STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

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

AVVE SHAPIRO,

Plaintiff,

vs.

STEPHEN J. DOTY, DAWN R. MILES, ET AL.,

Defendants.

Case No. **CV 2016 5069**

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT MILES' MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Dawn Miles' (Miles) Motion for Summary Judgment.

On July 11, 2016, Avve Shapiro (Shapiro) filed a Complaint against Miles and Stephen L. Doty (Doty). Shapiro is the son of the late Claudia Shapiro (Decedent), the Successor Trustee of the Claudia Shapiro Living Trust, and the Personal Representative of the Estate of Claudia Shapiro. Shapiro Dec. 1, ¶ 1. The allegations in Shapiro's Complaint are based on the alleged acts of Doty and Miles in the last few years of the Decedent's life. In September 2001, the Decedent moved to north Idaho. *Id.* at 1–2, ¶ 2. While living in north Idaho, the Decedent attended Grace Bible Church in Coeur d'Alene, Idaho, and church is where the Decedent first met Doty. Doty Dec. 1; Shapiro Dec. 1–2, 4, ¶¶ 2, 8. In late 2013 or in the last few months of 2014, Doty

began helping the Decedent with household chores.[1] Doty Dec. 1; Shapiro Dec. 4, ¶ 8; Rivera Dec. (submitted in Opp'n to Doty's Mot. Summ. J. to be heard August 2, 2017) 3, ¶ 7. In March 2015, the Decedent sold Doty her Kubota tractor for $1.00, and Doty became a joint bank account holder with the Decedent that same month. Doty Dec. 2; Shapiro Dec. 6, ¶¶ 15–16. Five months later in August 2015, Doty acquired the Decedent's home, all of the home's contents, and acreage located at 18599 North Elk Run Lane, Rathdrum, Idaho. Doty Dec. 2–3; Shapiro Dec. 6, ¶ 15. The Decedent continued to live at the property she sold to Doty until her death in January 2016. Doty Dec. 3.

The Complaint alleges four causes of action: cancellation of deed and sale of tractor, quiet title, conversion, and accounting and damages. Compl. 3–5. Only the conversion and accounting and damages claims apply directly to Miles. In addition, the Complaint alleges that Doty and Miles were the "agents, servants, and employees of their co-defendants." Compl. 2. Miles seeks summary judgment on both the conversion claim and the claim of accounting and damages. She also seeks summary judgment on the issue of agency and whether an employer-employee relationship existed between Miles and Doty.

It is unclear from the record when Miles met the Decedent and whether Miles and the Decedent were acquaintances, friends, business partners, or something else entirely.[2] The Court assumes that Miles and the Decedent met sometime before June

[1] Doty states that he began working for the Decedent in late 2013. Doty Dec. 1. Shapiro disagrees. Shapiro states that Doty began working for the Decedent in the last few months of 2014. Shapiro Dec. 4, ¶ 8. Rivera, who submitted a Declaration in Opposition to Doty's Motion for Summary Judgment, states that he helped the Decedent with household chores until sometime in 2014, and that Doty began helping the Decedent at some point in 2014 when Rivera could no longer do so. Rivera Dec. 3, ¶¶ 7–8.

[2] Shapiro suggests that the Decedent was involved with Miles in a series of business

2015. That is because on June 6, 2015, the Decedent opened a linked checking and savings account with Wells Fargo Bank, and presumably the Decedent and Miles were acquainted prior to that. Thompson Dec. (re: Miles Mot. Summ. J.) 2, ¶ 3; Miles Aff. 2, ¶ 9. While Miles' affidavit has some impermissible legal conclusions as to employment, servitude or agency relationships, Miles testimony regarding when she met Decedent, Doty, and Miles' observations of bank accounts is admissible. The Court also notes that Michelle Thompson's declaration mentions two other accounts, but there is no detail or supporting documentation regarding those accounts. The linked checking and savings account with Wells Fargo Bank had an opening balance of $100.00. Thompson Dec. 2, ¶ 3. Three days after opening the account with Wells Fargo Bank, the Decedent added Miles to the linked checking and savings account (Joint Account). *Id.* On June 18, 2015, the Decedent deposited $54,923.37 into the Joint Account, which represented the proceeds from a sale of real property the Decedent owned with Shapiro. *Id.* at 2, ¶ 4; Shapiro Dec. 4, ¶ 10. Besides accrued interest, there was only one other deposit into the Joint Account and the Decedent made that deposit. Thompson Dec. 2, ¶¶ 4, 8. Between June 2015 and January 2016, "thousands of dollars were withdrawn monthly from" the Joint Account, and corresponding amounts were deposited into a joint account the Decedent held with Doty and into another unspecified account(s) the Decedent held jointly with Miles. *Id.* at 2, ¶ 5. A precise dollar amount or accounting of each transaction is not provided.

On January 10, 2016, the Decedent died at her home. *Id.* at 2, ¶ 6; Shapiro Dec. 5–6, ¶¶ 13–14. On the day of the Decedent's death, Miles withdrew $4,800 from the

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ventures. Shapiro Dec. 5, ¶ 11. Shapiro states that the Decedent bought oils and homeopathic products from Miles, the Decedent sold ionized water using a machine she purchased from Miles, and the Decedent raised rabbits for fur (presumably with encouragement and help from

Joint Account and transferred that sum into her general business checking account ending in 1570. Thompson Dec. 2, ¶ 6, Ex. A; Miles Aff. 2, ¶ 10. On January 14, 2016, Miles withdrew $34.03 from the Joint Account and transferred that sum into her general business checking account ending in 1570.[3] Thompson Dec., at Ex. A; Miles Aff. 2, ¶ 10. The Joint Account's ending balance was $0.04 as of January 22, 2016. Thompson Dec., at Ex. A. Similarly, on January 11, 2016, Doty withdrew $10,000 from the account he held jointly with the Decedent. Doty Dec. 2; Thompson Dec. 3, ¶ 9. On January 20, 2016, he withdrew the remaining $105.38 and closed the account. Doty Dec. 2; Thompson Dec., at Ex. A. Both Miles and Doty claim that the Decedent wanted them to have whatever remained in the bank accounts in the event of her death. Amended Mem. Supp. Def. Dawn Miles' Mot. Summ. J. 14 (citing Thomas Aff. and Meatzie Aff.); Doty Dec. 2.

