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County of KOOTENAI)ss
FILED 5/9/18
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CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

PATRICIA A. LYNCH and THOMAS W. LYNCH, wife and husband, *Plaintiffs,* vs. **MICHAEL BOOM, and SAVANNAH HOLLOPETER,** *Defendants.*	Case No. **CV 2017 2340** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANT HOLLPETER'S MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Savannah Hollopeter's (Savannah) Motion for Summary Judgment.[1]

The parties appear to agree to the following facts.[2] On or about April 23, 2015, plaintiff Patricia Lynch (Patricia) was driving a 2004 Mercedes Benz 500 SLK east on Interstate 90 in Kootenai County, Idaho. The Mercedes Benz was owned by Patricia and her husband, plaintiff Thomas Lynch (Thomas). At the same time and date, defendant Michael Boom (Michael) was driving a 2015 Chrysler 200 east on Interstate 90; he was directly behind the Mercedes Benz driven by Patricia. The Chrysler 200 was owned by EAN Holdings, LLC (EAN Holdings), and it had been rented by Savannah. At some point, Patricia, in the Mercedes Benz, stopped for traffic in a

[1] EAN Holdings, LLC was also a moving party when the Motion for Summary Judgment was initially filed, but, as noted below, has since been dismissed as a party in this case.

[2] As discussed below, the parties have not submitted admissible evidence.

construction zone and was rear-ended by Michael in the Chrysler.

On March 22, 2017, Patricia and Thomas filed a Complaint against Savannah, Michael, and EAN Holdings. Patricia and Thomas generally allege that at the time of the collision, Michael was operating the Chrysler 200 in the "scope of his agency." Compl. 2, ¶ 5. They further allege that Savannah, Michael, and EAN Holdings are liable for negligently driving the Chrysler 200 or for allowing the Chrysler 200 to be negligently driven. *Id.* at 2, ¶ 6. On April 27, 2017, Michael and Savannah filed an Answer, in which they admit certain facts but deny liability.

On December 26, 2017, Savannah and EAN Holdings moved for summary judgment on Patricia's and Thomas' claim against them (due to the "agency" argument on summary judgment, defendant Michael Boom did not move for summary judgment). In support of their Motion for Summary Judgment, Savannah and EAN holdings submitted a Memorandum in Support of Defendant Savannah Hollopeter and Defendant EAN Holdings' Motion for Summary Judgment. They attached two exhibits to their Memorandum, which include a copy of the Complaint and a copy of Defendants' First Set of Interrogatories to Plaintiff Patricia A. Lynch and Answers Thereto. In general, Savannah argues she is entitled to summary judgment because the elements of negligence cannot be established and there is no evidence to support an alternate theory of liability. EAN Holdings argues it is entitled to summary judgment because under Idaho Code § 49-2417 its actions were not negligent and it did not participate in any criminal wrongdoing.

Thereafter, on March 23, 2018, the parties stipulated to the dismissal of EAN Holdings as a party in this case. The Court issued an order dismissing EAN Holdings as a party on April 2, 2018.

On April 17, 2018, Patricia and Thomas filed a Memorandum Opposing

Defendants' Motion for Summary Judgment. They attached three exhibits to their Memorandum, which include a copy of the Idaho Vehicle Collision Report, a copy of Defendants' Memorandum in Support of Motion for Summary Judgment, and a copy of the Complaint. Patricia and Thomas generally contend that Savannah is liable to them for Michael's negligent conduct because Savannah and Michael had a principal-agent relationship and, as such, Savannah, the principal, is liable for her agent Michael's negligence.

A hearing on defendants' Motion for Summary Judgment was held May 1, 2018. At that hearing, counsel for Savannah cited a few cases which neither party had cited in briefing. Accordingly, this Court gave counsel for Patricia and Thomas additional time to file a response to those case, and on May 4, 2018, counsel for Patricia and Thomas filed Declaration of Richard C. Feltman in Response to Cases Cited by Defendants' Counsel During the Hearing on Defendants' Motion for summary Judgment Regarding Savannah Hollopeter.

II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, 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). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
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> (1) give an opportunity to properly support or address the fact;
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> (2) consider the fact undisputed for purposes of the motion;
>
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea*, 156 Idaho at 545, 328 P.3d at 525 (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of*

> *Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet "the 'genuine issue of material fact' burden . . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994).

> Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Dunnick*, 126 Idaho at 311 n.1, 882 P.2d at 478 n.1. Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994).

Heath v. Honker's Mini-Mart, Inc., 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000).

III. ANALYSIS.

Savannah seeks summary judgment on Patricia's and Thomas' claim that she is liable for negligence. Before considering the merits of Savannah's Motion for Summary Judgment, the Court must address the admissibility of the evidence submitted by both parties.

