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Nelson v. Kaufman Appellant's Brief Dckt. 46027

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IN THE SUPREME COURT OF THE STATE OF IDAHO

AMEY J. NELSON, Appellant, vs. STEFANI KAUFMAN, ANYTIME FITNESS, and AT FITNESS, LLC. and DOES 1 through 10 inclusively, Respondents.	Docket Number: 46027 Case No.: CV-2016-1618 **APPELLANT'S BRIEF**

APPEAL FROM THE JUDGMENT OF THE MAGISTRATE COURT OF THE SEVENTH JUDICIAL DISTRICT IN AND FOR BONNEVILLE COUNTY

COMES NOW, Appellant, Amey J. Nelson, by and through her counsel of record, Allen H. Browning, ISB #3007, and appeals the Order of Summary Judgment of the District Court entered March 6, 2018.

STATEMENT OF JURISDICTION

Jurisdiction lies in this Court for appeal from the decision of a district judge pursuant to Idaho Appellate Rule 11.

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SUMMARY OF THE ARGUMENT

The Court erred in finding that Defendant was not an independent contractor.

This portion of Appellant's Brief will discuss how the district court erred in making a finding that the defendant was not an independent contractor due to the Defendants' lack of a showing of evidence to contest Plaintiff's claim that she was an independent contractor. This section will also begin to discuss, factually, who has the power to determine if Defendant was an independent contractor or agent.

Apparent authority does not protect Defendant.

This portion of the Brief will discuss what apparent authority is and why it does not apply to this case or to Defendant.

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

This portion of Appellant's Brief discusses the district court's error as a matter of law in making findings which it had no power or authority to make.

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

This portion of Appellant's Brief discusses the district court's errors in viewing the facts before it in light of the moving party when the moving party presented no facts.

STATEMENT OF FACTS

1. On one occasion Plaintiff was using the Anytime Fitness facilities by herself and saw a notice on a whiteboard posted by the office at that location, which advertised a "circuit class" at Anytime Fitness and that a trainer would be teaching the class. (R., p. Aug 1, L. 4-6).
2. The circuit class was put on by Anytime Fitness and it was clear that an instructor would be selected by Anytime Fitness. (R., p. Aug 12 L. 1-4).
3. Plaintiff did not arrange for Stefani Kaufman to instruct the class. (R., p. Aug 2, L. 7-9).
4. The Principal here, Anytime Fitness, has stated that Defendant was never an agent or employee of Anytime Fitness or AT Fitness, LLC. (R., p. 63-64, L. 4, 1-3).
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).
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).
7. Plaintiff attended the class at the date and time noted on the whiteboard. (R., p. Aug 2, L. 10-11).
8. Plaintiff was the only attendee of the class. (R., p. Aug 2, L. 17).
9. Defendant was the only other person present for the class. (R., p. Aug 2, L. 21).
10. Plaintiff followed Defendant's instructions exactly as she was told. (R., p. Aug 2, L. 22).

11. Defendant directed Plaintiff to the machine. (R., p. Aug 3, L. 7-9)..
12. Defendant directed Plaintiff as to how to hold the handles of the machine. (R., p. Aug 3, L. 2-3).
13. Defendant, having observed that Plaintiff was not able to use the machine properly, changed the configuration of the handles on the machine. (R., p. Aug 3, L. 4-5).
14. Defendant instructed Plaintiff to push down on the machine with the end of the handle in the palm of her hand instead of pushing down with the wide part of the handle. (R., p. Aug 3, L. 4-5).
15. Defendant was in front of Plaintiff directing her movements the entire time she was on the machine. (R., p. Aug 3, L. 6-7).
16. The handles of the machine rotated when pushed, they were not fixed in place. (R., p. Aug 3, L. 8).
17. Defendant instructed Plaintiff how to hold the handles on the machine she was instructed to use. (R., p. Aug 3, L. 9-10).
18. Defendant improperly instructed Plaintiff how to hold the handles on the machine. (R., p. Aug 9, L. 8, p. Aug 9, L. 1-6.)
19. Defendant instructed Plaintiff to push down on the handles, causing her left hand to move sideways, flipping the machine handle over and subsequently striking her left hand. (R., p. Aug 3, L. 11-14).
20. The strike caused a fracture in the metatarsal bone of Plaintiff's left hand. (R., p. Aug 3, L. 11-14).

INTRODUCTION

This appeal stems from a Personal Injury Case filed in the Seventh Judicial District of Idaho, County of Bonneville. Plaintiff, Amey J. Nelson, alleged that she sustained a fracture to her 5th metacarpal bone while following the instruction of Defendant, Stefani Kaufman.

