

In the Supreme Court State of North Dakota

No. 20170453

Jacob Greer, d/b/a Greer Farm,

Plaintiff-Appellant,

v.

Global Industries, Inc., Nebraska Engineering Co., a Division of Global Industries,
Inc., Advanced Ag Construction Incorporation,

Defendants-Appellees.

Appeal from the District Court's Memorandum Opinion and Order Granting Motion
for Summary Judgment dated August 31, 2017 (Doc. #103),
Order for Summary Judgment on Claims Alleged Against Global Industries, Inc.,
Nebraska Engineering Co. dated September 18, 2017 (Doc. #106),
and Judgment entered October 2, 2017 (Doc. #113)
Barnes County District Court, Case No. 02-2014-CV-00220

BRIEF OF APPELLANT

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I. STATEMENT OF ISSUES

[¶1] Whether the District Court erred by granting summary judgment dismissal of the claims asserted by the Plaintiff, Jacob Greer, against the Defendants, Global Industries, Inc. and Nebraska Engineering Co., a division of Global Industries, Inc.

[¶2] Whether the District Court abused its discretion in granting certification of the Judgment entered October 2, 2017 under N.D. R. Civ. P. 54(b).

II. STATEMENT OF CASE

[¶3] Jacob Greer (“Greer”) is a farmer from the Marion, North Dakota area. He wanted to increase the capacity of his grain dryer and redesign his grain bin site. Greer determined that he wanted to purchase a Nebraska Engineering Co. (“NECO”) brand grain dryer. Greer contacted NECO, which is a division of Global Industries, Inc. (“Global”), by telephone around December 12, 2011. He called NECO to purchase the grain dryer he wanted. The NECO representative informed Greer he must purchase a grain dryer through one of NECO’s authorized dealers. Based upon the NECO representative’s statements, Greer understood the only way to purchase a NECO grain dryer was through a NECO dealer. He believed NECO’s dealers were agents of NECO.

[¶4] Greer then contacted two authorized NECO dealers, E.E.E., Inc. (“Triple E”) and Advanced Ag Construction Incorporation (“Advanced Ag”). After receiving price quotes from both, Greer entered into a Project Contract with Advanced Ag on December 30, 2011 to purchase a NECO Model D24360 Continuous-Flow Grain Dryer. He also gave Advanced Ag a check for \$237,075. Advanced Ag deposited the check on January 3, 2012.

[¶5] Around January 13, 2012, Greer learned Advanced Ag had not paid some manufacturing plants and this concerned him. He tried to contact Advanced Ag and also

contacted NECO to see if it had received Greer's payment from Advanced Ag—it had not. Representatives of NECO made attempts to reach Advanced Ag but were unsuccessful.

[¶6] On March 1, 2012, NECO severed ties with Advanced Ag and cancelled all pending orders, including Greer's NECO grain dryer. Greer never received a grain dryer from NECO, Advanced Ag, or any other company. He also never received his money back.

[¶7] Greer commenced an action against Advanced Ag, Global, and NECO alleging breach of contract and conversion. (App. 6-9). The Summons and Complaint were served upon Advanced Ag through the North Dakota Secretary of State. (Doc. 54). Advanced Ag never made an appearance, and Greer was not able to locate any representative of Advanced Ag during the pendency of this case.

[¶8] On October 28, 2016, Global and NECO moved for summary judgment asserting there was no principal-agency relationship with Advanced Ag. Greer opposed the motion. A hearing was held on April 6, 2017. On August 31, 2017, the District Court issued its Memorandum Opinion and Order Granting Motion for Summary Judgment. (App. 16-20). The District Court determined Advanced Ag did not have ostensible authority to act on behalf of Global and dismissed the claims against Global and NECO. (App. 19). Judgment was entered on October 2, 2017. (App. 23).

[¶9] On October 3, 2017, Greer filed a motion seeking certification under N.D. R. Civ. P. 54(b) so he could appeal the summary judgment dismissal of his claims against Global and NECO. A hearing was held on October 23, 2017. On November 3, 2017, the District Court issued an Order Granting Plaintiff's Motion for Rule 54(b) Certification and for Continuance of Trial. (App. 24-25). Greer filed the Notice of Appeal on December 21, 2017. (App. 26-28).

III. STATEMENT OF FACTS

[¶10] Greer is a farmer from the Marion, North Dakota area. (Doc. #68) (Deposition Transcript of Jacob Greer dated June 23, 2016 (“Greer Dep. I”), 4:18-5:2). He was 29 years old when the events underlying this action occurred. Id. at 4:16-17. Greer had a small grain dryer to dry corn, but around 2011 he decided he wanted to increase the capacity of his dryer and redesign his grain bin site. Id. at 36:3-37:8. He wanted to capitalize on better yields that would result from earlier combining and drying. Id. He wanted to have the capacity to combine at about 5,000 bushels per hour, and then store and handle the crop. Id.