Miles and Doty have provided no description of the events leading up to the Decedent's death. According to Shapiro, Miles and Doty were present as the Decedent was dying but did not call for medical help or attempt to save the Decedent's life. Shapiro Dec. 5, ¶ 14. However, there is no foundation for this claim by Shapiro as he does not state how he came to have this information. Shapiro also states that Doty informed him of the Decedent's death in a text message after the Decedent had died. *Id.* at 5, ¶ 14. Upon learning of her death, Shapiro traveled to Idaho. *Id.* After Shapiro arrived at the Decedent's house, Shapiro states that he learned that Doty owned the Decedent's home, all of her personal property, and the Kubota tractor. *Id.* at 6–7, ¶ 15–17. According to Shapiro, Doty also told him that Miles had taken the Decedent's

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Miles). *Id.*

[3] There was a $100 withdrawal from the Joint Account on January 12, 2016. It is unclear who made that withdrawal. The description of the withdrawal indicates that the transfer

identification and credit cards. *Id.* at 5, ¶ 21. He later learned about the Decedent's Joint Account with Miles, the account the Decedent shared with Doty, and that both Miles and Doty had withdrawn all funds remaining in the accounts shortly after her death. *Id.*

The extent of Miles relationship with Doty, and vice versa, is unclear. Miles states that the Decedent introduced her to Doty at the Decedent's birthday party. Miles Aff. 2, ¶ 3. No date is provided. Neither Doty nor Miles describe what contact, if any, they had with one another as a result of their respective relationships with the Decedent. Instead, Miles and Doty deny an employment, servitude, agency, personal, or business relationship with one another.[4] Miles Aff. 2, ¶¶ 5–7; Doty Aff. 2, ¶¶ 3–5.[5] They similarly deny discussing with each other the Decedent's house, bank accounts, property, and finances prior to her death. Miles Aff. 2, ¶ 5; Doty Aff. 2, ¶ 3. Miles denies authorizing Doty to act on her behalf or being authorized to act on Doty's behalf; Doty makes similar denials. Miles Aff. 2, ¶¶ 6; Doty Aff. 2, 4. There is, however, at least some evidence that Doty and Miles had a personal relationship. In an affidavit submitted by Tamara Meatzie in support of Doty's Motion for Summary Judgment, Tamara Meatzie states: "After she [the Decedent] died, being so accustomed to being at her house, Stephen [Doty], Dawn [Miles] and I agreed to meet there the following day. We weren't sure what we were going to do, but we felt we needed to do something to keep us busy. We decided to go through and dispose of her clothes . . . ." Meatzie Aff. 8, ¶ 17. On January 24, 2017, Shapiro filed Plaintiff's Objection to

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was made to a Business Card ending in 2429.

[4] The language of their respective affidavits is verbatim.

[5] The Doty Affidavit, not to be confused with the Doty Declaration, is attached as Exhibit B to Defendants' Statement of Undisputed Material Facts Submitted in Support of Defendant Dawn Miles' Motion for Summary Judgment.

Evidence Proffered by Defendant Doty, in which Shapiro objects to Meatzie's statements regarding competency evidence. This Court finds the above quote from the Meatzie affidavit to be admissible.

On July 11, 2016, Shapiro filed his Complaint, naming Miles and Doty as co-defendants. As for the allegations against Miles, Shapiro brought two causes of action: conversion and accounting and damages. Shapiro further alleged an agency or employer-employee relationship between Miles and Doty; that is, that Miles and Doty "were and now are the agents, servants and employees of their co-defendants," and, as such, they worked together to "induce the Decedent to add them to various bank accounts maintained by the Decedent, with rights of survivorship." Compl. 2–3, ¶¶ 5, 9. Miles filed her Answer on August 8, 2016. In her Answer, Miles admitted that she withdrew the funds from the Joint Account and has refused to return those funds to Shapiro. Answer and Demand for Jury Trial 4–5, ¶¶ 16, 19. However, she denies that her actions give rise to a conversion claim, and she likewise denies the accounting and damages claim. *Id.* With regards to the allegation that Miles and Doty were the agents, servants, and employees of each other, Miles denies that claim. Answer and Demand for Jury Trial 2–3, ¶¶ 5, 9.

On January 4, 2017, Miles filed a Motion for Summary Judgment. In support of that Motion, she submitted a Memorandum in Support of Defendant Dawn Miles' Motion for Summary Judgment, a Statement of Undisputed Facts, Affidavit of Virginia M. Robinson in Support of Defendant Dawn Miles' Motion for Summary Judgment, and Affidavit of Dawn Miles (which is attached as an exhibit to the Robinson Affidavit). On January 24, 2017, Shapiro filed Plaintiff's Opposition to Defendant Miles' Motion for Summary Judgment, Declaration in Opposition to Defendants' Motion for Summary

Judgment (Avve Shapiro), and a Declaration of Michelle Thompson in Opposition to Defendant Miles' Motion for Summary Judgment. On January 31, 2017, Miles filed a Reply Memorandum in Support of Defendant Dawn Miles' Motion for Summary Judgment. That same day Miles filed a Motion for Leave to Supplement the Summary Judgment Record.

There has been no order, oral or written, granting or denying Miles' Motion for Leave to Supplement the Summary Judgment Record. Nevertheless, on February 21, 2017, Miles filed another Motion for Summary Judgment and Amended Memorandum in Support of Defendant Dawn Miles' Motion for Summary Judgment. She also submitted a Statement of Undisputed Material Facts and attached to the Statement of Undisputed Material Facts are affidavits from Dawn Miles, Stephen Doty, Lisa Thomas, and Tamara Meatzie. On June 29, 2017, Shapiro filed Plaintiff's Opposition to Defendant Miles' Motion for Summary Judgment. His Opposition is supported by the declarations filed by Shapiro on January 23 and 24, 2017.

A hearing on Miles' Motion for Summary Judgment was held on July 13, 2017, at the conclusion of which this Court took that matter under advisement.

II. STANDARD OF REVIEW.

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:
>
> > (1) give an opportunity to properly support or address the fact;
> > (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)].[6] *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.

Miles seeks summary judgment on the issue of agency, servitude, and employment as between Miles and Doty, and she also asks this Court to grant her Motion for Summary Judgment on the claims of conversion and accounting and damages. Amended Mem. Supp. Def. Dawn Miles' Mot. Summ. J. 4. The Court considers each argument in the order in which they were raised in Miles' Memorandum.

