SAMAYRA ESTRADA v. JOHN NGUYEN, SUNNY NGUYEN, et al.

2023 | Cited 0 times | Court of Appeals of Arizona | February 16, 2023

IN THE ARIZONA COURT OF APPEALS DIVISION TWO

SAMAYRA ESTRADA, Plaintiff/Appellant,

v.

JOHN NGUYEN; SUNNY NGUYEN; ADVANTAGE INSURANCE PLLC; NFP INSURANCE SERVICES, INC., A TEXAS CORPORATION DBA NFP PROPERTY & CASUALTY SERVICES, Defendants/Appellees.

No. 2 CA-CV 2022-0081 Filed February 16, 2023

Appeal from the Superior Court in Maricopa County No. CV2018002223 The Honorable Daniel G. Martin, Judge

VACATED AND REMANDED

COUNSEL

Ahwatukee Legal Office P.C., Phoenix By David L. Abney Counsel for Appellant

Law Offices of John Aguirre APC, Phoenix By John Aguirre

and Davis Miles McGuire Gardner PLLC, Tempe By Steven E. Weinberger, Michael E. Medina, Jr., and Kyle B. Sherman Counsel for Plaintiff/Appellant

Hassett Glasser P.C., Phoenix By Myles P. Hassett, Jamie A. Glasser, and David R. Seidman Counsel for Defendant/Appellee NFP Insurance Services, Inc.

Righi Fitch Law Group By Richard L. Righi and Benjamin L. Hodgson Counsel for Defendants/Appellees John Nguyen, Sunny Nguyen, and Advantage Insurance PLLC

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MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Judge Eppich concurred and Presiding Judge Brearcliffe dissented.

S T A R I N G, Vice Chief Judge:

¶1 Samayra summary judgment in favor of NFP Insurance Services, Inc., Advantage Insurance PLLC, John Nguyen, and Sunny Nguyen (collectively, NFP) in a negligence action predicated on a theory of vicarious liability. 1 She also discovery deadlines, as well as its denial of her motion for new trial. For

the following reasons, we vacate the judgment and remand for further proceedings.

Factual and Procedural Background

¶2 In October 2014, Phuthrida Fite was driving to begin her dinner shift at Thai Basil, a restaurant where she worked as a server and in

1 NFP Insurance Services, Inc. initially cross-claimed against the Nguyens NFP Insurance Services, Inc. Nguyens and Advantage joined, the parties stipulated to stay the cross-

claim. On appeal, the Nguyens and Advantage join in NFP Insurance Services, Inc. which she owned a minority interest, when she struck and injured Estrada, a pedestrian. Estrada initially filed a negligence action against Fite, her husband, and several businesses they owned, including Sara Sha, LLC dba Thai Basil. Estrada alleged that, at the time of the accident, Fite had been acting as an agent and/or employee of the restaurants owned by the Fites and had been restaurants. Further, she asserted Fite had been in the process of while her personal vehicle on company business and in the course and scope of

her employment. Thus, Estrada argued, the Fites Thai Basil, were vicariously liable for negligence maintain a proper lookout for

¶3 The Fites were insured under a personal automobile insurance policy with a $100,000 per person limit, and their insurance company retained attorney Benjamin Thomas to represent them against In 2016, during the course of such representation, Thomas wrote a letter to NFP Insurance Services, Inc., the insurance agency under which John Nguyen and his company, Advantage Insurance PLLC, had assisted Thai Basil in purchasing business insurance, inquiring whether . In the letter, Thomas wrote: restaurant and was on her way to the restaurant at the time of the accident to deliver restaurant supplies which she had just picked up at a restaurant supply store. As such, she was performing a function on behalf of the restaurant at the time of the accident. attorney at the time, John Aguirre, was copied on the letter. coverage.

