

9-2-2016

Green River Ranches v. Silva Land Co. Appellant's Brief 1 Dckt. 43548

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Green River Ranches v. Silva Land Co. Appellant's Brief 1 Dckt. 43548" (2016). *Idaho Supreme Court Records & Briefs, All*. 6278.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6278

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

Nathan M. Olsen, Esq., ISB # 7373
 PETERSEN MOSS HALL & OLSEN
 485 "E" Street
 Idaho Falls, Idaho 83402
 Telephone: (208) 523-4650
 Facsimile: (208) 524-3391
Attorneys for Appellant, Max Silva

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREEN RIVER RANCHES, LLC, an)
 Idaho limited liability company,)
)
 Plaintiff-Counterdefendant,)
)
 vs.)
)
 SILVA LAND COMPANY, LLC, et al.,)
)
 Defendants-Counterclaimants.)
 _____)
)
 JACK McCALL,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 MAX SILVA, an individual; and SILVA)
 DAIRY, LLC an Idaho limited liability)
 company,)
)
 Defendants-Appellants.)
 _____)

Idaho Supreme Court Consolidated
 Docket Nos. 43547-2015 and
 43548-2015

Twin Falls County Case No. CV-
 2013-1263 (consolidated Twin Falls
 County Nos. CV-2013-3154 / CV-
 2013-4732 / CV-2013-4728)

**APPELLANT'S BRIEF
 FOR MAX SILVA**

Case No. CV-2013-3154

JACK McCALL,)
)
Plaintiff-Respondent,)
)
vs.)
)
SILVA LAND COMPANY, LLC, et al.,)
)
Defendant-Appellant.)
_____)

Case No. CV-2013-4732

JACK McCALL, an individual and doing)
business as JT LIVESTOCK,)
)
Plaintiff-Respondent,)
)
vs.)
)
MAX SILVA, an individual,)
)
Defendant-Appellant.)
_____)

Case No. CV-2013-4728

Appeal from the Fifth Judicial District Court
of the State of Idaho, in and for the County of Twin Falls

Honorable Randy J. Stoker, District Judge, Presiding

Nathan M. Olsen, Esq.
PETERSEN MOSS HALL & OLSEN
485 "E" Street
Idaho Falls, Idaho 83402

Bradley J. Dixon, Esq.
GIVENS PURSLEY, LLP
P.O. Box 2720
Boise, Idaho 83701-2720

Attorney for Appellant, Max Silva

Attorney for Respondent, Jack
McCall

Steven L. Taggart, Esq.
MAYNES TAGGART, PLLC
P.O. Box 3005
Idaho Falls, Idaho 83403

Attorney for Appellant, Silva Dairy, LLC

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES	4
STATEMENT OF THE CASE	5
NATURE OF THE CASE	5
COURSE OF PROCEEDINGS BELOW	5
STATEMENT OF FACTS	9
ISSUES PRESENTED ON APPEAL	13
ARGUMENT	13
I. Standard of Review	13
A. After a bench trial, conclusions of law are freely reviewed and factual findings are reviewed on whether they are based on substantial evidence.	13
B. Decisions regarding attorneys fees are reviewed on whether there was abuse of discretion.	14
II. The District Court Erred in Making Max Silva Individually Liable for Silva Dairy's Purchase of the Cows.	14
III. The District Court Should Have Awarded Silva All of his Attorney Fees or as Proportioned to the Claims on which he Prevailed.	21
IV. Silva is Entitled to his Attorney Fees on Appeal.	24
CONCLUSION	24

TABLE OF CASES AND AUTHORITIES

Cases

<i>Agrisource, Inc. V. Johnson.</i> , 156 Idaho 903, 909-911, 332 P.3d 815, 820-22 (2013)	16-17
<i>City of Meridian v. Petra Inc.</i> , 154 Idaho 425, 434-35, 299 P.3d 232, 241-42 (2013)	14
<i>Dunagan v. Dunagan</i> , 147 Idaho 599, 213 P.3d 384 (2009)	14
<i>Ramco v. H-K Contractors, Inc.</i> , 118 Idaho 108, 113, 794 P.2d 1381,1386 (1990) . . .	21, 22, 23
<i>Schroeder v. Partin.</i> , 151 Idaho 471, 478, 259 P.3d 617, 625 (2011)	21, 22, 23
<i>Shettel v. Bamesberger</i> , 130 Idaho 217, 2210, 938 P.2d 1255, 1258 (Idaho App. 1997)	13
<i>Smith v. Mitton</i> , 140 Idaho 893, 104 P.3d 367 (2004)	14
<i>Zanotti v. Cook</i> , 129 Idaho 151, 153, 922 P.2d 1077, 1079 (Idaho App. 1996)	13-14

Other Authorities

IC § 12-120(3)	24
IC § 30-6-304	15
11 USC § 363(c)(1)	20
11 U.S.C. § 1203	20

STATEMENT OF THE CASE

NATURE OF THE CASE

This is an appeal over whether the trial court improperly held an individual owner/manager Max Silva of a limited liability company Silva Dairy, LLC, liable for dairy cows purchased from the plaintiff/respondent Jack McCall (McCall), and whether the court erred in not awarding Max Silva his attorney fees and costs as the prevailing party in the claims brought against Silva by McCall.