[6] The bracketed portion originally referenced Idaho Rule of Civil Procedure 56(f). The Idaho Rules of Civil Procedure were rescinded by Court Order and replaced entirely, effective July 1, 2016. According to the cross-reference table (old to new) provided by the Idaho Supreme Court, Idaho Rule of Civil Procedure 56(f) is currently found at Idaho Rule of Civil Procedure 56(d). *See* State of Idaho Judicial Branch, Supreme Court, *Cross-Reference Table – Old to New*, https://isc.idaho.gov/rules/forms/IRCP_Cross-Reference-Table-old-to-

First, the Court addresses what it has and has not considered as evidence. On January 10, 2017, counsel for Doty filed a "Submission" to which are attached purported "affidavits" of Lisa Thomas, Robert D. Wilbur, Auguste Clart, Paul Peabody, Tamara Meatzie, Michael Oliver, Larry Berreth and Christine Berreth. While these are filed in support of Doty's motion for summary judgment, for which oral argument has not yet occurred, some of these "affidavits" were discussed at oral argument on Miles' motion for summary judgment. First, the "affidavit" of Lisa Thomas is not an affidavit. It fails to meet the I.R.C.P. 56(c)(4) criteria of being made upon personal knowledge, and that the affiant or declarant is competent to testify on the matters stated. There is no compliance with Idaho Code § 9-1406, via I.R.C.P. 2.7, that the statements made are sworn statements made under oath, or, a declaration under penalty of perjury that the statements are true and correct. The statement of Robert D. Wilbur (this document does not even purport to be an affidavit or a declaration in its title) has the same deficiencies. The Affidavit of Auguste Clart meets the requirements of an affidavit, but contains hearsay statements and legal conclusions. The "affidavit" of Paul Peabody is not an affidavit. It fails to meet the criteria of I.R.C.P. 56(c)(4) criteria of being made upon personal knowledge, and that the affiant or declarant is competent to testify on the matters stated. There is no compliance with Idaho Code § 9-1406, via I.R.C.P. 2.7, that the statements made are sworn statements made under oath, or, a declaration under penalty of perjury that the statements are true and correct. The Affidavit of Tamara Meatzie meets the requirements of an affidavit, but contains hearsay statements, beliefs and legal conclusions. The "affidavit" of Michael Oliver is not an affidavit. It fails to meet the I.R.C.P. 56(c)(4) criteria of being made upon personal

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knowledge, and that the affiant or declarant is competent to testify on the matters stated. There is no compliance with Idaho Code § 9-1406, via I.R.C.P. 2.7, that the statements made are sworn statements made under oath, or, a declaration under penalty of perjury that the statements are true and correct. It contains hearsay, contains impermissible conclusions and opinions and discusses his impressions. The "affidavit" of Larry Berreth is not an affidavit. It fails to meet the criteria of I.R.C.P. 56(c)(4) criteria of being made upon personal knowledge, and that the affiant or declarant is competent to testify on the matters stated. There is no compliance with Idaho Code § 9-1406, via I.R.C.P. 2.7, that the statements made are sworn statements made under oath, or, a declaration under penalty of perjury that the statements are true and correct. It contains his feelings and impressions which are impermissible. The "affidavit" of Christina Berreth is not an affidavit. It fails to meet the criteria of I.R.C.P. 56(c)(4) criteria of being made upon personal knowledge, and that the affiant or declarant is competent to testify on the matters stated. There is no compliance with Idaho Code § 9-1406, via I.R.C.P. 2.7, that the statements made are sworn statements made under oath, or, a declaration under penalty of perjury that the statements are true and correct. It contains hearsay, contains impermissible conclusions and opinions and discusses her impressions.

A. Agency, Servitude, and Employment

Miles argues that she is entitled to summary judgment on the issue of agency, servitude, and employment because Shapiro has "failed in his burden to establish essential elements of his claims by failing to produce evidence of agency/servitude or employment between the co-defendants." *Id.* In response, Shapiro generally argues that summary judgment on these issues is premature. Pl.'s Opp'n Def. Miles' Mot.

Summ. J. 3–4. He states that there is evidence on which one might reasonably infer that Miles and Doty acted with coordination and cooperation with each other. *Id.* Accordingly, Shapiro asks this Court to withhold summary judgment until discovery is complete pursuant to Idaho Rule of Civil Procedure 56(d). *Id.* Counsel for Shapiro repeated that request at oral argument on July 13, 2017. However, Shapiro has failed to file an affidavit or a declaration showing reasons why Shapiro "cannot present facts essential to justify [his] opposition"; Shapiro has only made a claim of such in his briefing. I.R.C.P. 56(d). The Court finds such to be insufficient to avoid or delay summary judgment at this time.

1. Agency.

Idaho recognizes three types of agency: express authority, implied authority, and apparent authority. *Bailey v. Ness*, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985).

> Both express and implied authority are forms of actual authority. Express authority refers to that authority which the principal has explicitly granted the agent to act in the principal's name. Implied authority refers to that authority "which is necessary, usual, and proper to accomplish or perform" the express authority delegated to the agent by the principal.

Id. (citations omitted). Apparent authority differs from express and implied authority. *Am. W. Enters., Inc. v. CNH, LLC*, 155 Idaho 746, 753–54, 316 P.3d 662, 669–70 (2013) (quoting *Bailey*, 109 Idaho at 497–98, 708 P.2d at 902–03 (internal citations and quotations omitted)).

> 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.

Id. According to the Idaho Supreme Court, apparent authority consists of 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, i.e., conduct by the principal "holding out" that person as its agent; and (2) acceptance of the agent's service by one who reasonably believes it is rendered on behalf of the principal.

Jones v. HealthSouth Treasure Valley Hosp., 147 Idaho 109, 116, 206 P.3d 473, 480 (citing Estate of Cordero v. Christ Hosp., 403 N.J. Super. 306, 958 A.2d 101, 106 (Ct. App. Div. 2008)).