¶4 The Fites subsequently entered into a settlement agreement with Estrada under the terms of which mobile insurer was to pay Estrada the $100,000 policy limit; the Fites and their businesses assigned to Estrada any claims they may have had against NFP arising out of the collision; the parties stipulated to judgment in the amount of $5,000,000; and Estrada agreed not to execute on the judgment and to release the Fites and their businesses from further liability. The agreement stated admit[] liability and responsibility for some of the Estrada

¶5 In March 2018, Estrada commenced this action against NFP, gligently failed to secure automobile insurance connection with any loss or damage arising out of the ownership, use, or operation of their motor vehicles in connection with their business operations Estrada sought $5,000,000 in damages, representing her stipulated judgment against the Fites. 2 Because her claim against NFP was conduct at the time of the accident, Estrada again a vehicle in the course and scope of her employment with Thai Basil.

¶6 At a deposition in December 2019, Fite testified that at the time of the accident, she had been -10, coming down, because [she] ha asked where she had been coming from, she I

customer. And then after that I just come to fulfill for the dinner, the dinner

She later confirmed she had been traveling to Thai Basil from an event for [her] real estate, [her] at the time of the accident. . NFP subsequently supplemented its

disclosure statement to include the following description of its legal basis of defense: [T]o show that NFP caused damages, Plaintiff must show that Sara Sha and any other businesses implicated by Plaintiff were legally responsible for causing the subject accident. Plaintiff cannot do so because she cannot show that Mrs. Fite was acting in the course and scope of her employment with Sara Sha or any of the other businesses implicated in this lawsuit.

¶7 In August 2020, NFP moved for summary judgment, alleging Fite had not been the course and scope of her employment with Thai Basil at the time of the accident. In support of this assertion, NFP pointed that she had been traveling to Thai Basil from a real estate event. NFP argued that because Fite had merely been driving to work would not have applied to [her] allegedly Thus, it urged, Estrada could not damages by not selling it such a policy.

¶8 Estrada opposed , arguing genuine issues of material fact existed as to whether Fite had been In support of her argument, she pointed to three exhibits: 1) the settlement

2 Estrada initially brought her claim in the names of the Fites, Sara Sha, LLC, and The Gold 9, LLC, but later amended her complaint to substitute only herself as the plaintiff. agreement in which the Fites had 2016 letter stating that Fite the accident to deliver restaurant supplies which she had just picked up at

3) quoting the statements made in his 2016 letter and . Estrada asserted

, thereby preventing the trial court from entering summary judgment in favor of NFP.

¶9 After briefing on summary judgment had been completed, Estrada move pending motion, requested relief pursuant to Rule 56(d), Ariz. R. Civ. P.,

and asked the court to extend the disclosure and discovery deadlines pursuant to Rule 37(c), Ariz. R. Civ. P., to allow her to name and depose Thomas. statements, as described in the exhibits accompanying her response to

stimony. The court denied her request

for relief under Rule 56(d) as untimely but deferred ruling on her motion to extend disclosure and discovery deadlines until motion for summary judgment.

¶10 In February 2021, following oral argument, the trial court granted motion for summary judgment, reasoning that, based on evidence . . . that . . . Fite was not acting within the course and scope of her

employment on the day of the accident. The court continued:

Estrada, on the other hand, relies on hearsay (the May 16, 2016 letter and the Thomas Affidavit), and a document (the [settlement] agreement) (also hearsay) from a different case to which NFP was not a party and which does not contain within it any statements as to conduct that would establish that Ms. Fite was acting within the course and scope of her employment on the day of the accident.

¶11 In to extend disclosure and discovery deadlines, the trial be allowed to collect additional, admissible evidence after NFP pointed out that she had none is contrary to Rule 56, which requires such requests to be It also noted that . . . her on the testimony elicited by defense counsel that she was not acting 3

¶12 Estrada subsequently filed a motion for new trial, which the trial court denied. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(a).

