8-16-2011

Michelsen v. Broadway Ford Respondent's Brief Dckt. 38111

IN THE SUPREME COURT OF THE STATE OF IDAHO

TANNER MICKELSEN,

Plaintiff-Appellant,

v.

BROADWAY FORD, INC.,

Defendant-Respondent,

and

US BANK, N.A.; USB LEASING, LT.

Defendants.

Case No. CV-2009-6348

Docket No. 38111-2010

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bonneville

Honorable Joel E. Tingey, District Judge

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1. NATURE OF THE CASE

The plaintiff's/appellant's claim arises from an allegation of misrepresentation (fraud) by defendant/respondent Broadway Ford regarding the warranty associated with Appellant Tanner Mickelsen's lease of a 2008 Ford F-350 truck from Broadway Ford. The truck had a lift kit installed to accommodate the over-sized tires and rims. The tires, rims and lift kit were new, but not manufactured by Ford Motor Company. These non-Ford parts were covered by a supplier's warranty.

Mickelsen leased the truck from Broadway Ford, drove it 26,522 miles and encountered problems with the steering gear box and drag link mechanism. Mickelsen took the truck to Discovery Ford in Moses Lake, Washington, and was told that the repairs were not covered by the manufacturer's warranty. Rather than pay $1,264.65 for the repairs and then dispute the warranty issue with Ford Motor Company or Discovery Ford, Mickelsen abandoned the truck, stopped making lease payments and sued Broadway Ford for misrepresentation concerning the warranty. Discovery Ford purchased the truck at auction after the truck was abandoned and repossessed. Thereafter, Discovery Ford reversed its position and repaired the steering gear box and drag link under the Ford Manufacturer's warranty. Mickelsen never made a claim against Discovery Ford.

The nature of the misrepresentation claimed by Mickelsen has evolved markedly from the filing of Mickelsen's Complaint, to the filing of his Memorandum opposing Broadway Ford's Motion for Summary Judgment, to the most recent filing of his Appellant's Brief. Mickelsen's Amended

Complaint alleged that Broadway Ford had misrepresented the truck to be covered by a "factory warranty" but that the "use of after-market parts . . . voided the factory warranty." R. at 17, 419; *Memorandum Decision,* at p. 4. Mickelsen's Memorandum in Opposition to Defendant's Motion for Summary Judgment alleges:

> [I]f a bumper to bumper warranty is to cover every part of a vehicle, and neither the lift kit or tires that Broadway Ford installed or sold to Tanner were covered by the warranty, then the representation that the truck had a full "bumper to bumper warranty" is false. (R. at 419; *Memorandum Decision,* at p.4).

On appeal, Mickelsen's allegation is that all claims "arise out of a dispute that Appellee, Broadway Ford, installed a 'lift'[sic] kit' on a Ford pickup truck, voiding all or part of the factory bumper-to-bumper warranty." *Appellant's Brief* at p. 3. This is a mis-characterization of the issue in this case.

The true nature of the case is simply whether the truck leased by Mickelsen was fully covered by a warranty at the time it was leased to Mickelsen, and thereafter. The record reflects that, contrary to the belief of Mickelsen, the truck always had in effect both a Ford Motor Company manufacturer's "bumper-to-bumper" warranty, as well as a supplier's warranty covering all non-Ford parts, including the tires, custom wheels and lift kit.

2. STANDARD OF REVIEW

On appeal from an order granting summary judgment, this Court's standard of review is the same as the standard used by the district court in passing upon the motion for summary judgment. *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002). Summary judgment is

appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgement as a matter of law. *Id. citing* I.R.C.P. 56(c); *Badell v. Beeks,* 115 Idaho 101,102, 765 P.2d 126,127 (1988).

The burden of proving the absence of material facts is upon the moving party. *Id. citing Petricevich v. Salmon River Canal Co.,* 92 Idaho 865, 452 P2d 362 (1969). The adverse party, however, "may not rest upon the mere allegations of denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). Therefore, the moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Thomson,* 137 Idaho at. 476, 50 P.3d at 491, *citing Badell,* 115 Idaho at 102, 765 P.2d at 127 (*citing Celotex v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)).

3. COURSE OF PROCEEDINGS

This case was originally brought on October 28, 2009, by plaintiff-appellant, Tanner Mickelsen, against defendant-respondent, Broadway Ford, alleging fraudulent behavior and mutual mistake in reference to a Ford F-350 truck lease. R. at 12; *Complaint,* at p. 3. Thereafter, Broadway Ford moved for a more definite statement. R. at 1. The district court ordered a more definite statement, and on January 13, 2010, Mickelsen filed his Amended Complaint. *Id.* The Amended Complaint

clarified the allegations against Broadway Ford as Fraud in the Inducement, or in the alternative, Mutual Mistake. R. at 15-19.

On February 2, 2010 a Status Conference was held in chambers. R. at 2. As a result of the Status Conference, the a trial was set, with the trial to begin August 24, 2010. *Id.* Pursuant to the dates outlined in the Order and Notice Setting Jury Trial, Broadway Ford moved for Summary Judgment on May 10, 2010. R. at 2. Broadway Ford's Motion for Summary Judgment was supported by the Affidavits of G. Lance Nalder, Mont Crnkovich, and Randy Cate. R. at 2-3. The hearing on the Motion for Summary Judgment was scheduled for June 29, 2010. *Id.*

Mickelsen did not file a response to Broadway Ford's Motion for Summary Judgment until June 10, 2010. *Id.* At that point, it came to light that Mickelsen's attorney, Brian J. Cheney had left the practice of law, and that Bron Rammell, a partner with May, Rammell, and Thompson, Chartered (the firm where Mr. Cheney worked as an Associate) acknowledged that no one with his firm was familiar with Mickelsen's claim. R. at 71; *Affidavit of Bron Rammell,* at p. 2, ¶¶ 2-4. In addition, it was alleged that Mr. Cheney was now a botanist and field agent, rendering communication with Mr. Cheney almost impossible[1]. *Id.* at p. 4, ¶23.

On June 15, 2010, the district court held an expedited hearing on Mr. Rammell's Motion to Continue the Summary Judgment Hearing. R. at 2-3. The motion to continue was granted and Mr.

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[1]Interestingly, although communication was "almost impossible," Mr. Cheney did provide an Affidavit in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment ten days after the Affidavit filed my Mr. Rammell. *See* R. at 119; *Affidavit of Brian J. Cheney,* filed 6/16/2010.