To support her argument that there is no evidence of express or implied authority, Miles directs this Court to her own evidence and to the lack of evidence offered by Shapiro. The Court begins by considering Miles' evidence. Miles cites to her affidavit, the Doty declaration, and Doty's Answer to demonstrate that there is no evidence of express or implied authority. Doty's Answer is unverified and is entitled to no probative weight. *Golay v. Loomis*, 118 Idaho 387, 389, 797 P.2d 95, 97 (1990). In her affidavit, Miles states that the Decedent introduced her to Doty at the Decedent's birthday party. Miles Aff. 2, ¶ 3. No date is provided. Other than that first meeting, Miles does not mention any further contact or interaction with Doty. Miles makes the following statements in regard to her relationship with Doty, or lack thereof:

> 4. I first learned that Stephen Doty was on a bank account with [the Decedent] on January 11, 2016, the day after [the Decedent's] death.
> 5. Never at any time, prior to [the Decedent's] death, did Stephen Doty and I communicate regarding [the Decedent's] house or bank accounts or any other matter involving or relating to the [Decedent's] property or finances.
> 6. I did not have any employment, servitude, or agency relationship with Stephen Doty at any time, and have not taken, and was never authorized to take any action on his behalf nor have I ever authorized him to take any action on my behalf.
> 7. Never at any time did I tell or indicate to [the Decedent] that I had any agency relationship of any kind with Stephen Doty, or that I was working with or for Stephen Doty, or had any kind of personal or business relationship with Stephen Doty.

> 8. Never at any time have I had any interest in any bank accounts with Stephen Doty, or shared any assets or ownership of any property with Stephen Doty.
> . . .

Miles Aff. 2, ¶¶ 4–8. Doty makes verbatim statements in his affidavit:

> 3. Never at any time, prior to [the Decedent's] death, did Dawn Miles and I communicate regarding [the Decedent's] house or bank accounts or any other matter involving or relating to [the Decedent's] property or finances.
> 4. I did not have any employment, servitude, or agency relationship with Dawn Miles at any time, and have not taken, and was never authorized to take any action on her behalf nor have I ever authorized her to take any action on my behalf.
> 5. Never at any time did I tell or indicate to [the Decedent] that I had any agency relationship of any kind with Dawn Miles, or that I was working with or for Dawn Miles, or had any kind of personal or business relationship with Dawn Miles.

Doty Decl. 2, ¶¶ 3–5.

The Court finds that the portions of Miles' affidavit and Doty's declaration which discuss "relationships", whether they be employment, servitude or agency, do not satisfy the requirements of Idaho Rule of Civil Procedure 56(c)(4) because they are conclusory affidavits. Those portions proffer a legal conclusion. To the extent they discuss what they did or did not do, Miles' affidavit and Doty's declaration are admissible. Idaho Rule of Civil Procedure 56(c)(4) requires supporting and opposing affidavits to be "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." I.R.C.P. 56(c)(4). "Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule [56(c)(4)]."[7] *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 917, 188 P.3d 854, 859 (2008)

[7] Rule 56(e) is now found at 56(c)(4) and (e). *See* State of Idaho Judicial Branch, Supreme Court, *Cross-Reference Table – Old to New*, https://isc.idaho.gov/rules/forms/IRCP_Cross-Reference-Table-old-to-new_07.16.pdf (last visited July 10, 2017).

(quoting *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002) (citations omitted)). Because Miles' Affidavit and the Doty Affidavit are conclusory and do not satisfy the admissibility requirements, the Court does not rely on either affidavit in its analysis. Up to this point, Miles' affidavit and Doty's declaration have not been objected to. On its own accord, the Court can find such to be inadmissible.

> A trial court has the discretion to decide whether an affidavit offered in support of or opposition to a motion for summary judgment is admissible under Rule 56(e), even if that issue is not raised by one of the parties. *Rhodehouse v. Stutts,* 125 Idaho 208, 868 P.2d 1224 (1994). However, we have not required the trial court to rule on the admissibility of the affidavit when there is no objection to it. If there is no timely objection, the trial court can grant summary judgment based upon an affidavit that does not comply with Rule 56(e). *State, Dept. of Agric. v. Curry Bean Co. Inc.,* 139 Idaho 789, 86 P.3d 503 (2004) (conclusory *918 **860 affidavit); *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.,* 124 Idaho 607, 862 P.2d 299 (1993) (statements containing hearsay and lacking adequate foundation); *East Lizard Butte Water Corp. v. Howell,* 122 Idaho 679, 837 P.2d 805 (1992) (statements lacked adequate foundation). Because Esser Electric did not object to the affidavit of Lost River's president, the district court did not err in relying upon it when granting Lost River's motion for summary judgment.

Esser Elec. v. Lost River Ballistics Techs., Inc., 145 Idaho 912, 917–18, 188 P.3d 854, 859–60 (2008).

The Court turns to Shapiro's evidence[8] and finds no facts on which it might reasonably infer that Miles expressly or impliedly authorized Doty to act on her behalf. Shapiro argues that there is reason to believe that the relationship between Miles and

[8] To be clear, Miles bears the initial burden of showing that there is no genuine issue of material fact entitling her to judgment as a matter of law. She may meet her 'genuine issue of material fact' burden by establishing the absence of evidence on an element that Shapiro will be required to prove at trial. *See Dunnick*, 126 Idaho at 311, 882 P.2d at 478. Such an absence of evidence may be established either by an affirmative showing with Miles' own evidence o*r by a review of all Shapiro's evidence* and the contention that such proof of an element is lacking. *Id.* at 311 n.1, 882 P.2d at 478 n.1 (emphasis added). *See also Portfolio Recovery Associates, LLC v. MacDonald,* ___ Idaho ___, 395 P.3d 1261 (2017).

Doty was more than they contend. Shapiro points to their actions before and after the Decedent's death as sufficient to reasonably infer that they coordinated and cooperated with each other. Pl.'s Opp'n Def. Miles' Mot. Summ. J. 4. For example, both Miles and Doty held joint accounts with the Decedent; over a seven-month period, approximately $25,000 was transferred from accounts the Decedent held jointly with Miles to the account the Decedent held jointly with Doty; Miles and Doty both closed out their respective joint accounts shortly after the Decedent's death; and Miles and Doty were present when the Decedent died and did not seek medical help on behalf of the Decedent. *Id.* at 3–4. In addition, there is evidence in the record showing that Miles and Doty frequently spent time together at the Decedent's home, and from that, one might reasonably infer that Miles and Doty were friends. *See* Meatzie Aff. 8, ¶ 17.