Discussion

¶13 grant of summary judgment in favor of NFP based on its conclusion that the evidence she presented in opposition to and that she therefore failed to establish a genuine issue of material fact as to . According to Estrada, at the time of the accident, to the restaurant to start her work shift, [Fite] was also delivering supplies

We review the , BMO Harris Bank, N.A. v. Wildwood Creek Ranch, LLC, 236 Ariz. 363, ¶ 7 (2015), construing the facts and all reasonable inferences therefrom in the light most favorable to Estrada, see , 230 Ariz. 55, ¶ 8 (2012). We summary judgment proceedings for an abuse of discretion. Mohave Elec.

Coop., Inc. v. Byers discretion if it commits legal error in reaching a discretionary conclusion,

or if the record lacks substantial evidence to s Tritschler v. Allstate Ins. Co., 213 Ariz. 505, ¶ 41 (App. 2006).

3 erred in denying her motion to extend disclosure and discovery deadlines

or her apparent suggestion that it erred in denying her motion for relief pursuant to Rule 56(d), we note that her attachment of the transcript of the December 2020 hearing on the Rule 56(d) motion to her opening brief does not satisfy the requirements of Rule 11(b) and (c), Ariz. R. Civ. App. P. Estrada bore the responsibility of necessary for proper App. P. 11(b)(1), (c)(1)(A); see In re Property at 6757 S. Burcham Ave., 204 Ariz.

401, ¶ 11 (App. 2003) (discussing former version of Rule 11(c)(1)(A)). We will not consider transcripts attached to the opening brief. See 6757 S. Burcham Ave., 204 Ariz. 401, ¶ 11. ¶14 Summary judgment is proper when that there is no genuine dispute as to any material fact and the moving party

Ariz. R. Civ. P. 56(a). Accordingly, a party must come forward with evidence it believes demonstrates the absence of a genuine issue of material fact and must explain why summary judgment should be entered in its favor. , 218 Ariz. 112, ¶ 14 (App. 2008). Where the burden of proof on the claim or defense at trial rests on the non- evidence disproving the non- Id. ¶ 22.

Rather, the moving party is only required to point out by specific reference to the relevant discovery that no evidence exist[s] to support an essential element of the [non- or defense. Id. (alteration in Thruston) (quoting Orme Sch. v. Reeves, 166 Ariz. 301, 310 (1990)). In doing so, the moving party must record Id. ¶¶ 23, 29 & 28.

¶15 If the moving party satisfies its initial burden of showing that the non-moving party lacks enough evidence to satisfy its ultimate burden of proof at trial, the burden then shifts to the non-moving party to present sufficient evidence demonstrating the existence of a genuine factual dispute as to a material fact. Id. ¶ 26. To defeat the motion, the non-moving party must call the [trial] court s attention to evidence overlooked or ignored by the moving party or must explain why the motion should otherwise be denied. Id. Parties are permitted to use affidavits to oppose motions for knowledge, set out facts that would be admissible in evidence, and show

P. 56(c)(5); see also Jabczenski v. S. Pac. Mem l Hosps., Inc., 119 Ariz. 15, 18

(App. 1978) (trial court should not consider hearsay in addressing motion for summary judgment).

¶16 W simply because the trial judge may believe the moving party will probably

es the moving party should Orme Sch., 166 Ariz. at 310. When determining whether to grant summary judgment, the trial court must refrain from weighing witness credibility and the quality of the evidence, Id. at 311. Our duty on appeal is to determine if there were any genuine disputes as to material facts, or disputes as to inferences drawn from material facts, and if not, whether the court applied the law correctly. See Cliff Findlay Auto., LLC v. Olson, 228 Ariz. 115, ¶ 8 (App. 2011); cf. Santiago v. Phx. Newspapers, Inc., 164 Ariz. 505, 508 (1990). A dispute about a fact is the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

¶17 of respondeat superior for negligent driving of a vehicle by its employee if

the facts establish an employer-employee relationship and the negligence Carnes v. Phx. Newspapers, Inc., 227 Ariz. 32, ¶ 9 (App. 2011). Conduct is within the [it] is the kind the employee is employed to perform, (2) [it] is substantially within the authorized time and space limits, and (3) [it] Id. ¶

court has expla s

Id. (quoting State v. Superior Court (Schraft), 111 Ariz. 130, 132 (1974)). when commuting to or from work, our supreme court has adopted the

accidents caused when an employee is going to or returning from her place

of employment. Id. ¶ 11. an

. Smith v. Am. Express Travel Related Servs. Co., 179 Ariz. 131, 136 (App. 1994).