Rammell was given additional time to conduct out of state depositions of Discovery Ford. *See* R. at 4-5. Thereafter, the Motion for Summary Judgment was re-noticed, with the hearing to be held on July 23, 2010. *Id.*

Prior to the hearing, Mickelsen completed depositions of Discovery Ford and its representatives in Moses Lake, Washington. Although several depositions were taken, Mickelsen failed to depose the actual technician who had purportedly determined that the repair of Mickelsen's truck should not be covered under warranty.[2]

Even though the district court granted a continuance to allow time for Mickelsen to complete depositions and discovery, Mickelsen again moved on July 9, 2010 for more time to complete discovery and retain an expert. R. at 5. On July 23, 2010 the court heard oral argument on Mickelsen's Motion for Additional Time to Complete Discovery and Retain Expert, as well as Broadway Ford's Motion for Summary Judgment. R. at 6-7; *Transcript on Hearing on Motion for Summary Judgment, Motion to Strike the Affidavit of Tanner Mickelsen, and Motion in Limine,* July 23, 2010, augmented 5/4/2010. During oral argument Mickelsen's counsel conceded that an additional extension of time was not needed to respond to Broadway Ford's Motion for Summary Judgment. R. at 416; *Memorandum Decision,* at p. 1. Mickelsen has not appealed that decision.

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[2] This failure to depose the technician occurred notwithstanding the fact that the technician was known to Mr. Mickelsen, and disclosed and identified in Mr. Mickelsen's deposition on April 8, 2010. *See Deposition of Tanner Mickelsen,* at pp. 82-83, Ll. 9-25, 1-9.

Based on the pleadings and oral argument (held on July 23, 2010), the District Court issued its Memorandum Decision and Order on August 13, 2010 granting Broadway Ford's Motion for Summary Judgment. R. at 7, 416.

Mickelsen thereafter brought the current appeal.

4. DETAILED STATEMENT OF FACTS

On August 18, 2007 Mickelsen, who resides in Moses Lake, Washington, leased a 2008 Ford F-350 truck from Broadway Ford through U.S. Bank. *Deposition of Tanner Mickelsen.*, at p. 6, Ll. 13-15; p. 13, Ll. 12-15, augmented 5/4/2011.

Mickelsen was in Idaho Falls visiting a friend and went to Broadway Ford because he was interested in the "lifted" trucks. *Id.* at p. 112, Ll. 14-22. Mickelsen test drove the truck, liked it and leased it. *Id.* at pp. 112-113, Ll. 19-25, 1-4. Mickelsen was informed at the time he leased the truck that it had custom wheels, larger than standard tires, and a lift kit, all of which had been installed as new parts by Big O Tire at the request of Broadway Ford. *Id.* at pp. 74-75, Ll. 12-25, 1-17.

At the time of the lease, the truck had 1,496 miles on the odometer and was leased to Mickelsen as a new vehicle with the standard manufacturer's "bumper-to-bumper" warranty and a supplier's warranty covering the lift, tires and rims. R. at 262; *Affidavit of Mont Crnkovich,* at p. 2, ¶¶ 3-5. During the course of the leasing process, Mickelsen inquired of the salesman and the loan officer, verifying that the truck had a "factory" warranty. R. at 162; *Affidavit of Tanner Mickelsen,* at p. 1, ¶¶ 7-15. Both the salesman and loan officer confirmed that the vehicle was new and came with a full warranty. *Id.* Although Mickelsen was not prevented from reading the lease document or its

provisions, he never read or inquired into the specific terms and conditions of the warranty. *Mickelsen depo.,* at p. 115, Ll. 3-12, pp. 58-60, Ll. 24-25, 1-25, 1-2. Broadway Ford never represented to Mickelsen that there was a "dealer warranty" or any other warranty given by Broadway Ford with respect to the vehicle. *Id.* at pp. 73-74, Ll. 19-25, 1-4.

Mickelsen returned to Moses Lake, Washington with the truck. R. at 163; *Mickelsen Affid.*, at p. 3, ¶23. Whenever he experienced problems with the truck he would take the truck to Discovery Ford for repair. *Id.* at ¶¶ 25-26. Specifically, Discovery Ford performed two separate radiator repairs/replacements under warranty (one at 9,545 miles, the other at 15,346 miles). R. at 163; *Mickelsen Affid.*, at p.3, ¶¶ 25-26; R. at 384; *Deposition of Laura Riley,* p. 46, Ll. 9-23.

On September 29, 2008, thirteen months after the initial lease and with 28,017 miles accrued on the odometer, the truck developed steering problems and was taken by Mickelsen to Discovery Ford. *Mickelsen depo.* at p. 21, Ll. 9-23; p. 29, Ll. 1-14; Exhibit #2. According to Mickelson, Discovery Ford refused to repair the truck's steering problem under the Ford Motor Company manufacturer's warranty, asserting (according to Mickelsen) that the "lift" installed on the truck had "voided" the warranty. *Id.* at p.26 Ll.6-12; p.37, Ll.1-7. However, upon further inquiry, Discovery Ford was adamant that the warranty was never voided on Mickelsen's truck. Instead, Discovery Ford asserted that the specific repair of the steering gear box and drag link was being declined because such was not a warrantable repair. *Riley depo.* at p. 15, Ll. 16-20; pp. 69-70, Ll. 18-25, 1; pp. 78-79, Ll. 14-25, 1; pp. 80-81. Ll. 4-6, 20-25, 1-3. This was apparently based on an erroneous perception by

Discovery Ford that the "lift" had caused a malfunction or failure of the steering gear box and drag link mechanism. *Riley depo.,* at pp 63-64, Ll. 6-25, 1-14

Mickelsen was informed by Discovery Ford that the cost of the repair would be $1,264.65. *Mickelsen depo.*, at p. 49, L1. 5-12; Exhibit #4. Although Mickelsen had the financial ability to pay for the repair, he nevertheless declined to pay for the repair himself, and the steering problem was not repaired. *Id.* at pp. 41-42, Ll. 2-25, 1-4. Mickelsen then left for Alaska for a construction job, abandoned the truck and quit paying the monthly lease payments. *Id.* at pp. 77-79, Ll. 23-25, 1-25, 1-10. U.S. Bank repossessed the truck and sold the truck through an auto auction. *Id.* at p. 80, Ll. 4-10. Discovery Ford then purchased the truck at the auction, and then sold the truck to a third party. R. at 267, 279; *Crnkovich Affid.*, at p. 7, ¶ 23; Exhibit "F".

Following repossession and sale, Mickelsen observed the truck being driven around Moses Lake by the new owner/purchaser, and confirmed with the new owner that the truck still had steering problems. *Mickelsen depo.* at pp. 152-153, Ll. 6-25, 1-18. Discovery Ford then made repairs to and replaced the same steering parts and components on the truck for the new owner in November 2009, **under the Ford manufacturer's warranty!** The parts repaired and/or replaced were the same parts that Discovery Ford had refused to repair/replace under warranty when Mickelsen first brought the truck into Discovery Ford for the steering problems over one year earlier on September 29, 2008. R. at 265; *Crnkovich Affid.*, p.5, ¶¶ 15-16. The November 2009 repair was performed and paid for under the Ford Motor Company manufacturer's warranty covering the truck! R. at 382, 391; *Riley depo.* at pp. 39-40 Ll.18-25, 1-14; p. 74, Ll. 9-20; R. at 265; *Crnkovich Affid.*, p.5, ¶¶ 15-16.

