9-15-2011

Gerdon v. Rydalch Respondent's Brief Dckt. 38419

THE SUPREME COURT FOR THE STATE OF IDAHO

JOSEPH A. GERDON,

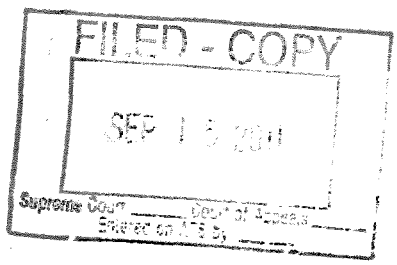
Plaintiff-Appellant,

vs.

JOSHUA R. RYDALCH,

Defendant-Respondent.

Supreme Court No. 38419



RESPONDENT'S 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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I. STATEMENT OF CASE

A. Nature of Case

This case arises from a motor vehicle accident. At the time of the accident, Gerdon was asleep while his co-employee, Rydalch, was driving a vehicle owned by their joint employer, Con Paulos Chevrolet, Inc. Rydalch swerved to miss deer which were on the road and inadvertently hit the edge of the road and was pulled down an embankment. At the time of the accident, Gerdon and Rydalch were en route on a work trip wherein they traveled by plane from Idaho to Washington to pick up their employer's vehicle and drive it to their employer's place of business in Jerome, Idaho. Both Gerdon and Rydalch were injured during the accident and both received worker's compensation benefits as a result of the accident.

On summary judgment, the district court found that both Gerdon and Rydalch were acting in the course of their employment at the time of the accident. As such, the district court ruled that the exclusive remedy rule and co-employee doctrine barred Gerdon's claims against both Con Paulos Chevrolet, Inc. and Rydalch. Gerdon now appeals the trial court's ruling with regard to its claims against Rydalch. Gerdon's appeal should be denied because the district court's ruling was proper.

B. Procedural Background

Rydalch does not generally disagree with Gerdon's recitation of the procedural posture of the current action. However, Rydalch will note that the July 13, 2010 amended motion for summary judgment was filed to supplement the factual record; Rydalch did not file an additional memorandum in support. Notably, Gerdon did not object to Rydalch's amended motion or the

affidavit filed in support thereto. The amended motion for summary judgment was filed more than twenty-eight (28) days before the rescheduled hearing date and, therefore, complied with the Idaho Rules of Civil Procedure. Gerdon was thereafter provided sufficient time to and did, in fact, file an opposition to the amended motion for summary judgment.

Rydalch will note Gerdon inaccurately stated that Rydalch filed its motion to strike on July 13, 2010 before Gerdon responded to the amended summary judgment motion. Contrary to this statement, Rydalch did not move to strike portions of Mr. Gerdon's affidavit until August 11, 2010, which was after Gerdon filed his August 9, 2010 opposition to the amended motion for summary judgment.

C. Statement of Facts

Due to several factual inaccuracies, Rydalch will set forth his own statement of the facts which are undisputed for the purposes of Rydalch's amended summary judgment motion, which is the focus of this appeal.

1. Background Facts

At all times material hereto, Gerdon and Rydalch both worked for Con Paulos Chevrolet, Inc. ("Con Paulos") as sales people. R. 127, 208, 238. Con Paulos is located in Jerome, Idaho. R. 126. Included in Gerdon and Rydalch's job duties were facilitating the sale of vehicles and "from time to time" couriering vehicles to Con Paulos' dealership to facilitate a sale. R. 279. Both Gerdon and Rydalch couriered vehicles on behalf of Con Paulos on more than one occasion. R. 247.

At all material times hereto, Gerdon was Rydalch's team leader. R. 207. The team leaders, including Gerdon, had a certain degree of supervision over the members on their teams. R 272.

At all material times hereto, Butch Heatwole was the sales manager, in charge of the entire sales department, for Con Paulos and Jerry King was a manager at Con Paulos. R. 271. Mr. Heatwole was Mr. King's supervisor. Both Mr. Heatwole and Mr. King had a supervisory role over Rydalch. R. 273.

Rydalch began working for Con Paulos in March 2008. R. 180. Per Con Paulos' payroll records, Rydalch's rate of pay was solely commission-based on June 12 and June 13, 2008. R. 180, 183, 184, 185, 186. At 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. R. 180, 181, 185, 187.

Prior to June 11, 2008, Rydalch met with Mickey Gerdon on several occasions to discuss and facilitate her purchase of a GMC Acadia. R. 247-248. In fact, it is undisputed that Rydalch was the sales person on the deal. R. 242. Jerry King assisted Rydalch by locating the Acadia requested by Mrs. Gerdon. R. 288. The Acadia Mrs. Gerdon wanted was located in Washington and needed to be transported to Jerome, Idaho for the purchase to close. R. 135, 136. On 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. R. 243, 273-274. At first, Con Paulos considered having Gerdon and Rydalch drive a rental vehicle to Washington and, upon arrival, one of them would drive the Acadia and the other would drive the rental vehicle to

Jerome. R. 243. For cost reasons, the travel arrangements were reconsidered and a decision was made for the travel to Washington to be by airplane. R. 243.