¶18 Estrada making a prima facie showing of the absence of any genuine dispute of fact

because the only evidence it presented was a singular, ambiguous statement by a deponent who expressed uncertainty about her activities prior to a motor vehicle collision that had occurred five (5) years earlier. Alternatively, she asserts that were under

Rule 801(d)(1)(A), Ariz. R. Evid., , any one of which taken individually precludes summary judgment from being : 2016 settlement agreement between Estrada and the Fites and their businesses.

Estrada contends l dispute of fact that directly contradicts the . . .

¶19 Specifically, Estrada argues 2016 letter to NFP was admissible as prior inconsistent statement regarding her activities on the day of the accident because Thomas represented Fite at the time , which . She NFP and its counsel were clearly aware of the conflicting statements at the

time they filed the [motion for summary judgment] and disingenuously claimed said fact to be undispu obligation to disclose Mr. Thomas by name, contact information, and a fair

description of the relevant information that [he] 4

¶20 Further, sworn affidavit, made in 2020, was also admissible as a prior inconsistent statement because it contained as well as his attestation that he had attended a meeting during which Fite

his 2016 letter. And, as to the settlement agreement between Estrada, the

Fites, and Thai Basil, Estrada contends it the she had not been within the course and scope

of her employment at the time of the accident. Specifically, she asserts that by entering into the agreement, the Fites and Thai Basil and by so doing effectually made a statement that Ms. Fite was in the course

and scope of her responsibilities as an owner and employee of the

¶21 NFP responds that inadmissible hearsay, not subject to any exception or exclusion First, NFP statement allegedly made by Ms. Fite to Mr. Thomas; and 2) the statement

Moreover, it argues, pursuant to inconsistent statement is admissible only if the witness is given an

opportunity to explain or deny the statement and an adverse party is given Thus, NFP contends tements when

she declined to examine Ms. Fite at deposition with what she now contends

4 -page data- attorney, John Aguirre, was copied on the original letter from Thomas to

NFP, a fact Estrada does not dispute on reply. and should not be permitted to -testimony about deliveries [at the deposition] And, NFP asserts that 5

¶22 Additionally, NFP argues

restaurant supplies, Moreover, it asserts, receipts, statements contained therein Thomas as a fact witness until after the lay witness disclosure deadline had

expired, NFP contends he accordingly

¶23 Further, specifically challenging the admissibility of of delivering restaurant supplies is not based on his personal knowledge

and essentially repeats the hearsay statements contained in his 2016 letter, g] an inadmissible third level of hearsay under Ariz. R. It further

5 For the first time in supplemental briefing, and again during oral argument before this court, NFP asserted State v. Allred, 134 Ariz. 274 (1982), is controlling in this case and precludes There, the court acknowledged the danger of unfair prejudice when impeachment evidence is used for substantive purposes and identified factors for courts to consider in determining whether a under Rule 403, Ariz. R. Evid. 134 Ariz. at 277-78

(factors include witness denying having made the statement, lack of corroboration that statement was made, impeachment testimony as only evidence of guilt, and true purpose being substantive rather than impeaching). Because NFP acknowledged during oral argument the lack of authority establishing the applicability of these factors in civil cases, and we find none, we . NFP also contends o vague to

¶24 And, arguing the settlement agreement is inadmissible to prove vicarious liability, NFP asserts the agreement lacks specificity identify any activities in which [she] was engaged at the time of the accident that could have . NFP also contends that the stipulations contained within the agreement are inadmissible to establish material facts in this subsequent proceeding, and that because the Fites signed the agreement in only their personal capacity, they lacked authority and intent to bind Thai Basil to the factual representations and purported admissions contained in the agreement. Further, NFP argues the admission the uncontested

evidence in the record shows Fite only occasionally purchased food for the re ; and the agreement because not parties to this lawsuit, apply.

