1-11-2019

Nelson v. Kaufman Respondent's Brief Dckt. 46027

IN THE SUPREME COURT OF THE STATE OF IDAHO

AMEY J. NELSON,

Plaintiff-Appellant,

vs.

STEFANI KAUFMAN, ANYTIME FITNESS, and AT FITNESS, LLC,

Defendants-Respondent.

Supreme Court No. 46027-2018

Bonneville County District Court
CV-2016-1618

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, Honorable Dane H. Watkins, Jr., District Judge, Presiding

Allen H. Browning, ISB #3007
Steve Carpenter, ISB #9132
BROWNING LAW
482 Constitution Way, Suite 111
Idaho Falls, ID 83402

Attorneys for Plaintiff-Appellant

Jeffrey A. Thomson, ISB #3380
Joseph F. Southers, ISB #9568
ELAM & BURKE, P.A.
P.O. Box 1539
Boise, ID 83701

Attorneys for Defendant-Respondent Stefani Kaufman

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a negligence action arising out of plaintiff-appellant Amey Nelson's ("Nelson") use of gym equipment during a new circuit training class that defendant Anytime Fitness ("AT Fitness") was offering to its members. AT Fitness hired defendant-respondent Stefani Kaufman ("Kaufman") to teach its new circuit training class. While participating in the circuit training class, Nelson's hand slipped off one of the weight machines and was injured. As a result of the injury she sustained in the circuit training class, Nelson brought this negligence action against defendants AT Fitness and Kaufman. The district court granted both AT Fitness's and Kaufman's respective motions for summary judgment on the grounds that Nelson's gym membership agreement released AT Fitness and Kaufman, in her capacity as an agent of AT Fitness, from liability. Specifically, the district court determined that Kaufman was acting as an agent of AT Fitness when the incident occurred through both express authority and apparent authority and was therefore released from liability under the plain language of Nelson's membership agreement.

Nelson appeals from the district court's grant of summary judgment dismissing her complaint against Kaufman with prejudice.

B. Statement of Facts

Kaufman disagrees with the following facts set forth in Nelson's Appellant's brief as they are improperly characterized and/or are incorrect:

> 4. The principal here, Anytime Fitness, has stated that Defendant was never an agent or employee of Anytime Fitness or AT Fitness, LLC. (R., pp. 63-

64, L. 4, 1-3 [citing *Affidavit of Stefani Kaufman in Support of Motion for Summary Judgment*, ¶ 2]).

5. The principal here, Anytime Fitness has stated in an affidavit that Defendant was an independent contractor to Anytime Fitness. (R., p. 64, L. 6-7[1] [sic]).

6. The principal here, Anytime Fitness has stated in an affidavit that Defendant was paid as an independent contractor, for one task, by Anytime Fitness. (R., p. 64, L. 6-7[2] [sic])

(Appellant's Brief, p. 5.) Nelson's contention that Anytime Fitness stated Kaufman was never an agent of Anytime Fitness or AT Fitness, LLC is incorrect because Anytime Fitness made no statement as to whether Kaufman was an agent of AT Fitness. (*See,* Aug. R. p. 2, ¶ 7.) Paragraphs 5 and 6 refer to the affidavit submitted by Anytime Fitness in support of its motion for summary judgment but incorrectly cite to Kaufman's affidavit submitted in support of her motion for summary judgment.

Moreover, in the introduction section of Nelson's Appellant's brief, she states that the affidavit submitted by AT Fitness in support of its motion for summary judgment provides that it "was not liable for the actions of Stefani Kaufman because she was not an agent and that she was an independent contractor." (Appellant's Brief, p. 7.) This is incorrect. The Affidavit of Tayson Webb submitted in support of AT Fitness's motion for summary judgment states that Kaufman

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[1] This citation relates to the *Affidavit of Stefani Kaufman in Support of Motion for Summary Judgment*, not the affidavit submitted by Anytime Fitness in support of its motion for summary judgment.

[2] *See* footnote 2, *supra.*

was an independent contractor, but makes no reference to whether Kaufman was an agent of AT Fitness at the time of the incident. (Aug. R. p. 2, ¶ 7[3].)