Plaintiff initially sued both Stefani Kaufman an Anytime Fitness. Anytime Fitness defended on the basis of an agreement it had with Amey J. Nelson and submitted an affidavit that it was not liable for the actions of Stefani Kaufman because she was not an agent and that she was an independent contractor. The district court granted summary judgment in favor of Anytime Fitness. This Appeal is not from that judgment.

Defendant Stefani Kaufman then moved for Summary Judgment on Plaintiff's claims. Defendant's Motion for Summary Judgment was granted erroneously as a matter of law. Plaintiff filed this Appeal in response to the erroneous judgment by the District Court.

STANDARD OF REVIEW

The Court reviews a grant of summary judgment under the same standard of review the district court originally applied in its ruling. *Conner v. Hodges*, 157 Idaho 19, 23, 333 P.3d 130, 134 (2014) (citing *Arregui v. Gallegos-Main*, 153 Idaho 801, 804, 291 P.3d 1000, 1003 (2012)). Summary judgment is proper "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." Idaho Rule of Civil Procedure. 56(a). "When considering whether the evidence in the record shows that there is no genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences, in favor of the nonmoving party." *Liberty Bankers Life Ins. Co. v.*

Witherspoon, Kelley, Davenport & Toole, P.S., 159 Idaho 679, 685, 365 P.3d 1033, 1039 (2016). The moving party has the burden of establishing there is no genuine issue of material fact. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 317, 246 P.3d 961, 970 (2010). "If the moving party has demonstrated the absence of a question of material fact, the burden shifts to the nonmoving party to demonstrate an issue of material fact that will preclude summary judgment." *Id.* (citations omitted). The nonmoving party must present evidence contradicting that submitted by the movant, and which demonstrates a question of material fact. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007). However, "[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Wright v. Ada Cnty.*, 160 Idaho 491, 495, 376 P.3d 58, 62 (2016) (citing *Finholt v. Cresto*, 143 Idaho 894, 897, 155 P.3d 695, 698 (2007)). "Both constitutional questions and questions of statutory interpretation are questions of law over which this Court exercises free review." *Stuart v. State*, 149 Idaho 35, 40, 232 P.3d 813, 818 (2010).

ARGUMENT

I. The Court Erred in finding that Defendant was not an Independent Contractor.

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the result of his work. *Goble v. Boise-Payette Lumber Co.*, 38 Idaho 525, 527 (1924); *also* Idaho Code § 72-102(16).

The Idaho Supreme Court has stated that, when there is an issue of status, it is the **principal** who determines whether a worker is an independent contractor or has any other relationship with

the company. In *Chamberlain v. The Amalgamated Sugar Company*, the Court stated that, "A person dealing with an agent should ascertain the extent of his authority ***from the principal*** and he cannot rely upon the agent's statement or assumption of authority, or upon the mere presumption of authority." *Chamberlain v. The Amalgamted Sugar Company*, 42 Idaho 604, 612 (1926)(emphasis added).

In this case the owner of the company clearly stated in a sworn affidavit that Defendant was an independent contractor and was never an agent or employee of Anytime Fitness. Aug. Pg. 7, L. 1-3; 14-15. There is no other interpretation that can be made considering the evidence in the case, even if all facts were erroneously construed in favor of the moving party. Here, the Court erroneously made the finding that Defendant was an Agent of Anytime Fitness based upon a theory of apparent authority. Tr. P. 78, L. 20-21.

The Idaho Supreme Court has developed a four part test to determine whether a worker is an employee/agent or an independent contractor. The four parts of this test, found in *Shriner v. Rausch*, are: 1) the employer's control of the worker; 2) the method in which the worker was paid; 3) whether major items of equipment were furnished by employer or worker; 4) and whether either party has the right to terminate the relationship at will. *Shriner v. Rausch*, 141 Idaho 228, 231 (2005).

A. Shriner Factors

1. Employer's Control of Worker

Kaufman was approached by Anytime Fitness to teach a circuit training class (R., p. 63-64, L. 4, 1-3). Kaufman at no time has alleged or indicated that she was employed by Anytime

Fitness either in a full or part-time capacity. It is clear from the record that Kaufman was given ample authority to teach the class how she chose to teach it and at no time did Anytime Fitness exercise any control over Kaufman or her methods, only indicating the results they were interested in. Anytime Fitness's lack of any type of control over how Kaufman performed the singular task she was hired for clearly demonstrates that the nature of Kaufman's employment was that of an independent contractor and not that of an employee/agent.

