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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOSEPH A. GERDON,	)	
	)	Supreme Court Docket No.
Plaintiff-Appellant,	)	38419-2011
	)	Jerome County Docket No.
v.	)	2010-572
	)	
JOSHUA R. RYDALCH,	)	
an individual,	)	
	)	
Defendant-Respondent.	)	

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District for Jerome County

Honorable John K. Butler, District Judge, presiding

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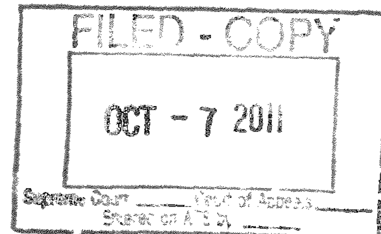

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STATEMENT OF THE CASE

Nature of the Case

Plaintiff believes the statement of the Nature of the Case in the Appellant's Brief is more complete and accurate than that offered in the Respondent's Brief. Beyond that, two particular points require comment.

First, Defendant errs in stating, as though it is an undisputed fact, that "Rydalch swerved to miss deer which were on the road." Respondent's Brief, page 5. That was Mr. Rydalch's deposition testimony. R., pages 245-47. Defendant later correctly concedes (Respondent's Brief, page 10), "the cause of the accident is irrelevant for the purposes of the issues before this Court" and "the focal issue is whether Rydalch was acting in the course of his employment at the time of the accident." That "focal issue" was the only defense raised by the summary judgment motion in the district court and, consequently, the only issue on which Plaintiff properly made a record. Indeed, Mr. Gerdon's deposition has not even been taken at this time. Should the issue of the cause of the accident be reached on remand, Plaintiff expects to show that the accident had nothing to do with deer on the road. For now, and for the purpose of informing this Court of the nature of the case, the proper approach to that issue is simply to summarize the allegations in the parties' pleadings, as was done in the Appellant's Brief.

Second, Defendant states that Rydalch was Gerdon's "co-employee" and that "Gerdon and Rydalch were en route on a work trip." Respondent's Brief, page 5. Gerdon agrees that Rydalch was also an employee of Con Paulos Chevrolet and that the trip was a "work trip" for Gerdon. But the main issue before the Court is whether there are genuine issues of material fact regarding whether in accompanying Gerdon on the trip Rydalch was doing a duty of his employment so as to be in the course of his employment and protected from liability for his negligence pursuant to Idaho Code § 72-209(3) according to the standard stated by the Idaho Supreme Court in *Wilder v. Redd*, 111 Idaho 741, 721 P.2d 1240 (1986), and *Gage v. Express Personnel*, 135 Idaho 250, 253, 16 P.3d 926, 929 (2000).

Course of Proceedings in the District Court

The Respondent's Brief takes issue with a poorly worded sentence in the Appellant's Brief which could be read as stating that Rydalch's motion to strike portions of Mr. Gerdon's affidavit was filed on July 13, 2010, the same date as Rydalch filed his amended motion for summary judgment, but then the Respondent's Brief itself erroneously implies that Gerdon's affidavit was not filed until later. *Compare* sentence at pages 4-5 of Appellant's Brief *with* first full paragraph on page 6 of the Respondent's Brief. Although Plaintiff does not believe this issue has anything to do with the issues on appeal, the correct chronology is that Mr. Gerdon's

affidavit was filed on July 1, 2010, as part of Plaintiff's response to the Defendants' original motion for summary judgment (R., page 207), Defendants' amended motion for summary judgment was filed on July 13, 2010 (R., page 284), Plaintiff's response to the amended motion for summary judgment was filed on August 9, 2010 (R., page 290), and Defendants' motion to strike was filed on August 11, 2010 (R., page 300).

Statement of Facts

Plaintiff stands by the Statement of Facts in the Appellant's Brief, which is an accurate summary of the evidence in the district court regarding the motion for summary judgment. Rydalch, however, offers his own statement of facts "due to several factual inaccuracies" (Respondent's Brief, page 6), but never identifies those inaccuracies. At the same time, however, Rydalch's Statement of Facts in a number of particulars is misleading, omits evidence unfavorable to the defense, and violates the rule that in an appeal from a ruling granting a motion for summary judgment, the record is to be construed in favor of the nonmoving party, and all reasonable inferences are to be drawn in that party's favor. *E.g., Callies v. O'Neal,* 147 Idaho 841, 846, 216 P.3d 130, 135 (2009). The particulars are:

Rydalch, asserts that "Both Gerdon and Rydalch couriered vehicles on behalf of Con Paulos on more than one occasion," citing his own testimony at R., page 247.

Respondent's Brief, page 6. In fact, that testimony claimed only one previous occasion.