[¶11] Greer began shopping around for grain dryer options and exploring ideas. Id. at 35:16-19. He decided a NECO brand dryer was the only one he wanted for his farming operation and grain bin site. Id. Greer contacted NECO around December 12, 2011 to purchase a grain dryer.¹ Id. at 77:11-78:3; 115:4-116:13. The NECO representative told Greer he must purchase a grain dryer through one of NECO’s dealers. Id. at 77:11-78:3; (Doc. #82) (Affidavit of Jacob Greer (“Greer Aff.”), ¶ 3).

[¶12] In 2011 NECO’s website provided: “Please Contact us, for your additional product information. Our Customer Service Representatives will be pleased to provide you with the latest information on NECO products.” (Doc. #87). Doug Fargo (“Fargo”), the President and CEO of Global, confirmed that dealers were part of the process for obtaining a NECO grain dryer. (Doc. #86) (Deposition Transcript of Douglas Fargo (“Fargo Dep.”),

¹ Global’s position is that Global and NECO are in essence the same company as NECO is an unincorporated division of Global. (Doc. #9, ¶ 2). Any reference to Global herein includes NECO and vice versa.

23:4-25:4). NECO represented to the public that its dealers were involved in the process of selling NECO products. Fargo Dep., 36:17-19.

[¶13] Michael Schram (“Schram”), who was a customer service representative for NECO, confirmed that NECO always referred farmers to dealers to purchase NECO machinery. (Doc. #88) (Deposition Transcript of Michael Schram (“Schram Dep.”), 11:9-13). NECO wholly relied upon its dealers to market and sell NECO products in a given area. Fargo Dep., 57:20-25. In some instances, Global’s website provided contact information for dealers. Id. at 75:8-14. Global also maintained a “dealer portal” that allowed dealers to obtain updated product and pricing information. Id. at 22:6-13; (Doc. #90) (Deposition Transcript of Denny Kakacek (“Kakacek Dep.”), 21:17-24). Global exercised control over its dealers because it kept “an eye on the dealers to make sure they [were] performing.” (Doc. #89) (Deposition Transcript of Kelvin Surdal (“Surdal Dep.”), 80:23-81:1).

[¶14] When inquiring about buying a grain dryer directly from NECO, Greer recalled being told by a NECO representative: “No, you have to purchase it through our dealer. We protect our dealers.” Id. at 117:19-118:4. After being informed he had to purchase a grain dryer through a NECO dealer, the NECO representative mentioned one of its dealers was Triple E located in Page, North Dakota. Id. at 104:19-24; 115:17-116:13; 118:19-24; 119:8-10.²

[¶15] After his call to NECO, Greer understood from the conversations the only way he could purchase a NECO grain dryer was through a NECO dealer. Greer Dep. I.

² Schram testified that NECO’s business model was to refer any inquiring customer to a dealer within the customer’s geographical area. Schram Dep. 32:25-33:8.

77:11-78:3; Greer Aff., ¶ 5. Greer understood NECO and its dealers were one in the same. Id. He believed any NECO dealer was also an agent for NECO/Global. Greer Aff., ¶ 5. No one from NECO or Global ever told Greer he should not purchase a NECO grain dryer from Advanced Ag. Schram Dep., 54:4-7.

[¶16] Greer contacted Triple E. Greer Dep. I, 121:21-122:1. He scheduled a meeting with Triple E to talk about options for NECO grain dryers. Id. at 121:18-20. He ultimately received a price quote from Triple E for a NECO grain dryer.

[¶17] Greer also learned that Advanced Ag was a dealer of NECO grain dryers. Id. at 123:3-21; Greer Aff., ¶ 6. Greer's brother-in-law, Kent Sortland ("Sortland"), attended an ag expo in Fargo in the fall of 2011, and while there saw a booth for Advanced Ag. (Doc. #81) (Affidavit of Kent Sortland ("Sortland Aff."), ¶¶ 2-3). Sortland received a folder of information which indicated Advanced Ag was authorized to sell NECO grain dryers. Id. at ¶ 5. Sortland informed Greer that Advanced Ag was "representing NECO at the Northern Ag Expo" in Fargo. Greer Dep. I, 123:16-21. At that time Advanced Ag was authorized by NECO to sell NECO grain dryers. Surdal Dep., 61:12-16; Schram Dep., 52:15-20. Greer contacted Advanced Ag around December 14 or 15, 2011, and spoke with Joe Beech ("Beech"), a representative of Advanced Ag. Greer Dep. I, 124:13-16.

[¶18] Around December 20, 2011, Greer and his father met with a representative of Triple E. Id. at 125:1-7. Greer did not purchase anything from Triple E. The following week, on December 27, 2011, Greer and his father met with Beech of Advanced Ag. Id. at 125:13-16. When Greer and his father met with Beech, Greer already had some pricing information for NECO grain dryers that he had received from Triple E. Id. at 125:17-23.

