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IN THE SUPREME COURT OF THE STATE OF IDAHO

PRIMERA BEEF, LLC, a Texas Limited
Liability Company,

Plaintiff/Appellant,

vs.

ALLAN WARD, an individual,

Defendant/Respondent.

Supreme Court Docket No. 46595-2018

RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho,
In and for the County of Cassia, Honorable Michael P. Tribe, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises out of an alleged breach of a Settlement Agreement and Mutual Release (“Settlement Agreement”) entered into between Appellant Primera Beef, LLC (“Primera”) and Respondent Allan Ward (“Ward”), individually and on behalf of his company, Little Moo Cattle Company, LLC (“Little Moo”), in connection with a prior lawsuit venued in Cassia County, Case No. CV 2016-859 (“underlying lawsuit”). Confidential R. 5-11. On information and belief, the Settlement Agreement was executed by Primera, Ward, and their respective counsel.¹ Confidential R. 9. For Primera, the Settlement Agreement was executed by Dustin Dean and by its attorney, Gary Slette of Robertson & Slette, PLLC. For Ward and Little Moo, the Settlement Agreement was executed by Ward and his attorney, R. Keith Roark (“Roark”) of The Roark Law Firm. Confidential R. 9. The Settlement Agreement included a confidentiality and non-disparagement clause. Confidential R. 8.

After the Settlement Agreement was executed, Roark continued to represent Ward in a related criminal proceeding then pending in Cassia County. Confidential R. 2. In an apparent effort to have the criminal charges dismissed, Roark sent a letter to the Prosecuting Attorney for Cassia County wherein he notified the Prosecuting Attorney of the parties’ settlement in the underlying

¹ Ward does not have in his possession a fully-executed version of the Settlement Agreement, nor has one been provided in discovery. Confidential R. 2. Ward reserves any and all arguments that he may have regarding the validity and/or finality of the Settlement Agreement until he is provided a fully executed copy. Ward assumes only for the sake of this appeal and the underlying motion for summary judgment and motion for reconsideration that the Settlement Agreement was fully executed.

lawsuit. R. 52-53. The letter had not been authorized or reviewed by Ward. Confidential R. 2-3. Ward did not know about the letter until this lawsuit was filed against him. Confidential R. 2.

Primera's Complaint and Demand for Jury Trial ("Complaint") asserts a single cause of action against Ward for breach of the Settlement Agreement and seeks liquidated damages in the amount of \$25,000. R. 12-15, Confidential R. 8. This claim is based solely on Roark's letter to the Prosecuting Attorney. R. 13-14. The district court granted summary judgment in Ward's favor on the grounds that Roark was acting outside the scope of his authority when he disclosed confidential terms of the Settlement Agreement to the Prosecuting Attorney, and thus there was no genuine issue of material fact with respect to whether Ward breached the Settlement Agreement. R. 98-102. Primera then filed a motion for reconsideration. R. 104-105. The district court denied Primera's motion for reconsideration and reiterated its prior holding that there was no genuine issue of material fact that Roark acted without express or implied authority. R. 123-125.

On appeal, Primera has failed to establish that the district court erred. Consequently, the district court's ruling should be affirmed.

B. Concise Statement of Facts

On or about October 3, 2016, Primera filed the underlying lawsuit arising out of the purchase and sale of Wagyu calves. R. 13, Confidential R. 6. Primera and Ward resolved the underlying lawsuit by way of a Settlement Agreement entered into on or about November 10, 2016. R. 13, Confidential R. 6-11. The Settlement Agreement included the following confidentiality and non-disparagement provision:

Except as otherwise required by this Agreement, law, or order of a court of competent jurisdiction, the parties shall keep the terms of this Agreement strictly confidential. The parties further agree that neither shall hereafter disparage the name or character of the other in any way. Each party agrees that it will not make any negative or derogatory comments to the media, to their colleagues, or to any members of the public concerning the other party, or any of their respective past or present officers, members or directors. The remedy for any breach of this provision shall be the recovery of liquidated damages incurred as a result of such breach at the rate of \$25,000.00 per occurrence.