The Respondent's Brief states, in the second paragraph on page 7, that "[a]t all material times hereto, Butch Heatwole was the sales manager, in charge of the entire sales department, *(sic)* for Con Paulos and Jerry King was a manager at Con Paulos," "Mr. Heatwole was Mr. King's supervisor," and "Both Mr. Heatwole and Mr. King had a supervisory role over Rydalch," citing Mr. Heatwole's deposition testimony at R., pages 271 and 273. While Mr. Gerdon does not disagree with those statements as far as they go, Rydalch omits Mr. Heatwole's description of his and Mr. King's roles in this transaction, at R., pages 273-74, which is important to the question whether other evidence, especially Mr. King's affidavit, shows there is a genuine issue of material fact as to whether Rydalch went on the trip as a duty that he was employed to perform, or instead simply as a personal favor to Gerdon on Rydalch's day off, as Gerdon stated in his response to Defendants' Interrogatory No. 28. *See*, R., pages 135-36. That description by Mr. Heatwole was as follows:

> "Q. Reflecting upon the transaction between Con Paulos and Mickey Gerdon for the sale of the Acadia that was involved in this accident, were you familiar with the decision not to use a courier service to pick that vehicle up?
> **A. No.**
> Q. Were you involved in the discussions in terms of whether to use or not use the courier service?
> **A. No.**
> Q. Who, if you know, would have made that decision?

A. That would have been the manager on duty. It would have been Jerry King.
Q. And Jerry, I understand, no longer works at Con Paulos?
A. Yes.
Q. What was his role at the time of the accident?
A. He was a manager.
Q. Would he have been in a supervisory capacity over Joseph Gerdon?
A. Yes.
Q. Would you have been in a supervisory capacity over Josh Rydalch?
A. Yes.
Q. Were you consulted at all regarding the sale of the Acadia from Con Paulos Chevrolet to Mickey Gerdon prior to the accident?
A. No.
Q. Were you at a sales meeting the morning of the accident, which was 6/12 of '08?
A. Yes.
Q. Did the transaction involving Mickey Gerdon's Acadia come up during the course of that sales meeting?
A. No. I don't believe it was during the sales meeting. It was already put in place, plane tickets were already bought, the people that were designated to go was already in place, they knew where they were going to go to. So it was already a done deal.
Q. Prior to the meeting that morning, on 6/12 of '08, what involvement, if any, did you have in terms of the details involving picking up the Acadia in Spokane?
A. None. I just knew as soon as Joe and Josh said they were leaving, they had plane tickets, they were ready to go, they were waiting for a check from the office for incidentals and stuff like that. If I'm not mistaken, Joe's mom paid for the airplane tickets in advance out of her own pocket.
Q. Was that something that was normally requested of customers who had vehicles that needed to be transported?
A. No.
Q. Have you any knowledge of Con Paulos requesting customers to pay for the transport of their vehicle in advance of the purchase?
A. No.
Q. Is it fair to say that this was an unusual method that was employed outside of the normal methods used by Con Paulos to retrieve the Acadia from Spokane to Jerome?

A. I don't think it was unusual. What I think is because Mrs. Gerdon wanted her car immediately that these things were escalated, and she wanted the car like right now. So I think that's why she went and paid for the tickets, and she didn't want to wait for us to do it the other way, is my understanding.
Q. All right. Do you know why Con Paulos or the supervisors at Con Paulos had both Joe Gerdon and Josh Rydalch fly to Spokane to retrieve the Acadia?
A. No.
Q. Were you aware that they were going to fly to Spokane on the 12th, pick up the Acadia, and drive all night and return back to Jerome the following day?
A. I didn't know about it until, like I said, everything was already put in place and they were ready to go."
R., pages 273-74 (bolding in original transcript).

A short time later in that deposition, Heatwole expressly denied that he authorized Rydalch to make the trip. R., page 279.

In the third paragraph on page 7 of the Respondent's Brief Defendant asserts "[p]er Con Paulos' payroll records, Rydalch's rate of pay was solely commission-based on June 12 and June 13, 2008" and "[a]t some time after June 13, 2008 and not later than January 8, 2009, Rydalch began receiving a daily guarantee of $77.00 in addition to his commission," citing the Affidavit of Jacki Marzitelli, including its exhibits, that was submitted by Defendants. Ms. Martizelli did make the quoted statements within her affidavit. However, Exhibit G, the "Salesperson's Guarantee" at R., page 183, and the "Retail Team Salesperson's Pay Plan" at R., page 184, both of which were signed by Rydalch on June 2, 2008, and which Martizelli's affidavit identifies, cites, and incorporates, shows he was guaranteed "minimum monthly pay"

of $1,500. Furthermore, although Exhibit J to Martizelli's affidavit, which specifically refers to a guarantee of $77.00 per day, was signed by Rydalch on June 8, 2009, it does not say when that guarantee started. Thus, Martizelli's affidavit, considered in light of its exhibits, does not even unambiguously contradict the testimony of sales manager Heatwole that if Rydalch was considered to be working the day he went on the trip he should have been paid a $77 guarantee for that day, but he had no information Rydalch received that pay. R., pages 199, 202.

Near the beginning of the last paragraph on page 7 of the Respondent's Brief, Rydalch asserts "it is undisputed that Rydalch was the sales person on the deal," citing his own deposition testimony, and further asserts "Jerry King assisted Rydalch by locating the Acadia requested by Mrs. Gerdon," citing an unacknowledged copy of Mr. King's affidavit that is in the record.[1] These assertions are substantially controverted by paragraphs 6 and 12 of Mr. King's affidavit, as follows:

> " . . .
>
> 6. That the day prior to the accident, I was in charge of and did locate the Arcadia *(sic)* that was involved in the accident. I also made the arrangements to purchase the Arcadia *(sic)* for Joe Gerdon's parents.
>
> . . .
>
> 12. Joshua Rydalch was not going to make any money on the sales transaction of the Arcadia *(sic)*.
>
> . . ." R., page 313.