COURSE OF PROCEEDINGS BELOW

This is a matter which involves four separate actions in Fifth District Court for the State of Idaho, Twin Falls County, with numerous plaintiffs, defendants and counter-claimants, involving transactions and occurrences involving a disputed dairy cow operation in Twin Falls County near Buhl.¹ All four actions were ultimately consolidated into the initial action (CV-2013-1263).² Related to these state actions is a matter pending before the U.S. Bankruptcy Court for the District of Idaho, the Chapter 12 reorganization of Silva Dairy, LLC, (Case No. 10-41484 JDP).³ It is anticipated that appellant Silva Dairy, LLC, will provide additional information as to the procedural history involving its claims in its related appeal.

¹ R. Vol. I, pp. 4-36 “Case Summary.” In this appeal, the record came in several different portions in the process, and in an attempt to avoid confusion, will be cited as follows: The “Clerk’s Limited Record on Appeal” (the initial record submitted in this case) will be cited as “R. Vol. I.” The augmented record submitted at the request of Appellant Max Silva will cited as “Augmented R. Vol. I.” The augmented recorded recently submitted by Appellant Silva Dairy, LLC, will be cited as “Augmented R. Vol. II.”

² Id. See also Augmented R. Vol. II, p. 2

³ R. Vol. I, pp. 12, 95, Tr. Ex. “G”

Insofar as this appeal is concerned, appellant Max Silva was named as a defendant by respondent/plaintiff Jack McCall and is dba JT Livestock (McCall) in three separate complaints filed in district and/or magistrate court: CV-2013-3154⁴, filed on August 1, 2013, CV-2013-4728⁵ and 2013-CV-4732⁶, both filed on November 15, 2013. The claims against Max Silva as succinctly summarized as follows:

CV-2013-3154⁷: 1. “claim and delivery” of 101 cows (Count I) 2. “implied in fact or law contract” for \$86,929.95 plus pre-judgment interest toward 101 cow purchase (Count II-III.)

CV-2013-4732: 1. “Mismanagement claim” in the amount of \$187,589.23 (Count I) 2. “Feed conversion” in the amount of \$246,288 (Count II.) 3. “Pasture and feed” for “Defendant’s heifers” in the amount of \$52,296.90 (count III.) 4. 15 cow purchase for \$13,542.40 (Count IV.)

CV-2013-4728: 1. Breach of Contract for \$10,000 that McCall claimed was “advanced” to Max Silva for payment of the retainer for Silva Dairy’s bankruptcy.

On February 13, 2014, Silva filed a motion for summary judgment with supporting memorandums and affidavits to dismiss the claims brought against him on CV-2013-4732.⁸ That motion was denied on May 2, 2014, after which the case was consolidated with the underlying matter (including CV-2013-3154) under CV-2013-1263.⁹

⁴ Augmented R. Vol I, pp. 146-150.

⁵ Augmented R. Vol. I, pp. 212-215.

⁶ Augmented R. Vol. I, pp. 232-237.

⁷ The claims against Max Silva in CV-2013-3154 were not added by amendment until the first of the bifurcated trial in this matter on June 25 (see *infra*.)

⁸ Augmented R. Vol. I, pp. 240-279.

⁹ Augmented R. Vol I, p. 229.

A bifurcated court trial was held on June 26 and 27, 2014, to determine liability on the various actions before the court.¹⁰ The trial court granted McCall's Motion to amend his complaint in CV-2013-3154 to add Max Silva as a defendant on all of the claims in that particular complaint.¹¹ (The Motion to Amend was filed approximately two weeks before on June 11, 2014.)¹² In its August 14, 2014 Memorandum Decision, the district court held Max Silva to be personally liable for the purchase of 116 dairy cows, as well as the pasturing of heifers on property rented by McCall for an amount to be determined at a separate trial for damages.¹³ The court dismissed all other claims against Max Silva, including the mismanagement and conversion claims.¹⁴

After the bifurcated trial, Max Silva moved the trial court to reconsider its decision on liability.¹⁵ That motion was denied from the bench on February 09, 2014.¹⁶ Additionally, the trial court awarded McCall damages in the amount of \$104,770.55 for the 116 cow purchase.¹⁷ The court trial on damages on the remaining issue of damages for the pasture rent was held on

¹⁰ Tr. I, pp. 1-545. There are two transcripts in this appeal. The first, which will be cited as "Tr. I," consists of the bifurcated trial on liability that occurred in June of 2014, as well as some hearings that occurred thereafter. The second, which will be cited as "Tr. II," consists of the bifurcated trial on damages and other issues that occurred in June of 2015.