Discovery Ford has never explained why the repairs were not made under the warranty for Mickelsen from the outset. R. at 382; *Riley depo.* at p. 40, Ll. 12-14.

Because U.S. Bank was pursuing Mickelsen for the deficiency after repossession, Mickelsen brought suit against Broadway Ford for fraud. R. at 10; R. at 15; R. at 166; *Michelsen Affid.*, at p. 6, ¶ 58. Interestingly, neither in his Complaint nor in his Amended Complaint has Mickelsen sued Ford Motor Company or Discovery Ford, notwithstanding the fact that the truck had a manufacturer's warranty – not a dealer's warranty – and even though it was Discovery Ford that declined to fix Mickelsen's truck under warranty, but subsequently fixed the same parts on the same truck under the same warranty for the same problem after being inspected by the same Discovery Ford technician a year later. *See* R. at 10; R. at 15; *Mickelsen depo.* at pp. 73-74, Ll. 19-25, 1-4; R. at 391; *Riley depo.* at pp. 74-75, Ll. 14-25, 1-15.

III. ATTORNEY FEES ON APPEAL

Respondent Broadway Ford requests attorney fees on appeal on the basis of Idaho Appellate Rule 41, and Idaho Code § 12-120(1) and (3).

Where a statute authorizes the award of attorney fees to the prevailing party, the statute is also applicable on appeal. *Boise Truck and Equipment v. Hafer Logging*, 107 Idaho 824, 693 P.2d 470 (App., 1984). Where an appeal is brought or pursued unreasonably or without foundation, the court may award attorney fees. *Lowrey v. Board of County Commissioners for Ada County,* 115 Idaho 64, 764 P2d 43 (App., 1988).

Respondent's entitlement to an award of attorney fees is predicated in Idaho Code § 12-120 which states, in relevant part:

> Except as provided in subsections (3) and (4) of this action, in any action where the amount pleaded is twenty-five thousand dollars ($25,000) or less, there shall be taxed and allowed to the prevailing part, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees.
> . . . .
> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wars, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxes and collected as costs.
> I.C. §12-120(1) and (3)

The underlying action is on a contract relating to a commercial transaction and without question the amount pleaded in Mickelsen's Amended Complaint is less than $25,000. *See* R. at 17-18; *Amended Complaint*, at p. 3, ¶ 13, p. 4, ¶ 4.

Broadway Ford is the prevailing party below, having obtained a summary judgment by the district court dismissing all of Mickelsen's claims. Mickelsen has failed to present any argument on appeal to demonstrate that summary judgment should not have been granted in favor of Broadway Ford. As will be demonstrated below, summary judgment in favor of Broadway Ford was correctly entered by the district court, and therefore Broadway Ford is entitled to attorney fees on appeal.

IV. ARGUMENT

1. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT REGARDING THE ALLEGED FRAUD. THE COMPONENT PARTS OF THE FORD TRUCK WERE ALWAYS COVERED BY A WARRANTY. THEREFORE SUMMARY JUDGMENT WAS PROPER.

   A. Mickelsen has failed to establish facts to prove all the elements of Fraud in the Inducement.

Mickelsen's Amended Complaint alleges Fraud in the Inducement. R. at 16-17. In Idaho, to prove fraud, there must be evidence of (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of the truth; (5) his intent it be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Aspiazu v. Mortimer,* 139 Idaho 548, 550, 82 P.3d 830 (2003) (citations omitted).

For Mickelsen to prevail, he must prove that Broadway Ford made representations to Mickelsen that were false, and that Mickelsen reasonably relied up on those false representations in entering into the lease agreement for the truck. Mickelsen claims that Broadway Ford falsely represented that the truck was covered by a factory warranty and that the installation of the "lift" voided the factory warranty. R at 16-17. Essentially, Mickelsen asserts that Broadway Ford's claim that the truck had a "bumper-to-bumper" warranty was false because the "lift" installed on the truck somehow voided the warranty. Mr. Mickelsen is in error.

i. Broadway Ford leased Mickelsen a new truck with a full warranty.

Broadway Ford acknowledges that Mickelsen was leased a new truck with an associated "bumper-to-bumper" warranty. R. at 231; *Deposition of Mont Crnkovich* at pp. 29-30, Ll. 22-25, 1-3. In addition, there is no dispute that Broadway Ford did not provide a dealer's warranty. *Mickelsen depo.*, at pp. 73-74, Ll. 19-25, 1-4.

Mickelsen specifically asked the Broadway Ford salesman and the U.S. Bnak loan officer if the factory warranty would be valid anywhere. R. at 162; *Mickelsen Affid.*, at p. 2, ¶¶ 8-10, 14-15. Both

the salesman and the loan officer told him that the warranty would be valid at any authorized Ford dealership. *Id.* As evidenced by the repairs ultimately performed on Mickelsen's truck by Discovery Ford in Moses Lake, Washington, the warranty on Mickelsen's truck was in fact valid and recognized. *See* R. at 163; *Mickelsen Affid.*, at p. 3, ¶¶ 25-26; R. at 384; *Riley depo.*, at p. 46 Ll. 9-23.

At no time has Mickelsen argued or alleged that he inquired into the specific terms and conditions of the warranty. In fact, Mickelsen admitted that he did not even know the terms and conditions of the warranty (because he did not read the warranty information), but knew only that there was a 3 year – 36,000 mile bumper-to-bumper and a 5 year – 60,000 mile power train warranty. *Mickelsen depo.*, at p. 115, Ll. 3-18.

ii. The truck leased by Mickelsen was always covered by a warranty. Mickelsen's assumptions to the contrary are erroneous and not substantiated by the Record.

In an attempt to prove that the representation of a "bumper-to-bumper" warranty was false, Mickelsen claims that he was told in September or early October 2008 by Discovery Ford, not Broadway Ford, that the new vehicle warranty on the truck had been voided because a "lift" kit had been installed. *Id.* at pp. 71-72, Ll. 15-25, 1-2. Discovery Ford did not support that contention when Discovery Ford and its representatives were deposed. R. at 392; *Riley depo.*, at p. 80, Ll. 3-6.