2. The Method of Payment.

The terms of payment by Anytime Fitness to Kaufman have not been disclosed at this time; however, Defendant bears the burden as the moving party for Summary Judgment to supply specific facts to demonstrate that there is no genuine issue of any material fact in the case. Where there is ambiguity, the evidence is to be liberally construed in favor of the nonmoving party. Without Anytime Fitness providing a clear history of W-2 forms indicating Kaufman's payments as well as indicating that she was in fact an employee on tax forms, her form of payment cannot be construed in any way other than that of an independent contractor.

3. Furnishing of Major Items of Equipment.

There is no dispute that Anytime Fitness furnished the facility and exercise equipment; however, Kaufman's duties did not extend to the requirement that any equipment be provided to her. She was contracted to instruct a circuit training class and instruct patrons of Anytime Fitness how to use the equipment in a manner consistent with circuit training while adhering to her duty of care as a fitness instructor to promote, represent, and practice safety, support, and exercise methodology to enhance the life of their client.

Here, although equipment was furnished to Kaufman by Anytime Fitness, it was not required or necessary for the completion of the task Kaufman was contracted for, and as such, should not be considered in this case to weigh in favor of either an employer- employee relationship or an independent contractor relationship.

4. Whether either party could terminate the relationship at will.

Defendant has made no showing that would be any repercussions for either party to terminate their relationship at any time, without cause. Because cause of action would arise from the termination by either party, it is clear that no employer-employee/agent relationship existed between Anytime Fitness and Kaufman. Therefore, the relationship appears to be one of a principal and an independent contractor.

The factors outlined in *Shriner* are a balancing test, which in this case, clearly favors the interpretation that the relationship between Anytime Fitness and Kaufman was that of an independent contractor relationship. Defendant, at the summary judgment stage, had the burden of showing that no question of material fact existed for which a trier of fact could rule in favor of Plaintiff. Defendant did not show, through testimony, deposition, affidavit, or other evidence admissible at trial that the case could not be ruled in Plaintiff's favor. Therefore, Defendant's Motion for Summary Judgment should not have been granted.

Agency, actual or apparent, is created by Anytime Fitness, not by Stefani Kaufman's or Amey J. Nelson's statement of belief. Evidence of apparent authority is irrelevant. The question is: was Defendant an actual agent of Anytime Fitness or was Defendant an independent contractor? Defendant has not denied that she has a contract with Anytime Fitness. Plaintiff believes she has

not produced the contract because the contract would spell out that she is an independent contractor and not an agent of Anytime Fitness.

Plaintiffs have shown that Kaufman was not considered an agent, in any capacity, by Anytime Fitness.

Kaufman produced neither her contract from Anytime Fitness nor an affidavit from anyone from Anytime Fitness stating what her status with that company was. Defendant Kaufman has failed to provide any evidence to demonstrate that she was an agent of Anytime Fitness aside from mere speculation and inference drawn from her contracted ability to teach a single class. Defendant Kaufman admits on page three (3) of her Memorandum in Response to Plaintiff's Brief in Support of Motion to Reconsider that "Whether facts sufficient to constitute an agency relationship exist is a question of fact for the jury." (R., p. 122, L. 1-6.)

Defendant Kaufman then fallaciously argued that the burden shifted to the Plaintiff to prove that Kaufman was an independent contractor. Plaintiff must show facts contrary to Defendant's assertions in order to survive summary judgment, but there is no shifting of evidential burden. The burden remains consistently on the Defendant to prove her defense. The Defendant has provided no showing of facts or evidence which could lead to the conclusion that Defendant Kaufman had any legal authority to act for, contract for, order inventory for, or otherwise perform any of the duties given to a legal agent. Defendant has further attempted to claim that a failed argument by Plaintiffs against AT Fitness, LLC., attempting to prove that AT Fitness was liable for the actions of Defendant Kaufman, but that could not be established and is not controlling.

In order for Defendant to be an agent of Anytime Fitness she would need to demonstrate that the principal, Anytime Fitness and AT Fitness, LLC., by Anytime Fitness or AT Fitness LLC., recognized her as an agent. Agency cannot be proven by mere self-declaration. Defendant asserted that she was independently contracted to teach a single class at Anytime Fitness and that this single instance was sufficient to create an agency relationship between herself and Anytime Fitness. Tr. P. 17, L. 7-8.