The quote from Advanced Ag for the NECO grain dryer was less than the quote Greer received from Triple E. Id. at 126:6-8

[¶19] Prior to December 30, 2011, Greer also received a brochure for NECO continuous-flow grain dryers. Id. at 107:11-108:7; Greer Aff., ¶ 7. The brochure contained general information and specifications for various NECO grain dryers. Greer Aff., ¶ 7; (Doc. #83). He either received the brochure directly from Advanced Ag or Sortland (who received it from Advanced Ag). Greer Dep. I, 107:11-108:7. The back of the brochure contained the following:



The brochure provided “See your NECO Dealer: Advanced Ag Construction, 420 Main St. Horace ND 58047 877.293.6050 www.advancedag.biz.” (Doc. #83). NECO was aware that dealers often placed their names next to the NECO logo information on brochures. Fargo Dep., 95:3-9. This was common knowledge within NECO. Kakacek Dep., 35:25-36:6; 49:1-5.

[¶20] On December 30, 2011, Greer met with Beech and Chad Peda (“Peda”) of Advanced Ag to pay for the NECO grain dryer he wanted to purchase from NECO. Greer Dep. I, 126:25-127:7. Greer entered into a Project Contract for purchase of a “NECO Model D24360 Continuous-Flow Grain Dryer” that same day. Greer Aff., ¶ 8; (Doc. #84). He also wrote a check to Advanced Ag for \$237,075. (Doc. #71). Greer signed the Project Contract on December 30, 2011, and a representative of Advanced Ag also signed the

Project Contract that day. Greer Dep. I, 66:10-17; Greer Aff., ¶ 8. The check was deposited by Advanced Ag on January 3, 2012. (Doc. #71).

[¶21] Around January 13, 2012, Greer spoke with a millwright and learned Advanced Ag had not paid some manufacturing plants and this concerned Greer. Greer Dep. I, 129:7-131:4. Greer tried to contact Beech to determine whether the check had been cashed by Advanced Ag. Id. at 131:5-9. The same day, Greer contacted Schram of NECO. Id. at 132:4-15. Greer called NECO to determine whether it had received the payment from Advanced Ag for his NECO grain dryer. Id. at 132:16-25.

[¶22] Schram recalled the phone call with Greer and recalled informing others within NECO about Advanced Ag stealing the \$237,075 from Greer. Schram Dep., 64:15-65:22. Representatives of NECO made attempts to reach Peda without success. Id. NECO also made attempts to contact Beech without success. Id.

[¶23] Over the next several months, Greer had phone calls with representatives of Advanced Ag, Triple E, and Global about getting the NECO grain dryer he paid for. Greer Dep. I, 139:22-144:22. Greer understood that Global was talking with its dealers about how to get Greer a dryer. Id. at 137:15-138:14. Around March 1, 2012, Greer again spoke with Schram of NECO in an attempt to have the grain dryer delivered. Id. at 145:10-17. Greer was told by Schram he had to make another payment, this time to Triple E, to get the grain dryer. Id. at 146:7-24. This did not occur.

[¶24] Fargo testified Global investigated its potential dealers and that dealers must have sufficient credit to become authorized by NECO. Fargo Dep., 50:23-51:2. Fargo also testified he never would have approved Advanced Ag as a dealer had he seen a Dun & Bradstreet Report showing Advanced Ag had a poor credit rating. Id. at 51:3-15. No one

from Global or NECO communicated to Greer that Advanced Ag had a poor credit rating or otherwise cautioned Greer about dealing with Advanced Ag.

[¶25] NECO/Global severed ties with Advanced Ag on March 1, 2012. There was an email from Steve Black, the territory sales manager for NECO, to employees confirming the termination. (Doc. #91). NECO severed ties with Advanced Ag, cancelled the dryers on order (including Greer's dryer), and cancelled Advanced Ag's dealership. Id. Schram recalled that Advanced Ag was terminated as a dealer because "[i]t was apparent that [Peda] wasn't acting in good faith." Schram Dep., 69:20-23.

[¶26] In June 2012, Greer spoke with the President and CEO of Global. Greer Dep. I, 169:5-10. During the call, Greer was informed NECO would no longer be willing to take a check from Advanced Ag. Id. at 170:1-6. Greer wanted the NECO grain dryer he had paid for so continued to try and get the grain dryer from NECO. Greer was eventually informed that NECO was not willing to help him. Greer recounted a telephone call he had with Fargo, Schram, and Steve Black, around July 9, 2012:

Q: So this was one conversation around that date?

A: This was a conversation - - they called me. I didn't record it or anything. I was sitting in my brother-in-law's shop when it happened. They called me up and they mentioned the people that were there, and they just said, "Yeah, we've thought about it. We've worked over it. We're just deciding we're just not going to help you at all." And obviously I'm like, "What? Yes, you are." And they said, "No, we decided to wash our hands of this. We're not going to be involved with Chad Peda anymore. We're not really going to be involved with you anymore."

And I said, "Well, if I can get Chad to produce the money that I gave him to you guys, you have to give me a dryer." And they said, "No, we're just not going to worry about it." And I said, "If you don't take the money from Chad and give me the dryer, you're directly stealing from me," which has pretty much already happened 'cause that's the only way I could get the dryer was through a dealer."

Id. at 173:18-174:13.

[¶27] Greer hoped to receive the NECO grain dryer before the 2012 harvest, and he continued to hope NECO would do the right thing and deliver the grain dryer. *Id.* at 181:17-24. This never happened. Greer never received the NECO grain dryer he paid \$237,075 for, and he never recovered his money.