¹¹ Augmented R. Vol. I, p. 90.

¹² Augmented R. Vol. I, pp. 38-40.

¹³ Augmented R. Vol. I, pp. 103-105.

¹⁴ Id.

¹⁵ Augmented R. Vol. I, pp. 109-122.

¹⁶ R. Vol. I, p. 38, Tr. I, p. 590 LL 6-13.

¹⁷ R. Vol. I, pp. 38, 91.

June 24-26, 2015 (as well as numerous other issues not pertaining to Max Silva).¹⁸ On July 16, 2015, the court issued a memorandum opinion which reversed its prior decision holding Max Silva personally liable for the pasturing of heifers, which it held was in fact the responsibility of Silva Dairy, LLC, and therefore dismissing that claim.¹⁹

In addition to the aforementioned actions, on November 15, 2013, Jack McCall filed a separate action (CV-2013-4728) against Max Silva individually in the magistrate court claiming that Mr. Silva had borrowed \$10,000 to pay for a retainer to Silva Dairy's bankruptcy attorney.²⁰ After cross-motions for summary judgment were filed,²¹ McCall was awarded summary judgment.²² Max Silva appealed after which the district court (Judge Randy Stoker) issued a Memorandum Opinion on May 28, 2015, vacating the magistrate court decision and judgment.²³ This case was then consolidated with CV-2013-1263, and addressed at the June 24-26 trial (in front of Judge Stoker.)²⁴ In its July 16, 2015, Memorandum Opinion, the trial court dismissed McCall's claim under CV-2013-4728 against Max Silva in its entirety, effectively holding that McCall was not owed \$10,000 because that amount had been paid.²⁵

¹⁸ Tr. II, pp. 1-778.

¹⁹ R. Vol. I., pp. 71-90 (see in particular pp. 77-78.)

²⁰ Augmented R. Vol. I, pp. 146-150

²¹ Augmented R. Vol. I, p. 217.

²² Id.

²³ Augmented R. Vol. I, pp. 217-25.

²⁴ R. Vol. I, p. 71.

²⁵ R. Vol. I, pp. 79-80.

The trial court held that the matters involving Max Silva and McCall involved a commercial transaction that would entitle the prevailing party an award of attorney fees under IC § 12-120(3), but awarded no attorneys fees or costs to either party.²⁶ On August 27, 2015, Max Silva filed a Notice of Appeal.²⁷

STATEMENT OF FACTS

Silva Dairy, LLC, (Silva Dairy) is a dairy company near Buhl, Idaho consisting of around 600 to 800 dairy cows, a herd of heifers (young cows), and a farming operation where some feed is raised and harvested for the dairy.²⁸ Silva Land Company, LLC is a limited liability company that owns property on which the dairy and farm is operated.²⁹ Max Silva is one of the managers and owners of both entities.³⁰

In approximately April of 2010, through various negotiations and conduct, Silva Dairy and Silva Land entered into an arrangement with plaintiff/respondent Jack McCall to manage and house a dairy herd of approximately 350 cows that McCall had recently purchased.³¹ There was no agreement on amount of the management fee, but that it would be determined at some later

²⁶ R. Vol I, pp. 38, 87-89.

²⁷ Max Silva's "Notice of Appeal" was apparently inadvertently not included in the Clerk's Record. (Instead, Silva Dairy, LLC's "Notice of Appeal" was included.) Silva is therefore moving to augment the record to add his Notice of Appeal.

²⁸ Augmented R. Vol. I, pp. 89- 91, Tr. I, pp. 194 LL 19-25, 195 LL 1-21.

²⁹ Id.

³⁰ Tr. I, p. 40 LL 10-25.

³¹ R. Vol. I, pp. 92-93.

time.³² In August of 2010, when Silva informed McCall that Silva Dairy was suffering from a downturn in milk prices and would likely need to file for bankruptcy, McCall recommended an attorney Harry DeHaan to represent the dairy.³³ McCall introduced Silva to Mr. DeHaan and also covered Silva Dairy's \$10,000 retainer.³⁴

On August 18 2010, Silva Dairy filed for bankruptcy under Chapter 12 of the bankruptcy code.³⁵ Chapter 12 allows for an agricultural entity to remain in full possession and operation of its business while it works out a plan to restructure its debts. (See 11 U.S.C. § 1203) McCall continued to engage in business with Silva Dairy after it had filed its Chapter 12 bankruptcy, including the management of his dairy herd.³⁶ On several occasions, Max Silva approached McCall about reaching agreement on the price of the management fee, but was assured by McCall that it would all be worked out "in the back side" or "settled in the back end."³⁷³⁸

³² R. Vol. I, pp. 92-93, Tr. I, p. 77 LL 10-19.

³³ R. Vol. I. P. 73, Tr. I. p. 117 LL 17-25, p. 118 LL 1-8, p. 251 LL 3-15.

³⁴ Id.

³⁵ Tr. II, p. 31 LL 14-16, R. Vol. I, p. 73.