On or about June 11, 2008, Jerry King instructed Gerdon to travel to Washington to pick up the Acadia. R. 288. Although Mr. King testified that he did not authorize Rydalch to accompany Gerdon, there exists no evidence that Mr. King specifically informed Rydalch he was forbidden from going on the trip. *See generally* R. 237-269, 287-288. Instead, it appears Mr. King only spoke with Gerdon regarding his authorization for the trip. R. 288. Additionally, even though Mr. King may not have personally authorized Rydalch's involvement in the trip, on June 11, 2008, Con Paulos directed Mrs. Gerdon to purchase plane flights for both Gerdon and Rydalch. R. 191-192. Mrs. Gerdon made this purchase on June 11, 2008. R. 206. Travel was thereafter scheduled to begin on June 12, 2008. R. 287-288.

Both Gerdon and Rydalch began work on June 12, 2008. R. 242. They were required to and did attend a sales meeting with Mr. Heatwole and other sales staff at 8:30 a.m. R. 244, 255, 273. While the Acadia purchase and the travel were not discussed during the sales meeting, 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. R. 273-274. Additionally, Mr. Heatwole was aware on the morning of June 12, 2008 that Gerdon and Rydalch would leave Con Paulos' dealership after the morning sales meeting for such travel. R. 273-274. Mr. Heatwole was also aware that Gerdon and Rydalch were expected to travel during the night of June 12, 2008 and early morning of June 13, 2008 without sleep so that the Acadia would be delivered to Con Paulos on the morning of June

13, 2008. R. 274. Mr. Heatwole explained that he did not authorize nor forbid the travel arrangements. R. 273, 274, 278-279. Instead, he directed Gerdon that, "if they [meaning Gerdon and Rydalch] became too tired, they could pull over and stop or do whatever they had to do to be safe." R. 278-279. Mr. Heatwole further testified Gerdon and Rydalch were expected to report to work on June 13, 2008 and also attend the morning sales meeting on June 13, 2008 unless there was "risk to them to get back" in time for the meeting. R. 274.

At some time on or before June 12, 2008, Mr. Heatwole informed Gerdon "that the deal **would only get done** if [Gerdon] and Defendant Joshua Rydalch retrieved the vehicle." R. 208 (emphasis added).

After the June 12, 2008 sales meeting, Gerdon and Rydalch waited for a check from Con Paulos to purchase the Acadia. R. 208, 244, 256-257. After receiving the check, they traveled to the airport located in Boise, Idaho. R. 244, 256-257. They missed their original flight and took a rescheduled flight to Spokane, Washington.[1] R. 244, 256-257. Once in Spokane, they traveled to Elite Motors and purchased the Acadia on behalf of Con Paulos. R. 244.

While Jerry King testified that he only authorized Gerdon to travel via a specific route utilizing the interstate highways, per Gerdon's instruction, Gerdon and Rydalch traveled via a different route utilizing Idaho state roads. R. 245, 288. Although not authorized by Mr. King to do so, Gerdon and Rydalch stopped at a casino during their return trip to Jerome, Idaho. R. 244,

[1] It appears the tickets for the rescheduled flight were also purchased by Mrs. Gerdon. R. 206.

288. Upon leaving the casino, at Gerdon's instruction, Rydalch drove the Acadia. R. 109, 244-245. While Rydalch drove, Gerdon slept. R. 109, 245.

At approximately 3:49 a.m., with Rydalch driving and negotiating a curve, the Acadia veered off the road into an embankment and collided with a fence. R. 260. Rydalch testified that the accident occurred because deer were in the road. R. 245-246. Gerdon has no personal knowledge regarding how the accident occurred as he was asleep immediately prior to the accident. R. 109, 245. Even without personal knowledge, Gerdon argues that Rydalch fell asleep while driving. *See* Appellant's Brief, p. 9. Regardless, the cause of the accident is irrelevant for the purposes of the issues before this Court. Instead, the focal issue is whether Rydalch was acting in the course of his employment or agency at the time of the accident.

Importantly, Gerdon maintains he was in the course of his employment while asleep at the time of the accident, but incorrectly alleges Rydalch, who was driving the vehicle on behalf of Con Paulos, was not acting in the course of his employment.

2. Gerdon's Discovery Responses

In response to discovery requests served upon him, Gerdon admitted the following facts:

- Gerdon filed a worker's compensation disability claim for a work-related loss as a result of the June 13, 2008 accident at issue herein. R. 92-93, 101-102.
- The injuries and medical expenses at issue in his worker's compensation complaint are the same as the injuries and medical expenses at issue in the current action. R. 92-93, 101-102.