Confidential R. 8. The Settlement Agreement was executed by Gary Slette (attorney for Primera), Dustin Dean (for Primera), Ward (individually and on behalf of Little Moo), and Roark (attorney for Ward and Little Moo). Confidential R. 9. The underlying lawsuit was dismissed on November 16, 2016. Confidential R. 2.

Meanwhile, a separate criminal matter was pending against Ward in Cassia County on charges related to the facts giving rise to the underlying lawsuit. Confidential R. 2. Approximately two months after the parties entered into the Settlement Agreement, Roark unilaterally sent a letter to the Prosecuting Attorney for Cassia County, dated January 9, 2017, asserting the criminal case should be dismissed because the underlying lawsuit had settled. R. 52-53. In support of this assertion, Roark disclosed certain terms of the confidential Settlement Agreement. *Id.*

Ward had not authorized, requested, or directed Roark to disclose terms of the Settlement Agreement to the Prosecuting Attorney. Confidential R. 2. Ward did not know about the letter until this lawsuit was filed against him. Confidential R. 2-3. Ward has not personally disclosed any terms of the Settlement Agreement and did not ask or authorize his attorney to do so. Confidential R. 2-3, R. 49, 59.

C. Course of Proceedings

Primera filed its Complaint on March 13, 2017, claiming Ward breached the terms of the Settlement Agreement. R. 12-15. Ward filed his Answer and Counterclaim on April 24, 2017. R. 16-25. Pursuant to a stipulation between the parties, the district court entered an order dismissing Ward's counterclaim with prejudice on May 21, 2018. R. 86-87.

On May 3, 2018, Ward filed a motion for summary judgment, along with a memorandum in support. R. 34-47. In his supporting memorandum, Ward argued he had not breached the Settlement Agreement because Roark acted outside the scope of his authority when he sent the letter to the Cassia County Prosecuting Attorney and, further, the liquidated damages clause of the Settlement Agreement serves as a penalty, and is therefore void and unenforceable under Idaho law. R. 41-46. In conjunction with his motion for summary judgment, Ward submitted a declaration of counsel attaching as exhibits the Roark letter and Plaintiff's Response to Defendant's First Set of Interrogatories and Requests for Production of Documents to Plaintiff, served March, 29, 2018. R. 48-64. Ward also submitted his own declaration attaching the Settlement Agreement as an exhibit. Confidential R. 1-11. The district court entered an order to seal Ward's declaration the day after it was filed. R. 65-66.

On May 17, 2018, Primera filed its memorandum in opposition to Ward's motion for summary judgment. R. 67-74. In support of its Opposition, Primera submitted a declaration of its counsel in the underlying lawsuit, Gary Slette, attaching as exhibits email correspondence between himself and the Cassia County Prosecuting Attorney's Office and email correspondence between himself and Roark. R. 75-82. Primera also submitted the declaration of its agent, Dustin Dean,

who participated in the settlement negotiations in the underlying lawsuit. R. 83-85. Ward filed his reply memorandum in support of his Motion for Summary Judgment on May 24, 2018. R. 88-94.

Following a hearing on June 1, 2018, the district court granted summary judgment in Ward's favor in its July 20, 2018 Memorandum Decision Granting Defendant's Motion for Summary Judgment ("Memorandum Decision"). R. 95-103. The district court dismissed the breach of contract cause of action on the grounds that Roark acted without express, implied, or apparent authority when he disclosed confidential terms of the Settlement Agreement to the Cassia County Prosecuting Attorney, and thus there was no genuine issue of material fact with respect to whether Ward breached the Settlement Agreement. R. 98-102. Based on this ruling, the district court determined it was unnecessary to decide the enforceability of the Settlement Agreement's liquidated damages provision. R. 102.