[1] The Respondent's Brief repeatedly cites only the unacknowledged copy of Mr. King's affidavit. The full affidavit, including notarial acknowledgment, is found at R., pages 312-14.

The next part of the same paragraph on page 7 of the Respondent's Brief states "[t]he Acadia Mrs. Gerdon wanted was located in Washington and needed to be transported to Jerome, Idaho for the purchase to close," citing R., pages 135 and 136, and "[o]n or about June 11, 2008, a decision was made by Con Paulos that Con Paulos staff would travel to Washington and drive the Acadia from Washington to Jerome," citing R., pages 243 and 273-74. Regarding the first statement, the Respondent's Brief omits that the same part of the record includes Gerdon's response to Defendants' Interrogatory No. 28 (R., pages 135-36), which stated "[i]t was Defendant Rydalch's day off and as a favor to Plaintiff, Defendant Rydalch agreed to accompany Plaintiff to Spokane to retrieve the vehicle at Plaintiff's mother's expense, to help drive the vehicle back to Jerome." Regarding the second statement, it is unclear who Rydalch means by "Con Paulos" as there is no evidence that Mr. Con Paulos himself was in any way personally involved in this transaction. As noted above, Mr. Heatwole specifically denied any role in such a decision in the very pages of his deposition that Rydalch cites (R., pages 273-74), and Mr. King, who Heatwole identified as the manager in charge of the transaction, expressly denied that he authorized Rydalch to make the trip:

> "...
>
> 7. My instructions were that Joe Gerdon was to go by himself to pick up the Arcadia *(sic)*, 'as a one man show.'

. . .

> 10. I never authorized, nor did Joshua Rydalch have the authority, to accompany Joe Gerdon on the trip to pick up the Arcadia *(sic)*.
>
> 11. I was unaware until after the accident that Joshua Rydalch went with Joe Gerdon on the trip to pick up the Arcadia *(sic)*.
>
> . . .
>
> 13. Joshua Rydalch's accompanying Joe Gerdon on the trip was not only unauthorized by me, but was not in the scope or course of Joshua Rydalch's employment with Con Paulos, Chevrolet, Inc."
>
> Affidavit of Jerry King, at R., page 313.

In the first full paragraph on page 8 of the Respondent's Brief, Rydalch asserts "there exists no evidence that Mr. King specifically informed Rydalch he was forbidden from going on the trip." While that statement is narrowly and literally true, it certainly does not provide the foundation for a conclusion as a matter of law that Rydalch was acting in the course of his employment in light of the statements in Mr. King's affidavit, quoted above.

In the last paragraph on page 8 of the Respondent's Brief, Rydalch asserts ". . . Mr. Heatwole testified that, before the morning of June 12, 2008, the decision and plans were already made by Con Paulos to have Gerdon and Rydalch travel to Washington to procure the Acadia and drive it to Jerome." This description of a decision made by some generic "Con Paulos" as though it is an uncontroverted fact has already been discredited above.

That deficiency in the record supporting the motion for summary judgment underscores the lack of significance of the statement attributed to Mr. Heatwole in the

first full paragraph on page 9 of the Respondent's Brief "that the deal would only get done if [Gerdon] and Defendant Joshua Rydalch retrieved the vehicle." If Mr. Heatwole had already learned that Rydalch was going on the trip, it is natural that he would have made such a statement, just as it would have been natural for Heatwole, if Mr. Gerdon had instead said some other person was going with him, to have then said the car would not be picked up unless Gerdon and that person picked it up. It would not mean as a matter of law that such another person, or Rydalch, was acting in the course of his employment by Con Paulos Chevrolet in going on the trip.

In the first full paragraph on page 10 of the Respondent's Brief, Rydalch discusses how the accident occurred. As already pointed out in this brief in addressing the Nature of the Case, the cause of the accident should not be regarded as undisputed, and it is not relevant at this stage of this case.

At pages 10-12 of the Respondent's Brief Rydalch recites various statements made by or on behalf of Gerdon in discovery responses, particularly that Gerdon received worker's compensation benefits for his injuries, Gerdon was in the course of his employment at the time of the accident, it was a "work trip" for Gerdon, Rydalch accompanied him on the trip, and Rydalch was his "co-worker." Gerdon does not dispute any of this, but as was thoroughly discussed in the Appellant's Brief none of it provides a foundation for the conclusion that, as a matter of law, Rydalch was

performing a duty of his employment and was therefore acting in the course of his employment so as to be immune from tort liability under Idaho Code § 72-209(3).

The question-begging nature of Rydalch's argument (which it primarily is, rather than being a statement of facts) in those pages is underscored by the assertion in footnote 2 and the accompanying text that the statement in a discovery response that "Plaintiff and Rydalch were to pick up a vehicle and drive it back to the Con Paulos dealership" admits of only the inference "that Gerdon and Rydalch were required to courier the Acadia to the dealership." Driving the vehicle to the dealership was certainly the purpose of the trip, but it does not establish that in going on this particular trip and helping to fulfill that purpose Rydalch was performing a duty of his employment any more than any other third person would have been, especially when sales manager Heatwole denied any role in deciding Rydalch would go on the trip, the manager on the transaction King unequivocally and expressly stated that Rydalch was not authorized to go on the trip, and Gerdon stated Rydalch came along only as a personal favor to him.