- Gerdon received worker's compensation benefits for the injuries he sustained as a result of the June 13, 2008 accident at issue herein. R. 93-94.
- The "June 13, 2008 accident was a work related injury." R. 108.
- "On June 13, 2008, the Plaintiff Joe Gerdon flew to Spokane on behalf of Con Paulos, to pick up a vehicle and to transport that vehicle back to Con Paulos in Jerome, Idaho." R. 108.
- Gerdon was "on the job working for Con Paulos" at the time of the accident at issue herein. R. 108.
- Gerdon was acting within the course and scope of his employment with Con Paulos at the time of the accident. R. 109.
- Gerdon "was asleep in the vehicle when the accident occurred on June 13, 2008". R. 109.
- Gerdon allowed Rydalch to drive the Acadia "during the work trip to retrieve and transport the vehicle from Washington to Jerome, Idaho." R. 109.
- Mrs. Gerdon was reimbursed for the plane tickets she purchased for Gerdon and Rydalch. R. 109.

Gerdon further stated that Rydalch was driving the vehicle at the time of the accident. R. 119.

In his answers to Interrogatories propounded by Rydalch, Gerdon provided statements as to his duties and the duties of Rydalch. Specifically, when asked to provide his version of how the accident occurred, the Plaintiff stated:

> Plaintiff recalls flying to Spokane Washington with Defendant Rydalch. **Plaintiff and Rydalch were to pick up a vehicle and drive it back to the Con Paulos dealership.**[2] On the drive back ... Plaintiff was a passenger and the accident occurred at that time.

R. 118-119 (emphasis added). Gerdon also stated that Rydalch accompanied him "to Spokane to retrieve the vehicle...to help drive the vehicle back to Jerome." R. 135-136. Finally, Gerdon provided the following:

> Plaintiff and Defendant Rydalch were at Defendant Con Paulos' dealership on the morning of June 12, 2008, during the morning sales meeting, to pick up the check for the vehicle.
>
> Plaintiff and Defendant Rydalch then traveled to Boise to catch a plane to Spokane, WA, where the vehicle was located, picking up the vehicle around 6:30 – 7:00 p.m. PST, June 12, 2008. Plaintiff and Defendant Rydalch then traveled from Spokane, WA back toward Jerome stopping several times...

R. 136.

> Gerdon's *Workers' Compensation Complaint* alleges:
>
> On June 13, 2008, Claimant was a passenger in a vehicle, which was driven by a **co-worker**. Claimant and his **co-worker** were traveling from Spokane back to Jerome when Claimant's **co-worker** fell asleep, drove off an embankment and wrecked the vehicle, just north of Weiser, Idaho. Claimant suffered serious injuries as a result of the auto accident.

R. 87 (emphasis added).

II. ADDITIONAL ISSUES ON APPEAL

3. Whether the Exclusive Remedy Rule Bars Gerdon's Civil Liability Claims Because Rydalch was an Agent of Con Paulos at the time of the accident.

4. Whether Rydalch is entitled to Attorney Fees and Costs on Appeal Pursuant to I.A.R. 11.1 and I.C. § 12-121 due to the Frivolous Nature of the Appeal.

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[2] The only reasonable inference which can be drawn from this statement is that Gerdon and Rydalch were required to courier the Acadia to the dealership.

III. ARGUMENT

A. The Trial Court Properly Granted Summary Judgment in Favor of Rydalch.

In his brief, Gerdon argued that the trial court improperly granted summary judgment in favor of Rydalch because he alleges genuine issues of material fact exist regarding whether Rydalch was acting in the course of his employment at the time of the accident. As explained in further detail below, Gerdon's assertion is misplaced.

1. Standard of Review for Summary Judgment Motions

The Idaho Supreme Court employs the same standard as the lower courts when determining whether a ruling of summary judgment was appropriate. *See e.g. Montgomery v. Montgomery*, 147 Idaho 1, 5, 205 P.3d 650, 654 (2009). Specifically, the Idaho Supreme Court will find summary judgment proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See e.g.* Idaho R. Civ. P. 56(c). The Court will "construe disputed facts and draw all reasonable inferences in favor of the non-moving party." *See e.g. Montgomery*, 147 Idaho at 5. The nonmoving party, however, "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or . . . otherwise . . . , must set forth specific facts showing that there is a genuine issue for trial." Idaho R. Civ. P. 56(e). "A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact...The nonmoving party must submit more than conclusory assertions that an issue of material fact exists to withstand summary judgment." *See e.g. Mendenhall v. Aldous*, 146 Idaho 434, 436, 196 P.3d 352, 354 (2008).

If the moving party challenges an element of the non-moving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the non-moving party to establish a genuine issue of material fact regarding the element or elements challenged by the moving party's motion. *Thompson v. City of Idaho Falls*, 126 Idaho 587 (Ct. App. 1994); *Badell v. Beeks*, 115 Idaho 101, 102 (1988). Summary judgment is properly granted in favor of the moving party, when the non-moving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Thompson*, 126 Idaho 587; *Badell*, 115 Idaho at 102.

"If a reasonable person could reach different conclusions or draw conflicting inferences from the evidence, a motion for summary judgment must be denied." *Great Plains Equip. v. Northwest Pipeline Corp.*, 132 Idaho 754, 773-774 (1999). "However, if the evidence reveals no disputed issues of material fact, what remains is a question of law on which the Court should rule." *See e.g. id.; Grover v. Wadsworth*, 147 Idaho 60, 205 P.3d 1196, 1199 (2009).