³⁶ There are numerous other issue pertaining to the management of McCall's dairy herd, including the providing of feed and calving that is relevant to Silva Dairy's appeal in this matter, and will be covered therein.

³⁷ Tr. II, p. 32 LL 10-19, R. Vol. I p. 77.

³⁸ McCall claimed that the management fee was determined by a later written "Lease Agreement" to be \$1,000 per month. Augmented R. Vol. I, pp. 101-103. However, the district court found that this was an invalid agreement. (Id.) McCall has not appealed these rulings or findings.

On approximately November 30 of 2011, the parties became aware of 101 dairy cows that Farmers Bank had seized from another dairy which was in default.³⁹ Pursuant to a discussion between Max Silva and Jack McCall, McCall paid for the cows which were then transported to Silva Dairy's facilities and added to the dairy's herd.⁴⁰ Another similar purchase of 15 additional cows was made earlier in April of 2011, and was also transported to the Silva Dairy facilities.⁴¹ There was never any meeting of the minds on how McCall would be repaid. McCall alleged that he would be repaid under an interest bearing note of 8% and Silva alleged that the loan would be repaid at 4%, and that he assumed it would be included as part of the offset to what McCall owed on the management fee.⁴² Many of the cows were in poor condition and stopped producing, after which they were sold as "cull" or as beef, the proceeds of which were paid directly by Silva Dairy to McCall to be counted toward the balance owed to McCall.⁴³

Max Silva does not own a dairy.⁴⁴ As confirmed by both Silva Dairy's and Silva's personal accountant, Scott Plew, all the dairy assets, income and liability were included on Silva Dairy's books.⁴⁵ Most of the dairy's cows, including the 116 cows purchased in 2011, were

³⁹ Augmented R. Vol. I, p. 89.

⁴⁰ Augmented R. Vol. I, pp. 95-96.

⁴¹ Id.

⁴² Augmented R. Vol. I, pp. 95-96, see also Silva Dairy's "Answer, Counterclaim and Third Party Complaint." Augmented Rec. Vol. II, pp. 5-20.

⁴³ Id., Tr. Ex. "K."

⁴⁴ Tr. pp. 42 LL 21-15, 43 LL 1-11.

⁴⁵ Tr. 195 LL 1-21.

housed at a facility leased by Silva Dairy and all of its cows were included on the Feed & Dairy collateral inventory maintained by the bank.⁴⁶ Additionally, Jack McCall was provided a “Livestock Brand Inspection Sheet” for the 15 cow purchase in April of 2011, indicating that the cows were purchased by Silva Dairy, and that Max Silva was the “agent” for Silva Dairy.⁴⁷

After Silva Dairy filed its Chapter 12 petition, McCall also agreed to allow some of Silva Dairy’s heifers to be pastured on land owned by one of his entities “Clear Creek Properties, Inc” over a four to six month period (as disputed by the parties.)⁴⁸ Again, there was no agreed upon amount for the pasturing of Silva Dairy’s heifers.⁴⁹ However, Max Silva testified at trial that they understood that any amounts owed for the pasture was offset by work that the dairy had done on the Clear Creek Property and other properties owned by McCall, including compost spreading, watering the property and the immunization of McCall’s cattle.⁵⁰

The Silva Dairy heifers that were pastured were branded with the “MS” brand, standing for “Manuel Silva & Sons” which Max Silva testified was a dba for Silva Dairy.⁵¹ In addition, the cows were transferred to and from the Silva Dairy facilities.⁵² Further, McCall (as a principal of Clear Creek Properties) had specifically credited Silva Dairy for the compost spreading on the

⁴⁶ Augmented R. Vol. I, pp. 93, 95-96, Tr. Ex. N.

⁴⁷ Tr. Ex. L, Tr. II pp. 503 LL 21-25, 504 LL 1-19.

⁴⁸ Augmented R. Vol. I, p. 95, R. Vol. I p. 78.

⁴⁹ Augmented R. Vol. I, p. 77.

⁵⁰ Tr. II, pp. 577 LL 12-25, 578 LL 1-22, 583 LL 15-25, 584 LL 1-25.

⁵¹ Tr. II, p. 576 LL 4-20, Tr. Ex. “K.”

⁵² Tr. II, p. 576 LL 20-25.

pasture ground as an “offset” to the grazing fee.⁵³ In approximately August of 2012, after Silva Dairy presented an analysis prepared by their accountant and appraiser, Scott Plew, suggesting that the management fee owed by McCall to Silva Dairy could be valued at around \$245,000, McCall moved his herd from the dairy and the litigation in this matter ensued thereafter.⁵⁴

ISSUES PRESENTED ON APPEAL

1. Did the district court err in holding Max Silva personally liable for the purchase of dairy cows owned and used by Silva Dairy, LLC?
2. Did the district court err in not awarding Max Silva his attorney fees and costs for prevailing on his claims?
3. Should Max Silva be awarded his attorney fees on appeal?