On August 21, 2018, Primera moved for reconsideration of the district court's Memorandum Decision. R. 104-110. Ward filed his opposition to Primera's motion for reconsideration on September 5, 2018. R. 111-115. Primera filed its reply memorandum on September 10, 2018. R. 116-119.

Following a hearing on September 12, 2018, the district court denied Primera's motion for reconsideration in its September 13, 2018 Memorandum Decision Denying Plaintiff's Motion for Reconsideration ("Reconsideration Order"). R. 120-126. The district court reiterated its prior holding that there was no genuine issue of material fact that Roark acted without express or implied authority, and therefore summary judgment was proper. R. 123-125. The district court did not analyze apparent authority because neither Primera nor Ward raised arguments based on apparent

authority. R. 123. Primera argued solely on an express authority theory, while Ward rebutted both express and implied theories. *Id.* Judgment was entered on October 24, 2018. R. 127-129. Primera filed its Notice of Appeal on December 4, 2018. R. 130-138.

II. ISSUES PRESENTED ON APPEAL

Whether the district court erred in finding that Roark acted outside the scope of his express authority by disclosing terms of the Settlement Agreement to the Prosecuting Attorney for Cassia County without Ward's knowledge, authorization, or direction.

III. ARGUMENT

A. Standards of Review

1. Summary Judgment

On appeal from the grant of a motion for summary judgment, this Court utilizes the same standard of review used by the district court originally ruling on the motion. *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport, and Toole*, 159 Idaho 679, 689, 365 P.3d 1033, 1039 (2016). Summary judgment must be granted "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). To avoid summary judgment, the nonmoving party "must submit more than just conclusory assertions that an issue of material fact exists." *Nw. Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 838, 41 P.3d 263, 266 (2002). "Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to the party's case." *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008).

Whether facts giving rise to an agency relationship exist is a question of fact, “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.” *Forbush v. Sagecrest Multi Family Property Owners Association, Inc.*, 162 Idaho 317, 330, 396 P.2d 1199, 1212 (2017).

2. Motion to Reconsider

When a district court decides a motion to reconsider, “the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered.” *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). When this Court reviews a trial court’s decision to grant or deny a motion for reconsideration, it uses the same standard of review the lower court used in deciding the motion for reconsideration. *Liberty*, 159 Idaho at 686, 365 P.3d at 1040.

B. The District Court Did Not Err in Granting Summary Judgment in Favor of Ward.

The district court did not err in granting summary judgment in favor of Ward because Roark acted outside the scope of his authority when he disclosed terms of the Settlement Agreement to the Prosecuting Attorney for Cassia County. Because Roark acted outside the scope of his authority, Ward cannot be held vicariously liable for Roark’s alleged breach of the Settlement Agreement.

“The elements of a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages.” *Safaris Unlimited, LLC v. Von Jones*, 158 Idaho 846, 850, 353 P.3d 1080, 1084 (2015) (citing *Mossell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013)). Implicit

in these elements is that the breach must have been committed by a party to the contract. Primera does not allege Ward personally breached the Settlement Agreement. R. 14, 49, 59. Instead, Primera alleges Roark breached the Settlement Agreement while acting within his scope of authority as Ward's attorney. *Id.*

“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).

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.

Id. Agency relationships are limited in scope to the authority granted by the principal. *Id.* “Only acts by the agent that are within the scope of the agency relationship affect the principal’s legal liability.” *Id.*

Based on the undisputed facts of this case, Ward did not expressly or impliedly grant Roark authority to disclose the terms of the Settlement Agreement to the Prosecuting Attorney.