In the current action, the trial court correctly found that no genuine issues of material facts existed as to whether Rydalch was in the course of his employment at the time of the accident. As such, the trial court's grant of summary judgment in favor of Rydalch and its dismissal of Gerdon's claims were appropriate. *See e.g.* Idaho R. Civ. P. 56(c).

2. No Genuine Issue of Material Fact Exists Regarding Whether Rydalch was in the Course of His Employment at the Time of the Accident.

In his Appellant's Brief, Gerdon sets forth the same arguments as he did in his motion for reconsideration. First, Gerdon incorrectly argues that the district court misapplied the summary

judgment standard because it provided a complete recitation of the standard. Specifically, Gerdon points out that the district court included language regarding the effect a bench trial has on the standard. Gerdon argues this language is inapplicable to the current case. Rydalch does not disagree with this statement. Neither did the district court in this action. Importantly, contrary to Gerdon's assertion, the district court did not utilize that portion of the standard when determining summary judgment. *See generally* R. 350-359. Instead, as explained in the Memorandum Decision on Plaintiff's Motion for Reconsideration, the judge applied the portion of the standard relevant to jury trials. R. 411. In doing so, the court correctly found conflicting inferences could not be drawn from the factual record of the case and no reasonable jury could find in favor of Gerdon. R. 411.

Next, Gerdon contends the trial court erred in finding the non-existence of a genuine issue of material fact regarding whether Rydalch was acting in the course of his employment. As explained in further detail below, Gerdon's assertion is misplaced.

a. Course of Employment Standard.

Idaho's worker's compensation law provides benefits for workers who suffer injuries arising out of and in the course of employment. *See e.g.* I.C. § 72-201 et. seq.; *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7 (2005). To effectuate relief, "the worker's compensation act is...construed liberally in favor of worker's compensation coverage of claimants." *Hansen v. Estate of Harvey*, 119 Idaho 333, 338 (1991). While granting "sure and certain" relief to injured workers, Idaho's worker's compensation law, at the same time, limits the liability of employers by making employers immune from other civil causes of action. *See e.g. Robison v. Bateman-*

Hall, Inc., 139 Idaho 207, 209, 76 P.3d 951, 953 (2003); *see also* I.C. § 72-209(1). Specifically, I.C. § 72-209(1) provides that an employee's remedies under the worker's compensation statutes are exclusive; meaning an employee who receives worker's compensation cannot also assert a claim for tort liability against his employer. *See also DeMoss v. Coeur d'Alene*, 118 Idaho 176, 178 (1990).

The aforementioned tort immunity extends to the plaintiff's co-workers and to agents of the plaintiff's employer. *See* I.C. § 72-209(3). Idaho Code section 72-209(3) specifically reads: "The exemption from liability given an employer by this section shall also extend to the employer's surety and to all officers, agents, servants and employees of the employer or surety..."

In explaining the scope of the extension of the employer's immunity, the Idaho Supreme Court has stated:

> ...the Idaho legislature expressly extended an exemption from liability to "all officers, *agents*, servants, *and employees* of the employer or surety"...We believe it is significant that in adopting I.C. § 72-209, the legislature has expressly extended the immunity both to employees, as well as agents of the employer, referring to them separately. Since throughout the Workmen's Compensation Act the relevant criteria for deciding "employee" status has been the "course of employment" test set forth in I.C. § 72-102(14)(a), it is clear that this same standard is to be used to determine "employee" status for purposes of determining co-employee immunity.

Wilder v. Redd, 111 Idaho 141, 143, 721 P.2d 1240, 1242 (1986) (citations omitted; italics and ellipses in original).

In applying the above-referenced course of employment test, the Idaho Supreme Court has explained that co-employee status will exist where there exists only "some connection between the defendant's acts and his employment". *See id.* at 144. An employee will be acting within the course of his employment "if the worker is doing the duty that the worker is employed to perform". *Gage v. Express Personnel*, 135 Idaho 250, 253, 16 P.3d 926, 929 (2000). While a determination of whether one was acting within his course of employment is generally a question of fact, "[w]here there is no dispute in the evidence and it is not reasonably susceptible of more than one inference, the question of whether an accident to a workman arose out of and in the course of employment is a conclusion of law..." *Id.* (quoting *Colson v. Steele*, 73 Idaho 348, 351, 252 P.2d 1049, 1050 (1953)).

A determination regarding whether one was acting in the course of his employment is liberally construed in favor of the employee whose conduct is being evaluated. *See e.g. Hansen*, 119 Idaho at 338. In this light, the Idaho Supreme Court has recognized that travel may constitute a business trip, falling 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" *Reinstein v. McGregor Land & Livestock Co.*, 126 Idaho 156, 159 (1994) (emphasis added). As otherwise stated, "[i]f the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own." *Id.* (quoting *In re Christie*, 59 Idaho 58, 75 (1938)); *see also Cheung v. Wasatch Electric*, 136 Idaho 895, 898 (2002) (holding that an employee traveling between different job sites was a traveling employee within the course of her employment). This is true even where the employee is not

reimbursed for travel expenses. *See Andrews v. Les Boise Masonry*, 127 Idaho 65, 67, 896 P.2d 973, 975 (1995).