The Court generally agrees with Shapiro that there is evidence in the record on which it might reasonably infer that Miles and Doty had a personal relationship and coordinated their actions to some extent. However, a principal and agent acting in coordination and cooperation does not give rise to an agency relationship, nor does evidence that the two were friends. Instead, an agency relationship exists where the "principal has a right to control the agent. *Where a party acts in concert with the principal but is not under his or her control, an agency relationship does not arise*." *Humphries v. Becker*, 159 Idaho 728, 735–36, 366 P.3d 1088, 1095–96 (2016) (citing *Knutsen v. Cloud*, 142 Idaho 148, 151, 124 P.3d 1024, 1027 (2005)) (emphasis added). There is no evidence on which this Court can reasonably infer that Miles expressly or impliedly directed Doty's actions, or had the right to control Doty.

As for apparent authority, the Court finds that Shapiro has failed to produce any evidence of apparent authority. As argued by Miles, there is no evidence in the record

showing that Miles held Doty out as her agent to the Decedent, or that the Decedent accepted Doty's services because she believed Doty rendered the services on behalf of Miles.

The Court grants Miles' Motion for Summary Judgment on the issue of agency.

2. Employment/Servitude.

As above with the issue of "agency", the issues of "employment" or "servitude" are decided on summary judgment not by Miles' inadmissible conclusions in her affidavit or Doty's declaration, but by a lack of evidence submitted by Shaprio. Miles argues that Shapiro has failed to produce evidence of an employment relationship between Miles and Doty, which, in turn, triggers the doctrine of *respondeat superior*. Under the doctrine of respondeat superior, "an employer is liable in tort for the tortious conduct of an employee committed within the scope of employment." *Finholt v. Cresto*, 143 Idaho 894, 897, 155 P.3d 695, 698 (2007). In his Complaint, Shapiro alleges that Miles and Doty were the employees of each other. Compl. 2, ¶ 5. However, there is no evidence in the record that Miles and Doty had an employer-employee relationship. In fact, the only suggestion that such a relationship existed is in Shapiro's Complaint. Because Miles has met her genuine issue of material fact burden by showing an absence of evidence in the record on an issue for which Shapiro bears the burden of proof at trial, and Shapiro has presented no contradictory evidence (or even argument) that Miles and Doty had an employer-employee relationship, the Court grants Miles' Motion for Summary Judgment on this issue.

3. Idaho Rule of Civil Procedure 56(d).

In his Opposition to Defendant Miles' Motion for Summary Judgment, Shapiro argues that summary judgment on the issues of agency and employment/servitude

would be premature. He asks this Court to refrain from deciding this issue until discovery is complete pursuant to Idaho Rule of Civil Procedure 56(d). Pl.'s Opp'n to Def. Miles' Mot. Summ. J. 4. Idaho Rule of Civil Procedure 56(d) states:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

I.R.C.P. 56(d). While Shapiro cites to Rule 56(d) in his Memorandum in Opposition to Miles' Motion for Summary Judgment, he did not file a motion under Rule 56(d) nor an affidavit or declaration explaining why he cannot present facts essential to justify its opposition. As a result, the Court is unable to consider Shapiro's request for additional time. *See, e.g.*, *Franklin Bldg. Supply Co. v. Hymas*, 157 Idaho 632, 637, 339 P.3d 357, 362 (2014) (citing I.R.C.P. 56(f) (now I.R.C.P. 56(d))).

B. Conversion Claim

In Idaho, a conversion is "defined as a distinct act of dominion wrongfully asserted over another's personal property in denial of or inconsistent with [his] rights therein." *Med. Recovery Servs., LLC v. Bonneville Billing & Collections, Inc.*, 157 Idaho 395, 400, 336 P.3d 802, 807 (2014) (citations omitted) (explaining further that "conversion is a dealing by a person with chattels not belonging to him, in a manner inconsistent with the rights of the owner"). Based on this definition, the Idaho Supreme Court has stated that a conversion claim consists of three elements: "(1) that the charged party wrongfully gained dominion of property; (2) that the property is owned or possessed by plaintiff at the time of possession; and (3) that [the] property in question is personal property." *Id.* (quoting *Taylor v. McNichols*, 149 Idaho 826, 846, 243 P.3d

642, 662 (2010)); *see also Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 979 P.2d 605 (1999).

Miles seeks dismissal of Shapiro's conversion claim, arguing that she is entitled to summary judgment because Shapiro has not established the third element of his conversion claim—that the property allegedly converted is personal property. Miles argues that Shapiro's conversion claim cannot be maintained because Miles withdrew the funds from the Joint Account and deposited the funds in her general business checking account, thereby commingling the funds with her other assets. Amended Mem. Supp. Def. Dawn Miles' Mot. Summ. J. 11–13. According to Miles, once the funds were commingled, they lost their specific identity, cannot be identified as a specific chattel, and, as a result, the funds are not personal property. *Id.* Miles cites to *Medical Recovery Services, LLC v. Bonneville Billing & Collections, Inc.*, 157 Idaho 395, 336 P.3d 802 (2014) and *Warm Springs Properties, Inc. v. Andora Villa, Inc.*, 96 Idaho 270 526 P.2d 1106 (1974) in support of her argument. *Id.* at 11–12. Likewise, Miles directs the Court to her own affidavit to support her assertion that the funds from the Joint Account were commingled with other funds. *Id.* at 13.

In response, Shapiro argues that both cases cited by Miles are not applicable to the present case. Pl.'s Opp'n Def. Miles' Mot. Summ. J. 5. He states that the "rule advocated by Miles applies only when the funds involved lose their identity when combined with other funds plaintiff does not own." *Id.* at 4. Further, Shapiro argues that the "chattel is the bank account. Every penny in the account belonged to [the Decedent] on the date of her death[]" and Miles wrongfully appropriated the bank account. *Id.* at 6. Shapiro points to the Declaration of Michelle Thompson to support his allegation that Miles withdrew funds from the Joint Account. That declaration

demonstrates that only the Decedent made deposits into the Joint Account; Miles made at least two withdrawals: a $4,800 withdrawal initiated on January 10, 2016, and a $34.03 withdrawal initiated on January 14, 2016; the funds withdrawn totaled $4,834.03; and those funds were electronically transferred to and deposited in Miles' general business checking account ending in 1570. Thompson Dec. 2, ¶ 4, Ex. A.