A. The parties have not submitted admissible evidence in support of or in opposition to the Motion for Summary Judgment.

In support of their Motion for Summary Judgment, Savannah submitted a Memorandum along with two attachments. The attachments include a copy of the

Complaint and a copy of Defendants' First Set of Interrogatories to Plaintiff Patricia A. Lynch and Answers Thereto. In opposition to Savannah's Motion for Summary Judgment, Patricia and Thomas submitted a Memorandum along with three attachments. The attachments include a copy of the Idaho Vehicle Collision Report, a copy of Defendants' Memorandum in Support of Motion for Summary Judgment, and a copy of the Complaint.

The parties do not challenge the admissibility of each other's evidence. However, the Court finds that both parties have failed to submit evidence in an admissible form. "Summary judgment proceedings are decided on the basis of admissible evidence." *Campbell v. Kvamme*, 155 Idaho 692, 696, 316 P.3d 104, 108 (2013). To admit documents and exhibits into evidence for purposes of supporting or opposing a motion for summary judgment, the documents and exhibits must be attached to an affidavit or verified complaint. *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 820–21, 979 P.2d 1174, 1178–79 (1999); *Johnson v. City of Homedale*, 118 Idaho 285, 288, 796 P.2d 162, 165 (Ct. App. 1990); *Shacocass v. Arrington Contr. Co.*, 116 Idaho 460, 463, 776 P.2d 469, 472 (Ct. App. 1989). In turn, "a court cannot hypothecate facts which are absent from the record cognizable under Rule 56." *Shacocass*, 116 Idaho at 463, 776 P.2d at 472 (citing *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337–38, 689 P.2d 227, 229–30 (Ct. App. 1984)). As indicated, the documents and exhibits submitted by both parties were not attached to a verified complaint or an affidavit; rather, each party attached documents and exhibits to their respective Memorandums. By doing so, the parties have not submitted the documents and exhibits in an admissible form, nor have they established that the attachments are true and correct copies or complied with Rule 56 and the Idaho Rules of Evidence.

Therefore, the attachments to each party's Memorandums are not evidence and cannot be used to support or oppose an asserted fact.

The Court also notes that both parties attached a copy of the Complaint to their Memorandums, and Patricia and Thomas attached a copy of Savannah's Memorandum in Support of Motion for Summary Judgment. While the Court understands that what is alleged in the pleadings is relevant on summary judgment, it is unclear why either party would see a need to attach a copy of these documents to their Memorandums as these documents are a part of the Court's file in this case. Additionally, Patricia's and Thomas' Complaint is unverified and, therefore, it consists of unsworn statements. "Unsworn statements are entitled to no probative weight in passing on motions for summary judgment." *Camp v. Jiminez*, 107 Idaho 878, 882, 693 P.2d 1080, 1084 (Ct. App. 1984); *Golay v. Loomis*, 118 Idaho 387, 389, 797 P.2d 95, 97 (1990). Further, Savannah's Memorandum is not evidence and cannot be used to create of issue of fact. *See Fed. Home Loan Mortg. Corp. v. Butcher*, 157 Idaho 577, 581, 338 P.3d 556, 560 (2014) (citing *Smith v. Mack Trucks, Inc.*, 505 F.2d 1248, 1249 (9th Cir. 1974) (per curiam) ("Legal memoranda and oral argument, in the summary-judgment context, are not evidence, and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment.")).

In summary, the Court concludes that both parties have failed to submit any admissible evidence. .

B. Apparent stipulation to certain facts.

Savannah on one hand and Patricia and Thomas on the other, agree that the following facts are undisputed. On or about April 23, 2015, Patricia was driving a 2004 Mercedes Benz 500 SLK east on Interstate 90 in Kootenai County, Idaho. The Mercedes Benz was owned by Patricia and Thomas. At the same time and date,

Michael was driving a 2015 Chrysler 200 east on Interstate 90, directly behind Patricia's and Thomas' Mercedes Benz. The Chrysler 200 was owned by EAN Holdings, and it had been rented by Savannah. Patricia, in the Mercedes Benz, stopped for traffic in a construction zone. She was rear-ended by the Chrysler 200 driven by Michael. Savannah was a passenger in the Chrysler 200 driven by Michael.

C. Patricia and Thomas have pled an alternate theory of liability with regard to Savannah.

Savannah argues that Patricia's and Thomas' claim against her fails because the elements of a negligence claim cannot be established. Mem. Supp. Def. Savannah Hollopeter and Def. EAN Holdings' Mot. Summ. J. 3–4. She argues that Patricia and Thomas have not explained what duty she owed them and how she breached that duty as a passenger in the Chrysler 200. *Id.* at 4. Savannah points out that the allegations in the Complaint relate to the safe operation of the Chrysler 200 and, as a passenger, she did not operate the vehicle. *Id.* She also asserts that Patricia and Thomas "have not claimed, and there is no evidence to support, that [she] is liable under an alternate theory, such as for negligent entrustment or an employment relationship." *Id.* As a result, Savannah argues that the negligence claim against her fails as a matter of law, and she asks the Court to enter summary judgment in her favor. *Id.*