The Idaho Supreme Court has also recognized that an employee is within the course and scope of employment when, "although not at his regular place of employment, even before or after customary working hours, **[he] is doing**, is on his way home from performing, or on the way from his home to perform, **some special service or errand or the discharge of some duty incidental to the nature of his employment in the interest of, or under the direction of, his employer**." *Finholt v. Cresto*, 143 Idaho 894, 898 (2007) (quoting *Bocock v. State Bd. of Educ.*, 55 Idaho 18, 22, 37 P.2d 232 (1934)) (emphasis added); *see also Trapp v. Sagle Volunteer Fire Dep't,* 122 Idaho 655 (1992) (discussing special errand rule). Likewise, an employee can act within the course of his employment even if, at the time of the accident, he is not "on-the-clock" or not receiving compensation. *See e.g. Wilder*, 111 Idaho at 143 (finding defendant acted in course of employment even though he was on personal business, his lunch break, when accident occurred); *Dameron v. Yellowstone Trail Garage*, 54 Idaho 646, 651 (1934) (employee can still be within course of employment whether he is performing duty on his time or his employer's time).

Furthermore, the Court has found that an employee is in the course of his employment "any time an employee is injured while going to or coming from work in transportation provided by his employer." *Hansen*, 119 Idaho at 338; *see also Baker v. Sullivan*, 132 Idaho 746, 979 P.2d 619 (1999). Thus, in *Hansen*, the court upheld dismissal of a tort suit against an employer where the accident occurred when the plaintiffs were on their way to work while riding in a truck

provided by their employer which was driven by a co-worker. In so holding, the Court found, because the transportation was furnished by the employer, the plaintiffs "were injured within the course of their employment and, pursuant to I.C. § 72-211, worker's compensation benefits are appellants' exclusive remedy." *Hansen*, 119 Idaho at 338-39.

Notably, 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. *See e.g. Basin Land. Irr. Co. v. Hat Butte Canal Co.*, 114 Idaho 121, 125, 754 P.2d 434, 438 (1988). Additionally, 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 his employment at the time of the injury. *See Gage*, 135 Idaho at 254. Finally, 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." *Mortimer v. Riviera Apartments*, 122 Idaho 839, 845 (1992).

b. Rydalch was Acting in the Course of His Employment.

Contrary to Gerdon's contentions, the trial court correctly found the non-existence of a genuine issue of material fact as to whether Rydalch was acting in the course of his employment and correctly ruled, when considering all reasonable inferences, no reasonable jury could find in favor of Gerdon.

In asserting that the trial court erred in granting summary judgment, Gerdon ignores pertinent, undisputed facts and draws unreasonable and unsupported factual inferences from the available record.

Of significant importance are the indisputable facts that Rydalch was a Con Paulos employee at the time of the accident and his job duties at the time of the accident included couriering vehicles for delivery to Con Paulos. R. 127, 208, 238, 279. Butch Heatwole testified the duties of Con Paulos' sales team included, "from time to time", couriering vehicles to the dealership to facilitate their sale. R. 279. Pursuant to Rydalch's undisputed testimony, Gerdon and Rydalch had exercised this duty and couriered vehicles for Con Paulos on more than one occasion. R. 247. Based upon such undisputed testimony, it is without question, at the time of the accident, Rydalch was performing a duty he was employed to perform, i.e. transporting a vehicle owned by Con Paulos to facilitate the sale of the vehicle. Based upon Idaho case law, the aforementioned undisputed facts establish more than "some connection between the [Rydalch's] acts and his employment" and establish that Rydalch was acting within the course of his employment at the time of the accident. *See e.g. Wilder*, 111 Idaho at 143.

In his brief, Gerdon maintains that, although Rydalch was performing a duty he was employed to perform, he was not acting within the course of his employment because Jerry King did not authorize Rydalch to courier the Acadia. It cannot be denied that Mr. King has testified he did not authorize Rydalch and he informed Gerdon that Gerdon was to take the trip alone. R. 288. However, Mr. King's approval is irrelevant as Mr. King was not the employer, Con Paulos was. A review of the undisputed facts and all reasonable inferences which can be drawn establish that Con Paulos was not only aware Rydalch was traveling to Washington to acquire the Acadia and courier it back to Jerome, but, despite Mr. King's lack of authorization, Con Paulos still authorized Rydalch's trip. Importantly, even though Mr. King did not personally