1. Primera has Waived Arguments Regarding Implied or Apparent Authority.

An appellant must identify its claimed assignments of error with particularity and specificity. *PHH Mortgage v. Nickerson*, 164 Idaho 33, 423 P.3d 454, 459 (2018). If an appellant does not “assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by this Court.” *Id.*

“This Court will not consider general attacks on the district court’s conclusions absent specific reference to evidentiary or legal errors.” *Id.* “Arguments of this type are deemed to have been waived.” *Id.*

In its Memorandum Decision, the district court determined Roark acted without express, apparent, or applied authority when he disclosed terms of the Settlement Agreement to the Prosecuting Attorney. R. 98-108. At the hearing on the motion for reconsideration, Primera’s counsel clarified: “I don’t think I’m arguing apparent authority at all. My focus is on express authority.” Transcript 7 at 16:23-25. In its Reconsideration Order, the district court determined that Roark acted without express or implied authority. R. 124-125. The district court analyzed arguments based on implied authority even though Primera had “appear[ed] to argue strictly based on an express authority theory.” R. 123.

On appeal, Primera similarly appears to argue strictly based on an express authority theory. The issue on appeal broadly assigns error to the district court’s finding that Roark “was not acting within the scope of his authority,” but does not specify whether Primera contends Roark was acting pursuant to express, implied, or apparent authority. Appellant’s Brief 3. The Memorandum Decision and Reconsideration Order include specific findings with respect to each type of authority. R. 98-102, 123-125. Broadly assigning error to the district court’s findings regarding Roark’s authority is a general attack on the district court’s conclusions without specific reference to legal errors.

The only type of authority specifically identified in Primera’s brief is express authority. Appellant’s Brief 3, 6. Because Primera has not asserted, with particularity and specificity, any

assignments of error based on apparent or implied authority, any arguments based on these two types of authority have been waived.

2. The District Court Did Not Err in Determining Roark Acted Without Express Authority.

“Express authority refers to that authority which the principal has explicitly granted the agent to act in the principal’s name.” *Shatto v. Syringa Surgical Center, LLC*, 161 Idaho 127, 131, 384 P.3d 374, 378 (2016). “Express authority is articulated between the parties.” *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 944, 854 P.2d 280, 287 (1993). Declarations of the alleged agent, standing alone, do not establish that the principal has conferred express authority. *Muniz v. Schrader*, 115 Idaho 497, 500, 767 P.2d 1272, 1275 (Ct. App. 1989).

There is no dispute that Ward did not ask or authorize Roark to disclose terms of the Settlement Agreement to the Prosecuting Attorney. Confidential R. 2. In fact, Ward first learned about the disclosure when this lawsuit was filed against him approximately two months after Roark sent his letter to the Prosecuting Attorney. Confidential R. 2-3. Because Ward did not explicitly grant Roark authority to disclose terms of the Settlement Agreement, Roark acted without express authority in doing so.

Primera does not argue that Ward directed Roark to disclose terms of the Settlement Agreement and has not submitted any evidence to this effect. Primera argues that because Ward retained Roark as his counsel in the criminal matter, any actions taken by Ward in connection with that matter were within the scope of his authority.

In support of this argument, Primera relies on Idaho Civil Jury Instruction 6.43.1, which defines the term “scope of authority” and states:

Conduct is within the scope of the agent’s authority if it occurs while the agent is engaged in the duties that the agent was asked or expected to perform and relates to those duties. It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent’s authority. Conduct for the benefit of the principal that is incidental to, customarily connected with, or reasonably necessary for the performance of such duties is within the scope of the agent’s authority.

IDJI 6.43.1. This definition is inapplicable to express authority to the extent it does not require a particular act to be expressly authorized by the principal to be within the scope of authority. As the name suggests, express authority requires express authorization by the principal.

The definition in Idaho Civil Jury Instruction 6.43.1 is consistent with Idaho case law defining implied authority, which does not require express authorization and instead only requires that the conduct be necessary to complete that which was expressly authorized. *See Humphries*, 159 Idaho at 735, 366 P.3d at 1095. In other words, an agent has express authority to take action that has been expressly authorized and has implied authority to take actions necessary and proper to complete that which has been expressly authorized. *See id.*

Thus, Primera’s argument that Roark had “express authority” to disclose terms of the Settlement Agreement because he had express authority to act as his attorney is based on an incorrect and overly broad definition of express authority. This argument is based on implied authority, not express. Primera has waived arguments based on implied authority because its brief only refers to express authority. Further, Primera only raised arguments based on express authority in connection with its motion for reconsideration. R. 123, Transcript 7 at 16:23-25. Because

Primera has waived arguments based on implied authority, it cannot raise arguments based on implied authority under the incorrect label of “express authority.”