II. Apparent Authority does not protect Defendant.

"Agency" is not a concept in the abstract. As the Restatement of Agency states:

> "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."

Restatement of the Law, Third: Agency Section 1.01.

Agency is a fiduciary relationship to people with whom the principal acts; his fiduciary responsibility to third parties exists when an agent acts on his behalf. This was stated quite clearly and accurately in Plaintiff's original brief on this matter.

Apparent authority is not a defense to that apparent agent; it is a means for an injured party to hold a principal liable for the actions of the apparent agent.

> **Apparent authority is the power held by an agent or other actor *to affect a principal's legal relations with third parties* when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.**

Restatement (Third) Of Agency § 2.03 (2006).

As shown in the Restatement of Agency, the purpose of the doctrine of apparent authority is to determine when a principal is liable for the actions of a person it has hired to do something, when the principal has given a third party reason to believe that person is acting as the agent of the principal. The doctrine has nothing to do with shielding an apparent agent from liability; it has only to do with holding the principal liable for making others believe the apparent agent (who is not a real agent) is acting on behalf of the principal. It is a legal means of protecting plaintiffs from being deceived by persons who are made to believe they are dealing with the principal. It is not an escape hatch for wrongdoing-defendants to absolve themselves for the consequences of their torts.

> 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.

Am. W. Enters. v. CNH, LLC., 155 Idaho 746 (2013)(emphasis added).

The Supreme Court of Idaho recognizes that "apparent authority" is different from "actual authority." There is a difference between a real agent and one acting with apparent authority, and again, this has to do with actions of the principal which bind it to representations made by anyone when the principal made a third party believe that person speaking was speaking on behalf of the principal. "The declarations of an alleged agent made outside the presence of the alleged principal are, of themselves, incompetent to prove agency." *Clark v. Gneiting*, 95 Idaho 10, 12, 501 P.2d 278, 280 (1972), citing *Cupples v. Stanfield*, 35 Idaho 466, (1922). Apparent authority of an agent is determined by acts of the principal not acts of the agent. It is conduct of

principal and not of agent that binds the principal. Declarations of an agent are insufficient to prove the grant of power exercised by him and bind his principal to their parties. *Chamberlain v. Amalgamated Sugar Co.*, 42 Idaho 604, 247 P. 12.

There are no cases allowing "apparent authority" to be used as a shield of liability for persons in the position of Stephanie Kaufman, because that is not what apparent authority is for. All of the subheadings in the Restatement of Agency, 3rd, concerning apparent authority discuss when the principal can be held liable. There is not one which allows a defense for the person claiming to be the agent. See, e.g., RS 3d Agency Sections 2.05, 2.06, 2.07 (Restitution to the 3rd party who relies), 3.02 (estops the principal from escaping restitution to the person made to believe the agent had authority to bind the principal).

The defendant erroneously asserted the doctrine of apparent authority as a shield to escape liability, when no such defense exists in law---anywhere in the nation.

In addition to there being evidence that the Defendant was an independent contractor, Defense counsel erroneously asserted, and the Court erroneously found, that the theory of "apparent authority" could be used as a shield to protect independent contractors from the consequences of their misconduct. The District Court's finding otherwise is a mistake of law, which must be reversed. On remand, the jury should not even be allowed to consider whether the defendant could be considered an agent of Anytime Fitness on the basis of "apparent authority."

III. The Court Erred by making a finding that an Agency Relationship existed when it had no power to do so.

> "This Court has previously viewed the question of whether an agency relationship exists as a question of fact for the jury to determine." *Id.* at 735 n.2, 366 P.3d at 1095 n.2. But, to be clear, "[w]hether facts sufficient to constitute an agency relationship exist is indeed 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 appropriate for this Court's consideration." *Id.*

Forbush v. Sagecrest Multi Family Prop. Owners' Ass'n , 162 Idaho 317, 330, 396 P.3d 1199, 2033-2034 (Idaho 2017) citing *Humphries v. Becker*, 159 Idaho 728, 735, 366 P.3d 1088, 1095 (2016).

The Court in *Forbush* lays out a two-part analysis. The first step of this analysis is for the Court to determine if the facts before it are sufficient that an agency relationship could exist. The second step is for a jury to decide, based on those facts, if an agency relationship exists.