approve, on June 11, 2011, Con Paulos instructed Mrs. Gerdon to purchase a plane ticket for Rydalch's travel. R. 191-192. The only reasonable inference which can be drawn from this fact is that Con Paulos was authorizing Rydalch's trip; otherwise, there would have been no reason for Con Paulos to be involved with Rydalch's travel arrangements. Next, as testified by Gerdon, Mr. Heatwole specifically stated that the deal, meaning the sale of the Acadia, "**would only get done**" if both Gerdon and Rydalch "retrieved the vehicle". R. 208 (emphasis added). The only reasonable inference which can be drawn from Mr. Heatwole's statement is that Rydalch was required by Con Paulos to assist in the Acadia delivery. Rydalch's assistance would allow Rydalch and Gerdon to share in the driving so they could meet the June 13, 2008 delivery deadline and return to Jerome in time to attend the morning sales meeting on June 13, 2008. Finally, although Mr. Heatwole testified that he personally did not approve or reject Rydalch's travel, he explained his approval was unnecessary because the decision for Rydalch to assist in couriering the Acadia was already made before June 12, 2008. R. 273, 274, 278-279. On June 12, 2008 (the first day of travel), Mr. Heatwole was fully aware Rydalch was traveling with Gerdon to and from Washington. R. 256. With this knowledge in mind, Mr. Heatwole provided Gerdon and Rydalch permission to take breaks during the travel. R. 278-279. The only reasonable inference and/or conclusion which can be derived from the aforementioned facts is that Con Paulos was aware and approved of Rydalch's involvement in transporting the Acadia. Mr. King's personal feelings about Rydalch's involvement do not change this fact and do not create a genuine issue of material fact regarding Rydalch's actions falling within the course of his employment.

At this juncture, it is noteworthy to mention that Rydalch's travel falls within the several exceptions to the general "coming-and-going" doctrine, which were set forth in the immediately preceding section of this Brief. *See e.g. Finholt*, 143 Idaho at 898. Pursuant to this doctrine, an employee is generally not within the course of his employment when he is traveling. *See e.g. id.* However, if an exception is met, the employee's travel will be considered to have occurred within the course of that employee's employment. *See e.g. id.* The first exception exists where the employee is traveling in "transportation provided by his employer". *See Hansen*, 119 Idaho at 338; *see also Baker*, 132 Idaho 746. In the current action, it is axiomatic that Rydalch was traveling from Washington to Con Paulos' place of business in a vehicle provided by Con Paulos, the Acadia, at the time of the accident. R. 244. As such, this exception applies. *See Hansen*, 119 Idaho at 338; *see also Baker*, 132 Idaho 746.

The next exception is the business travel exception which arises "[w]hen an employee's work requires him to travel away from the employer's place of business". *See Finholt*, 143 Idaho at 898; *Reinstein*, 126 Idaho at 159. This exception is met because it is without question that Rydalch's employment required him to travel away from Con Paulos' place of business on occasion to courier vehicles, including the Acadia. R. 273-274, 278-279.

The third exception is the special service/errand exception which arises when an employee is performing a special service or errand for his employer or is discharging "some duty incidental to the nature of his employment in the interest of, or under the direction of, his employer". *See Finholt*, 143 Idaho at 898. By couriering the Acadia, Rydalch was performing a special service or errand. R. 243, 273-274. He was also discharging a duty incidental to the

nature of his employment as a car salesman "in the interest of, or under the direction of," Con Paulos. R. 243, 273-274. Notably, Gerdon has admitted that Rydalch was benefiting Con Paulos and, therefore, acting in Con Paulos' interests by driving the Acadia. *See* Appellant's Brief, p. 20. As such, it is undeniable that Rydalch's travel falls within the special service/errand exception. *See Finholt*, 143 Idaho at 898. Because Rydalch's conduct falls within the above-referenced exceptions, it cannot be denied that Rydalch was acting within the course of his employment when the accident occurred. *See e.g. Finholt*, 143 Idaho at 898.

Despite the aforementioned law and facts, Gerdon maintains Rydalch was not acting within the course of his employment during the trip because he allegedly went on the trip to provide companionship to Gerdon. Contrary to Gerdon's assertion, even if one of the reasons Rydalch traveled with Gerdon was to provide companionship, this is not sufficient to take Rydalch's actions outside the realm of the course of his employment. *See e.g. Mortimer*, 122 Idaho at 845. As stated above, Idaho courts have routinely held that a worker will act in the course of his employment while traveling so long as service of the employer is at least a concurrent cause of the trip. *See e.g. Reinstein*, 126 Idaho at 159. Service to the employer need not be the paramount cause of the travel. *Id.*

In the current action, it is undisputed that one of the purposes for Rydalch to travel with Gerdon was to courier the Acadia and, at the time of the accident, Rydalch was, in fact, driving the Acadia on behalf of Con Paulos. R. 118-119, 135-136, 256. As 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. *See e.g. Reinstein*, 126 Idaho at 159; *Mortimer*, 122 Idaho at 845. As such, Gerdon's argument to the contrary is without merit.