On August 4, 2009, at the request of Mickelsen's counsel the Warranty Administrator at Discovery Ford in Moses Lake, Washington (Laura Riley), drafted a letter stating that because a technician at Discovery Ford determined that the "lift" modified the original vehicle and was the

root cause of the concern, the repair was not covered by the "bumper-to-bumper" warranty. R. at 115. However, during her deposition, Laura Riley clearly stated that the warranty on the truck was not, and never had been voided. R. at 292; *Riley depo.*, at p. 78, Ll. 14-17. According to Ms. Riley, there is a difference between denying a repair under warranty, and voiding a portion or the entirety of the "bumper-to-bumper" warranty. *Id.* at pp. 78-79, L1. 11-25, 1-19. Although Discovery Ford incorrectly denied the repair of the steering gear box and drag link mechanism under warranty, Ms. Riley clarified that the warranty was never voided. Ms. Riley succinctly stated that the "lift did not void the warranty." R. at 292-293, *Riley depo.*, at, pp. 80-81, Ll. 4-25, 1-3.

Regardless of what Mickelsen claims to have been told by Discovery Ford, the "bumper-to-bumper" warranty on the truck was never voided. *Id.* at pp. 80-81, L1. 20-25, 1-3. Discovery Ford's denial of the repair under warranty was because Discovery Ford made an erroneous determination that the damage or wear to the steering gear box and drag link was caused by the "lift." R. at 115; R. at 392; *Riley depo.*, at pp. 80-81, L1. 20-25, 1-3. Mickelsen was thereafter erroneously informed by Discovery Ford that the repair would not be covered under the "bumper-to-bumper" warranty. *Mickelsen depo.*, at p. 36; L1. 1-24. Since Mickelsen never read the terms and conditions of the warranty, he did no know the parameters of the warranty, or the circumstances by which a particular repair may not be covered under the warranty. *Id.*, at 115, L1. 3-18. Nonetheless, there is no evidence that the "lift" caused any damage to or failure of the steering gear box or drag link. To prove his claim, Mickelsen would have to show that the "lift" caused the gear box and drag link

problem. *See Appellant's Brief* at p. 13. In this, Mickelsen has failed entirely – both on appeal, and in the district court. This "causation" issue will be discussed at length in subsection (viii), below.

Simply put, Mickelsen mistakenly thought that the truck's warranty was voided when, in fact, the warranty covering the truck existed at all times and was in full effect from the inception of the lease. The warranty covered the repairs to the steering gear box and drag link. Mickelsen's erroneous belief, based on the unsubstantiated, stray comments made by Discovery Ford (which were later recanted), fail to establish the falsity of any representation pertaining to the warranty covering all component parts of the truck.[3]

That the truck leased by Mickelsen always had a "bumper-to-bumper" warranty is confirmed by the fact that Discovery Ford later repaired and replaced the same parts on the same truck under warranty! R. at 264-265; *Crnkovich Affid.*, pp. 3-4, ¶¶ 14-16. After initially denying the repair, no repair to these parts occurred until Discovery Ford purchased the truck at auction and then performed the repair of the same parts on the same truck (which was in the same "lifted" condition) **under the Ford manufacturer's warranty** for the new owner. *Id.* In addition, the technician who asserted that the "lift" had caused the damage to the steering gear box and drag link components under Mickelsen's ownership, was the same technician who determined that the exact same repair should be processed under the Ford warranty for the new owner. R. at 391; *Riley depo.*, at p. 75, Ll. 5-15.

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[3] It should be noted that Mickelsen is not asserting the failure of the trucks oversized tires, rims, or that the lift components failed. Instead, Mickelsen is asserting (without a whit of proof in the record) that the existence of the lift caused the steering gear box and drag link failure.

Despite Mickelsen's bald and unsupported assertion that the warranty was invalid and the repairs not covered, the record belies such. In fact, the Record supports the position that the truck was always covered by a "bumper-to-bumper" warranty from the inception of the lease, and that the warranty continued in effect even beyond the period after the truck was repossessed from Mickelsen and sold to a third party.

iii. Even if the steering gear box and drag link repairs had been properly denied by Discovery Ford, such would not have provided the requisite "materiality" to sustain a fraud claim.

Mickelsen's attempt to draw a distinction between the definition of materiality under the *common law* and under the Uniform Commercial Code is inapplicable given the fact that the factory warranty covering the truck was never voided. However, for clarity and completeness, the record is clear that the alleged misrepresentation does not rise to the requisite level of materiality.

a. Common Law Materiality

The RESTATEMENT (SECOND) OF TORTS indicates that a representation is "material" if:

(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it. RESTATEMENT (SECOND) OF TORTS § 538(2) (1977).

Mickelsen argues that the representations of Broadway Ford to the effect that the truck was covered by a full factory warranty was material because of his repeated questioning/confirming that the vehicle was "new" and covered by a warranty. *Appellant's Brief,* pp. 16-17. Mickelsen's arguments are circular. He advances only policy arguments and generalities, unsupported by any facts or law. *See Id.,* pp. 17-18, 21.

Mickelsen incorrectly recites the basis for the court's decision on the issue of materiality. Mickelsen wants this tribunal to believe that the district court held:

> (1) that Broadway did not know or have reason to know that Tanner would place such great importance on a factory warranty covering the after-market parts, (2) that the lift kit and tires did not adversely affect the factory warranty, and (3) that the lift kit and tires never required repair themselves. *Id.* at p. 19.

The district court, in fact, made the determination that any representations that the truck had a "bumper-to-bumper" warranty were not material because "all parts *were* covered by a warranty." R. at 424; *Memorandum Decision,* at p. 9 [Emphasis in original]. Mickelsen is attempting to "split hairs" regarding the nomenclature relating to the warranty, even though he admitted having never read or reviewed the specific terms and conditions of the warranty. *Mickelsen depo.*, at p. 115, L1. 3-12. However, the only reasonable inference that can be drawn from the district court's summary judgment decision is that no matter what language is used to describe the warranty (factory warranty, "bumper-to-bumper" warranty, manufacturer's warranty, etc.) the fact is that Mickelsen received a truck of which every component part was covered fully by a warranty; by a factory

warranty (as to the Ford parts) and a supplier's warranty (as to the lift-kit, rims and tires). R. at 424; *Memorandum Decision* at p. 9.

According to the standard enunciated in the RESTATEMENT, a reasonable person would not quibble over the exact name given the warranty, but would be interested only that the vehicle was, in fact, fully covered by a warranty. Had Broadway Ford known of the importance that Mickelsen placed on a "bumper-to-bumper" warranty, it is unreasonable to believe that such importance was critical or fundamental to the transaction, given that 1) all parts of the truck were in fact covered by a warranty, 2) the existence of the tires, rims and lift were fully disclosed to Mickelsen as non-Ford manufactured components, and 3) Mickelsen specifically sought to lease a truck with a "lift". R. at 265; *Crnkovich Affid.*, at p. 5, ¶ 17; *Mickelsen depo.*, at pp. 74-75, L1. 12-25, 1-14; pp 112-113, L1. 19-25, 1-4. Therefore, neither prong of the RESTATEMENT standard has been met, and the court correctly concluded that there were no genuine issues of material fact regarding "materiality" of any alleged misrepresentation.

b. Uniform Commercial Code

Mickelsen also attempts to contrive a genuine issue of material fact regarding materiality by asserting that a "subjective" test should be applied under the UCC. Although Mickelsen correctly states that the issue of revocation of a lease has not been addressed by any appellate court in Idaho (*Appellant's Brief* at p. 24), Mickelsen's "plain meaning" approach falls short of established law.