Kaufman adds the following facts:

On January 29, 2014, Nelson signed an Anytime Fitness Membership Agreement with AT Fitness ("Membership Agreement"). (Aug. R. pp. 5-6.) The Membership Agreement also contained a release of liability and assumptions of risk agreement ("Release Agreement"). (*Id.*) The relevant parts of the Release Agreement provide as follows:

> I understand the risk of injury from CLUB activities and using any CLUB equipment is significant, including the potential for permanent paralysis and death, I KNOWINGLY AND FREELY ASSUME ALL SUCH RISKS, both known and unknown. I acknowledge that this is an UNSUPERVISED FITNESS CENTER and I assume all risks associated with using exercise equipment and other products and machines and exercising alone without the aid and presence of CLUB staff on the premises... I HEREBY RELEASE, INDEMNIFY, AND HOLD HARMLESS Anytime Fitness, LLC and its affiliates, ABC Financial Services, INC., AND THE OWNERS OF ALL CLUBS WITHIN THE ANYTIME FITNESS SYSTEM, as well as all sponsors and advertisers, and all owners and lessors of the premises of such clubs, and their respective officers, affiliates, agents and employees WITH RESPECT TO ANY AND ALL INJURY, DISABILITY, DEATH, LOSS OR DAMAGE to person or property that may arise out of or in connection with my use of any of the equipment products and machines or the facilities of the CLUB of any other Anytime Fitness club, or any incident that occurs while using such facilities, or otherwise related to my membership.
>
> I expressly agree that this release is intended to be as broad and inclusive as permitted by applicable law and if a portion of this release is held invalid, the balance shall remain in full force and effect. This release shall apply to my heirs,

[3] Paragraph 7 of Tayson Webb's Affidavit provides: "That on the date of the subject accident Stefani Kaufman was an independent contractor trainer offering services at AT Fitness, LLC's club." (Aug. R. p. 2, ¶ 7.)

> assigns, personal representatives and any other next of kin. I understand that the CLUB is relying on this release in agreeing to enter into this Agreement.
>
> I HAVE READ THE RELEASE OF LIABILITY AND ASSUMPTIONS OF RISK AGREEMENT, FULLY UNDERSTAND ITS TERMS AND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND SIGN IT FREELY VOLUNTARILY WITHOUT ANY INDUCEMENT.

(*Id.*) (Underline added).

While using AT Fitness's facilities, Nelson noticed an advertisement for a new AT Fitness circuit training class. (Augmented R. p. 1, ¶ 2, *Affidavit of Amey J. Nelson.*) AT Fitness offered to its members its new circuit training class at no additional cost. (*Id.*, p. 2, ¶ 3.) The advertisement also stated that the circuit training class would be taught by a trainer selected by AT Fitness. (*Id.*) Moreover, the advertisement included Kaufman's picture, stating that Kaufman "was a personal trainer at Anytime Fitness." (*Id.*, ¶ 4.)

AT Fitness hired Kaufman to teach its new circuit training class. (*Id.*, ¶¶ 3-5; R. pp. 63-64, ¶ 2.) AT Fitness scheduled the dates and times the circuit training class would be held. (R. p. 64, ¶ 3.) AT Fitness paid Kaufman to teach the circuit class that Nelson attended in March of 2014. (*Id.*, ¶ 4.) Nelson believed Kaufman "was working for Anytime Fitness, as she was the one teaching their class, for the purpose of familiarizing members of Anytime Fitness with the new Anytime Fitness Equipment." (Augmented R. p. 3, ¶ 24.)

On March 24, 2014, while participating in the AT Fitness circuit training class, Nelson was using a triceps weight machine when her left hand slipped off the machine's handle and struck the machine. (*Id.*, ¶ 21.) Nelson fractured a metatarsal bone in her left hand when she struck the machine. (*Id.*)

C. Course of Proceedings

Nelson failed to provide a Course of Proceedings. Kaufman offers the following:

On March 24, 2016, Nelson filed her Verified Complaint for Damages and Demand for Jury Trial ("Complaint"), in which she asserted a single negligence cause of action against both AT Fitness and Kaufman related to the injury she sustained to her hand while participating in an AT Fitness circuit training class. (R. pp. 9-16.) On May 2, 2016, AT Fitness filed its Answer to the Complaint. (R. pp. 17-21.)