ARGUMENT

I. Standard of Review

- A. After a bench trial, conclusions of law are freely reviewed and factual findings are reviewed on whether they are based on substantial evidence.

Where there has been an appeal of a bench trial “an appellate court will defer to findings of fact based upon substantial evidence, but will review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts found.” *Shettel v. Bamesberger*, 130 Idaho 217, 2210, 938 P.2d 1255, 1258 (Idaho App. 1997) (*see also Zanotti v. Cook*, 129 Idaho 151, 153, 922 P.2d 1077, 1079 (Idaho App. 1996) (“Appellate judges should defer to

⁵³ Tr. II, p. 578 11-22, R. Vol. I, p. 78.

⁵⁴ Tr. I, pp. 89 LL 1-25, 90 LL 1-18, 93 LL 1-25, 94 LL 1-25. Augmented Vol I, p. 95.

findings of fact based upon substantial evidence, but they ought to review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts found.”)

Additionally, “when reviewing a trial court’s conclusions of law, this Court is not bound by the legal conclusions of the trial court, but may draw its own conclusions from the facts presented.

City of Meridian v. Petra Inc., 154 Idaho 425, 434-35, 299 P.3d 232, 241-42 (2013) (citations omitted).

B. Decisions regarding attorneys fees are reviewed on whether there was abuse of discretion.

A trial court’s decision on whether to award attorneys fees and costs is reviewed under an abused of discretion standard. *Smith v. Mitton*, 140 Idaho 893, 901, 104 P.3d 367, 375, (2004).

When reviewing an exercise of discretion, a court on appeal conducts a three-tiered inquiry. The lower court must have (1) correctly perceived the issue as one of discretion, (2) acted within the outer boundaries of its discretion and consistently with legal standards applicable to specific choices available to it, and (3) reached its conclusion by an exercise of reason. *Dunagan v.*

Dunagan, 147 Idaho 599, 213 P.3d 384 (2009).

II. The District Court Erred in Making Max Silva Individually Liable for Silva Dairy’s Purchase of the Cows.

At issue in the case were numerous claims that McCall made against Max Silva individually in relation to McCall herd. Those claims included mismanagement, conversion, a pasture agreement, and the purchase of 116 cows, and the \$10,000 advance. In the end, the district court indicated that most of McCall’s claims were truly against Silva Dairy, with the exception of the purchase of the 116 cows. The basis for the court’s decision was as follows:

The Court finds that the contract was with Max as an individual and not with Silva Dairy. The reasoning for this conclusion is the same as set forth above regarding McCall's sale of 15 cows. At the time of the sale of the 101 head of cows, as with the sale of the 15 cows discussed above, Silva Dairy was in a Chapter 12 bankruptcy proceeding. McCall's testimony that he knew of this fact and that based upon his experience with bankruptcy proceedings there was "no way" he would ever enter into transactions with a bankrupt entity is very convincing. He was aware that Silva Dairy's cattle were subject to a first lien in favor of D.L.Evans Bank and that an unsecured sale to Silva Dairy would mean that these cattle would be subject to the bank's line. Moreover, there is no evidence before the Court that the Bankruptcy Court approved this purchase. Therefore, the Court finds that Max Silva is personally liable for this debt.⁵⁵

As discussed herein, upon a basic review of the law, it becomes abundantly clear that this holding is legally flawed and utterly inconsistent with the unchallenged findings of fact by the district court, as well as undisputed facts that were virtually ignored.

By law, as an agent for Silva Dairy, LLC, Max Silva is typically not liable for obligations of the company pursuant to IC § 30-6-304 which states as follows.

- (1) The debts, obligations or other liabilities of a limited liability company, whether arising in contract, tort or otherwise:
 - (a) Are solely the debts, obligations or other liabilities of the company; and
 - (b) Do not become the debts, obligations or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager.

- (2) The failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations or other liabilities of the company.

Id.

In this case, there is no dispute that Max Silva was acting as an agent for Silva Dairy who purchased the 116 cows. The cows were accounted for on Silva Dairy's books and on the

⁵⁵ Augmented R. Vol, p. 104. This holding was reaffirmed by the court in its decision on Silva's Motion for Reconsideration. R. Vol. I, p. 38.

inventories provided to the bank.⁵⁶ Additionally, as acknowledged by the Court, the cows were brought to the Silva Dairy facilities and bore the company “MS” brand.⁵⁷

The question then becomes whether Max Silva could be held liable by some exception to the rule, *i.e.* as an “undisclosed agent.” This Court has addressed that very issue as it pertains to limited liability companies or corporations as recently as 2014, in *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 332 P.3d 815 (2014):

An agent is liable on a contract when his agency and principal are undisclosed. An agent is also liable when he discloses his agency but not the principal he acts for; this is a partial disclosure. However, an agent is not liable when, at or before the time of the contact, he discloses that he acts as his principal's agent. In other words, a principal is disclosed when the other party has notice of two facts: (1) the agent is acting for a principal and (2) the principal's identity....