IV. STANDARD OF REVIEW

A. SUMMARY JUDGMENT

[¶28] This Court's standard of review for a district court's grant of summary judgment is well established:

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. . . .

THR Minerals, LLC v. Robinson, 2017 ND 78, ¶ 6, 892 N.W.2d 193 (quoting Markgraf v. Welker, 2015 ND 303, ¶ 10, 873 N.W.2d 26). Whether the District Court properly granted summary judgment in favor of Global is a question of law which this Court reviews de novo on the entire record. *Id.*

[¶29] The question of the existence of a principal-agency relationship is one of fact. Fleck v. Jacques Seed Co., Prescott, Wisconsin, 445 N.W.2d 649, 651 (N.D. 1989). A question of fact only becomes a question of law when a reasonable person can draw a single conclusion from the evidence. Spring Creek Ranch, LLC v. Svenberg, 1999 ND 113,

¶ 17, 595 N.W.2d 323. “Summary judgment is inappropriate if the court must draw inferences and make findings on disputed facts to support the judgment.” Markgraf, 2015 ND 303, ¶ 28. “In deciding a motion for summary judgment, the district court may not ‘weigh the evidence, determine credibility, or attempt to discern the truth of the matter’” Id. (quoting Northern Oil & Gas, Inc. v. Creighton, 2013 ND 73, ¶ 11, 830 N.W.2d 556).

B. CERTIFICATION UNDER N.D. R. CIV. P. 54(b)

[¶30] This Court is “not bound by the trial court’s determination but will *sua sponte* review a Rule 54(b) certification to determine if the court abused its discretion.” Sickler v. Kirkwood, 1997 ND 40, ¶ 5, 560 N.W.2d 532. The district court abuses its discretion “only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of rational mental process leading to a reasoned determination.” Nesvig v. Nesvig, 2006 ND 66, ¶ 12, 712 N.W.2d 299.

V. LAW AND ARGUMENT

[¶31] The District Court erred in granting summary judgment in favor of Global and determining there was no evidence to support that Advanced Ag acted with ostensible authority for Global/NECO. The District Court did not abuse its discretion in granting Rule 54(b) certification. Therefore, this Court should affirm the District Court’s Rule 54(b) certification, but reverse and remand the District Court’s grant of summary judgment in favor of Global.

A. THE DISTRICT COURT ERRED IN FINDING ADVANCED AG DID NOT HAVE OSTENSIBLE AUTHORITY TO ACT ON BEHALF OF GLOBAL/NECO

[¶32] The District Court made a finding that “there [was] no evidence to support a claim that Advanced Ag was acting with apparent or ostensible authority.” (App. 19).

The District Court made this determination solely because “Advanced Ag was not mentioned during” the conversations Greer had with representatives of NECO. *Id.* The District Court completely disregarded the evidence demonstrating that representatives of NECO caused Greer to believe any dealer of NECO grain dryers was an agent of NECO, and that this occurred before Greer entered into the Project Contract with Advanced Ag. This Court should therefore reverse the grant of summary judgment and allow the fact finder to determine whether Advanced Ag was an ostensible agent for Global.

1. **Genuine issues of material fact exist to support a finding of ostensible agency.**

[¶33] “Agency is the relationship which results when one person, called the principal, authorizes another, called the agent, to act for the principal in dealing with third persons.” N.D.C.C. § 3-01-01. Section 3-01-02 defines the two types of agency:

An agency is either actual or ostensible. It is actual when the agent really is employed by the principal. It is ostensible when the principal intentionally or by want or ordinary care *causes a third person to believe* another to be the principal’s agent, who really is not employed by the principal. (emphasis added).

“An agent has such authority as the principal actually or ostensibly confers upon the agent.” N.D.C.C. § 3-02-02. An agent represents the principal for all purposes within the scope of the agency, and “all the rights and liabilities which would accrue to the agent from the transactions within such limit, if they had been entered into on the agent’s own account, accrue to the principal.” N.D.C.C. § 3-03-01.

[¶34] “Ostensible authority is such as the principal intentionally or *by want of ordinary care causes a third person to believe* the agent possesses.” N.D.C.C. § 3-02-02 (emphasis added). In considering the existence of an ostensible agency relationship, there must have been “some conduct on the part of the principal *reasonably resulting in the*

belief in the mind of the third party, that an agency existed together with a reliance thereon.” Pfliger v. Peavey Co., 310 N.W.2d 742, 745 (N.D. 1981) (emphasis added). “An ostensible agency exists where the conduct of the supposed agent is consistent with an agency, and where, in a particular transaction, someone is justified in dealing with the supposed agent.” Krank v. A.O. Smith Harvestore Prods., Inc., 456 N.W.2d 125, 128 (N.D. 1990).