Mickelsen cites to *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P.2d 816 (1978) as evidence of the Idaho Supreme Court's treatment of nearly identical language found

in the UCC as it relates to revocation of acceptance for the *sale* of goods (holding that revocation of acceptance is possible where a nonconformity impairs the value of the goods to the buyer). *See* Idaho Code § 28-2-608. However, in *Jensen v. Seigel Mobile Homes Group,* 105 Idaho 189, 668 P.2d 65 (1983) the Supreme Court of Idaho clarified the appropriate standard to apply under a UCC analysis to determine if the nonconformity "substantially impairs" the value of goods to the buyer.

Specifically, the Court in *Jensen* clarified that the UCC standard embodies the principle that "one who has used goods for a significant amount of time should not be allowed to force used goods back on the seller unless the defect in the goods is substantial, as opposed to technical." *Id.* at 192, [citations omitted].

The *Jensen* Court continued:

> There appears to be confusion as to the meaning of "substantially impairs" and it has been called a subjective test. It is subjective in that the test is whether the nonconformities substantially impaired the value of the [goods] to the actual buyer and not whether the nonconformities substantially impaired the value of the [goods] to a reasonable person. . . . [However], the court must first determine the purpose for which the [buyer] purchased the [goods] and secondly, determine whether the nonconformities substantially impaired their ability to use the [goods] for the purpose intended. *Id.* at 193.

Even under the allegedly "subjective" test under the UCC, there remains an underpinning that the substantial impairment must affect the ability to use the good for the purpose intended.

Here there was no "nonconformity" relating to the warranty on the truck or its parts. Additionally, Mickelsen leased the truck from Broadway Ford as a "new" vehicle with 1,495 miles on the odometer. R. at 162; *Mickelsen Affid.*, at p. 2, ¶¶ *7-9; Mickelsen depo.*, p. 77, Ll. 17-22. After

Mickelsen used of the truck for 13 months and had driven the truck 26,522 miles (28,017 miles registered on the odometer), Mickelsen presented to Discovery Ford complaining about the steering. R. at 153-164; *Mickelsen Affid.*, at pp. 3-4, ¶¶ 27-30; *Mickelsen depo.*, at p. 106, Ll. 18-24. Mickelsen's mistaken belief that the truck was no longer covered by warranty does not create a "substantial impairment" to the purpose of the lease. *Mickelsen depo.*, at pp.71-72, Ll. 22-25, 1-2. The truck and the particular repair was covered under warranty! R. at 265; *Crnkovich Affid.*, at p. 5, ¶ 16. Hence, no substantial impairment exists or could exist as to Mickelsen. Even after Mickelsen's default and the repossession of the truck, the truck was purchased by Discovery Ford at auction, sold to a subsequent purchaser, driven an additional 1,200 miles by the new owner without the "steering problem" ever being corrected, and then repaired by Discovery Ford under warranty (the truck had 29,274 miles on the odometer when it was ultimately repaired by Discovery Ford under warranty). *Id.*, at pp. 4-5; ¶¶ 14-16; R. at 383; *Riley depo.*, at p. 42, Ll. 10-15; *Mickelsen depo.*, at pp. 152-153 Ll. 6-25, 1-18. Clearly there was not a "substantial impairment" in Mickelsen's ability to use the truck for the purpose intended. The post-repossession "new owner" drove the truck for over 1,000 miles before the repair under warranty was performed.

Under either theory advanced by Mickelsen, any representation made to Mickelsen regarding the existence of a warranty is immaterial. As the district court concluded, "all parts *were* covered by a warranty." R. at 424; *Memorandum Decision*, at p. 9. Even under the UCC standard, the purpose of the lease was not substantially impaired just because Mickelsen was mistakenly told by Discovery Ford that the repair was not covered by the warranty (when in fact it was ultimately

covered and repaired by Discovery Ford under warranty). Consequently, and even if the Court were to somehow find a genuine issue of material fact regarding "the falsity" of a representation by Broadway Ford, any such representation could not have been "material." Mickelsen has not met the requirements for revocation of acceptance under the UCC. Therefore, summary judgment was proper.

iv. The representation made to Mickelsen regarding a "bumper-to-bumper" warranty was not false. Hence, there could be no "knowledge" of the alleged "falsity of the representation."

Mickelsen alleges that "three separate individuals (Rierson, Crnkovich and Cate) at Broadway Ford have now acknowledged that the lift kit and tires were not covered by the warranty as represented." *Appellant's Brief*, at p. 30. Such a statement is unfounded, as evidenced by Mickelsen's failure to cite anywhere in the record to support such a statement.

Again, the only allegation in Mickelsen's Amended Complaint (R. at 15-19) is that Broadway Ford represented that the vehicle being leased was covered by a factory warranty. *Id.* Mickelsen does not allege that Broadway Ford specified the warranty to be soley was a Ford Motor Company manufacturer's warranty covering all component parts.

Prior to Mickelsen executing the lease, it was disclosed to Mikelsen that the tires and lift kit were new, non-Ford parts. *Mickelsen depo.*, at pp. 74-75, Ll. 12-25, 1-14; p. 76, Ll. 5-8. As described at length above, the presence of the non-Ford parts did not void any warranty or warrantable repair. (*See supra*, subsection (i)). Although these non-Ford parts would not have been

covered under the Ford Motor Company manufacturer's warranty, they were all covered by a warranty from the supplier of the parts. R. at 424; *Memorandum Decision*, at p. 9.

Because, as the district court concluded, all parts *were* covered by a warranty, there is no genuine issue of material fact as to whether the speaker had knowledge of the falsity or ignorance of the truth in making the representation. All of Broadway Ford's representations were absolutely true.

v. There is no dispute that Broadway Ford intended to either sell or lease Mickelsen a motor vehicle.

Broadway Ford does not dispute that as a result of the all the conversations and communications held with Mickelsen over the course of the several hours while Mickelsen was present at Broadway Ford, the sale or lease to Mickelsen of a motor vehicle was intended. *See Mickelsen depo.*, at pp. 113-114, L1. 5-25; 1-17.

vi. Mickelsen's perception of the falsity of the representation is the product of misinformation and misrepresentation by Discovery Ford, not the result of any misrepresentation by Broadway Ford.

As discussed at length above, the truck leased by Mickelsen had in effect a valid warranty on all parts from the inception of the lease. (*See supra*, subsection (i)). Though Mickelsen claims to have been told by Discovery Ford that the warranty was voided *(Mickelsen depo.*, at pp. 71-72, L1. 22-25, 1-2), Laura Riley, warranty administrator at Discovery Ford clarified that the "lift did not void the warranty" and the "warranty was never canceled." R. at 392-393; *Riley depo.*, at p. 80, L.