On April 19, 2017, AT Fitness filed a motion for summary judgment on the grounds that Nelson's Complaint was barred because she expressly contracted to assume the risk of using AT Fitness's facilities and equipment. (R. pp. 22-27.) AT Fitness also argued that Nelson could not demonstrate that any alleged instruction by Kaufman regarding the triceps machine was improper, a breach of duty, or the proximate cause of Nelson's injuries. (R. p. 29.) When AT Fitness filed its motion for summary judgment, Kaufman had not made an appearance in this case[4]. In opposition to AT Fitness's motion for summary judgment, Nelson argued that "Kaufman supervised and instructed her regarding equipment use and the membership agreement does not, therefore, waive Defendants' liability." (R. p. 26.) In fact, Nelson argued that at the time of the underlying incident, Kaufman was an agent of AT Fitness: "Under the law of Idaho, there is evidence that Stefani Kaufman was acting with either express, implied or

[4] Service of the Complaint and summons upon Kaufman was done by publication because Kaufman had moved to New Mexico. *See* Register of Action Report within the Clerk's Record. (R. p. 2.)

apparent authority of Anytime Fitness and AT Fitness, LLC. The manager of AT Fitness made it appear that Stefani Kaufman was one of the club staff, a teacher of a class at the club." (*See* pending Motion to Augment, *Plaintiff's Memorandum in Opposition to Summary Judgment*, p. 5.)

On June 30, 2017, the District Court granted AT Fitness's motion for summary judgment and dismissed Nelson's Complaint for the following reasons: (1) the plain language of the Release Agreement established that Nelson released AT Fitness from liability, and (2) Nelson failed to provide any evidence as to the breach of duty element of her negligence claim. (R. pp. 29-31.)

On July 28, 2017, Kaufman filed her answer to Nelson's Complaint. (R. pp. 33-38.)

On August 3, 2017, the District Court entered a judgment with respect to AT Fitness's motion for summary judgment and dismissed Nelson's claims against AT Fitness with prejudice. (*Id.*, pp. 39-40.) Nelson has not appealed from this grant of summary judgment or AT Fitness's dismissal. *See* Appellant's Brief, p. 7 ("This Appeal is not from that judgment.")

On September 11, 2017, Kaufman filed a motion for summary judgment and supporting memorandum and affidavits of counsel and Kaufman. (R. pp. 41-56 and pp. 63-65.) The basis for Kaufman's motion was that she was an agent of AT Fitness at the time of the incident and therefore, under the plain language of the Release Agreement, Nelson also released Kaufman from liability. (R. pp. 46-56.) On October 19, 2017, Nelson filed a brief in opposition to Kaufman's motion for summary judgment, in which she reversed course from her prior arguments in opposition to AT Fitness's motion for summary judgment, and argued that at the

time of the incident, Kaufman was not an agent of AT Fitness. (R. pp. 66-78.) In support of her opposition, Nelson filed an affidavit of a personal trainer, *Affidavit of Kaecee Reed*, which attached three exhibits. (R. 79-80.) The exhibits were neither authenticated by the affiant, nor were they even mentioned in the affidavit. (*Id.*) As such, on October 26, 2017, Kaufman filed a motion to strike the exhibits attached to Reed's affidavit and those statements in Nelson's brief in opposition to the motion for summary judgment supported by Reed's affidavit or the attachments. (R. pp. 92-93.)

On October 27, 2017, Nelson filed a *Second Affidavit of Kaecee Reed*, which attempted to correct the mistakes associated with Reed's original affidavit. (R. pp. 81-82.) On October 30, 2017, Kaufman filed a motion to strike the second affidavit of Kaecee Reed on the grounds that it was untimely, contained incorrect information, and merely contained conclusory statements that lacked foundation and/or were hearsay. (R. pp. 99-106.)