[¶35] “[A] principal is responsible to third persons for the negligence of the principal’s agent in the transaction of the business of the agency, including wrongful acts committed by the agent in and as a part of the transaction of the business, and for the agent’s willful omission to fulfill the obligations of the principal.” N.D.C.C. § 3-03-09. “[A] principal is bound by acts of the principal’s agent under a merely ostensible authority to those persons only who *in good faith* and *without ordinary negligence* have incurred a liability or parted with value upon the faith thereof.” N.D.C.C. § 3-03-03 (emphasis added). Thus, the determination of whether an ostensible agency relationship existed invokes considerations of the perspectives and reasonable beliefs of the third person dealing with the alleged agent. In cases involving issues “where the standard of the reasonable man must be applied to conflicting testimony, and even where there is no dispute as to the facts, where inferences may be reasonably drawn from the evidence that indicate the presence of a genuine issue of fact, summary judgment should not be granted” Johnson v. American Motors Corp., 225 N.W.2d 57, 60 (N.D. 1974).

[¶36] NECO clearly led Greer to believe any NECO dealer, including Advanced Ag, was an authorized agent for the sale of a NECO grain dryer. Greer contacted NECO directly in the early part of December 2011—before he entered into the Project Contract

and paid Advanced Ag for the NECO grain dryer.³ Greer Dep. I, 77:11-78:3; 115:4-116:13. A NECO representative told Greer he must purchase a grain dryer through a NECO dealer. Id. at 77:11-78:3. The NECO representative also told Greer that NECO had “good dealers.” Greer Aff., ¶ 4. The representative also communicated to Greer that NECO must protect its dealers. Greer Dep. I, 117:19-118:4.

[¶37] The conversation Greer had with NECO led him to understand the only way he could purchase a NECO grain dryer was through a NECO dealer. Greer Dep. I, 77:11-78:3. He formed the reasonable belief that any NECO dealer was also an agent for NECO. Greer Aff., ¶ 5. As a result of the communications with NECO, Greer believed NECO and its dealers were one in the same. Id. The NECO representative also did not tell Greer he should not purchase a grain dryer from Advanced Ag. Schram Dep., 54:4-7.

[¶38] The District Court failed to consider whether the representations made by NECO directly to Greer, before Greer entered into the Project Contract, when “reasonably interpreted” caused Greer to believe Advanced Ag had authority to act for NECO. Lagerquist v. Stergo, 2008 ND 138, ¶ 14, 752 N.W.2d 168. Greer understood that he could purchase a NECO grain dryer from any NECO dealer, and at the time Advanced Ag was an authorized NECO dealer. Greer Aff., ¶ 3. He reasonably believed NECO dealers were authorized agents for NECO. Id. at ¶ 5. The District Court erred in relying solely upon the fact that the NECO representative did not directly mention Advanced Ag to Greer as being dispositive of the ostensible agency determination.

³ The District Court incorrectly found that Greer entered into the Project Contract with Advanced Ag on December 5, 2011. (App. 17). Greer did not sign any contract until December 30, 2011. Greer Aff., ¶ 8.

[¶39] This Court’s decision in Hagel v. Buckingham Wood Prods., Inc., is instructive here. In Hagel the plaintiffs contacted Midwestern Homes by responding to an ad in the newspaper. Hagel v. Buckingham Wood Prods., Inc., 261 N.W.2d 869, 870 (N.D. 1977). The plaintiffs mailed the ad to Midwestern Homes and received a catalog with a letter attached designating Randall Pooley as the “area representative” for Midwestern Homes. Id. The next month, Ed Koch contacted the plaintiffs by telephone and advised them he was a representative of Midwestern Homes. Id. The plaintiffs met with Koch, who informed the plaintiffs he was a builder-contractor involved in constructing prefabricated homes, and he gave the plaintiffs a newer edition of the Midwestern Homes catalog, which contained a handwritten notation, “Ed Koch Cost. Co., Bismarck, 223-8260,” on the cover of the catalog. Id. After several meetings with Koch, the plaintiffs selected a home design. Id. Koch received a quote for the selected home from Midwestern Homes, and the following month Koch entered into a contract with the plaintiffs for the sale and construction of the home. Id. Midwestern Homes sold the home to Koch at a discount, and Koch began constructing the home for the plaintiffs. Id. at 870-71. Koch ultimately abandoned the construction, and the plaintiffs sued Midwestern Homes and Koch, individually and as an agent of Midwestern Homes. Id. at 871. The trial court granted judgment against Koch and dismissed the complaint against Midwestern Homes concluding Koch was only an agent of Midwestern Homes for the sale of the home, not for constructing the home. Id. The plaintiffs appealed.

[¶40] Upon review this Court agreed there was “substantial evidence” to support that Koch was an agent for Midwestern Homes for the sale of the home to the plaintiffs. Id. at 873. The Court then analyzed whether Koch was also an ostensible agent of

Midwestern Homes for construction of the home, and concluded he was an ostensible agent. Id. at 877-78. This Court wrote “the third party must have believed in the existence of the authority in the supposed agent, and such belief must rest upon some act or statement of the principal sought to be bound by the alleged authority.” Id. at 874. The ostensible agency “must rest upon conduct or communications of the principal which *reasonably interpreted* causes a third person to believe that the agent has authority to act for and on behalf of the principal.” Id. (emphasis added). “Where the third party believes in the existence of such authority, and the belief rests on some act of the principal . . . the principal is estopped to deny this ostensible authority.” Id. Finally, this Court wrote:

Thus, if a principal acts or conducts his business either intentionally or through negligence, or fails to disapprove of the agent’s acts or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, the principal is bound by the acts of the agent within the scope of his apparent authority as to persons who have reasonable grounds to believe that the agent has such authority and in good faith deal with him.