The lower Court misinterpreted this analysis to mean that the Court could make a determination and finding as to whether or not an agency relationship existed, as a matter of law. Clearly, that determination, which is the second step in the analysis, can be made **only by a jury** as it is a determination of fact and not one of law. In its Bench Memorandum Re:[sic] Kaufman's[sic] Motion to Reconsider, the Court quoted *Forbush* as cited above, but emphasized the section reading "whether a given set of facts are sufficient to constitute an agency relationship is a question of law appropriate for this Court's consideration," which, ironically, is exactly the portion of the analysis the lower Court erroneously skipped by making a finding that an agency relationship existed. (R., p. 139, L. 12-14).

The determination of whether an agency relationship exists is a question for the jury to determine. At the summary judgment stage, even if there is sufficient evidence for the Court to

find that an agency relationship could exist, it cannot make the jury's determination that the agency relationship does in fact exist and the agency question fails as a matter of law. That is the law in Idaho.

The Court skipped over the first step in the analysis and invaded the purview of the jury by making a finding that agency existed. The Court did not have the power to do so, and on these grounds alone, the District Court's decision granting summary judgment **must** be reversed.

IV. The Court Erred by construing facts in the light most favorable to the moving party.

The Idaho Supreme Court stated in *Friel v. Boise City Housing Authority* that "[t]he Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994).

The principal, not the one asserting agency, determines whether an agency relationship exists. Defendant produced no evidence that the principal agreed she was an agent of Anytime Fitness. Plaintiff produced an affidavit from one representing Anytime Fitness in its earlier filings in support of its summary judgment motion expressly stating, under oath, that Stefani Kaufman was an independent contractor, not an agent of Anytime Fitness.

Since Stefani Kaufman had no power to make herself an agent of Anytime Fitness, the affidavit on behalf of Anytime Fitness carries far more weight on this topic. Aside from the fact that the affidavit produced by Plaintiff supporting her contention that Defendant was an independent contractor defeats, as a matter of law, summary judgment brought by the defendant,

Plaintiff's evidence was far more compelling than Defendant's self-serving affidavit with no support from the principal.

V. Conclusion

In conclusion, the District Court has made clear errors resulting in the erroneous dismissal of Plaintiff's case by summary judgment. The Court's first error was that it applied the doctrine of apparent authority as a defense to liability of the defendant in this case. Apparent authority is a mechanism in which (1) a principal is able to be held liable for the actions of one who the (2) principal has placed in a position in which (3) a person of ordinary prudence who is conversant in the business usages and the nature of a particular business, (4) would be justified in believing that the agent is acting pursuant to existing authority. It is not a defense to liability.

The second error occurred when the District Court used the doctrine of apparent authority to declare that Stefani Kaufman was indemnified by the agreement between Anytime Fitness or AT Fitness, LLC., and Amey J. Nelson. The agreement's indemnities extend to agents and employees, but do not extend to independent contractors. The Court, improperly applying the doctrine of apparent authority, made a finding that the indemnities of the agreement between AT Fitness and Amey J. Nelson applied to Stefani Kaufman and barred her claim. This finding was clearly erroneous because apparent authority does not function to shield a defendant from liability, but to extend liability to the principal of the agent and could not be used to justify indemnifying Stefani Kaufman's actions.

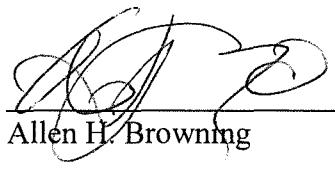
The third error made by the District Court was one of law. The District Court misread and failed to apply the test from the controlling cases on this subject, namely *Forbush* and *Humphries*. (*supra*). The Court made a finding that an agency relationship existed between AT Fitness LLC., or Anytime Fitness and Stefani Kaufman. The Court, as a matter of law, lacked the authority to make that finding. The Court further committed an error when it failed to make a finding, which was in its power to make, as to whether or not enough evidence existed for a jury to make a finding that an agency relationship existed.

The fourth error that the District Court made was in construing the facts in the light most favorable to the moving party. As a matter of law, the Court must construe the facts in a light most favorable to the non-moving party. In making its erroneous findings, the Court disregarded the evidence presented to it through affidavit and record, and instead adopted the facts that Defendant asserted as argument with no evidence, testimony, or affidavit to allow it to be admitted into the Court.

Because of these errors by the District Court, this case must be reversed and remanded to the District Court for trial, with no consideration given to apparent authority.

DATED this 29 th day of November, 2018.

BROWNING LAW



Allen H. Browning

CERTIFICATE OF SERVICE

I hereby certify that on the 29 th day of November, 2018, a true and correct copy of the foregoing document was delivered to the following attorney of record by email, efile, or facsimile.

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