The Court begins by noting that while Shapiro states the Joint Account is the chattel, Shapiro is in fact seeking return of the *monies* in the Joint Account, not the Joint Account itself. Thus, the property allegedly converted is money and the Court will analyze Shapiro's claim as an alleged conversion of money. Given that, the issue presented is whether the funds from the Joint Account are personal property and subject to a conversion claim. Personal property is "[a]ny movable or intangible thing that is subject to ownership and not classified as real property." *Med. Recovery Servs., LLC*, 157 Idaho at 400, 336 P.3d at 807 (quoting *Personal Property*, Black's Law Dictionary (7th ed. 1999)). Money, if specifically identifiable, is personal property and subject to a conversion claim. *Id.*; *Warm Springs Properties, Inc.*, 96 Idaho at 272, 526 P.2d at 1108. Conversely, "conversion for misappropriation of money does not lie unless it can be described or identified as a specific chattel." *Medical Recovery Services, LLC*, 157 Idaho at 400, 336 P.3d at 807 (quoting *Warm Springs Properties, Inc.*, 96 Idaho at 272, 526 P.2d at 1108). Idaho appellate courts appear to have considered whether money can be described or identified as specific chattel in only a handful of cases. *See,e.g.*, *Medical Recovery Services, LLC*, 157 Idaho 395, 336 P.3d 802; *Taylor*, 149 Idaho 826, 243 P.3d 642; *Warm Springs Properties, Inc.*, 96 Idaho 270, 526 P.2d 1106; *Erhardt v. Leonard*, 104 Idaho 197, 657 P.2d 494 (Ct. App. 1983). Those three cases are discussed below.

The first two cases considered are cited by Miles. In the first case, Warm Springs Properties, Inc. (Warm Springs) entered in to an agreement with Butler Brothers Corporation (Butler Brothers) for the construction of a condominium project. *Warm Springs Properties, Inc.*, 96 Idaho at 271, 526 P.2d at 1107. Similarly, Andora Villa, Inc. (Andora Villa) entered in to an agreement with Butler Brothers for the construction of its own condominium project. *Id.*

> [E]ach of these projects was to be financed by progress payments to be paid by Warm Springs or by Andora Villa as the work progressed on the respective condominium projects; that between September 1, 1971, and the end of that year Warm Springs paid over $60,000 to Butler Brothers with the understanding that the funds were to be used for the sole purpose of paying expenses already incurred on the Warm Springs condominium; that during the same period work on the Andora Villa project continued, even though Andora Villa failed to make payments to Butler Brothers.

Id. Based on these facts, Warms Springs alleged that Andora Villa was liable for conversion of Warms Springs' property (i.e., the $60,000 payment) because "the cash payments [Warm Springs] made to Butler Brothers . . . was used to pay off obligations already incurred on the Andora [Villa] properties." *Id.* The Idaho Supreme Court concluded that Warm Springs' conversion claim could not be maintained because "once the funds were received by Butler Brothers they went into its general checking account and lost any specific identity." *Id.* at 272, 526 P.2d at 1108. In reaching this decision, it noted that Butler Brothers placed the funds received by Warm Springs (and others) into a general checking account and paid expenses from this general fund without regard to the particular contract. *Id.* at 271, 526 P.2d at 1107.

In the second case, Medical Recovery Services, LLC (MRS) obtained a judgment against a debtor and an order for garnishment of the debtor's wages. *Medical Recovery Servs., LLC*, 157 Idaho at 396, 336 P.3d at 803. "The garnishment order

instructed the Bonneville County Sheriff to garnish [the debtor's] wages at her place of employment, Western States Equipment Company (WSEC) . . . ." *Id.* Due to a data entry error, instead of sending the garnished wages to the Bonneville County Sheriff, WSEC inadvertently sent the wages in the form of a check to Bonneville Billing and Collections, Inc. (BBC), who also had outstanding accounts involving the debtor. *Id.* at 397, 336 P.3d at 804. This mistake occurred three times, totaling $1,083.21. *Id.* Once the mistake was discovered, MRS demanded BBC return the funds, BBC refused, and MRS sued BBC for conversion. *Id.* The Idaho Supreme Court held that MRS could not maintain its conversion claim against BBC because the allegedly converted property was not specifically identifiable chattel. *Id.* at 400, 336 P.3d at 807. It explained that

> the funds that MRS argues BBC has converted have no specific identity. The record indicates that the checks were drawn on WSEC's general bank account after the monies were withheld from [the debtor's] earnings. MRS has offered no evidence, or made any effort to trace the garnished money, to establish its character as specific chattel. Nor has MRS offered any evidence of WSEC's general garnishment practices that would allow this Court to find that the funds in BBC's possession were specific funds withheld from [the debtor's] earnings. Although the checks themselves are tangible property and may represent specific chattels, the funds the checks represent are not. Like the funds in *Warm Springs* that lost their specific character after passing through Butler's general bank account, the funds in this case also lost whatever specific identity they may have once had when they were comingled in WSEC's general checking account

Med. Recovery Servs., LLC, 157 Idaho at 400–01, 336 P.3d at 807–08 (footnote omitted).

In both of the above cases, the funds at issue lost their specific identity when they were commingled in a third-party's general checking account, both Andora Villa and BBC were passive participants (i.e., they received the benefit of a third-party's misappropriation or mistake but did not actively seek that result), and the commingling occurred before the allegedly converted property was received by the defendant or

used for the defendant's benefit. In contrast, in this case, the funds Miles withdrew from the Joint Account were not commingled in a third-party's account but in Miles' own general business checking account; the commingling of the allegedly converted funds occurred after Miles took possession of the funds; and unlike Andora Villa and BBC, Miles was an *active*, not passive, participant in taking the funds from the Joint Account for Miles' *own* benefit—the funds were not "received" by Miles as she states. Rather, Miles *took* the funds within hours of the Decedent's death. At the moment those funds were withdrawn by Miles, they were identifiable; they were not commingled in any way shape or form at that moment. Any commingling was done subsequently by Miles. But the moment Miles acted and withdrew those funds, they were identifiable; there is a record of exactly how much money was withdrawn and when. As Shapiro correctly points out, for the facts in this case to be analogous to the facts in *Medical Recovery Services* and *Warm Spring Properties*, the Decedent (or her estate) would have had to transfer the funds in the Joint Account to a third-party's account, where the Decedent's funds would be commingled with funds in the third-party's general checking account, and then that third-party would have had to mistakenly or without the Decedent's permission pay, give, or otherwise distribute monies from its general checking account to Miles. That is not what happened here and, as a result, the case at hand is distinguishable from these two cases.