On November 2, 2017, a hearing on Kaufman's motion for summary judgment and the motions to strike was held and the District Court heard each parties' respective arguments related to the motions. (R. pp. 7 and 136; Tr. pp. 5-52.) At the November 2, 2017, hearing, Nelson's counsel withdrew the three exhibits that were attached to Kaecee Reed's affidavit. (Tr. p. 28, ll. 16-23.) The District Court granted Kaufman's motion for summary judgment from the bench and found:

> Based upon the undisputed evidence[5] offered by Nelson, a question of [fact] does not exist that Anytime Fitness authorized Kaufman to act on its behalf to conduct the circuit training class and train members how to use its exercise equipment.
>
> Anytime Fitness granted Kaufman with the actual authority to conduct the class.
>
> Similarly, a question of fact does not exist that Anytime Fitness vested Kaufman with apparent authority to act on its behalf in teaching the circuit training class.

(Tr. p. 49, ll. 5-14)

> ...
> Kaufman possessed both actual and apparent authority from Anytime Fitness to conduct the circuit training class at Anytime Fitness' facility.

(*Id.*, p. 51, ll. 2-4.)

In granting Kaufman's motion, the District Court determined that Kaufman had actual/express authority to act as AT Fitness's agent. (*Id.*, p. 51, ll. 2-4; R. pp. 140-41.) Additionally, the District Court also determined that AT Fitness granted Kaufman apparent authority to act as its agent in teaching AT Fitness's circuit training class. (*Id.*)

On November 17, 2017, Nelson filed a motion to reconsider arguing that the Release Agreement did not apply to Kaufman because Kaufman was an independent contractor and not an employee or agent of AT Fitness. (R. pp. 107-115.)

On November 28, 2017, the District Court issued an order granting Kaufman's motion for summary judgment and dismissed the Complaint with prejudice against Kaufman. (R. pp. 116-17.) Judgment was entered that same day. (R. p. 118.)

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[5] *See*, Tr. pp. 48-49, ll. 11-4.

On March 6, 2018, the District Court issued its *Bench Memorandum Re: Kaufman's [sic] Motion to Reconsider* ("Bench Memorandum"), in which it analyzed whether Nelson's motion to reconsider should be granted and concluded that the motion to reconsider should be denied. (R. pp. 134-142.) Specifically, the District Court held: (1) there was no genuine issue of material fact that Kaufman was an agent of AT Fitness; (2) even if Kaufman were an independent contractor of AT Fitness at the time of the incident, it would not be determinative of her status as an agent; (3) under the plain language of the Membership Agreement, Nelson released agents of AT Fitness from liability; and (4) because the facts upon which the District Court relied to determine the existence of an agency relationship between Kaufman and AT Fitness were not disputed, the determination of agency was a question of law for the District Court to decide. (R. pp. 136-142.) On March 15, 2018, the District Court issued an order denying Nelson's motion to reconsider. (R. pp. 143-44.)

On April 24, 2018, Nelson timely filed a notice of appeal and identified the issue on appeal as follows: "...that summary judgment was erroneously granted where facts supported the Plaintiff's case, summary judgment was granted prematurely, the burden of proof was erroneously shifted to Plaintiff, and evidence was erroneously construed in favor of the moving party." (R. p. 145; *see also,* Appellant's Brief, p. 4.)

II. ISSUES PRESENTED ON APPEAL

A. Issues on Appeal

Appellant did not provide any issues on appeal. Under "Summary of the Argument," Appellant provides the following headings:

1. The Court erred in finding that Defendant was not an Independent Contractor.

2. Apparent authority does not protect Defendant.

3. The Court erred by making a finding that an agency relationship existed when it had no power to do so.

4. The Court erred by construing facts in the light most favorable to the moving party.

(Appellant's Brief, p. 4.)

B. Additional Issue on Appeal

1. Whether the Court Can Affirm the Grant of Summary Judgment to Kaufman Based on Nelson's Failure to Contest the District Court's Alternative, Independent Grounds for Granting Summary Judgment that Kaufman has Express Authority to Act as AT Fitness's Agent.

III. STANDARD OF REVIEW

This Court "uses the same standard properly employed by the district court originally ruling on the motion." *Jordan v. Beeks*, 135 Idaho 586, 589, 21 P.3d 908, 911 (2001) (citation omitted). "The court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). "The movant has the burden of showing that no genuine issues of material fact exist. Disputed facts and reasonable inferences are construed in favor of the nonmoving party. This Court freely reviews issues of law." *Soignier v. Fletcher*, 151 Idaho 322, 324, 256 P.3d 730, 732 (2011)(citations omitted).