There is no dispute that Ward did not explicitly grant Roark authority to disclose the terms of the Settlement Agreement to the Prosecuting Attorney, and therefore the district court did not err in determining that Roark acted without express authority.

3. **Even if Primera has Not Waived Arguments Regarding Implied Authority, the District Court Did Not Err in Determining Roark Acted Without Implied Authority.**

Primera has not made any specific assignment of error based on a theory of implied authority. The only type of authority specifically identified in Primera’s brief is express authority. Although there is no specific reference to implied authority, some of Primera’s arguments appear to be based on a theory of implied authority. Even if this Court determines Primera has not waived arguments based on implied authority, the district court properly concluded that Roark acted without implied authority when he disclosed terms of the confidential Settlement Agreement to the Prosecuting Attorney.

a. **Although Primera does not specifically refer to implied authority, its arguments are based on a definition of “scope of authority” that is broader than the scope of implied authority, as defined by the Idaho Supreme Court.**

“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.” *American West Enterprises, Inc. v. CNH, LLC*, 155 Idaho 746, 753, 316 P.3d 662, 669 (2013), *see also* IDJI 6.40.3. Although Idaho case law limits implied authority to that which is necessary, usual, and proper to accomplish the express authority that has been granted, Primera argues—without specific

reference to implied authority—that the scope of agency essentially extends to all actions by the agent so long as the agent is not doing something totally and completely unrelated to what he or she was expressly authorized to do.

For example, citing to *King v. H.J. McNeel, Inc.*, 94 Idaho 444, 489 P.2d 1324 (1971), Primera argues that a real estate agent would be acting outside the scope of his authority if he represented a client in court. Appellant’s Brief 7. The *King* Court held that a realtor’s representations regarding boundaries and quantity of land are generally binding on the principal even if the realtor acted without express authority. *King*, 94 Idaho at 446, 489 P.2d at 1326. This holding has no bearing on the scope of an attorney’s express or implied authority. Further, the holding in *King* in no way supports Primera’s argument that an agent acts within the scope of his authority so long as his actions are not completely unrelated to that which the principal has expressly authorized.

Primera also relies on *Thornton v. Budge*, 74 Idaho 103, 257 P.2d 238 (1953) in support of this same argument. In *Thornton*, the operator of a garage rode as the passenger in a car driven by his acquaintance who had been in the garage at the time the operator noticed he needed to procure parts from a nearby town. *Id.* at 105, 257 P.2d at 239. The acquaintance worked as “a businessman in Malad.” *Id.* On the way back, the acquaintance’s car collided with a truck. *Id.* at 106, 257 P.2d at 240. The only issue on appeal pertaining to agency was whether the district court erred in submitting to the jury the question of whether the relationship between the garage operator and his acquaintance was that of host and gratuitous guest or principal and agent. *Id.* The Court held the

question presented an issue of fact and the garage operator was not prejudiced by having the question of agency submitted to the jury. *Id.* at 108, 257 P.2d 241-42.

Primera relies on *Thornton* to support its argument that negligently operating an employer's vehicle is within a driver's scope of authority, but listing his employer's home for sale is outside the driver's scope of authority.² Appellant's Brief 7. Ward does not dispute that a driver is generally not authorized to act as his employer's realtor and a realtor is generally not authorized to act as his client's attorney. However, these analogies are irrelevant for several reasons. First, the cases Primera relies on are factually distinguishable from the case at bar and simply have no bearing on the scope of an attorney's express or implied authority. Second, neither case involves a putative agent's breach of a contract entered into by the principal, as is the case here. In fact, Primera has not cited any case law supporting the argument that a principal can be held liable for breach of contract if the alleged breach was caused by the principal's unauthorized agent. Third, the analogies Primera draws from these two cases are unsupported by the holdings therein. Neither *King* nor *Thornton* support the argument that an agent acts within the scope of his authority so long as he is not doing something completely far afield from his job duties, such as a driver acting as a realtor or a realtor acting as an attorney. Fourth, these analogies are unsupported by Idaho case law that actually addresses the scope of implied authority. "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." *American West Enterprises, Inc.*, 155 Idaho at 753, 316