The third case, *Erhardt v. Leonard*, 104 Idaho 197, 657 P.2d 494 (Ct. App. 1983), is a thirty-year old decision from the Idaho Court of Appeals. In *Erhardt*, a grandmother opened a joint bank account with her grandson. *Id*. at 199, 657 P.2d at 496. The grandmother funded the account, making two deposits totaling $10,000. *Id.* The only other deposits to the account were interest payments credited by the bank.

Id. Approximately five years after opening the joint account, the grandson withdrew the entire balance of the joint savings account, which totaled $13,677.57. *Id.* at 200, 657 P.2d at 497. "He never received permission to do so from his grandmother, nor did he tell her of the withdrawal." *Id.* When the grandmother learned of her grandson's actions, she demanded the return the money plus interest. *Id.* He refused to do so and subsequently used the money for a down payment on a house. *Id.* The grandmother sued the grandson for conversion. *Id.* In *Erhardt* the Idaho Court of Appeals began its analysis by distinguishing the case before it from *Warm Springs Properties, Inc*. First, the Idaho Court of Appeals explained that

> in that case [*Warm Springs*] our Supreme Court simply held that an action based upon conversion, for misappropriation of money, does not lie unless the money can be specifically described or identified. In the present case, the funds in the account came solely from the grandmother. Moreover, the trial court specifically found that, after the funds were withdrawn, they were placed by the grandson into two successive, separate accounts and were never comingled with any other funds. Thus, at all relevant times the funds were subject to specific description—the amount never changed—and to specific identification—the evidence of withdrawals and deposits of the same amount was consistent. The finding that the money was subject to specific description and identification is supported by competent evidence . . . .

Id. at 201–02, 657 P.2d at 498–99. This Court finds that the use of the word "comingled" to really be dicta. This Court views that reference as a way of the Idaho Court of Appeals stating even if *Warm Springs* applied, under the facts in *Erhardt* there was still no comingling that occurred at any relevant point in time. This Court finds the *only* relevant point in time in the present case was when Miles withdrew the funds, just as the only truly relevant time in *Erhardt* was when the grandson withdrew the grandmother's funds. This Court finds, using the language from *Erhardt*, at the moment Miles withdrew the funds, "the funds were subject to specific description—the amount never changed—and to specific identification—the amount of withdrawals…was

consistent." Second, the Idaho Court of Appeals in *Erhardt* addressed the grandson's argument that "using the funds from the account to purchase real property rendered the money no longer identifiable under *Warm Springs Properties, Inc.*" It stated that in *Warm Springs Properties, Inc.*,

> the allegedly converted money was comingled into a general checking account by a third party who was not charged with conversion. Andora Villa, the party charged with liability because of the conversion, simply had received the benefit of the use of funds from the third party's general account. Here the party who converted the funds was also the party who made use of the funds as a down payment on his house, after his grandmother had demanded return of the funds. In our opinion, this should not defeat the grandmother's right of recovery. At the time she made demand for a return of the funds, the funds were readily segregated and identifiable. We conclude that the act of investing in real property with proceeds wrongfully obtained should not defeat the owner's right of possession of the funds taken from the bank account.

Id. at 202, 657 P.2d at 499 (citation omitted). In sum, the Idaho Court of Appeals concluded that the grandmother had a valid claim for conversion. In the present case, Miles, just as the grandson in *Erhardt,* was "the party who converted the funds [and] was also the party who made use of the funds." As the Idaho Court of Appeals in *Erhardt* found, "We conclude that the act of investing in real property with proceeds wrongfully obtained should not defeat the owner's right of possession of the funds taken from the bank account.", so too this Court finds Miles' act of taking a known amount from the Joint Account for her own benefit very soon after Decedent's death should not defeat the Decedent's right of possession [since we are at summary judgment, Shapiro's ability to claim Decedent's right of possession] of the funds Miles took from that bank account.

Like the grandmother in *Erhardt*, Shapiro has asserted facts, supported by an affidavit, sufficient to conclude that the funds are personal property. Shapiro's evidence shows that only the Decedent made deposits into the Joint Account. Thompson Dec. 2,

¶ 4. Miles made at least two withdrawals: a $4,800 withdrawal initiated on January 10, 2016, and a $34.03 withdrawal initiated on January 14, 2016. *Id.* at Ex. A. The funds withdrawn totaled $4,834.03. *Id.* The funds were electronically transferred to and deposited in Miles' general business checking account ending in 1570. *Id.* The funds deposited in to Miles' account ending in 1570 totaled $4,834.03. *Id.* Finally, Miles is the party who allegedly converted the funds and she is also the party who used the funds for her own benefit. Based on this evidence, the Court concludes that Shapiro has submitted sufficient evidence establishing the third element of his conversion claim. Specifically, the Court notes that when Miles made two withdrawals of $4,800 and $34.03 from the Joint Account and deposited that same sum into her business checking account, the funds took on an identifiable character and were subject to specific description. Thus, even though Miles may have met her initial burden of showing that the funds from the Joint Account were not subject to specific identification because the funds were commingled with other funds, Shapiro successfully rebutted that evidence by presenting an affidavit showing that the funds were identifiable and, hence, personal property.

The Court recognizes that *Erhardt*, by inference, seems to support Miles' argument; specifically, that once Miles deposited the funds into her general business checking account and those funds were commingled with her other funds, the funds from the joint account were no longer identifiable as specific chattel. In *Erhardt*, as quoted above, the Idaho Court of Appeals highlighted the trial court's finding that the grandson never commingled the funds he took from the joint account with other funds, and that factual finding supported the trial court's conclusion that the funds were subject to specific identification at all relevant times. On the other hand, in *Erhardt*, the Idaho

Court of Appeals concluded that using the funds to invest in real property did not render the funds unidentifiable. These two conclusions appear contradictory. That is, it is unclear why the grandson commingling the funds he took from the joint account with funds in his other accounts might (by inference) render the converted funds unidentifiable, while those same funds remain identifiable when used to purchase real property. After all, in both scenarios, only the grandmother made deposits into the joint account and, when withdrawn from the joint account, the funds were subject to specific identification and description. If those funds were withdrawn and immediately deposited and commingled with other funds or those funds were withdrawn and immediately used to purchase real property, the funds, as they existed when withdrawn, no longer exist once used to make the real property purchase or once used as a deposit. Because the Idaho Court of Appeals concluded in *Erhardt* that using converted funds to purchase real property does not render those funds unidentifiable, the Court is unable to discern how depositing and commingling those funds with other funds renders the converted funds unidentifiable, particularly where deposit slips or bank statements permit the plaintiff to trace the converted funds.