ARGUMENT

Standard of Review – Summary Judgment Motions

The next point in the Respondent's Brief that merits a reply beyond what is already in the Appellant's Brief is the contention at page 15 that the district court's

inclusion in its statement of the standard for summary judgment of the rules inapplicable to this case that the court may resolve conflicting inferences if it is the fact finder, and "as the trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences" (*see* Appellant's Brief, pages 12-14) does not matter because, as the district court stated in responding to Plaintiff's motion for reconsideration, the district court only applied the rules relevant to jury trials. Respondent's Brief, page 15. Certainly, the district court did not deliberately apply the wrong standard, and Plaintiff does not doubt that the district court believed in good faith that it was applying the correct standard. Nevertheless, for the reasons explained in the Appellant's Brief and in this brief, Plaintiff believes the district court went too far under the standards stated by this Court in not only resolving conflicting inferences, but entirely discounting evidence that shows there are at least issues of material fact on the question whether Rydalch was not simply benefiting Con Paulos Chevrolet but was also performing a duty to Con Paulos Chevrolet in going on this trip, which is what is required in order for the exclusive remedy defense under Idaho Code § 72-209(3) to apply according to the Idaho Supreme Court's holdings in *Wilder v. Redd*, 111 Idaho 741, 721 P.2d 1240 (1986), and *Gage v. Express Personnel*, 135 Idaho 250, 253, 16 P.3d 926, 929 (2000), and which is a question of fact. The irrelevant rules pertaining only to cases in which the court is to be the trier of fact that

the district court included in its statement of the standard for ruling on summary judgment motions indicate the approach that resulted in the district court's error.

Course of Employment Standard

Plaintiff does not disagree with the general black letter rules stated from the bottom of page 15 to the middle of page 17 of the Respondent's Brief, but the brief starts to go adrift with the statement that "whether one was acting in the course of his employment is liberally construed in favor of the employee whose conduct is being evaluated." Defendant fails to acknowledge that as the party attempting to use the exclusive remedy defense to avoid civil tort liability, he has the burden of proof. *See Basin Land Irrigation Company v. Hat Butte Canal Company*, 114 Idaho 121, 123-24, 754 P.2d 434, 436-37 (1988).

Neither is Defendant's case helped by the statement in *Reinstein v. McGregor Land and Livestock Co.*, 126 Idaho 156, 159, 879 P.2d 1089, 1092 (1994), that travel may fall within the course of employment so long as "the service of the employer was at least a concurrent cause of the trip, it need not be a paramount cause of the trip," which he next cites (Respondent's Brief, page 17). Nothing in the holding or discussion in *Reinstein*, or the early precedent it cites, indicates that the requisite service to the employer can consist only of doing something that happens to benefit

the employer as distinguished from performing a duty to the employer in going on the trip.

Similarly, Rydalch's immediately following citations of *Cheung v. Wasatch Electric*, 136 Idaho 895, 42 P.3d 688 (2002), and *Andrews v. Les Bois Masonry. Inc.*, 127 Idaho 65, 896 P.2d 973 (1995), are inapposite. In *Cheung*, the worker held entitled to compensation was traveling between work sites, which clearly was a duty of her employment. In *Andrews*, the denial of worker's compensation benefits was upheld based on the following test, which was also the test applied in *Cheung*:

> "When an employee's work ***requires*** the employee to travel away from the employer's place of business or the employee's normal place of work, the employee will be held to be within the course and scope of employment continuously during the trip, except when a distinct departure for personal business occurs."
> *Andrews*, at 127 Idaho 67, 896 P.2d 975 (emphasis added).

There is at least an issue of material fact in this case whether Rydalch's work for Con Paulos Chevrolet required him to go on this trip with Gerdon. Furthermore, as explained in the discussion below of the *Finholt v. Cresto* decision, the Idaho Supreme Court has specifically not decided that the quoted test from *Andrews* and *Cheung*, also known as the "traveling employee" rule, should be applied outside of the context of worker's compensation claims or to determine tort liability.

Rydalch next cites and quotes *Finholt v. Cresto*, 143 Idaho 894, 155 P.3d 695 (2007) (Respondent's Brief, page 18) for the first of several times in the Respondent's

Brief. *Finholt*, however, underscores why summary judgment should not have been granted in this case. In *Finholt*, an automobile accident victim, Finholt, sued a driver, Albrethsen, and other defendants for her personal injuries, and later added the driver's employer, a lawn service company (Fairway, owned by Cresto), on the respondeat superior theory that Albrethsen was acting in the course of his employment as an estimator for Cresto at the time of the accident. The evidence was that Albrethsen worked a split shift for Cresto, using his own vehicle to travel to potential job sites to prepare estimates during the mornings, was free to spend early afternoons as he chose, and was then required to return to the Cresto office during the late afternoons to perform follow-up telephone calls on the jobs he had estimated during the mornings. Albrethsen testified that at the time of the accident he had finished performing his estimates for the day, which were all in west Boise, and was on his way to meet his girlfriend for lunch in downtown Boise. Cresto moved for summary judgment on the basis that Albrethsen was not in the course and scope of his employment at the time of the accident. The district court initially denied the motion, in large part because a potential inconsistency between Albrethsen's direction of travel and the route he testifed he planned to take downtown allowed an inference that he was actually still working at the time of the collision. In a subsequent second deposition, however, Albrethsen testified he had completed his assignments and the reason for his direction

of travel was that he mistakenly believed the road he was on intersected with the route he planned to take downtown. The district court then granted Cresto's motion for summary judgment, holding there were no genuine issues of material fact.