² The driver in *Thornton* was not an employee of the garage and was operating his own vehicle. *Thornton*, 74 Idaho at 105, 257 P.2d at 239-240.

P.3d at 669. This definition is markedly narrower than the definition Primera makes by way of analogy.

- b. Retention of an attorney, standing alone, does not establish that all actions taken by the attorney on behalf of the client are within the attorney's scope of authority.**

Primera's arguments are not supported by Idaho case law analyzing an attorney's scope of authority. Primera argues that because Ward retained Roark as his attorney, any actions taken by Roark while acting as his attorney were within the scope of his authority. Citing to *Devault v. Steven L. Herndon, a Professional Association*, 107 Idaho 1, 684 P.2d 978 (1984), Primera argues that "[l]itigants freely choose their attorneys and cannot avoid the consequences of the attorney's action," and therefore an attorney's actions, even if improper, are within his or her scope of authority. Appellant's Brief. 8-9. The *Devault* decision is clearly distinguishable from the case at bar. In *Devault*, the attorney failed to comply with the district court's discovery order, which led to the dismissal of the client's lawsuit as a sanction for the violation. *Id.* at 1-2, 684 P.2d at 978-79. The client argued he should not be penalized for his attorney's failure to comply with discovery orders. *Id.* at 2, 684 P.2d at 979. The Supreme Court upheld the trial court's order of dismissal under the broad discretion granted to the trial court to issue sanctions for violations of discovery orders. *Id.* The *Devault* opinion includes no holdings or analysis on theories of agency and is thus inapplicable to the case at bar. Roark's actions do not invoke Ward's duties under the Idaho Rules of Civil Procedure as a party to a civil action, but instead involve an alleged breach of contract by his attorney for actions Ward did not know of or authorize.

Under Idaho law, retention of an attorney does not automatically bring all actions taken by the attorney on behalf of the client within the attorney's scope of authority. For example, in *Cameron Sales, Inc. v. Klemish*, 93 Idaho 451, 463 P.2d 287 (1970), an attorney representing both a co-op supply company and a bank purported to enter into a settlement agreement on behalf of both during a meeting with another company, Cameron Sales, relating to repayment and securitization of Klemish's debts. *Id.* at 453-54, 463 P.2d at 289-90. The meeting was attended by Klemish, a representative and attorney for Cameron sales, a representative of the co-op supply company, and the attorney for the bank and co-op supply company. *Id.* No representative of the bank was present. *Id.* This Court held "there was no showing that the attorney had the actual authority to compromise or settle the claim on behalf of the bank." *Id.* at 455, 463 P.2d at 291. Although an attorney generally has implied authority to enter into stipulations with respect to procedural or remedial matters, this implied authority "does not extend to the doing of acts which will result in the surrender or giving up of any substantial right of the client." *Id.* A representative of the bank did not give the attorney authority to settle the claim, the bank did not later ratify the attorney's actions, and there was no showing that the bank had knowledge of the agreement. *Id.* at 455-56, 463 P.2d at 291-92. Based on these factors, this Court determined the attorney lacked authority to bind the bank to the agreement. *Id.*