¶25 Hearsay is defined as evidence to prove the truth of the matter asserted in the stateme Ariz.

R. Evid. 801(c). Hearsay is inadmissible unless an exception applies. See Villas at Hidden Lakes Condos. Ass n v. Geupel Constr. Co., 174 Ariz. 72, 82 (App. 1992). However, not all prior statements are hearsay. A prior statement may be admissible as non- testifies and is subject to cross-examination about [the] prior statement, and

the statement . . . is inconsistent with the dec Ariz. R. Evid. 801(d)(1)(A). story represents the truth in the light of all the facts, such as the demeanor

of the witness, the matter brought out on his direct and cross-examination, State v. Miller, 187 Ariz. 254, 257 (App. 1996) (quoting State v. Moran, 151 Ariz. 373, 375 (App. 1985)). inconsistent statements unless inadmissible under some other rule, become substantive evidence usable for all purposes. , 243 Ariz. 299, ¶ 27 (2017) (emphasis omitted) (quoting State v. Acree, 121 Ariz. 94, 97 (1978)); see State v. Skinner, 110 Ariz. 135, 142 (1973) (trier of fact may consider prior inconsistent statements as substantive evidence, not solely for impeachment purposes). ¶26 As an initial matter, contrary to Estrada assertion that it was burden to establish its affirmative defense of vicarious liability, party asserting the existence of an agency relationship bears the burden of proving it. Reed v. Hinderland, 135 Ariz. 213, 217 (1983); see also Woerth v. City of Flagstaff, 167 Ariz. 412, 419 (App. 1990) (party asserting claim for relief generally has burden of proving facts essential to claim); Pacific Indem. Co. v. Kohlhase under an insurance contract, the insured has the burden of proving that his

Ferguson v. Cash, Sullivan & Cross Ins. Agency, 171 Ariz. 381, 382, 386 (App. 1991) (for negligence claim against insurance agent, claimant must prove defendant caused the injury). Thus, as NFP argues, Estr was in the course and scope of her employment for Thai Basil, such that

¶27 Although Estrada asserts NFP failed to establish that no genuine issue of material fact existed by relying only she had been on her way to Thai Basil from a real estate event, she fails to

meaningfully develop this argument in her opening brief. See Ariz. R. Civ. App. P. 13(a)(7)(A) (opening brief must include arguments consisting of supporting reasons for each contention, and with citations of legal

; Ritchie v. Krasner, 221 Ariz. 288, ¶ 62 (App. 2009) supporting authority in opening brief). Notably, Estrada fails to

acknowledge that later during the deposition, Fite again confirmed that had been In any event, we

assume without deciding that NFP satisfied its initial burden on summary judgment.

¶28 Whether a non-moving party may withstand summary judgment relying solely on a prior inconsistent statement appears to be undecided in Arizona. Like Arizona, however, many other states allow for the substantive use of unsworn prior inconsistent statements where the declarant testifies at trial and is subject to cross-examination. See Gibbons v. State, 286 S.E.2d 717, 721 [A] prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence. Caliber Paving Co. v. Rexford Indus. Realty and Mgmt., Inc., 268 Cal. Rptr. 3d 443, 455 (Ct. App. 2020) (statements inconsistent with evidence); Vogel v. State, 291 N.W.2d 838, 840, 844-45 (Wis. 1980) (unsworn

prior statement admissible as substantive evidence). Several of these jurisdictions, including Wisconsin and Georgia, have concluded that a party opposing summary judgment may rely on the

prior inconsistent statement of a witness to establish a genuine issue of material fact.