"If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review." *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007). "In order to survive a motion for summary judgment, the non-moving party must 'make

a sufficient showing to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.'" *Jones v. Starnes*, 150 Idaho 257, 259–60, 245 P.3d 1009, 1011–12 (2011) (quoting *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988)).

Additionally, when a district court grants summary judgment on multiple independent grounds, the appellant must successfully challenge all of those grounds to prevail on appeal. *See, e.g., Lee v. Litster*, 161 Idaho 546, 549, 388 P.3d 61, 64 (2017); *see also In Re Contest of Election (primary election-Republican nomination) for State Representative in Legislative Dist. No. 7, Position "B"*, 164 Idaho 102, 425 P.3d 1245, 1251–52 (2018) ("Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court.").

IV. ARGUMENT

A. The District Court's Grant of Summary Judgment to Kaufman Should be Affirmed Because Nelson Failed to Contest the District Court's Independent Grounds for Granting Summary Judgment.

Nelson makes the following arguments on appeal, all of which relate to the District Court's findings regarding apparent authority and Kaufman's status as an agent: (1) "The Court erred in finding that Defendant was not an independent contractor"; (2) "Apparent authority does not protect Defendant"; (3) "The Court erred by making a finding that and [sic] agency relationship existed when it had no power to do so"; and (4) "The Court erred by construing facts in a light most favorable to the moving party." (Appellant's Brief, p. 4.) However, Nelson did

not challenge and has provided no argument or authority regarding the District Court's alternative, independent finding that Kaufman had actual/express authority to act as AT Fitness's agent. Moreover, Nelson did not appeal the District Court's findings that the plain language of Nelson's Membership Agreement with AT Fitness contains a general waiver of liability for agents of AT Fitness. (Tr. p. 51, ll. 5-13, "...Does the release agreement bar Nelson's claim against Kaufman? Under the plain language of the membership agreement, Nelson waived liability on behalf of Anytime Fitness and its agents. Therefore, as a matter of law, Nelson's claim against Kaufman is barred. Kaufman's motion for summary judgment should be granted, and the complaint against Kaufman should be dismissed"; Tr. p. 74, ll. 20-22, "B, the membership agreement is a valid contract under which Nelson waived liability of Anytime Fitness agents. And this is addressed in previous decision by the Court."; *see also* R. p. 138, "Under the plain language of the membership agreement, Nelson waived the liability of Anytime Fitness's agents.")

Under Idaho law, "if an appellant fails to contest all of the grounds upon which a district court based its grant of summary judgment, the judgment must be affirmed." *Lee*, 161 Idaho at 550, 388 P.3d at 65 (citing *AED, Inc. v. KDC Investments, LLC*, 155 Idaho 159, 164, 307 P.3d 176, 181 (2013)); *see also Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 524, 272, P.3d 491, 496 (2012).

In *Weisel*, the plaintiff sought to rescind a contract on the ground of mutual mistake. *Id.* The district court granted defendant's motion for summary judgment on two alternative grounds; first, no genuine issue of material fact existed to support a finding that the contract was based on

a mutual mistake of fact and therefore the claim was without merit, and second, that the mutual mistake claim was barred by the statute of limitations. *Id.* at 525, 272 P.3d at 497. On appeal, Weisel's initial appellate brief did not challenge the district court's conclusion that the statute of limitations required dismissal of the mutual mistake claim. *Id.* The Idaho Supreme Court held that because Weisel failed to adequately raise the statute of limitations issue in his initial appellate brief, he waived the matter on appeal. *Id.* at 525–26, 272 P.3d at 497–98 ("an appellant's failure to address an independent ground for a grant of summary judgment is fatal to the appeal.") (citation omitted). Thus, the Idaho Supreme Court declined to consider the independent ground for the grant of summary judgment.