4, p. 81, L. 1. Any perception held by Mickelsen that Broadway Ford falsified or misrepresented the existence of a warranty is not only in error, but the product of misinformation directed to Mickelsen by Discovery Ford. It is Discovery Ford, not Broadway Ford, that must answer for this error. As stated in respondent's Memorandum of Law in Support of Broadway Ford's Motion for Summary Judgment, Mickelson has, quite simply, sued the wrong party. R. at 65.

vii. It is not disputed that Mickelsen relied on, and had the right to rely on, Broadway Ford's representation that the truck had a full warranty.

Broadway Ford does not dispute that Mickelsen relied on, and had the right to rely on, the representation that the truck had a full warranty. In fact, the record includes ample examples to prove the veracity of Broadway Ford's representation of a full warranty, and that Mickelsen repeatedly availed himself of the warranty. R. at 163; *Mickelsen Affid.*, at p.3, ¶¶ 25-26; *Mickelsen depo.*, at pp. 47-48, Ll. 6-25, 1-4; R. at 384 *Riley depo.*, at p. 46, Ll. 9-23. Discovery Ford performed multiple repairs to the truck under warranty and recall notices, ultimately performing the repair of the steering gear box and drag link under warranty. *Id.*; R. at 265; *Crnkovich Affid.*, at p.5, ¶¶ 15-16; R. at 383; *Riley depo.*, at p.42, Ll. 10-15.

Unfortunately for Mickelsen, the misplaced reliance was not on the representation of Broadway Ford as to the existence of the warranty, but on Discovery Ford's misrepresentation to Mickelsen that the truck repair was not covered under warranty.

viii. Mickelsen has not been damaged as a result of any alleged misrepresentation.

Although Mickelsen agrees with the district court's assessment that in order to recover monetary damages, he must prove that he suffered some pecuniary damage *(Appellant's Brief,* at p. 13), the Record demonstrates that Plaintiff did not suffer pecuniary damage or loss, and is unable to causally connect the failure associated with the steering gear and drag link to the non-Ford components.

The root cause of the problem precipitating the steering gear box and drag link failure is worthy of discussion because according to the Ford Motor Company Warranty & Policy Manual:

> In some instances Ford may cancel all or part of a vehicle's warranty due to . . . damage caused by modifications . . . [if the] vehicle has been modified or altered for performance enhancement (for example chips, etc.), resulting in damage to the engine, transmission, or other vehicle components. *Riley depo.*, at Exhibit #3.

Although the denial is discretionary *(See* R. at 367; *Deposition of Randy Cate,* at Exhibit #3), not all modifications will void the New Vehicle Limited Warranty. It was this policy statement that Ms. Riley, in her capacity as warranty administrator at Discovery Ford, apparently relied on when she stated, "if an aftermarket part causes a problem to the vehicle, that can cause – that can affect the warrantability." R. at 377; *Riley depo.*, at p. 20, Ll. 12-15.

Because of this discretionary exception to the warrantability of a repair, the district court stated that Mickelsen must show that the truck's steering and drag link problem was caused by the non-Ford parts (lift kit and tires). R. at 422; *Memorandum Decision,* at p. 7 Without that causation evidence, Mickelsen's bald assertions as to the cause of the failure of the steering box and drag link are, without more, insufficient to preclude summary judgment.

During oral argument at the June 15, 2010 hearing on Mickelsen's Motion to Continue Summary Judgment and Motion for Protective Order, the court identified this specific fact as the crucial issue requiring proof. The court said of deposing Discovery Ford:

> To me that makes sense because as I look at the case, if it turns out Discovery Ford fixed the very same problem under a factory warranty, I don't see how that's not dispositive of the claim asserted by the plaintiff. And that's a very straightforward fact because that's going to trump everything else. . . [W]hat Broadway says about the whole thing is really irrelevant if it turns out that it was repaired under a factory warranty. So I see that being a critical issue. *Hearing on Plaintiff's Motion to Continue Summary Judgment and Motion for Protective Order, June 15, 2010.* at pp. 28-29, Ll. 23-25, 1-7, augmented 5/4/2011.

Despite the district court's straightforward directive regarding the "critical issue" of proof of causation, Mickelsen nevertheless failed to produce any evidence whatsoever at any time to show that the "lift" components or tires caused the damage to the steering gear and drag link. Mickelsen wants this appellate court to believe that Ms. Riley's letter stating that the denial of the repairs was based on the non-Ford parts is some evidence of causation. *Appellant's Brief*, at p. 13. However, the letter is self-impeaching. According to Ms. Riley's deposition testimony, it was clear that Ms. Riley had no personal knowledge the cause of the steering gear box and drag link problems. R. at 377; *Riley depo.*, at pp. 17-18, Ll. 10-25, 1-15; R. at 387; *Riley depo.*, at pp. 57-58, Ll. 23-25, 1-23. Rather, she relied on hearsay information allegedly passed along to her by either the service manager or technician who, coincidentally, were the same individuals who approved the repair under warranty for the new owner in November 2009. *Id.*; *Riley depo.*, at p. 75, Ll. 1-17.

The fact remains that the subsequent actions of Discovery Ford speak louder than any words could, because Discovery Ford did, in fact, repair the same problem, replacing the same parts under the factory warranty. R. at 265; *Crnkovich Affid.*, at p. 5, ¶¶ 15-16; R. at 383; *Riley depo.*, at p. 42, L1. 10-15. The only possible way for this repair to subsequently be completed under warranty would be for Discovery Ford to determine that the steering gear box and drag link problems were not caused by the lift. R. at 265-266; *Crnkovich Affid.*, at pp. 5-6, ¶¶ 17-19. Because the repair was performed under warranty by Discovery Ford, Discovery Ford must have necessarily determined that the steering gear box and drag link failure was not caused by the lift. *Id.*

On the other hand, Broadway Ford did present the expert testimony of Randy Cate, a master mechanic, technician and service manager at Broadway Ford, to refute Mickelsen's unsupported claim that the lift caused or contributed to the steering gear box and drag link failure. First, Mr. Cate discussed that steering and drag link problems are common with this particular Ford F-350 model, with or without a "lift" on the truck. R. at 322; *Affidavit of Randy Cate*, at p. 2, ¶ 6. More specifically, when asked whether a mechanic or technician properly trained could conclude that the lift caused the damages, Mr. Cate answered:

> You can't. If I were to pull that component off and set it on the table with ten certified technicians, they can't tell me that a lift caused that problem or caused excessive wear. . . I am saying they can't say being a reasonable shadow of a doubt what caused the failure. R. at 294-295; *Cate depo.*, at pp. 40-41, Ll. 23-25,1, 13-15.