¶29 Indeed, the Wisconsin Supreme Court has explained that here a party moving for summary judgment relies upon a particular assertion in the affidavit of a prospective witness as establishing his right to summary judgment, proof of a prior statement by the prospective witness, inconsistent in a material respect, is ordinarily sufficient to entitle

Koehler v. Haechler, 133 N.W.2d 730, 733 (Wis. 1965). Similarly, the Court of Appeals of Georgia has concluded that that a prior inconsistent statement is admissible as

substantive evidence is to permit a non-moving party to withstand a motion for summary judgment by submitting sworn testimony averring personal knowledge of the existence of a prior inconsistent statement made by the witness upon whose sworn testimony the movant relies. Cooperwood v. Auld, 334 S.E.2d 22, 23 (Ga. Ct. App. 1985).

¶30 We find the above reasoning persuasive and consistent with our case law and rules of evidence. See Skinner, 110 Ariz. at 142. uling

sworn testimony based on personal knowledge that Fite had previously made a statement inconsistent with her deposition testimony the testimony upon which NFP relies in support of summary judgment. See

Ariz. R. Civ. P. 56(c)(5). Indeed, the affidavit states that Thomas was doing at the time of the collision where she was going to her way to the restaurant at the time of the accident to deliver restaurant

Thomas avers that, after relaying this information to NFP in his 2016 letter, he attended a -person me counsel was also present, and had previously relayed to NFP.

¶31 T deposition testimony that she had been traveli event for . . . [her] separate real estate business. Such evidence was

therefore sufficient to create a question of fact as to whether Fite had been acting in the course and scope of her employment at the time of the accident, which Estrada was required to prove in order to negligence in failing to purchase automobile insurance for Thai Basil. 6 See State Farm Mut. Auto. Ins. Co. v. Swetmon, 492 S.E.2d 678, 680 (Ga. Ct. App. 1997) (police report containing prior inconsistent statement constituted substantive evidence creating a jury question); Engler, 230 Ariz. 55, ¶ 9. Construing, as we must, the evidence in the light most favorable to the non-moving party, Engler, 230 Ariz. 55, ¶ 8, the record indicates a material issue of fact remains. Thus, the trial court erroneously granted summary judgment in favor of NFP. 7

¶32 And, while Rule 613(b), Ariz. R. Evid., which governs the statement, ordinarily requires that the

witness be given an opportunity to

explain or deny the prior inconsistent statement and that an adverse party be given an opportunity to examine the witness about it, we do not believe these requirements apply in the limited context of summary judgment proceedings. See Ariz. R. Civ. P. 56(c)(5) (affidavit opposing summary . . set out facts that would be admi (emphasis added). 8 Indeed, the reason for permitting a witness to explain

6 -of-state cases on which we rely are inapplicable because to demonstrate the absence

of a genuine issue of material fact, and, in doing so, it directly referenced Thruston, 218 Ariz. 112, ¶ 29. 7 regarding the settlement agreement or her assertion that the trial court

we do not address her arguments that the court erred in denying her motion

to extend disclosure and discovery deadlines and motion for new trial. 8 As discussed, under Rule 801(d)(1)(A), a statement is not hearsay if [t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . prior inconsistent statement regarding her

activities on the day of the collision is material to the issue of whether Thai Basil is vicariously liable for her conduct, evidence of th[is] statement[] may be introduced if [Fite] on cross-examination denies making the statement[], claims no recollection of the statement[] or equivocates or deny an alleged prior inconsistent statement is to assist the fact-finder in assessing the witness s credibility, which can only occur at trial. Colarossi v. Coty U.S. Inc., 119 Cal. Rptr. 2d 131, 136-38 inconsistent statement admissible and sufficient to defeat summary

judgment despite no opportunity to explain or deny statement).

¶33 Moreover, affidavit because

creating issues of fact through affidavits that contradict their own Wright v. Hills, 161 Ariz. 583, 588 (App. 1989), overruled on other grounds by James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot., 177 Ariz. 316 (App. 1993) deposition testimony, not his own, and neither Thomas nor Fite are parties

to the instant case. that the sham affidavit rule is properly applied when a nonparty affiant has some motive, emotional or financial, to fabricate sham issues of fact, there is no evidence of such a motive in this case. Allstate Indem. Co. v. Ridgely, 214 Ariz. 440, ¶ 14 (App. 2007).