On Finholt's appeal, the Idaho Supreme Court affirmed the summary judgment for Cresto. The "Discussion" part of its opinion first addressed Finholt's contention that there was sufficient circumstantial evidence to create a genuine issue of fact regarding whether Albrethsen was truly off work at the time of the collision. It summarized her argument on that point as follows:

> "First, Finholt points to Albrethsen's direction of travel (to the north), which she argues demonstrates that Albrethsen was not really on his way to downtown Boise (to the east). Second, she refers to Cresto's testimony that Fairway had customers 'pretty much all over' and while he didn't know whether there were any customers in the Banbury subdivision, he assumed there probably were some. From this, Finholt asserts there is sufficient circumstantial evidence to create an issue of fact about whether Albrethsen has completed his final assignment at the time of the accident, or was on his way to Banbury to do another estimate. Finally, Finholt points out that any books and records in Fairway's possession which might have substantiated Albrethsen's assignment the day of the accident, were lost, destroyed or given to the company that bought Fairway several months after the accident."
> *Finholt*, at 143 Idaho 897, 155 P.3d 698.

The Court rejected Finholt's argument as mere speculation, insufficient to defeat Cresto's motion for summary judgment. *Id.*

In this case, in contrast, Gerdon does not rely on speculation to contend Rydalch's motion for summary judgment should have been denied. The affidavit of

Mr. King, the manager in charge of the transaction, that Rydalch was not authorized to go on the trip and was not in the course of his employment in doing so is unequivocal. The testimony of sales manager Heatwole shows that he was not involved in either that decision or the transaction to sell the Acadia to Gerdon's parents and, at most, he simply knew that Rydalch was going shortly before Gerdon and Rydalch left. Gerdon stated that Rydalch went along simply as a personal favor to him.

The *Finholt* opinion then addressed Ms. Finholt's remaining contentions that, even if Albrethsen was not specifically engaged in a work assignment at the moment of the accident, he was either engaged in a special errand or was a traveling employee. The standard it stated for whether an employee is within the course of employment under the "special errand" rule is that quoted, and partly bolded, in the first paragraph on page 18 of the Respondent's Brief. Immediately following, however, the Court continued its explanation of that rule as follows:

> " . . . The special errand exception is premised on the idea that an employee leaving his normal place of work to perform a special job for an employer is, nevertheless, still performing part of his normal job."
> *Finholt*, at 143 Idaho 898, 155 P.3d 699.

The same evidence discussed above also shows there are genuine issues of material fact regarding whether Rydalch was engaged in performing a special job for his employer. The Idaho Supreme Court has never held that the "special errand" rule

modifies the requirement based on the *Wilder* and *Gage* decisions that to be within the course of employment so as to be immune from negligence liability to a co-worker pursuant to Idaho Code § 72-209(3) an employee must have been performing a duty of his employment.

Finally, the *Finholt* opinion addressed the "traveling employee" rule, quoting the standard from the *Cheung* case that was quoted above in this brief. As already discussed above, there is at least an issue of material fact in this case whether Rydalch's work for Con Paulos Chevrolet required him to go on this trip with Gerdon or whether he did it for personal reasons. The *Finholt* opinion reasoned that the "traveling employee" rule would not trigger Cresto's liability for his travel to a personal engagement in Boise. *Id.* The opinion also noted, however, that "[t]his Court has not applied the traveling employee theory outside the worker's compensation context where it expands employer liability" and it determined it "need not reach the question of whether to apply the traveling employee exception to tort claims." *Id.*

In the same paragraph on page 18 of the Respondent's Brief in which Rydalch cites *Finholt v. Cresto* he also cites *Wilder v. Redd* as "finding defendant acted in course of employment even though he was on personal business, his lunch break, when the accident occurred." Unlike here, however, it was uncontroverted that the

defendant in *Wilder* would not have been driving where the accident occurred – his employer's parking lot – but for performing the duty of coming to work at the employer's facility.

Rydalch next cites holdings that workers were in the course of their employment when using employer-provided transportation to travel to and from work. Respondent's Brief, pages 18-19. That scenario has nothing to do with the facts of this case, nor does it eliminate the requirement that the travel result from performing a duty to the employer.