Id. at 875 (quoting 3 Am. Jur. 2d, Agency, § 74).

[¶41] “In deciding a motion for summary judgment, the district court may not ‘weigh the evidence, determine credibility, or attempt to discern the truth of the matter’” Markgraf, 2015 ND 303, ¶ 28. The District Court erred by weighing the evidence when it determined “[t]here is no evidence to support a claim that Advanced Ag was acting with apparent or ostensible authority.” (App. 19). Greer reasonably believed he was dealing with an agent of NECO in purchasing the grain dryer through Advanced Ag. Greer Aff., ¶ 5. Prior to having any contact with Advanced Ag, Greer was informed by NECO that he could only purchase a grain dryer through a NECO dealer. Greer then learned Advanced Ag was an authorized NECO dealer. Greer Dep. I, 123:16-21; Greer Aff., ¶ 6. Based upon the

statements by NECO, Greer believed that by purchasing the grain dryer through Advanced Ag he was purchasing the grain dryer from NECO. Greer Dep. I, 179:18-180:5. Greer's reliance on NECO's statements was reasonable under the circumstances. The District Court's decision should be reversed.

2. NECO acted consistently with the existence of a principal-agency relationship with Advanced Ag.

[¶42] Actions taken by the purported principal after the date of contract have also been considered by this Court in affirming a finding of agency. See Fleck, 445 N.W.2d at 651-52 (after the customer determined the agent provided the wrong type of seed the customer directly contacted the seed company, which then attempted to negotiate an adjustment with the customer). After Greer entered the Project Contract on December 30, 2011, NECO's actions were consistent with the existence of a principal-agency relationship with Advanced Ag. The District Court incorrectly found "[t]here is no evidence that there were any conversations between Global and Greer regarding Advanced Ag or Chad Peda." (App. 19). Greer contacted Schram in January 2012 to determine whether NECO had received Greer's payment from Advanced Ag for the grain dryer. Greer Dep. I, 132:4-25. Schram also recalled informing other NECO employees about Advanced Ag stealing \$237,075 from Greer. Schram Dep., 64:15-65:22. NECO employees then made attempts to reach representatives of Advanced Ag without success. Id. Over the course of the next several months, Greer had phone calls with representatives of Global/NECO about getting his NECO grain dryer. Greer Dep. I, 139:22-144:22.

[¶43] Global/NECO wanted the benefits of selling products through a dealer network without any of the associated risk or liability—essentially attempting to be isolated from liability when a dealer acts unlawfully. Global required all customers to purchase

NECO products through dealers, but when a customer experienced a problem with a dealer Global wanted nothing to do with the dealer and would not remedy the situation with the customer. Greer Dep. I, 173:18-174:13. Global/NECO should not be rewarded for steering customers to its authorized dealers, then being free from liability when a dealer steals from the customer.

[¶44] NECO's communications to Greer caused him to believe Advanced Ag had authority to act for NECO. NECO then acted as a principal would in trying to help Greer recover his money from Advanced Ag. The District Court therefore erred in granting summary judgment in favor of Global.

3. Advanced Ag's status as a dealer does not defeat the principal-agency relationship.

[¶45] Global will likely argue that because Advanced Ag was a non-exclusive dealer for NECO, it could not be an agent of Global/NECO under North Dakota law. Advanced Ag's non-exclusive dealer status does not defeat the existence of a principal-agency relationship between Advanced Ag and Global/NECO. A principal can have more than one agent.

[¶46] If Global argues that Advanced Ag was a dealer for more than just NECO products, the argument is similarly unavailing. See Foremost Ins. Co. v. Rollohome Corp., 221 N.W.2d 722, 726 (N.D. 1974) (evidence which tended to demonstrate agency authority was that the purported agent was a part-time vendor of the principal's products as well as those of other manufacturers). There is no North Dakota law that supports Advanced Ag's status as a non-exclusive dealer precludes finding that a principal-agency relationship existed.

[¶47] Global will also likely compare the relationship between NECO and its dealers to that of an automobile dealership and manufacturer. The comparison is not analogous because automobile dealerships have an inventory of vehicles available on location. Global's dealers did not maintain any inventory; rather each grain dryer was built specifically when an order was received from a customer. (Doc. #92) (Deposition Transcript of Kenneth Kohrt, 10:22-11:17). Global required Advanced Ag to submit each order directly to NECO when the order was secured from a customer. NECO then manufactured the particular product ordered by the customer. NECO did not operate the same as an automobile manufacturer because it did not manufacture grain dryers *en masse* and then provide the grain dryers to dealers for direct sale to customers. In fact, NECO delivered the grain dryers directly to the end customer, not to the dealer. *Id.* at 28:5-7.