¶34 Finally, we address , failure to timely disclose Thomas as a lay witness pursuant to Rule

therefore his affidavit could n under Rule 56(c). Under Rule 26.1(a)(3) and (4), each party is required to

disclose its witnesses may have knowledge or information relevant to the subject matter of the

use the . . . witness . . . Ariz. R.

Civ. P. 37(c)(1).

¶35 Despite the language of Rule 37, our supreme court has stated of a decision on the merits. Allstate , 182 Ariz. 284, 287

(1995). opponent a reasonable opportunity to prepare for trial or settlement Bryan v. Riddel, 178 Ariz. 472, 476 n.5 (1994).

regarding [her] making the statement[]. State v. Allen, 117 Ariz. 168, 170 (1977). If Fite admits that she made a prior inconsistent statement, the admissibility is discretionary. See State v. Woods, 141 Ariz. 446, 453 (1984) The trial court has broad discretion to d Solimeno v. Yonan, 224 Ariz. 74, ¶ 9 (App. 2010).

¶36 Although Estrada did not file her response to NF for summary judgment relying, in part, on s affidavit and letter until ten days after the deadline for disclosure of lay witnesses, this does

not automatically preclude use of his affidavit to defeat summary judgment or his testimony at trial. See , 182 not have a valid excuse for failing to timely disclose, permission to use the

s). NFP

argued in its reply in support of its motion that because Estrada had failed to timely disclose Thomas as a witness and permitting her to offer an affidavit from an undisclosed witness,

not rely on his affidavit to oppose summary judgment. However, the trial court does not appear to have precluded, stricken, or otherwise disregarded its contents in . 9

Disposition

¶37 For the foregoing reasons, we grant of summary judgment in favor of NFP and remand for further proceedings consistent with this decision. As the prevailing party on appeal, we award Estrada her taxable costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

B R E A R C L I F F E, Presiding Judge, dissenting:

¶38 I agree with most of the discussion above. I disagree on a very fundamental point, which leads me to dissent altogether.

¶39 After two years of litigation in the bad faith action, NFP brought summary judgment asserting that Estrada had failed to come

9 deadlines in its under advisement ruling,

[Estrada] and . . thus suggesting she

had failed to show good cause, the court did not address the merits of those arguments. forward with any evidence that Fite was acting in the course and scope of her employment at the time of the accident. In her response, Estrada argued that three pieces of evidence, as-yet undisclosed, were sufficient to defeat summary judgment: the Thomas letter, the Thomas affidavit, and the Damron agreement, as described by the majority. 10 Apart from writing out after referring to the Damron agreement, Estrada made no argument supported by any legal authority as to how each of these documents was admissible, seemingly just assuming that they were.

¶40 After briefing on the motion for summary judgment, Estrada raised a new theory in her Rule 56(d) motion, namely that the Thomas letter and affidavit hearsay rule (Rule 803(6), Ariz. R. Evid.). At oral argument, shifted again, as the trial cou of her position, Ms. Estrada urged at oral argument that she was not in fact

offering the letter, affidavit, and agreement to prove the truth of the matters asserted therein, but rather as impeachment evidence to demonstrate Ms.

¶41 The trial court granted because Estrada failed to show the existence of admissible evidence

sufficient to create a triable issue of fact. In its lengthy under-advisement ruling, the court determined that NFP had shown by admissible evidence statement that she had been traveling from a real estate event that

Fite was not acting in the course and scope of her employment when the underlying accident occurred, and that Estrada had failed to raise admissible contrary evidence in her response. It noted that the Thomas letter, affidavit, and Damron agreement were inadmissible hearsay and therefore incompetent to raise a genuine issue of material fact. The court found each ground for admitting these documents wanting whether raised by Estrada in her formal response to the motion for summary

10 I discuss the Damron agreement as one of the three pieces of evidence offered, along with the Thomas letter and affidavit, although it had even more infirmities than the other two. The Damron agreement was general admission of responsibility to contradict denial of responsibility. But, as the trial court correctly determined, it was hearsay party and which does not contain within it any statements as to conduct

that would establish that Ms. Fite was acting within the course and scope of judgment, in her post-briefing Rule 56(d) motion, or for the first time at oral argument.