Rydalch next contends "the extent of an employer's control over an employee is not determinative in deciding whether the employee is acting in the course of his employment," citing *Basin Land Irrigation Company v. Hat Butte Canal Company*, at114 Idaho 125, 754 P.2d 438. Respondent's Brief, page 19. While that proposition does not appear to be one of the holdings in *Basin Land*, Gerdon certainly does not dispute that a worker can be in the course of employment even though the employer does not control the details of how the worker performs his job, or sends him out into the field to work without supervision. That, however, or even the proposition as specifically stated by Rydalch, does not eliminate the requirement that the employee be performing a duty to the employer. The problem in *Basin Land* was determining which of two employers the worker was performing duties for at the time of the

accident and, as already noted in both this brief and the Appellant's Brief, the point in that decision most relevant to this case is that the party attempting to use the exclusive remedy defense to avoid civil tort liability has the burden of proof.

In the same paragraph on page 19 of the Respondent's Brief, Rydalch cites the *Gage* decision for the proposition that "an employee's violation of a company policy at the time of the injury is not sufficient to preclude a finding that the employee was acting within the course of employment." The relevant holding in *Gage* was that the employer's proscription of smoking on the job did not categorically compel denial of worker's compensation benefits to an employee who was smoking at the time of her injury, where this was but a slight deviation from the proper manner of performing the duty to the employer she was found to be engaged in at the time. *See Gage*, at 135 Idaho 254, 16 P.3d 930. That holding does not mean an employee can for personal reasons, and without authorization from the relevant supervisor, decide to accompany another employee on a trip and then claim that, because the trip benefited the employer and another supervisor had become aware he was going, he was as a matter of law in the course of his employment for the purposes of tort liability.

Finally in that paragraph of his Respondent's Brief Rydalch cites *Mortimer v. Riviera Apartments*, 122 Idaho 839, 845, 840 P.2d 383, 389 (1992), for the proposition that "a worker is also acting in the course of his employment where the

act is done 'partly for personal reasons and partly to serve an employer.'" The point of *Mortimer*, however, was that there was evidence to support the Industrial Commission's conclusion that the employee was doing the work that resulted in his injury (measuring a roof) at least partly because he was instructed to do it by his employer. Again, unlike here according to the material evidence that favors Gerdon, the employee in *Mortimer* was performing a duty of his employment as he was instructed.

Whether Rydalch Was Acting in the Course of His Employment

Rydalch's characterization of the standard for determining whether he was in the course of his employment being flawed, his application of that standard to contend he was in the course of his employment as a matter of law is at least equally flawed. Additional points regarding the discussion at pages 20-21 of the Respondent's Brief are as follows.

In the first paragraph on page 20, Rydalch contends transporting vehicles to Con Paulos Chevrolet was one of his duties. As has already been noted above in replying to Rydalch's Statement of Facts, Rydalch actually only testified to having performed such a duty on one other occasion. Even so, the fact it may have been his duty at other times does not mean as a matter of law that it was his duty this time. The best that can be said for this contention by Rydalch is that it is a point for

argument to the jury, in view of the testimony by Heatwole, the affidavit from King, and the statement from Gerdon regarding whether Rydalch was directed, required, or even authorized to go on the trip.

Rydalch begins his next paragraph, at the bottom of page 20 of the Respondent's Brief, with the sentence "[i]n his brief, Gerdon maintains that, **although Rydalch was performing a duty he was employed to perform**, he was not acting in the course of his employment because Jerry King did not authorize Rydalch to courier the Acadia" (bolding added). Gerdon has never maintained that Rydalch was performing a duty he was employed to perform. Indeed, Gerdon's central point is that the evidence does not establish that Rydalch was performing a duty he was employed to perform at the time of the accident.

That paragraph in the Respondent's Brief continues with the nonsensical assertion that the instruction of Mr. King, the manager in charge of the transaction, that Gerdon should make the trip alone does not matter because some generic "Con Paulos" authorized Rydalch to go through awareness he was going and through instructing Gerdon's mother to pay for the airline tickets for the trip. Again, that is at best for Rydalch a point for argument to a jury.

Next, in the same paragraph but on page 21 of the Respondent's Brief, Rydalch asserts that Heatwole's statement that the sale of the Acadia "would only get done" if

Gerdon and Rydalch "retrieved the vehicle" shows that Rydalch was required to assist in the delivery. This assertion has already been fully addressed in replying to Rydalch's Statement of Facts, above, as well as in the Appellant's Brief (at page 22). Again, it is at best for Rydalch a point for argument to a jury.

The same is true regarding the significance, if any, of the next point raised by Rydalch in the same paragraph – the awareness that Heatwole gained that Rydalch was going on the trip, which according to Heatwole's own testimony, as has already been discussed, did not occur until the morning the trip began. That Heatwole did not object after he became aware Rydalch was going does not establish as a matter of law that Rydalch was acting in the course of his employment, particularly considering that Heatwole testified he was not involved in the transaction.

Next, in the same paragraph, Rydalch asserts "[w]ith this knowledge in mind, Mr. Heatwole provided Gerdon and Rydalch permission to take breaks during the travel," citing pages 278-79 of the Clerk's Record. What Heatwole actually testified, at page 274 rather than pages 278-79 of the record, was "I told Mr. Gerdon if they were tired, well, they could pull over and stop or do whatever they had to do to be safe" and this was only after he found out about the trip on the morning of June 12th when Gerdon and Rydalch were about to leave. This does not establish Rydalch was in the course of his employment any more than if Heatwole had made the same

statement upon learning that Gerdon was about to leave accompanied by a friend or relative who had no relationship to Con Paulos Chevrolet.