In response, Patricia and Thomas argue that Savannah is liable for Michael's negligence because Savannah and Michael had an agency relationship premised on express authority. Mem. Opposing Defs.' Mot. Summ. J. 2–5. They explain that Savannah rented the Chrysler 200 from EAN Holdings, and because Michael was driving and Savannah was a passenger, Savannah must have given Michael "express permission" to operate the vehicle. *Id.* at 5. Patricia and Thomas state that Savannah benefitted from Michael driving the vehicle because he was transporting her to her

desired location. *Id.* Patricia and Thomas then assert that this type of conduct would give rise to a principal-agent relationship as discussed in *Thornton v. Budge*, 74 Idaho 103, 257 P.2d 238 (1953). *Id.* Patricia and Thomas conclude by asserting that the parties do not dispute that Michael negligently drove the Chrysler 200, the evidence demonstrates Michael was negligent, and because Michael was negligent, liability can be imputed to Savannah as Michael was Savannah's agent. *Id.*

The threshold issue raised by the parties' arguments is whether Patricia and Thomas pled an agency relationship such that Michael's alleged negligence can be imputed to Savannah. If Patricia and Thomas did not plead that alternate theory, the Court may consider Savannah's argument that the undisputed facts demonstrate she is not liable for common law negligence. However, if Patricia and Thomas did plead an alternate theory of liability, Savannah's argument in support of her summary judgment motion is irrelevant because Patricia and Thomas do not need to prove each element of a negligence claim as it relates to Savannah. Rather, at trial, they need to prove the existence of an agency relationship between Savannah and Michael, such that Michael's negligence (assuming it's proved) can be imputed to Savannah. *See Melichar v. State Farm Fire & Cas. Co.*, 143 Idaho 716, 723, 152 P.3d 587, 594 (2007) (citing *Transamerica Leasing Corp. v. Van's Realty Co.*, 91 Idaho 510, 517, 427 P.2d 284, 291 (1967)) ("The burden of proving a principal-agent relationship falls upon the party asserting agency.") Where the existence of an agency relationship is disputed, it is a question for the trier of fact to resolve from the evidence. *Gissel v. State,* 111 Idaho 725, 729, 727 P.2d 1153, 1157 (1986) (*citing Clark v. Gneiting,* 95 Idaho 10, 501 P.2d 278 (1972)).

As noted, Savannah contends that Patricia and Thomas have not claimed, and there is no evidence to support, that Savannah is liable under an alternate theory, such as for negligent entrustment or an employment relationship. The Court disagrees and finds that Patricia and Thomas did plead an alternate theory of liability, i.e., the existence of a principal-agent relationship. *See Navo v. Bingham Memorial Hosp.*, 160 Idaho 363, 374–75, 373 P.3d 681, 692–93 (2016).

> Under notice pleading, a party is no longer slavishly bound to stating **particular theories** in its pleadings." *Seiniger Law Office, P.A. v. N. Pac. Ins. Co*, 145 Idaho 241, 246, 178 P.3d 606, 611 (2008). Rather, a party is required to state an underlying cause of action and the facts from which that cause of action arises.

Id. at 375, 373 P.3d at 693 (emphasis added).

In their Complaint, Patricia and Thomas state an underlying cause of action for negligence against Michael, Savannah, and EAN Holdings. Given her Motion for Summary Judgment, Savannah recognizes the existence of the negligence claim against her. The Complaint is also sufficient to put Savannah on notice that Patricia and Thomas are seeking to hold Savannah liable for Michael's negligence on the ground that Michael was Savannah's agent. Paragraph 5 of the Complaint provides:

> 5. At said time and place, Defendant, EAN Holdings, LLC, was the owner of a certain 2015 Chrysler 200 which had been rented by Defendant, Savannah Hollopeter, that was being operated by the Defendant, Michael Boom, **in the scope of his agency**, in a westerly direction directly behind Plaintiffs' automobile.

Compl. 2, ¶ 5 (emphasis added). Paragraph 5 identifies the alleged the roles of each defendant—EAN Holdings as owner, Savannah as renter, and Michael as driver. By stating that Michael operated the vehicle in the "scope of his agency," Patricia and Thomas have sufficiently asserted the existence of an agency relationship between Savannah and Michael. Further, the fact that the Complaint does not clearly set forth the theory of agency is not fatal in light of the Idaho Supreme Court's analysis in *Navo*

v. Bingham Memorial Hosp., 160 Idaho 363, 373 P.3d 681 (2016). Therefore, the Court concludes that Patricia and Thomas did plead an alternate theory of liability.

However, while Patricia and Thomas discuss whether there is a genuine issue of material fact related to the existence of an agency relationship, Savannah did not move for summary judgment of that theory. Therefore, the Court declines to decide whether or not there is a genuine issue of material fact related to the existence of an agency relationship. Furthermore, the Court concludes that because Patricia and Thomas contend that Savannah's liability is premised only on the existence of an agency relationship, the Court need not address Savannah's argument that Patricia and Thomas will be unable to establish the elements of a negligence claim against her.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the Court denies Savannah's Motion for Summary Judgment.

IT IS HEREBY ORDERED defendant Hollopeter's Motion for Summary Judgment is DENIED.

Entered this 9th day of May, 2018.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 9 day of May, 2018, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
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