Under the Restatement (of Agency), a party has notice when " he knows the fact, has reason to know it, should know it, or has been given notification of it." Restatement (Second) of Agency § 9 (1958). A party has reason to know a fact when a person of ordinary or superior intelligence " would infer that the fact in question exists or that there is such a substantial chance of its existence that, if exercising reasonable care" he would act assuming that fact was possible until he knew for sure...

Our decisions indicate an agent has a duty to disclose by informing the other party of his agency and the principal's identity. We have stated: "[i]t is a basic principle that an agent who enters into a contract on behalf of a corporation, but who neither discloses his agency nor the existence of that corporation to the third party, is personally liable to the third party." *McCluskey Commissary, Inc.*, 96 Idaho at 93, 524 P.2d at 1065. In *McCluskey*, we applied agency law to corporate officers: " the managing officer of a corporation, even though acting for the company, becomes liable as a principal where he deals with one ignorant of the company's existence and of his relation to it, and fails to inform the latter of the facts." This applies to other corporate agents. See *W. Seeds, Inc. v. Bartu*, 109 Idaho 70, 71, 704 P.2d 974, 975 (Ct. App. 1985) (A contracting agent " is liable as a party to the contract unless he discloses, at or before the time of entering into the contract, the agency relationship and the identity of the principal."). Other jurisdictions also require an

⁵⁶ See the Statement of Facts *infra*

⁵⁷ *Id.*

agent to inform the other contracting party of his agency and the principal; in other words, the agent must ensure the other party actually knows of his agency and principal. See *Treadwell v. J.D. Const. Co.*, 2007 ME 150, 938 A.2d 794, 799 (Me. 2007) (" To avoid liability for the agent, the third party must have actual knowledge of the identity of the principal, and does not have a duty to investigate."); See also *Cent. Missouri Prof'l Servs., Inc. v. Shoemaker*, 108 S.W.3d 6, 10 (Mo.Ct.App. 2003) (" It is not sufficient to disclose facts and circumstances which would, if followed by inquiry, disclose the fact of agency and the identity of the principal.") Thus, the agent must inform the other party of his principal and agency and not rely on what that party " should have known...."

An agent gives sufficient notice of his principal's identity when an agent informs the other party of the entity he represents with enough specificity for the other party to actually know it is dealing with the particular entity. This includes specificity as to the company's name and corporate existence...

Id. 156 Idaho 909-911, 332 P.3d 820-22 (citations largely omitted)

If the district court had applied these guiding principles as set forth in *Agrisource, Inc.*, then there is no question that Max Silva should not have been liable for the dairy's purchase of the cows. Instead of conducting any analysis of the facts and circumstances to ascertain whether McCall was notified of, or "fully aware" of Silva's agency at the time of the purchase, the court instead relied upon a subjective belief of McCall, i.e. that there was "no way" that McCall would ever "do business" with a "bankrupt entity."⁵⁸ This was not only an errant analysis of the court, but it also flies in the face of many of the facts in the case including its own findings that overwhelmingly suggest that McCall was "fully aware of" and engaged in business directly with Silva Dairy throughout the dairy's bankruptcy and at the time of the purchase of the 116 cows.

Such facts/rulings include the following:

⁵⁸ Augmented R. Vol. I, p. 104

- a) Starting in spring of 2010 through August of 2012, Silva Dairy managed McCall's dairy herd.⁵⁹ Additionally, although there was no agreement as to the amount of the management fee, McCall admitted that "they would settle up on the back end" suggesting again that this was an ongoing transaction.⁶⁰
- b) On August 18, 2010, McCall paid Max Silva \$10,000 knowing that the funds would be used for Silva Dairy's retainer for a bankruptcy attorney.⁶¹
- c) The pasturing of dairy cows on McCall's property was the obligation of Silva Dairy, and that McCall had fully knowledge of that fact because 1) he "knew" that the cattle came from the Silva Dairy herd and that McCall's own invoice (i.e. through one of his entities) was with Silva Dairy, and not Max Silva.⁶²
- d) The "MS" brand on the cows stands for "Manuel Silva and Sons" and is the brand used on Silva Dairy cattle, which is "presumptive" proof of ownership.⁶³
- e) McCall allegedly spent \$40,067 for feed that "directly benefitted Silva Dairy" as "explained" by McCall at trial that "if Silva Dairy didn't survive then he would have no one to care for his cattle."⁶⁴

⁵⁹ Augmented R. Vol. I, pp. 93, 95, 103.

⁶⁰ R. Vol. I, p. 77, Tr. II, p. 32 LL 10-19.

⁶¹ R. Vol I, p. 79, Tr. I. p. 117 LL 17-25, p. 118 LL 1-8, p. 251 LL 3-15.

⁶² R. Vol. I, p. 78. Tr. II, p. 576 LL 4-20, Tr. Ex. K.