More specifically, an attorney must have actual authority, whether express or implied, to settle a claim on behalf of his or her client. *Caballero v. Wikse*, 140 Idaho 329, 332, 92 P.3d 1076, 1079 (2004). Following his termination from the Idaho Department of Welfare, Wikse filed three wrongful termination actions against the State and its officials. *Id.* at 330, 92 P.3d at 1077, 92 P.3d

at 1077. A global settlement agreement was reached at mediation. *Id.* at 331, 92 P.3d at 1078. At the beginning of the mediation, the parties were told that a representative with settlement authority was required to be in attendance throughout the mediation. *Id.* After the parties reached an agreement on non-monetary issues and were nearing an agreement on money damages, Wikse left the mediation and told his attorney words to the effect of “I’m leaving, Jim, you handle it.” *Id.* at 331-32, 92 P.3d at 1078-79. His attorney accepted the State’s counteroffer on monetary damages. *Id.* A settlement agreement was not executed at the mediation. *Id.* Wikse’s attorney informed him of the agreed upon terms shortly after the mediation. *Id.* About a month later, Wikse told his attorney he was unable to settle on those terms. *Id.* The Idaho Supreme Court held that there was substantial, competent evidence to support a finding of express actual authority based on Wikse’s statement that his attorney “handle it” coupled with his understanding that a representative with settlement authority had to be present at the mediation at all times. *Id.* at 333, 92 P.3d at 1080.

The facts of this case support a finding that Roark acted without actual authority when he disclosed terms of the Settlement Agreement to the Prosecuting Attorney without Ward’s direction or authorization. Similar to the bank in *Klemish*, Ward was not privy to the communications between Roark and the Prosecuting Attorney and had not given him authority to disclose terms of the Settlement Agreement. Confidential R. 2-3. Also similar to the bank in *Klemish*, Ward did not ratify or have any knowledge of Roark’s actions. Ward did not know that Roark had sent the letter to the Prosecuting Attorney until this lawsuit was filed against him. Confidential R. 2-3. After the underlying lawsuit was dismissed, Ward asked Roark if it would be possible to have the criminal lawsuit dismissed. Confidential R. 2. Unlike the statements in *Wikse*, Ward did not ask Roark about

the possible resolution of his case in the context of a mediation or settlement negotiations. Ward did not direct or authorize Roark to settle the criminal case on his behalf, let alone disclose terms of the confidential Settlement Agreement in doing so. Simply inquiring with counsel about the possible resolution of a lawsuit is not a grant of settlement authority, and it is by no means a grant of authority to disclose confidential terms of a settlement agreement.

The Idaho Supreme Court's definition of implied authority further supports the district court's finding that Roark acted without implied authority when he disclosed terms of the Settlement Agreement without Ward's authorization. "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." *American West Enterprises, Inc*, 155 Idaho at 753, 316 P.3d at 669. Roark represented Ward in the underlying lawsuit and signed the Settlement Agreement. Confidential R. 2, 9. Roark was therefore aware of the confidentiality provision. There can be no genuine dispute that it is not "necessary, usual, and proper" for an attorney to knowingly violate the terms of his client's ongoing contractual obligations, at least without first discussing this proposed violation with the client and obtaining *express* authority to do so. Roark never had any such discussion with Ward and never obtained his express authority to disclose terms of the confidential Settlement Agreement. Because Roark's actions were not "necessary, usual, and proper," he acted outside the scope of his implied authority as Ward's attorney.

Thus, the facts of this case support the district court's finding that Roark acted without express or implied authority when he disclosed terms of the Settlement Agreement without Ward's

authorization, direction, or knowledge. The facts underlying this determination are not in dispute, and therefore summary judgment was properly granted in favor of Ward.

IV. ATTORNEY FEES ON APPEAL

Ward respectfully requests that this Court award him costs on appeal pursuant to Idaho Code §§ 12-107, 12-120(3) and the Settlement Agreement. Confidential R. 8.

V. CONCLUSION

Ward respectfully requests that this Court affirm the Memorandum Decision and Reconsideration Order and affirm the Judgment dismissing Primera's Complaint with prejudice.

DATED this 8th day of May, 2019.

ELAM & BURKE, P.A.

By: _____



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of May, 2019, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

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