Finally in that paragraph, at the bottom of page 21 of the Respondent's Brief, Rydalch asserts that "Mr. King's personal feelings about Rydalch's involvement" do not change the fact asserted in the brief that some generic "Con Paulos was aware of and approved of Rydalch's involvement." It is not a matter of "personal feelings." Instead, King, as the manager in charge of the transaction, unequivocally stated that Gerdon was to make the trip alone, he did not authorize Rydalch to go, and Rydalch was not in the course of his employment when he went on the trip. Rydalch has not brought forth a single other Con Paulos executive or employee who contradicts Mr. King's statements in his affidavit.

In summary, perhaps the most revealing and important point to be drawn from the lengthy paragraph at pages 20-21 of the Respondent's Brief is that Rydalch not only has the summary judgment standard backward but also has the burden of proof backward on the issue whether Rydalch was in the course of his employment so as to qualify for the immunity allowed in Idaho Code § 72-209(3).

<u>Rydalch's Reliance on Exceptions to the "Coming-and-Going" Doctrine</u>

Next, from the top of page 22 to the top of page 24 of the Respondent's Brief, Rydalch contends that his "travel falls within the several exceptions to the general

'coming-and-going' doctrine." All of the cases, doctrines, and asserted facts that Rydalch relies upon in this section of his brief were thoroughly discussed in this brief's reply regarding the "Course of Employment" standard, above. Only the second-to-the-last sentence of this part of the Respondent's Brief, beginning at the bottom of page 23, merits additional comment. That sentence asserts: "[a]s delivering the Acadia to Con Paulos involves providing a service to Con Paulos, whether other purposes existed for Rydalch's travel is irrelevant and does not change the fact that Rydalch was acting in the course of his employment at the time of the accident." That sentence probably encapsulates the central fallacy of Rydalch's contentions and the district court's holdings in this case. The Idaho Supreme Court has never held that evidence an employee coincidentally provided a benefit or a service to an employer is sufficient to establish as a matter of law that the employee was within the course of his or her employment so as to qualify for the immunity from tort liability to a co-employee allowed by Idaho Code § 72-209(3). Instead, what is required for immunity is that the tortfeasor be performing a duty of the employment.

The Compensation Factor

Next, at page 24 of the Respondent's Brief, Rydalch addresses the fact Rydalch was not paid for the trip and asserts "whether Rydalch was compensated is irrelevant because Rydalch was, in fact, performing an employment duty on behalf of Con

Paulos when the accident occurred." For all of the reasons already discussed, the premise that Rydalch was performing an employment duty fails. Beyond that, Gerdon certainly does not contend that the fact an employee was not paid conclusively establishes he was not in the course of his employment, but it is a relevant fact for argument to a jury on that question.

At the bottom of page 24, Rydalch again mistakenly asserts it is established that at the time of the accident Rydalch was paid by commission only. That error was addressed in replying to Rydalch's Statement of Facts, above. In connection with that assertion, Rydalch, in footnote 3 at page 24 of the Respondent's Brief, asserts Mr. Heatwole's testimony that Rydalch should have received a daily guarantee if he was considered to be working was "speculative and unfounded." That assertion is mistaken. While Heatwole testified he was not familiar with the payroll records, he did not testify that he, as the sales manager, was unfamiliar with how the sales staff was to be paid.

The Fact Gerdon Was in the Course of His Employment Does Not Necessarily Mean Rydalch Was in the Course of His Employment

At page 25 of the Respondent's Brief Rydalch states "Gerdon's assertion that he was acting in the course of his employment at the time of the work-related accident, but Rydalch was not, defies logic." Actually, Rydalch's statement is the *non sequitur*. There is no dispute that Gerdon was in the course of his employment. It is

established by, among other evidence, the same evidence that most strongly shows at least an issue of material fact as to whether Rydalch was in the course of his employment – Mr. King's affidavit. That affidavit shows unequivocally that Gerdon was instructed to go on the trip as a duty of his employment, just as it unequivocally states that Rydalch was not even authorized to go on the trip. R., pages 312-14. As has already been exhaustively and repeatedly discussed, the fact Rydalch's participation in the trip also provided a benefit to Con Paulos Chevrolet does not establish as a matter of law that he was performing a duty of his employment, as distinguished from simply doing a personal favor for Gerdon as Gerdon stated.

Rydalch's Assertion That He Was an Agent of Con Paulos Chevrolet at the Time of the Accident

Next, Rydalch, at pages 25-26 of the Respondent's Brief, contends that even if he was not acting in the course of his employment, he was still acting as the agent of Con Paulos Chevrolet, so as to protected from civil liability to Gerdon on that separate basis under Idaho Code § 72-209(3). He asserts that, because Gerdon had actual authority from Con Paulos to courier the Acadia, and he requested Rydalch to drive during the trip, "Rydalch was acting as the agent of Con Paulos with either express or implied authority at the time of the accident."