Gerdon has also incorrectly argued that Rydalch was not in the course of his employment because he was not compensated for the time he spent traveling. Contrary to the Gerdon's position, the Idaho Supreme Court has recognized that an employee will fall within the scope of his employment when performing a special service or errand or discharging some duty incidental to his employer even if he is performing the service/duty without compensation, without reimbursement for travel expenses, or where he is off-the-clock or working on his own time, rather than his employer's time. *See e.g. Finholt*, 143 Idaho at 898; *Andrews*, 127 Idaho at 67; *Wilder*, 111 Idaho at 143; *Dameron*, 54 Idaho at 651. As such, whether Rydalch was compensated is irrelevant because Rydalch was, in fact, performing an employment duty on behalf of Con Paulos when the accident occurred. *See id.*

To the extent this Court finds the issue of compensation relevant, it is noteworthy to mention that the only admissible evidence on the issue of Rydalch's compensation establishes that, at the time of the accident, Rydalch was paid via commission only; Rydalch did not receive any daily guarantee.[3] R. 180, 183, 184, 185, 186. Accordingly, while Rydalch's travel to

[3] Contrary to Gerdon's contention, Mr. Heatwole's deposition does not provide competent testimony on the issue of Rydalch's compensation. Admittedly, Mr. Heatwole was not familiar with Con Paulos' payment records. R. 275. Additionally, at his deposition, Mr. Heatwole was not provided copies of any payment records referencing Rydalch's rate of pay, even though such documents exist. R. 270-283. Instead, Mr. Heatwole provided speculative and unfounded testimony regarding how he **believed** or **guessed** Con Paulos sales people, including Rydalch, were paid at the time of the accident. R. 273, 277. Pursuant to Idaho law, speculative testimony should be disregarded on summary judgment and is not sufficient to create a genuine

acquire and transport the Acadia was a part of his job duties; it was not a basis for him to receive compensation under the terms of his employment. R. 180, 183, 184, 185, 186.

Finally, it is noteworthy to mention that 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. At the time of the accident, Gerdon was a sleeping passenger. R. 109, 245. He was not actively performing any duty on behalf of Con Paulos. R. 109, 245. Rydalch, on the other hand, was performing one of his employment duties for and acting in the interests of Con Paulos as he was driving the Acadia, a vehicle owned by Con Paulos, to Con Paulos' place of business so that Con Paulos could sell the Acadia. R. 109, 244-245. Gerdon admitted the trip was work-related and that he suffered a work-related injury. R. 108, 109. When considering such irrefutable circumstances, Gerdon's assertion lacks any rationale and, as held by the trial court in this matter, no reasonable jury could conclude that Rydalch was not acting within the course of his employment.

B. Rydalch was Acting as an Agent of Con Paulos at the Time of the Accident.

Even if this Court were to rule that Rydalch was not acting in the course of his employment at the time of the accident, I.C. § 72-209(3) still precludes Gerdon's civil liability action because, at the very least, Rydalch was acting as Con Paulos' agent at the time of the accident.

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issue of material fact as to any issue. *See e.g. Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 917-19 (2008); *Finholt*, 143 Idaho at 897.

Idaho law provides for three types of agency relationships: express authority, implied authority and apparent authority. *See e.g. Bailey v. Ness*, 109 Idaho 495, 497, 708 P.2d 900, 903 (1985). Express authority and implied authority are forms of actual authority while apparent authority pertains to a third party's perception of the agency relationship. *See id.* at 497-98. Express authority exists where "the principal has explicitly granted the agent [authority] to act in the principal's name." *Id.* at 497 (citations omitted). "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." *Id.* (citations omitted).

The undisputed facts in the current action establish that Rydalch had actual authority to drive the Acadia at the time of the accident and, therefore, Rydalch was acting as an agent of Con Paulos when the accident occurred. R. 109, 244-245. Throughout this action, Gerdon has maintained that he had permission and actual authority from Con Paulos to courier the Acadia from Washington to Jerome, Idaho. The facts also establish, when leaving the casino, Gerdon, as the agent of Con Paulos, requested for Rydalch to drive the Acadia.[4] R. 109, 244-245. In doing so, Gerdon provided Rydalch with actual authority to operate the Acadia on behalf of Con Paulos. Pursuant to these undisputed facts, Rydalch was acting as the agent of Con Paulos with either express or implied authority at the time of the accident. *See e.g. Bailey*, 109 Idaho at 497. Therefore, I.C. § 72-209(3) bars Gerdon's claims against Rydalch.

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[4] Gerdon has admitted and cannot now contest that he was acting in the course and scope of his employment and authority from Con Paulos throughout the work trip. R. 109. The only reasonable inference which can be drawn from this admission is that, when he asked Rydalch to drive the Acadia, Gerdon was also acting within the course and scope of his employment.

C. The District Court Properly Struck Portions of Paragraph 7 from Gerdon's Affidavit.

1. Standard of Review

"Evidence presented in support of or in opposition to a motion for summary judgment must be admissible." *See e.g. Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999). "The admissibility of the evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial." *Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 696, 85 P.3d 667, 672 (2004) (citations omitted). The trial court has broad discretion in determining whether to strike evidence submitted by parties. *See e.g. Carnell v. Barker Mgmt.*, 137 Idaho 322, 327, 48 P.3d 651, 656 (2002).