The District Court granted Kaufman's motion for summary judgment on two independent grounds: (1) the undisputed evidence established that Kaufman had actual/express authority to act as AT Fitness's agent (Tr. p. 49, ll. 5-11; R. p. 140-41); and (2) alternatively, even assuming the undisputed facts did not support a finding that AT Fitness granted Kaufman express authority, AT Fitness granted Kaufman apparent authority to act as its agent in teaching the circuit training class in which Nelson injured her hand. (Tr. p. 49, ll. 12-14; R. p. 140-41.) On appeal, Nelson does not contest the District Court's holding that Kaufman had actual/express authority to act as AT Fitness's agent.

Nelson's failure to address the District Court's holding that Kaufman was an agent of AT Fitness through a grant of express authority is fatal to the appeal because the plain language of the Membership Agreement signed by Nelson contains a general waiver of liability of all agents

of AT Fitness with respect to all injuries to any person arising out of use of any equipment or the AT Fitness facility. (Aug. R. pp. 5-6.)[6]

"If an appellant fails to contest all of the grounds upon which a district court based its grant of summary judgment, the judgment must be affirmed." *See, e.g., Cuevas v. Barraza*, 155 Idaho 962, 965, 318 P.3d 952, 955 (2014) (quoting *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 164, 307 P.3d 176, 181 (2013); *see also, Lee v. Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Ass'n, Inc.*, No. 45390, 2018 WL 6188276, at *4 (Idaho Nov. 28, 2018)). Because Nelson did not challenge the District Court's ruling pertaining to Kaufman's status as an agent through express authority, this Court should affirm the District Court's rulings that Kaufman is an agent and agents are covered by the release of liability in the Membership Agreement. The appeal should be dismissed on this ground alone.

B. The District Court Properly Granted Summary Judgment on the Ground that Kaufman Was an Agent of AT Fitness Through Apparent Authority and was Therefore Released from Liability Under the Membership Agreement.

Alternatively, if this Court does not affirm the judgment dismissing the Complaint against Kaufman based on Nelson's failure to contest on appeal the District Court's independent ground for dismissing the Complaint, the District Court's grant of summary judgment to Kaufman can be affirmed on the grounds that Kaufman was AT Fitness's agent through apparent authority and covered by the release of liability in the Membership Agreement.

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[6] Nelson has not appealed the District Court's finding that the plain language of the Membership Agreement is a general waiver of liability of all agents.

1. The District Court Did Not Find That Kaufman was Not an Independent Contractor.

Nelson contends that the District Court erred in finding that Kaufman was not an independent contractor. (Appellant's Brief, p. 8.) The District Court made no finding regarding Kaufman's status as an independent contractor and did not rule that she was not an independent contractor. The District Court ruled instead that it does not matter whether Kaufman is an independent contractor, the material issue is whether she is an agent and her status as one is not determinative of her status as the other. (R. pp. 137-138; Tr. p. 73-74, ll. 16-19.) Specifically, the District Court stated:

> She argues Kaufman was an independent contractor and, therefore, the membership agreement's waiver of liability does not apply.
>
> **a. Independent contractor status does not preclude a finding of agency.**
>
> Nelson argues, "the owner of the company clearly stated in a sworn affidavit that [Kaufman] was an independent contractor and was never an agent or employee of Anytime Fitness."[1] P's Br. at 4 *(citing* Webb Aff. ¶ 7). Nelson's argument appears to be that an individual cannot simultaneously be an independent contractor and an agent. Nelson believes that if there is a question of fact regarding Kaufman's status as an independent contractor, then there must likewise be a question of fact regarding Kaufman's status as an agent of Anytime Fitness.
>
> Nelson's premise is faulty. "An independent contractor may or may not be an agent, and serving concurrently as an agent and as an independent contractor is not mutually exclusive." 41 Am. Jur. 2d Independent Contractors § 2 (notes omitted).
>
> > An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical
>
> [1] While the Webb Affidavit states that Kaufman was an independent contractor, Webb does not make any mention of Kaufman's status as an agent.

> conduct in the performance of the undertaking. *He may or may not be an agent.*
>
> Restatement (Second) of Agency § 2(3) (1958) (emphasis added). *See also Jones v. HealthSouth Treasure Valley Hosp.*, 147 Idaho 109, 113, 206 P.3d 473, 477 (2009) (finding a hospital may be held liable for the actions of an independent contractor vested with apparent authority).
>
> Whether or not Kaufman is an independent contractor does not determine the question of whether she was Anytime Fitness's agent. Even if Kaufman were an independent contractor, it would not determine her status as an agent.