[¶48] Global may also contend the law does not permit an agency relationship to exist between a manufacturer and a dealer. "Agency law generally recognizes a principal's authorization to an agent and the agent's duties to the principal are determined by the parties' agreement and the nature of the fiduciary relationship." Burlington Northern & Sante Fe Ry. Co. v. Burlington Resources Oil & Gas Co., 1999 ND 39, ¶ 21, 590 N.W.2d 433. While no written dealership agreement was produced by Global during discovery, actual agency can be formed by oral communications between the principal and agent. N.D.C.C. § 3-02-06.

[¶49] The President and CEO of Global testified NECO only sold products through its dealers. Fargo Dep., 19:21-20:2. There was no other way for a customer to purchase a NECO product. *Id.* NECO did not have an inventory of products available for immediate purchase—all orders were required to be placed through its dealer before being

manufactured. Global considered all dealers to be “part of the process” in selling NECO products to customers. Importantly, NECO always referred potential customers to dealers for the purchase of NECO products, and Global kept “an eye on the dealers” to ensure proper performance. Schram Dep., 11:9-13; Surdal Dep., 80:23-81:1. The evidence also demonstrates Global was responsible for imposing a requirement upon Advanced Ag to obtain the full purchase price for a product before NECO would begin to manufacture the product. Surdal Dep., 25:14-26:7. Global therefore exercised control over Advanced Ag, which resulted in Greer paying the full amount to Advanced Ag to have his NECO grain dryer placed into production.

[¶50] Global may contend there was no written contract between NECO and Greer for the purchase of the grain dryer. If Global argues that this demonstrates Advanced Ag knew it could not bind NECO to a sale, the argument fails. North Dakota law provides that an agent may act in the agent’s own name if doing so is in the usual course of business. N.D.C.C. § 3-02-05. The evidence demonstrates NECO’s usual course of business was for products to be sold only through dealers. Thus, no contract would exist between NECO and a customer. The District Court erred in finding there were no genuine issues of material fact on the principal-agency determination.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING CERTIFICATION UNDER RULE 54(b)

[¶51] The trial courts are to consider the following factors in assessing a request for certification:

In reviewing 54(b) certifications, other courts have considered the following factors, *inter alia*: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by further developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or

absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. Depending upon the facts of the particular case, all or some of the above factors may bear upon the propriety of the trial court's discretion in certifying a judgment as final under Rule 54(b).

Peterson v. Zerr, 443 N.W.2d 293, 296 (N.D. 1989). The district court's discretion "must be measured against the interests of sound judicial administration." Citizens State Bank-Midwest v. Symington, 2010 ND 56, ¶ 9, 780 N.W.2d 676. The District Court did not abuse its discretion in granting Rule 54(b) certification because this case presents unusual circumstances warranting certification.

1. Relationship between the adjudicated and unadjudicated claims.

[¶52] Greer commenced this action against Global and Advanced Ag. Greer had to serve Advanced Ag through the North Dakota Secretary of State. (Doc. #54). Advanced Ag defaulted so its liability is a certainty. With the dismissal of Global, only the question of the damages suffered by Greer remained. N.D. R. Civ. P. 55(a). With Global's liability being based entirely upon agency principles, Global would be jointly and severally liable for the full amount of damages awarded to Greer against Advanced Ag if the agency were established. Global would not have been able to defend against the damages evidence presented by Greer at trial. Due to its default, neither would Advanced Ag. Because the damages that would have been proven against Advanced Ag would also be attributed to Global if agency existed, this case presented "unusual circumstances" warranting certification.

[¶53] This case does not present joint tortfeasors whereby a jury has to apportion fault to determine the liability of each tortfeasor separately. Here, the liability of the alleged principal and agent is the same if an agency relationship is established.

N.D.C.C. § 3-03-01. “Unless required by or under authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of the principal’s agent in the transaction of the business of the agency, including *wrongful acts committed by the agent in and as a part of the transaction of the business*, and for the *agent’s willful omission to fulfill the obligations of the principal*.” N.D.C.C. § 3-03-09 (emphasis added).

[¶54] “The possibility that a second trial may be avoided is not a sufficient reason for granting a Rule 54(b) certification, absent unusual and compelling circumstances.” Wyatt v. Adams, 551 N.W.2d 775, 777 (N.D. 1996). Unusual and compelling circumstances exist in this case due to allegations of an agency relationship and the default by the alleged agent. Further, Greer should not have been required to present evidence of his damages to a jury (without objection by either party) and obtain a judgment against Advanced Ag, only to face the possibility of having to be required to present evidence of his damages a second time if his appeal is successful. This would unnecessarily result in inconsistent verdicts by the two juries.

[¶55] This case also does not present a situation whereby the remaining defendant, Advanced Ag, has been prejudiced by the decision to certify the judgment. Advanced Ag defaulted and its liability is not contingent on the existence of a principal-agency relationship. See Peterson, 443 N.W.2d at 298. Nor does it present a situation where the “facts ultimately adduced at trial of the remaining defendants could undermine the soundness of the decision on the certified appeal.” Id. The outcome of a trial against Advanced Ag would not alter the arguments made in this appeal nor undermine this Court’s decision.