⁶³ Id. Note that this finding by the district court is a correction from its prior ruling that "MS" stood for "Max Silva."

⁶⁴ R. Vol. I. p. 81. Silva Dairy is disputing in its appeal whether this un-pled claim was a proper "offset" to the management fee. Nevertheless, for the purposes of Max Silva's appeal,

- f) The “Livestock Brand Inspection” sheet which McCall received at the time of the 15 cow purchase on April 29, 2011, lists the “owner” as “Silva Dairy, LLC” and the “agent” as “Max Silva.”⁶⁵ Additionally, McCall **admitted** at trial that he received the Inspection sheet and **acknowledged** that Max Silva was the listed agent for Silva Dairy.⁶⁶
- g) As **acknowledged** by McCall, McCall’s own Quickbook register lists the transaction as a “Loan to Silva Dairy,” with entries for Silva Dairy’ purchase of the 101 cows at a price of \$84,150 (see 12/01/2011 entry) and the 15 cow purchase (see 01/01/2012 entry.)⁶⁷

Again, in considering all of these facts, there is no doubt that McCall knowingly dealt directly with Silva Dairy throughout the course of their ongoing dealings from May 2010 through 2012 and even during the course of the bankruptcy.⁶⁸ This included the 116 cow purchase during that period. Therefore, under the rules affirmed in *Agrisource, Inc*, the principal – Silva Dairy -- was adequately “disclosed,” and its “agent” – Max Silva – is not liable.

Further, it was completely inconsistent for the district court to on the one hand rule that – because of all of the aforementioned and undisputed facts – that Max Silva was not liable for the

this is an undisputed admission that McCall knew he was engaging directly with Silva Dairy, and not Max Silva.

⁶⁵ Tr. Ex. “Silva L.” Tr. II, pp. 503 LL 21-25, 504 LL 1-19.

⁶⁶ Id.

⁶⁷ Tr. Ex. “K,” Tr. I, pp. 381 LL 18-25, 382 LL 1-10.

⁶⁸ See the Statement of Facts *infra*.

management of the herd, pasturing of the cows, etc... – but then to hold Max Silva liable for the purchase of the 116 cows. That is clearly both a factual and legal error of the court that must be reversed.

Finally, the district court also suggested another errant and irrelevant reason why Max Silva should be liable for the 116 purchase, i.e. that “there is no evidence before the Court that the Bankruptcy Court approved this purchase.”⁶⁹ This assertion by the district court is not an accurate reflection of what is required under the bankruptcy code and is a red herring. As a debtor in possession in a Chapter 12 bankruptcy, Silva Dairy, LLC may enter into post petition transactions including the sale or lease of property “in the ordinary course of business, without notice or hearing.” 11 USC § 363(c)(1) states as follows:

If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

Id.

11 U.S.C. § 1203 states as follows with regard to the “rights and powers” of a debtor under Chapter 12:

Subject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm or commercial fishing operation.

Id.

⁶⁹ Augmented R. Vol. I, p. 104.

Thus the fact that Silva Dairy's purchase of the 116 cows was not reported or approved by the bankruptcy court does not mean that the purchase were not obligations of the debtor, and it was an error that the district court inherently suggests that.⁷⁰

III. The District Court Should Have Awarded Silva All of his Attorney Fees or as Proportioned to the Claims on which he Prevailed.

The district court held that the various claims made by McCall against Max Silva constituted a "commercial transaction" for the purposes of awarding attorney fees under IC § 12-120(3).⁷¹ That ruling has not been appealed by McCall. Obviously, if this Court were to reverse the district court's decision making Max Silva liable for the 116 cow purchase, then Silva is the prevailing party and should be awarded all of his reasonable attorneys fees and costs incurred in the case. Silva will have prevailed on each and every claim in the various lawsuits against him.

However, even if this Court upholds Silva's liability on the cow purchase, it was still an error for the district court to not award Silva his attorney fees as apportioned among the claims on which he prevailed. This Court has held that when respective parties prevail on their respective claims, "the court (has) a duty to apportion to each of the parties only the attorney fees related to the claims upon which each party prevailed." *Schroeder v. Partin*, 151 Idaho 471, 478, 259 P.3d 617, 625 (2011)(citing *Ramco v. H-K Contractors, Inc.*, 118 Idaho 108, 113, 794 P.2d 1381, 1386 (1990) (the claims should be severed and costs analyzed separately for each.)

⁷⁰ Note that the cow purchase is accounted for by Silva Dairy in its "Answer, Counterclaim and Third Party Complaint" as an "offset" to the management fee owed by McCall to Silva Dairy. (Augmented Rec. R. Vol. II, pp. 5-20. See in particular paragraphs 3-9 of Answer, and "Ninth" and "Eleventh" Affirmative Defense.)

⁷¹ R. Vol. I, p. 87.

Further:

The trial court's decision to award all attorney fees incurred by each party in connection with the litigation, without attempting to apportion those fees based upon the respective claims upon which each party prevailed, (is) inconsistent with the governing legal standard. Thus, the district court (abuses) its discretion.