(R. pp. 137-138.) (Italics in original). The District Court did not commit error in finding that Kaufman was not an independent contractor because it made no such finding. The District Court found that it did not matter whether she was an independent contractor because even if she was that does not determine whether the Membership Agreement's waiver of liability applies. Rather, the issue is whether she was an agent and the court correctly determined she was, both through express and apparent authority.

2. The District Court Did Not Err When it Found Kaufman was an Agent Through Apparent Authority.

"An agent is a person who has been authorized to act on behalf of a principal towards the performance of a specific task or series of tasks." *Humphries v. Becker*, 159 Idaho 728, 735, 366 P.3d 1088, 1095 (2016), *reh'g denied* (Feb. 23, 2016). "An agency relationship is created through the actions of the principal who either: (1) expressly grants the agent authority to conduct certain actions on his or her behalf; (2) impliedly grants the agent authority to conduct certain actions which are necessary to complete those actions that were expressly authorized; or (3) apparently grants the agent authority to act through conduct towards a third party indicating

that express or implied authority has been granted." *Humphries*, 159 Idaho at 735, 366 P.3d at 1095.

As referenced above, "express authority" refers to the authority a principal has explicitly granted the agent to act in the principal's name. *American West Enter., Inc. v. CNH, LLC*, 155 Idaho 746, 753, 316 P.3d 662, 669 (2013). "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.* Finally, apparent authority "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." *Id.*

The doctrine of apparent authority has two essential elements: (1) conduct by the principal that would lead a person to reasonably believe that another person acts on the principal's behalf; and (2) acceptance of the agent's service by one who reasonably believes it is rendered on behalf of the principal. *Shatto v. Syringa Surgical Ctr., LLC*, 161 Idaho 127, 133, 384 P.3d 374, 380 (2016).

In this case, AT Fitness's conduct satisfies the first element of the doctrine of apparent authority: (1) AT Fitness hired Kaufman to teach the circuit training class (R. pp. 63-4, ¶ 2.); (2) AT Fitness's advertisement for the circuit training class had a picture of Kaufman on it and indicated that Kaufman was an AT Fitness employee (Augmented R. pp. 2-3, ¶¶ 4, 22, 24); (3) AT Fitness paid Kaufman to be the instructor of AT Fitness's circuit training class (R. p. 64, ¶ 4; Augmented R. p. 4, ¶ 25); and (4) AT Fitness scheduled the times, dates, and location where the

circuit training class would be offered, and therefore, controlled when Kaufman would be AT Fitness's circuit training class instructor. (R. pp. 63-4, ¶¶ 2-3.) These facts are undisputed.

The second element is established by the following: (1) Nelson accepted Kaufman as the AT Fitness instructor for the circuit training class (Augmented R. p. 3, ¶¶ 22, 24); and (2) Nelson reasonably believed Kaufman was teaching the circuit training class on behalf of AT Fitness. (*Id.*) These facts are undisputed. Therefore, the District Court properly determined, as a matter of law, that the given set of facts was sufficient to constitute an agency relationship between Kaufman and AT Fitness at the time of the incident because AT Fitness provided her with apparent authority to act on its behalf (Tr. p. 49, ll. 5-14.)

Nelson's contention that the District Court erred because it had no power to make a finding that an apparent agency relationship existed is incorrect and is contrary to well-settled Idaho law. (Appellant's Brief, p. 16.) Whether facts sufficient to constitute an agency relationship exist is a question of fact for the jury; however, whether a given set of facts are sufficient to constitute an agency relationship is a question of law. *Humphries*, 159 Idaho at 735, 366 P.3d at 1095; *American West*, 155 Idaho at 753, 316 P.3d at 669 (stating the existence of an agency relationship becomes a question of law where the question depends on the construction of a legal instrument). Here, the quantum of evidence (facts) was not disputed, nor were the facts themselves. The District Court correctly ruled, under the second prong that the undisputed facts constituted an apparent agency relationship, which is a question of law.