When re-questioned about the same issue, Mr. Cate affirmed that there was absolutely no way that a technician could tell what caused the wear on these components. R. at 301; *Cate depo.*, at p. 67, L1 7-20. Mr. Cate also stated in his Affidavit:

> It is my opinion, stated to a reasonable degree of certainty as a master mechanic and a person who is intimately familiar with the steering mechanism on Ford trucks, and on the same make, model and year as Mr. Mickelsen's truck, that the "lift" could not have caused any excessive wear and /or failure to the steering gear or drag link on the truck. R. at 322; *Cate Affid.*, at p. 2, ¶5.

Mickelsen provided no contrary affidavit, evidence or expert testimony regarding causation. There is no genuine issue of material fact that the damage to the steering gear box and drag link was not, and could not have been, caused by the lift or any other non-Ford part. As the district court concluded, Mickelsen has failed to connect the steering and drag link problem to the use of the non-Ford parts, and as such, has failed to show any pecuniary damage. *See* R. at 422; *Memorandum Decision,* at p. 7.

Indeed, at the risk of redundancy, Mickelsen did not, and would not be able to present such evidence. The subsequent actions of Discovery Ford in repairing the same problems under warranty "trump everything else," and "what Broadway [said] about the whole thing is really irrelevant [because as it] turns out [the truck] was repaired under a factory warranty." *See Hearing on Plaintiff's Motion to Continue Summary Judgment and Motion for Protective Order, June 15, 2010,* at pp. 28-29, Ll. 23-25, 1-7. There is no dispute that the truck was ultimately repaired under a factory warranty by Discovery Ford. R. at 383; *Riley depo.*, at p. 42, L1. 10-15.

Because Mickelsen failed to prove a causal connection between the steering gear box and drag link failure and the lift, he desperately argues the concept of incidental damages in a last ditch attempt to salvage his claim. However, the claim of incidental damages is misplaced because (1) all alleged incidental damages could have been avoided had Mickelsen paid the $1,264.65 repair – as he was financially able to do (i.e., he failed to mitigate) (*Mickelsen depo.*, at p. 84, L1. 12-20) – and then sought recovery[4]; (2) the contract for the lease specifically disclaimed Mickelsen's right to recover any consequential or incidental damages, *Id.*, at Exhibit #1, p. 16, ¶ 11; and (3) all of the incidental damages alleged by Mickelsen are the result of Discovery Ford's misinformation and wrongful failure to honor the warranty, not the result of on any act, representation, or misrepresentations of Broadway Ford.

Because Mickelsen is unable to prove any actual pecuniary damage or loss, he attempts to now argue on appeal some amorphous form of damage that occurred at the very moment Mickelsen signed the lease agreement. *See Appellant's Brief*, at p. 14. This is a new argument and theory, which has not been advanced before. The only support offered by Mickelsen for such an assertion is a conclusory statement in his Appellant's Brief[5], unsupported by the record. The Idaho Supreme Court has made it clear that "[c]onclusory allegations and assertions of fact contained in the brief

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[4] Mickelsen declined the repairs and ceased making the lease payments as "a matter of principle." *Mickelsen depo.*, p. 42, Ll. 1-4.

[5] Mickelsen alleges "an arms-length transaction occurred at a bargained lease amount of $57,706.61. This figure was based on Broadway's representation of a full factory warranty, which turned out to be a misrepresentation." Appellant's Brief, at p. 14.

without citation to the record are not sufficient to support an argument on appeal." *Woods v. Sanders,* 150 Idaho 53, 244 P.3d 197, 202 (2010). In addition, appellate court review is "limited to the evidence, theories, and arguments that were presented below." *Id., citing Obenchain v. McAlvain Constr., Inc.,* 143 Idaho 56,57, 137 P.3d 443, 444 (2006). Not only did Mickelsen fail to present any evidence to support this theory and claim of damage below, the district court made it clear that Mickelsen "has not offered any evidence that the real value of the Vehicle was less than the price paid." R. at 422; *Memorandum Decision,* at p. 7.

Because Mickelsen failed to connect the damaged steering gear box and drag link to the non-Ford "lift" and tires installed on the truck, there is absolutely no evidence of any pecuniary damage suffered by Mickelsen. There is no genuine issue of material fact as to the element of damages, and therefore summary judgment was proper. The additional argument advanced by Mickelsen, that the loss occurred the moment Mickelsen signed the lease, is not supported by the record and not properly before the Court on appeal. Despite such a claim, as the district court noted, "All parts of the vehicle were covered by a warranty, albeit the lift kit and tires were covered by a supplier warranty rather than factory warranty." *Id.*

Because there are no genuine issues of material fact as to the elements of falsity, materiality, and damages/injury, the district court properly granted summary judgment in favor of Broadway Ford on the allegation of fraud in the inducement.

2. THERE WAS NO MUTUAL MISTAKE AS TO THE EXISTENCE OF A FACTORY WARRANTY ON MICKELSEN'S TRUCK WHEN IT WAS LEASED TO MICKELSEN. ANY MISTAKE WAS ON THE PART OF MICKELSEN ALONE, AND SUMMARY JUDGMENT WAS PROPER.

Mickelsen claims, in the alternative, that he should be able to rescind his agreement with Broadway Ford because of a "mutual mistake" concerning the existence of a valid warranty. *See Appellant's Brief*, at pp. 32-33. However, in Mickelsen's Appellate Brief, Mickelsen fails to advance any argument or authority or to cite to any facts in the record in support of such a claim. Broadway Ford's response has already been addressed in response to Mickelsen's claim of fraud in the inducement. *See* supra, Section A.

As pointed out by the district court, "A mutual mistake occurs when both parties, at the time of contracting, share a misconception regarding a basic assumption or vital fact upon which the bargain is based." *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). "The mistake must be common to both parties, and must be proven by clear and convincing evidence." *O'Connor v. Harger Const., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008).

As has been demonstrated at length, there was no mutual mistake. There was a valid warranty on the vehicle which had not been voided by installation of the lift or any other non-Ford part. Moreover, Broadway Ford was not, at the time of the lease, is not now, nor has it ever been mistaken as to the existence of a "bumper-to-bumper" warranty covering Mickelsen's leased truck. If any mistake was made, such was unilateral and on the part of Mickelsen (or was the result of the mis-information provided by Discovery Ford), but such did not involve Broadway Ford in any way. If

Mickelsen was misled or relied to his detriment on anything, it was the misrepresentation made by Discovery Ford, when its representatives told Mickensen that there was not a valid warranty on his truck or that the repair of the steering box and drag link were not warrantable repairs.

Therefore, the district court properly concluded, and the record establishes , that "Broadway Ford believed that a factory warranty applied to the Vehicle, with the exception of the lift kit and tires to which a supplier warranty applied." R. at 425-426; *Memorandum Decision,* at pp. 10-11. There are no genuine issues of material fact and therefore summary judgment was proper as to Mickelsen's claim of mutual mistake.