Because of this inconsistency, it seems reasonable for the Court to find that the money withdrawn from the Joint Account was specifically identifiable when it mattered most. That is, the funds from the Joint Account were specifically identifiable prior to Miles taking them because the funds were never commingled with third-party funds—only Decedent deposited money into the account. Additionally, the funds were specifically identifiable when Miles withdrew the funds (two distinct withdrawals totaling $4,834.03). And those funds were specifically identifiable when Miles deposited those funds in her general business checking account. Further, Shapiro has presented

evidence showing that he has traced a specific sum of money from the Joint Account to Miles' general business checking account.

C. Idaho Code § 15-6-104

In the alternative, Miles argues that Shapiro cannot maintain his conversion claim because the Decedent intended Miles to have the funds remaining in the account upon her death. Amended Mem. Supp. Def. Dawn Miles' Mot. Summ. J. 14–15. She cites to Idaho Code § 15-6-104 and points to affidavits submitted by Lisa Thomas and Tamara Meatzie to support her argument. Miles further argues that Shapiro has failed to provide any contrary evidence of the Decedent's intent, that Miles exercised undue influence over the Decedent, or that the Decedent was incompetent. *Id.* In response, Shapiro argues that Miles has not met her burden of proving that the Decedent intended her to have the funds remaining in the Joint Account. Pl.'s Opp'n Def. Miles' Mot. Summ. J. 6–7.

Idaho Code § 15-6-104 states:

> Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the state of the decedent *if an intent to give the account can be shown by the surviving party or parties*. . . .

I.C. § 15-6-104(a) (emphasis added). This statute "requires the surviving joint tenant to prove the decedent's donative intent at the time the joint account was established." *Matter of Lewis' Estate*, 97 Idaho 299, 302–03, 543 P.2d 852, 855–56 (1975) (explaining that "[i]t is well established in this state that, '[w]here money in a joint account is deposited by one party, and thereafter a question of the depositor's intent arises, the party asserting the gift must prove all the elements of a gift, excepting irrevocable delivery, by clear and convincing evidence.'" (citations omitted)). The essential elements of a 'gift inter vivos' are: (1) A donor competent to contract; (2)

freedom of will of donor; (3) the gift must be complete and nothing left undone; (4) the property must be delivered by the donor and accepted by the donee; (5) the gift must go into immediate and absolute effect. *Matter of Lewis' Estate*, 97 Idaho 299, 302, 543 P.2d 852, 855 (1975).

The Court concludes that there is a genuine issue of material fact regarding the Decedent's donative intent that precludes summary judgment under this alternative argument. First, Miles presented evidence tending to show that the Decedent intended Miles to receive the funds in the Joint Account upon the Decedent's death. Lisa Thomas, the Decedent's reflexologist, knew the Decedent for eight years. Thomas Aff. 2, ¶ 1. She testified that the Decedent was mentally "sharp at the end of her days" and told her repeatedly that she wanted Miles to have "whatever money was left . . . in the joint accounts." *Id.* at 2, ¶¶ 3–5. Similarly, Tamara Meatzie, who met the Decedent in 2015, was employed by the Decedent to perform housekeeping and personal care duties. Meatzie Aff. 1–2, ¶ 2. Tamara Meatzie states that the Decedent "always demonstrated a keen mind" and the Decedent told her that the "money left in the accounts was to go to [Miles] when 'I'm gone'." Meatzie Aff. 2, ¶¶ 3–6. Because Miles has presented evidence showing that the Decedent intended Miles to have the funds remaining in the Joint Account, the burden shifts to Shapiro to present evidence showing that the Decedent's donative intent is, in fact, disputed. Both the Shapiro and Rivera Affidavits show that the Decedent's donative intent is disputed. That is, in the Shapiro Affidavit, Shapiro describes his mother's deteriorating health, both physical and mental. Shapiro Aff. 3–4, 5, ¶¶ 5–7, 11. Likewise, Rivera states that he was the Decedent's friend for a number of years. Rivera Aff. 1, ¶ 1. In 2014, Rivera states that the Decedent started having "difficulty in expressing herself and was complaining of a

bad headache." *Id.* at 4, ¶13. Rivera took the Decedent to the hospital, the Decedent remained hospitalized for 10 days, and he describes the Decedent as being "weak and confused when she was released." *Id.* Rivera also states that the Decedent intended her assets to go to Shapiro. *Id.* at 4, ¶ 14. After drawing all factual allegations and factual inferences in favor of Shapiro, the Court finds that there is a genuine issue of material fact as to whether the Decedent intended Miles to have the funds remaining in the Joint Account.

D. Accounting and Damages

Because the Court denies Miles's Motion for Summary Judgment on the conversion claim, for the same reasons the Court likewise denies Miles' Motion for Summary Judgment as to the accounting and damages claim.

At oral argument, counsel for Miles made the argument that the claim for conversion and the claim for accounting and damages would more properly be a matter before the probate court. No real basis was given for that argument. The Court is not persuaded by that argument.

IV. CONCLUSION AND ORDER.

The Court grants Miles' Motion for Summary Judgment on the issue of agency, servitude, and employment. The Court denies Miles' Motion for Summary Judgment on the Conversion and Accounting and Damages claims.

IT IS HEREBY ORDERED Miles' Motion for Summary Judgment on the claim of Conversion, claim under I.C. § 15-6-104 and claim of Accounting and Damages, are DENIED.

IT IS FURTHER ORDERED Miles' Motion for Summary Judgment on the issue of agency, servitude, and employment is GRANTED.

Entered this 18th day of July, 2017.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2017, 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 #**
Peter J. Smith, IV/Jillian H. Caires	208-214-2416	Michael E. Ramsden/Chris Gabbert	664-5884
Virginia M. Robinson	664-4708		

_____
Jeanne Clausen, Deputy Clerk