Schroeder at 151 Idaho at 479, 794 P.2d at 1387 (emphasis added).

Additionally, in apportioning attorney fees, “the determination of which party has prevailed is not a matter of a mechanical measurement of the size of each party's respective recovery. Instead, the trial court should analyze each claim separately. Where both parties have successfully asserted claims, the claims should be severed and costs analyzed separately for each.” *Ramco v. H-K Contractors, Inc.*, 118 Idaho 108, 113, 794 P.2d 1381,1386 (1990)

In this case, the district court had held that Max Silva was the prevailing party and “entitled to an award of attorneys fees and costs” for prevailing on the various claims against him.⁷² However, in its final memorandum decision in the case the district court *sua sponte* addressed the awarding of attorney fees.⁷³ It first indicated that all of the claims are “commercial transactions” and therefore subject to an attorney fee and cost award.⁷⁴ The court then proceeded to indicate which parties “prevailed” on what claims in the various claims filed in the case.⁷⁵ However, rather than apportion the fees and costs as required under rule, the court decided to

⁷² R. Vol I, pp. 38, 80.

⁷³ R. Vol I, pp 87-89.

⁷⁴ Id.

⁷⁵ Id.

view the matter as “one action” and that the costs and fees “offset” each other.⁷⁶ (See, again, *Ramco v. H-K Contractors, Inc.* and *Schroeder v. Partin.*)

Had the fees and costs been apportioned accordingly, there is no question that Silva would have had a much greater award. Silva had prevailed in CV 2013-4728 (the matter initially over the \$10,000 loan filed in magistrate court.) That matter – which was initially filed in November of 2013 – had remained separate from the other claims until it was consolidated with the underlying case on the first day of trial in June of 2015. Silva incurred substantial fees in responding to summary judgment motions, successfully appealing the case, and ultimately prevailing at trial. Additionally, Silva had prevailed in three out of the four claims in CV-2013-4732, i.e. the mismanagement, conversion and pasture allegations, having spent substantial resources to dismiss these claims. He also prevailed in one of the two claims in CV-2013-3154, McCall’s “claim and delivery” claim, again at great expense.

The only issue that McCall prevailed was holding Max Silva liable for the purchase of 116 cows. However, the underlying facts of the claim were largely undisputed and the claim was fairly narrow. The only disputed issue – that was decided well before the four day trial in June of 2015 – was whether Max Silva was personally liable for the cow purchase. As such, if the district court had provided the appropriate analysis, or at least allowed the parties to present such analysis for the court’s consideration, then there is no question that Silva’s cost for successfully defending against the numerous claims made against him over a three year period and in multiple lawsuits would have far outweighed the fees incurred by McCall in his one successful claim

⁷⁶ Id.

wherein the facts were largely undisputed. Therefore, the district court abused its discretion and the matter should be remanded and the attorney fees and costs awarded as apportioned by the court.

In summary, again, if this Court reverses the district court on the issue of the cow purchase, then there is no dispute that Silva should be awarded all of his reasonable attorneys fees and costs under IC § 12-120(3). However, even if this Court upholds the district court, Silva is entitled to his apportioned fees as the prevailing party on his successful claims. McCall has not appealed the district court decision, and is therefore entitled to no relief.

IV. Silva is Entitled to his Attorney Fees on Appeal.

As undisputed, this matter involves a commercial transaction and as such, under Idaho Code § 12-120(3) Silva should be awarded his attorney fees and costs for prevailing on appeal.

CONCLUSION

Pursuant to the foregoing, this Court should reverse the district court's judgment and order finding Max Silva liable for Silva Dairy's purchase of dairy cows, and should remand the matter to the trial court for an award of attorneys fees and costs to Silva.

DATED this 2nd day of September, 2016.

PETERSEN MOSS HALL & OLSEN



Nathan M. Olsen

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 2nd day of September, 2016, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with Rule 5(b), I.R.C.P.

Persons Served:

Bradley J. Dixon, Esq.
GIVENS PURSLEY LLP
601 W. Bannock St.
P.O. Box 2720
Boise, ID 83701-2720
bradleydixon@givenspursley.com
FAX: (208) 388-1300

Method of Service:

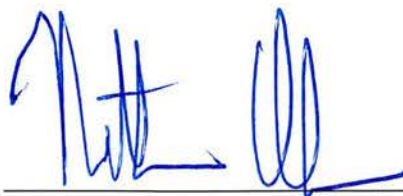
mail hand fax email

Attorneys for Respondent, Jack McCall

Steven L. Taggart, Esq.
MAYNES TAGGART, PLLC
525 Park Ave., Ste, 2E
P.O. Box 3005
Idaho Falls, Idaho 83403
staggart101@gmail.com
mayneslaw@hotmail.com
FAX: (208) 524-6095

mail hand fax email

Attorneys for Appellant, Silva Dairy, LLC



Nathan M. Olsen