoid the necessity of trial

on the issue of damages and explicitly to expedite an appeal of the District Court's decisions in that action.

Finally, although the record indicates an initial perception that no triable issue of fact existed with respect to liability, the after-discovered evidence indicates good cause for setting aside whatever might be construed as a stipulation by Appellants regarding the issue of liability. It is within sound discretion of a trial court, for good cause shown and in furtherance of justice, to relieve a party from a stipulation. *See, e.g., Thompson v. Turner*, 98 Idaho 110, 558 P.2d 1071 (1977). This Honorable Court has also ruled that denial by district court of motion to set aside stipulation and reopen case was a matter within sound judicial discretion of that court [*See, e.g., Loughrey v. Weitzel*, 94 Idaho 833, 498 P.2d 1306 (1972)] and that the court has discretion, for good cause and to prevent injustice, to relieve parties from stipulation which has been entered into through mistake or misunderstanding of fact. *See, e.g., Cross v. Moulton*, 114 Idaho 884, 761 P.2d 1236 (Ct. App. 1988). In the present matter, the District Court was advised via Appellants' Motion for Reconsideration that evidence existed with respect to offsets to damages. R.T. at pp. 96:1-99:2. This alone provides a basis for remanding this matter to the District Court. However, given the existence of additional evidence relating to liability as discovered in the Twin Falls Consolidated Matter (which will be presented during briefing in that matter), Appellants urge this Honorable Court to include in any remand order a directive to consider the after-acquired evidence bearing on the matter of liability.

### **III. REVERSAL OF THE DISTRICT COURT'S RULING ON FAGEN'S SUMMARY JUDGMENT NECESSITATES VACTING THE ORDER GRANTING FAGEN'S**

### **REQUEST FOR ATTORNEY'S FEES AND COSTS.**

By virtue of the errors in denying the requested continuance and the request for reconsideration, any vacating of the District Court's summary judgment ruling should, by extension, vacate the Order granting Fagen's request for attorney's fees and costs. In the event this Honorable Court reverses the aforementioned rulings issued by the District Court and remands this matter, it is proper that Fagen's Motion for Fees and Costs, which was granted (C.T. at 575-580) should be reversed for the same reasons.

### **CONCLUSION**

While the evidence at issue in the present appeal may have been discovered and/or confirmed late in the game, it provides a dispositive effect on the resolution of the issues of liability and damages and the District Court's refusal to consider any of it constitutes an abuse of its discretion. Remand to the District Court for review of the issues presented on summary judgment in light of the evidence discovered in the Twin Falls Consolidated Matters is necessary and mandated by the aforementioned analysis. Accordingly, Appellants respectfully submit that this Honorable Court should reverse the District Court's rulings and remand this matter with specific instructions relating to these issues.



DATED: 22 April 2015

Respectfully Submitted,

MARSH ROSA LLP



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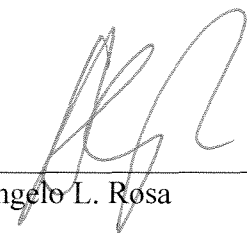
Angelo L. Rosa  
Attorney for Defendants/Appellants/Cross-  
Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on 22 April 2015, I caused a true and correct copy of the document herein by the method indicated below, and addressed to the following:

John R. Goodell  
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CHTD.  
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Boise, Idaho 83702

- U.S. First Class Mail, Postage Prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

Signed  \_\_\_\_\_  
Angelo L. Rosa