[¶56] This case presented unusual circumstances warranting Rule 54(b) certification due to the default by Advanced Ag and the vicarious liability of Global if agency is established. It was therefore appropriate for the District Court to certify the judgment for appeal under Rule 54(b)

2. Possibility of need for review being mooted.

[¶57] This case does not present a potential for mootness to be “a just reason for delay.” Tharaldson Ethanol Plant I, LLC v. VEI Global, Inc., 2014 ND 94, ¶ 20, 845 N.W.2d 900. There is no possibility that the unadjudicated claims by Greer against Advanced Ag would render certification inappropriate. Advanced Ag defaulted and cannot dispute liability. This does not present a situation whereby if Greer does not succeed on his claim against Advanced Ag then he cannot succeed on his claim against Global. In other words, there is no contingent liability. The liability of Advanced Ag is certain, and this factor supports the “unusual circumstances” making certification appropriate. There is also little possibility of a settlement with Advanced Ag that could render the appeal moot because Advanced Ag has been dissolved and its former principals cannot be located.

3. Possibility of having to consider the same issues twice.

[¶58] “It is uneconomical for an appellate court to review facts on an appeal following a Rule 54(b) certification that it is likely to be forced to consider again when another appeal is brought after the district court renders its decision on the remaining claims or as to the remaining parties.” Tharaldson Ethanol, 2014 ND 94, ¶ 19. Here, there is no risk that this Court will be forced to consider the same issues on appeal after the remaining claims are decided. The sole issue presented on appeal is whether genuine issues of material fact existed necessitating the jury determine whether Advanced Ag acted as an agent for Global. This issue will not be subject to a second appeal. If it is determined the

District Court did err, then the decision would be reversed and remanded with Global remaining in the case for the jury to determine whether Advanced Ag was the agent of Global. If it is determined the District Court did not err, then the dismissal of Global will be affirmed and Greer is left to prove damages against Advanced Ag. The principal-agency determination does not present a risk for two appeals. Therefore, Rule 54(b) certification is appropriate under this factor. See Peterson, 443 N.W.2d at 298 (“the court should not, as a general matter, direct the entry of a final judgment pursuant to Rule 54(b) if the same or closely related issues remain to be litigated against the undismissed defendants.”).

4. Presence of absence of claim or counterclaim resulting in setoff.

[¶59] This factor favors upholding the certification because no counterclaims were asserted by Advanced Ag or Global against Greer that could result in setoff.

5. Miscellaneous factors.

[¶60] The final factor involves miscellaneous considerations such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. Certification was appropriate under this factor as well.

[¶61] The North Dakota Rules of Civil Procedure are to be “construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” N.D. R. Civ. P. 1. Certification under Rule 54(b) will result in the just, speedy, and inexpensive determination of this action. Upholding the certification will allow Greer to avoid the possibility of having to conduct multiple trials on the same issue—damages. This will surely save him time and expense. It also will not lead to increased expense to Advanced Ag because it has not appeared in this action and is in default. Global would not be faced with two trials and there

is no risk that Global will face an appeal of the summary judgment dismissal more than once.

[¶62] There are also a few economic considerations in this case. Greer is a local farmer whose farming operation has been harmed by Advanced Ag's refusal to provide him with the grain dryer he paid \$237,075 for back in December 2011. For the past several harvest seasons Greer has been without the dryer and forced to incur additional expenses in drying his crop. The loss of \$237,075 has also had a detrimental effect on Greer's financial situation. This has created some economic hardship for Greer.

[¶63] It is also believed that Advanced Ag is insolvent, and a judgment against Advanced Ag would not be collectible. There are judgments against Advanced Ag exceeding \$165,000. See Case No. 09-2012-SC-01038; Case No. 09-2013-CV-00895; Case No. 09-2014-SC-00266; Case No. 09-2014-CV-02527. There are also numerous judgments against the former owner of Advanced Ag, Chad Peda. Chad Peda also pled guilty to felony theft of property in Ransom County Case No. 37-2013-CR-00073 in July 2014. Advanced Ag was also involuntarily dissolved by the North Dakota Secretary of State.

[¶64] The miscellaneous factors favor certification under Rule 54(b). The District Court therefore did not abuse its discretion in granting certification.

VI. CONCLUSION

[¶65] Appellant, Jacob Greer, hereby respectfully asks this Court to reverse and remand the District Court's summary judgment dismissal of the claims asserted against Global Industries, Inc. and Nebraska Engineering Co., a division of Global Industries, Inc.

He also respectfully asks the Court to determine the District Court did not abuse its discretion in granting certification under N.D. R. Civ. P. 54(b).

Dated this 14th day of March, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Respondent in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 7,325.

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No. 20170453

Jacob Greer, d/b/a Greer Farm

Plaintiff-Appellant,

v.

Global Industries, Inc., Nebraska Engineering Co.,
a Division of Global Industries, Inc., Advanced Ag Construction Incorporation,

Defendants-Appellees.

I hereby certify that on March 14, 2018, the following document(s):

BRIEF OF APPELLANT
and
APPENDIX OF APPELLANT

were served by electronic means as follows, to-wit:

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The email address above given is the actual email address of the party intended to be so served. The above documents were sent in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Dated this 14th day of March, 2018.

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