Affidavits filed in support or opposition to a motion "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Idaho R. Civ. P. 56(e). "The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e)." *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 917, 188 P.3d 854 (2008). Likewise, affidavit testimony which contains statements which are contradictory and/or inconsistent with the affiant's prior testimony is not admissible. *See e.g. Frazier v. J.R. Simplot Co.*, 136 Idaho 100, 103, 29 P.3d 936 (2001); *Loomis v. Church*, 76 Idaho 87, 93-94, 277 P.2d

561 (1951); *Matter of Estate v. Keeven*, 126 Idaho 290, 298, 882 P.2d 457 (Ct. App. 1994); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991).

On appeal, a trial court's evidentiary ruling will be reviewed under an abuse of discretion standard. *See e.g. Sprinkler Irrigation Co.*, 139 Idaho at 696. In determining whether a trial court abused its discretion, "this Court inquires: (1) whether it correctly perceived the issue as discretionary; (2) whether it acted within the boundaries of its discretion and consistently with applicable legal standards; and (3) whether it reached its decision by an exercise of reason." *Id.*

2. The Court did not Abuse its Discretion in Striking Portions of Paragraph 7.

Paragraph 7 of Gerdon's Affidavit reads as follows:

> That because Defendant Joshua Rydalch was on Affiant's team and it was your Affiant's day off on the day of the accident, it was therefore Defendant Josh Rydalch's day off.

R. 208. The trial court struck a portion of this paragraph. R. 352-354. First, the court struck the portion which reads "and it was your Affiant's day off on the day of the accident" because the court found this statement was contrary and inconsistent with Gerdon's prior testimony. R. 354. The district court's ruling is sound as the record establishes that Gerdon previously testified he was working and acting within the course of his employment at the time of the accident. *See e.g.* R. 108, 109. As the stricken portion of Paragraph 7 is clearly contradictory to Gerdon's former testimony, the court did not abuse his discretion in striking the same. *See e.g. Frazier*, 136 Idaho at 103; *Loomis*, 76 Idaho at 93-94; *Keeven*, 126 Idaho at 298; *Kennedy*, 952 F.2d at 266.

Next, the trial court correctly struck the portion reading "it was therefore Defendant Josh Rydalch's day off" because it was conclusory. R. 354; *Esser Elec.*, 145 Idaho at 917. Not only

is this statement conclusory, but, in making it, Gerdon failed to provide any foundation for the same. R. 208. Gerdon did not provide any basis for how he would know Rydalch's work schedule. R. 207-208. While he stated that work schedules were created by Con Paulos managers, Gerdon did not allege he was a manager and did not explain that he had seen any work schedule depicting Rydalch's schedule for June 13, 2008. R. 207-208. The unreliability of testimony lacking foundation or personal knowledge is highlighted by the testimony of both Mr. Heatwole, a Con Paulos manager, and Rydalch that Rydalch was scheduled to work on June 13, 2008. R. 248, 274. It is undisputed that Rydalch was expected to attend the June 13, 2008 morning sales meeting and report to work on June 13, 2008. R. 248, 274.

Notably, whether Rydalch was scheduled to be off of work on June 13, 2008 is irrelevant. The facts establish that Rydalch was performing a duty for his employer at the time of the accident. Just as Gerdon could work on his scheduled day off, so could Rydalch. Additionally, as explained above, the Idaho Supreme Court has recognized that an employee will fall within the scope of his employment when performing a special service or errand or discharging some duty incidental to his employer even if he is performing the service/duty before or after customary working hours or where he is "off the clock". *See e.g. Finholt*, 143 Idaho at 898; *Wilder*, 111 Idaho at 143; *Dameron*, 54 Idaho at 651. Therefore, even if this Court finds the trial court erred in striking portions of Paragraph 7, due to the irrelevant nature of the stricken statements, such error was harmless.

D. Rydalch is Entitled to Attorney Fees on Appeal.

Pursuant to I.A.R. 35(b)(5), Rydalch, as the prevailing party, respectfully requests an award of its reasonable costs and attorney fees on appeal. Rydalch's request is based upon I.A.R. 11.1, I.C. §12-121, Idaho R. Civ. Proc. 54, and any other applicable statute or rule as Gerdon's appeal is frivolous and is neither warranted by nor well-grounded in the existing facts or law;. *See e.g. Sprinkler Irrigation Co.*, 139 Idaho at 698 (awarding fees on appeal under I.A.R. 11.1 and I.C. §12-121).

IV. CONCLUSION

For the aforementioned reasons, Rydalch respectfully requests that this Court deny Gerdon's appeal in its entirety. The trial court acted properly in granting summary judgment in favor of Rydalch on the basis that Rydalch was acting in the course of his employment at the time of the accident. Likewise, the trial court properly exercised its discretion in striking the portions of Paragraph 7 of Gerdon's Affidavit which were contradictory to Gerdon's prior testimony and/or were conclusory.

DATED this 15th day of September, 2011.

ANDERSON, JULIAN & HULL LLP

By _____
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of September, 2011, I served a true and correct copy of the foregoing **RESPONDENT'S BRIEF** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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