¶42 On appeal, Estrada abandoned the business records exception ground, and does not argue that the documents are non-hearsay as admissions of a party-opponent or of an agent. Rather, Estrada solely argues that each document is admissible as a prior inconsistent statement under Rule 801(d)(1). While this argument was never expressly raised below, and Rule 801(d) was never cited except generally and then, only relative to the Damron agreement it was arguably encompassed within That is, that statements within these documents statements in her deposition. The trial court determined that such a claim

was inadequate because controverting evidence must be admissible and mere impeachment evidence is not. The court was not, however, ever formally asked to determine whether statements in the Thomas letter, affidavit, or Damron agreement qualified as prior inconsistent statements under Rule 801(d)(1), and thus it did not.

¶43 My colleagues above squarely and satisfactorily address that evidence of a prior inconsistent statement is admissible as substantive evidence. Consequently, if the Thomas letter, affidavit, and Damron agreement were prior inconsistent statements, they would be substantively admissible, and therefore could serve to create an issue of fact and defeat summary judgment. Unfortunately, the majority goes from recognizing that prior inconsistent statements are substantively admissible to reversing the trial court without ever adequately addressing whether the Thomas letter, affidavit, and Damron agreement are, in fact, prior inconsistent statements.

¶44 Our role on appeal is limited. We are to uphold a trial court unless there is a legal basis not to in light of the record, and even if for a reason wholly different from that supporting its judgment. Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co., 140 Ariz. 174, 178 (App. 1984); Gary Outdoor Advert. Co. v. Sun Lodge, Inc., 133 Ariz. 240, 242 (1982). Here, I would uphold letter, Thomas affidavit, or Damron deposition testimony and therefore there was no basis for their admission.

Thus, there was nothing to bar entry of summary judgment.

¶45 The operative admissions in the Thomas letter and repeated in the affidavit are that Fite was to the restaurant at the time of the accident to deliver restaurant supplies which she had just picked up at This was the sole evidence offered to establish that Fite was acting in the course and scope of her employment (or ownership) of the restaurant rather than merely coming and going as an employee. But, as stated above, nowhere in her deposition did Fite deny that she was delivering restaurant supplies or otherwise engaging in any business activity of the restaurant. In her deposition, she merely agreed that she was [her] She did not exclude at all that she was

bearing goods for the restaurant or otherwise on restaurant business. Her deposition therefore does

not contradict anything in the Thomas letter or affidavit, and certainly nothing in the Damron agreement. Nothing in either the Thomas letter or affidavit disclaims that she was coming from a real estate event or doing any other unrelated business at the same time she was doing restaurant business.

¶46 To be sure, Estrada could have examined Fite in her deposition and elicited a contrary statement, but she did not. She could have pressed her on what she was transporting in her car, or whether she had made a stop on restaurant business before leaving her real estate event, or indeed whether she had made a stop at a restaurant supply store after leaving her real estate event. There were any number of things she could have asked to allow for the use of this as contradictory evidence. Instead, she let lay a wholly innocuous statement of where Fite was coming directly from, rather than what she was doing or where else she had been. This decision was, however, fatal to the admission of anything in the Thomas letter, affidavit, or Damron agreement. As the trial court correctly concluded, hearsay is inadmissible at trial, and a motion for summary judgment must be contested by admissible evidence. Ariz. R. Civ. P. 56(c)(5), (6); , 174 Ariz. 72, 82 (App. 1992). And this motion was not.

¶47 As a result, and because the three documents at issue were hearsay and remained hearsay without exception at the time of the opposition to the motion for summary judgment, I respectfully dissent. I