3. SUMMARY JUDGMENT IN FAVOR OF BROADWAY FORD IS PROPER EVEN UNDER THE UNIFORM COMMERCIAL CODE REMEDY OF REVOCATION.

As discussed in Subsection (iii)(b), *supra,* summary judgment in favor of Broadway Ford is still proper even when applied to the UCC remedy of revocation. The standard for summary judgment does not change depending on the remedy sought, and is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the non-moving party, demonstrate no material issue of fact such that the moving party is entitled to a judgement as a matter of law. *Thomson v. City of Lewiston,* 137 Idaho 473, 476, 50 P.3d 488, 491 (2002). *citing* I.R.C.P. 56(c); *Badell v. Beeks,* 115 Idaho 101,102, 765 P.2d 126,127 (1988).

Mickelsen's argument is that because the UCC affords a legal remedy, summary judgment is improper. Assuming such were true, the effect of such a ruling would preclude summary judgment

in virtually all litigation in which a UCC remedy is asserted. Such is clearly not the rule, nor the role of summary judgment in our legal proceedings. *See* I.R.C.P. 56(c).

The fact that the UCC may afford Mickelsen a statutory remedy does not preclude the court from entering a summary judgment when there are no genuine issues of material fact. While issues of fact are for the jury to decide, the threshold inquire into whether the evidence is sufficient to create an issue of fact is a question of law for the court. *Sheets v. Argo-West, Inc.*, 104 Idaho 880, 883, 664 P.2d 787, 790 (1983) (discussing the principle on which a directed verdict is grounded; however, the same standard applies to a motion for summary judgment).

In support of his argument, Mickelsen relies only on *Jensen v. Seigel Mobil Homes Group*. *Appellant's Brief*, at p. 34. However, the quote sought to be used by Mickelsen is taken out of context and does not stand for the proposition advanced by Mickelsen. Mickelson uses the holding, and adds his own emphasis, to argue that the Court held "that the trial court erred in failing to adequately instruct *the jury* . . ." *See Appellant's Brief*, at p. 34. However, in *Jensen*, there was no entry of summary judgment. At the trial court level, the case was submitted to the jury to determine the disputed issues. *See Jensen*, 105 Idaho at 191. Therefore, the case is inapplicable in the instant analysis, and does not stand for the proposition advanced by Mickelsen that summary judgment was improper in this case.

4. THE DISTRICT COURT DID NOT ERR OR ABUSE ITS DISCRETION IN REFUSING TO CONSIDER HEARSAY TESTIMONY.

Mickelsen argues as a last resort that the district court abused its discretion in declaring inadmissible certain hearsay testimony. On review, this Court reviews challenges to a trial court's evidentiary rulings under an abuse of discretion standard. *Vreeken v. Lockwood Engineering, B.V.*, 148 Idaho 89, 106, 218 P.3d 1150, 1167 (2009) *citing Parry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 50, 995 P.2d 816, 820 (2000). Error is disregarded unless the ruling is a manifest abuse of the trial court's discretion and affects a substantial right of the party. *Id.* A party's failure to object to action by the trial court precludes a party from challenging that action on appeal. *Woods,* 150 Idaho at 53, *citing Mackowiak v. Harris,* 146 Idaho 864, 866, 204 P.3d 504, 506 (2009).

On July 16, 2010, Broadway Ford filed a Motion to Strike Affidavit of Tanner Mickelsen. *R.* at 6. At no time prior to the Hearing on Broadway Ford's Motion for Summary Judgment did Mickelsen file an Objection to Broadway Ford's Motion to Strike. *See* R. at 6-7. Neither was Broadway Ford's Motion to Strike discussed, challenged or objected to at the Hearing on Broadway Ford's Motion for Summary Judgment. *See transcript of Hearing on Motion for Summary Judgment, Motion to Strike the Affidavit of Tanner Mickelsen, and Motion in Limine,* July 23, 2010, augmented 5/4/2011. Therefore, because Mickelsen never filed or asserted an Objection to the Motion to Strike he is precluded on appeal from challenging the decision of the district court.

Any ruling by the district court as to the admissibility of testimony in deposition or affidavit was clearly not an abuse of discretion. The court correctly stated that "affidavit and deposition testimony

of Plaintiff or others as to what they were told by Discovery Ford personnel is inadmissible hearsay and will not be considered." R. at 420; *Memorandum Decision,* at p. 5. Mickelsen nonetheless argues that the district court was unclear as to what it was deeming inadmissible. However, on its face, the decision clearly defines what is being considered inadmissible as hearsay; namely, the deposition and affidavit testimony reciting what Discovery Ford, (a non-party) told Mickelsen! Under Idaho Rule of Evidence 801, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. I.R.E. 801(c). Mickelsen asserted no exception to the hearsay rule, and advances no such exception on appeal.

It is clear that the district court did not consider any hearsay statement in making its decision on the Motion for Summary Judgment. Because hearsay is inadmissible by rule, the district court did not abuse its discretion in not considering such testimony. Inadmissible hearsay cannot create a genuine issue of fact so as to defeat summary judgment.

V. CONCLUSION

Based on the foregoing, summary judgment was properly entered by the district court in favor of Broadway Ford. There is no genuine issue as to any material fact. Mickelsen chose to sue Broadway Ford, rather than Ford Motor Company or Discovery Ford with respect to the warranty dispute, which Discovery Ford created when it improperly and erroneously refused to repair Mickelsen's truck under warranty. When Mickelsen learned that Discovery Ford had later relied on the same technician at Discovery Ford to authorize the same repairs as had previously been denied

Mickelsen, he could have and should have sought his relief by suing Discovery Ford. The only misunderstanding was unilateral and solely by Mickelsen (as a result of the mis-information provided by Discovery Ford) and not in any way attributable to misrepresentations by Broadway Ford.

That a full warranty on all component parts was in full force and effect at all times with respect to Mickelsen's truck cannot be reasonably disputed. No matter the nomenclature used to define or characterize the warranty, every component part, both Ford and non-Ford, were fully covered by warranty. That Mickelsen's truck was, in fact, covered by the factory warranty for the exact repair which Mickelsen sought is confirmed by Discovery Ford's belated, but post-repossession repair of the same problem through the usual warranty process of Ford Motor Corporation.

Respectfully Submitted this 16 day of August, 2011.

NALDER LAW OFFICE, P.C.

By: _____
G. Lance Nalder, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 16 day of August, 2011, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

BRON RAMMELL, ESQ.
MAY RAMMELL & THOMPSON, CHTD
PO BOX 370
POCATELLO ID 83204-0370

[X] Mail
[ ] Hand Delivery
[ ] Facsimile

NALDER LAW OFFICE, P.C.

By: G. Lance Nalder, Esq.

GLN/lab
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