Based on the uncontroverted evidence relied upon by the District Court when it decided Kaufman's motion for summary judgment, AT Fitness's words and conduct that were directed

towards its members, including Nelson, establish that it provided Kaufman with apparent authority. Significantly, it is undisputed that Nelson reasonably believed that Kaufman had the authority to act on behalf of AT Fitness while she taught the circuit training class. (Augmented R. p. 3, ¶ 22, "With the ad for the class being immediately next to the manager's office, and the manager having identified Stefani Kaufman as the teacher of that class, and directing me to wait for her, by all appearances it was a class advertised and taught at Anytime Fitness by someone working for Anytime Fitness."; R. p. 3, ¶ 23, "No one told me Stefani was an "independent contractor."; R. p. 3, ¶ 24, "I believed Stefanie Kaufman was working for Anytime Fitness, as she was the one teaching their class, for the purpose of familiarizing members of Anytime Fitness with the new Anytime Fitness equipment."; *see also Jones v. HealthSouth Treasure Valley Hosp.*, 147 Idaho 109, 116, 206 P.3d 473, 480 (2009) (stating a third party who asserts apparent authority is required to prove a reasonable belief that the actor had authority to act on behalf of the principal that is traceable to the principal's manifestations to the third-party[7]).

3. The District Court Did Not Erroneously Use Apparent Authority to Shield Kaufman From Liability.

Apparent authority was not used as a shield to escape liability. Apparent authority was used to establish the relationships between AT Fitness and Kaufman. It is the Membership Agreement, signed by Nelson and found by the District Court to unambiguously release from liability all agents, that "shielded" Kaufman from liability.

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[7] In *Jones*, the third party asserting apparent authority was the plaintiff.

4. The District Court Did Not Err by Construing the Facts in Favor of the Moving Party.

Nelson contends that the District Court erred by "construing the facts in the light most favorable to the moving party." (Appellant's Brief, pp. 17 and 19.) Nelson further contends, "[i]n making its erroneous findings, the [District] Court disregarded the evidence presented to it through affidavit and record, and instead adopted the facts that [Kaufman] asserted as argument with no evidence, testimony, or affidavit to allow it to be admitted into the Court." (Appellant's Brief, p. 19.) Nelson's contentions are misguided. (*See* Tr. p. 45, ll. 15-23 and pp. 48-49, ll. 11-4 (District Court's statements setting forth the applicable standard of review when assessing facts and evidence before ruling on a motion for summary judgment.)

The District Court's Bench Memorandum sets forth the applicable standard of review as follows: "When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the non-moving party." (R. p. 135) (citing *Dodge-Farrar v. American Cleaning Services, Co.*, 137 Idaho 838, 54 P.3d 954 (Ct. App. 2002)). Additionally, the facts relied upon by the District Court in finding an agency relationship existed between Kaufman and AT Fitness were not disputed. (Tr. pp. 48-49, ll. 11-4; R. p. 139, "The facts upon which this Court relied to determine the existence of an agency relationship between Kaufman and Anytime Fitness were not disputed."; *see also* R. p. 142, "The undisputed facts establish Kaufman was an agent of Anytime Fitness in the capacity of a class instructor.")

Because the facts that the District Court relied upon in concluding that Kaufman had express and/or apparent authority to act as AT Fitness's agent were not disputed, the

determination of agency was a question of law for the District Court to decide. *See, e.g., Forbush v. Sagecrest Multi Family Prop. Owners' Ass'n, Inc.*, 162 Idaho 317, 396 P.3d 1199, 1212 (2017). The District Court properly determined that the undisputed facts established an agency relationship between Kaufman and AT Fitness.

V. CONCLUSION

Based on the foregoing, Kaufman respectfully requests that the Court affirm the District Court's grant of summary judgment to Kaufman and dismissal of the Complaint with prejudice.

DATED this 11 day of January, 2019.

ELAM & BURKE, P.A.

By _____
Jeffrey A. Thomson – Of the Firm
Joseph F. Southers – Of the Firm
Attorneys for Defendant-Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of January, 2019, I caused a true and correct copy of the foregoing document to be served as follows:

Allen H. Browning
Browning Law
482 Constitution Way, Suite 111
Idaho Falls, ID 83402
Attorneys for Plaintiff-Appellant

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile
(X) iCourt

Jeffrey A. Thomson