As authority for this agency theory, Rydalch cites the leading Idaho case of *Bailey v. Ness,* 109 Idaho 495, 708 P.2d 900 (1985), but only summarily states the

standards for the existence of agency relationships explained in that decision. A full statement of those standards makes obvious the flaws in Rydalch's agency theory. The *Bailey* decision states them as follows:

> "There are three separate types of agency, any of which are sufficient to bind the principal to a contract entered into by an agent with a third party, and make the principal responsible for the agent's tortious acts, so long as the agent has acted within the course and scope of authority delegated by the principal. The three types of agencies are: express authority, implied authority, and apparent authority. . . .
>
> Both express and implied authority are forms of actual authority. Express authority refers to that authority which the principal has explicitly granted the agent to act in the principal's name. . . . Implied authority refers to that authority 'which is necessary, usual, and proper to accomplish or perform' the express authority delegated to the agent by the principal. . . .
>
> Apparent authority differs from actual authority. It is created when the *principal* 'voluntarily places an agent in such a position that a person of ordinary prudence, conversant with the business usages and the nature of a particular business, is justified in believing that the agent is acting pursuant to existing authority.' . . . Apparent authority cannot be created by the acts and statements of the agent alone. . . . Finally, significant to this appeal, where the existence of an agency relationship is disputed—whether or not there is apparent authority on the agent's part to act as he acted—it is a *question for the trier of fact* to resolve from the evidence.
>
> *Bailey*, at 109 Idaho 497-98, 708 P.2d 902-903 (citations omitted; italics in original).

Applying those standards here, the principal is clearly Con Paulos Chevrolet. With respect to express authority, there is no evidence, and certainly not evidence sufficient to establish as a matter of law, that any manager at Con Paulos Chevrolet expressly gave Gerdon authority to direct or give anyone else permission to drive the Acadia on behalf of Con Paulos. With respect to implied authority, there also is not

evidence to establish as a matter of law that such authority to direct or give anyone else permission to drive was necessary, usual, and proper to accomplish or perform the authority granted to Gerdon. With respect to apparent authority, there also is not evidence to establish as a matter of law that Con Paulos placed Gerdon "in such a position that a person of ordinary prudence, conversant with the business usages and the nature of a particular business, [would have been] justified in believing that [Gerdon was] acting pursuant to existing authority" in asking or allowing Rydalch to drive, especially considering that "apparent authority cannot be created by the acts and statements of the agent alone." At best for Rydalch, these too are questions of fact for argument to a jury.

The Ruling Striking Paragraph 7 From Mr. Gerdon's Affidavit

Rydalch responds at pages 27-29 of the Respondent's Brief to the question whether the district court erred in striking paragraph 7 from Mr. Gerdon's affidavit. Gerdon has no quarrel with any of the rules stated at pages 27-28 of the Respondent's Brief. The issue, rather, is how those rules were applied by the district court in this case. As to that issue, Gerdon does not believe Rydalch has raised any contentions that require reply in addition to what was already stated in the Appellant's Brief and in the preceding parts of this brief, except for the following points.

First, Rydalch's description at page 28 of his brief of what parts of paragraph 7 were stricken from is correct.[2] This means the language in paragraph 7 reading "[t]hat because Defendant Joshua Rydalch was on Affiant's team" was not stricken. That very language, however, provides the foundation of personal knowledge for the rest of paragraph 7, which is a reason why the district court erred in ruling that the stricken parts were conclusory.

Second, Rydalch discusses the day at issue as June 13, 2008, and bases part of his argument on other events that were scheduled for later that day. Respondent's Brief, page 29. The day off was actually June 12, 2008, the date the trip began. *See* Gerdon's response to Defendants' Interrogatory No. 28. R., pages 135-36. The accident happened at 3:49 a.m. on June 13, 2008. *See* R., page 245. Candidly, Plaintiff has contributed to this confusion in that the paragraph 7 refers to the day off as being the "day of the accident."

<u>Rydalch is Not Entitled to Attorney Fees on Appeal</u>

At page 30 of his Respondent's Brief, Rydalch contends he should be awarded attorney fees on appeal because "Gerdon's appeal is frivolous and is neither warranted by nor well-grounded in the existing facts or law." As the extensive and substantial

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[2] In this section of his brief, however, as well as in his Statement of Facts, Rydalch cites only an incomplete copy of Gerdon's affidavit that somehow got into the Clerk's Record at R., pages 207-08. The complete affidavit is found at R., pages 214-16.

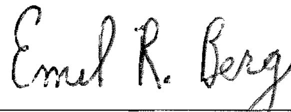
discussions of facts and law in this brief and the Appellant's Brief show, that is clearly not the case. It is fair to wonder if Rydalch's claim for attorney fees is primarily a stratagem to distract attention from the weakness of his own arguments with respect to whether the summary judgment should be affirmed. Indeed, if any one argument presented in this case is frivolous it is Rydalch's claim for attorney fees.

CONCLUSION

The summary judgment that the district court granted in favor of Defendant Joshua Rydalch should be reversed and this case should be remanded for trial.

Dated, October 7, 2011.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of October, 2011, I caused to be served two true and correct copies of the foregoing document by the method indicated below, and addressed to the following:

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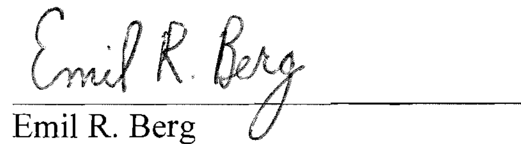

Emil R. Berg