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DIVISION II  
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STATE OF WASHINGTON  
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No. 49727-1-II

**IN THE COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON**

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In re:

Tensar International Corp., a Georgia Corporation,

Appellant,

v.

Jeffrey and Lori Main, Husband and Wife, and the Marital Community  
Composed Thereof,

Respondent.

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**BRIEF OF APPELLANT TENSAR INTERNATIONAL CORP.**

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## **INTRODUCTION AND SUMMARY**

While driving his personal vehicle, Gerhard Sander, a regional sales manager for Tensar Corporation , was involved in an automobile accident with underlying Plaintiff Jeffrey and Lori Main and the marital community composed thereof (“Main”). As a result, Main filed a negligence claim against Sander. More than a year later, Main amended the Complaint to add Sander’s employer Tensar as a defendant.

Tensar filed a Motion for Summary Judgment based on the fact that Sander’s discovery responses unequivocally stated he was on his way home at the time of the accident and did not recall where he was coming from. In response to Tensar’s Motion, Sander filed a Declaration stating that he was going to his home office, not home. The court denied Tensar’s Summary Judgment Motion deciding that the inconsistent statements were not fatal.

Main then filed a Motion for Partial Summary Judgment on the issue of vicarious liability, attaching a new Declaration by Sander stating he was on his way to his home office, not his home, and that he was coming from a sales call.

Sander’s employee records showed he used his business credit card for charges to a Tacoma restaurant and a Poulsbo movie theater on the day

of the accident. But the only expense submitted to his employer for that day was for the lunch. Tensar sent discovery requesting phone records, bank and credit card records and information as to the movie charge. The discovery was pending when the court granted Main's Motion for Partial Summary Judgment.

Tensar appeals the Summary Judgment Order because a material issue of fact exists as to whether Sander was in the scope of his employment at the time of the accident. Where Sander has given contradictory evidence under oath about his whereabouts and his destination at the time of the accident, *Respondeat Superior* is an issue for the trier of fact.

#### **I. ASSIGNMENTS OF ERROR**

Appellant makes the following assignments of error:

1. The trial court erred in granting partial summary judgment because material issues of fact exist about whether Sander was in the scope of his employment when the accident occurred, where Sander has provided contradictory sworn testimony on the facts surrounding his activity at the time of the auto accident.

2. The trial court abused its discretion when it denied Tensar's request for a continuance to obtain responses to outstanding discovery

directly relevant to the issue of Sander's activities at the time of the accident.

## **II. ISSUES PRESENTED**

1. Did the trial court err as a matter of law in granting partial summary judgment where material issues of fact as to whether Sander was within the scope of his employment at the time of the motor vehicle accident were disputed?

2. Did the trial court abuse its discretion when it failed to grant Tensar's CR56 (f) request for a continuance to obtain responses to pending discovery for records evidencing Sander's activities at the time of the accident?

## **III. STATEMENT OF THE CASE**

Gerhard Sander ("Sander") has been employed as a Regional Manager for the sale of retaining walls for Tensar International Corporation ("Tensar") since 1994. [CP 103]. Sander has an office in his home in Kitsap County and Tensar provides him a monthly reimbursement for use of his home as an office. [CP 104]. Sander owns the vehicle that he drives for work. Tensar provides him with a monthly car allowance of \$500 and reimbursement for 80% of his gasoline and maintenance costs. [CP 103], [CP 307]. The employment contract states, "In the event of an accident, the employee's insurance will cover the employee's liability and

the Company's insurance will cover the Company's liability. Company insurance does not cover the employee's liability." [CP 307].

On April 25, 2011, at approximately 2:50 pm, Sander was driving his motor vehicle south on Highway 3 in Kitsap County, and exited onto the off-ramp entrance to Highway 305. As Sander approached the end of the off-ramp, he rear-ended Jeffrey and Lori Main's vehicle as it was stopped at the stoplight. [CP 90]. Sander did not report the accident to his employer, Tensar. Nor did Sander mention the accident in any email, correspondence or telephone call to Tensar. [CP 44].

On August 6, 2012, Jeffrey and Lori Main, and the marital community composed thereof filed a Summons and Complaint against Sander for their injuries sustained in the accident. [CP 1-7]. Sander filed an Answer that did not name Tensar as a potential third party defendant. [CP 8-12].

When responding to Interrogatories from Main regarding the purpose of his trip that day, Sander responded, "Defendant was on his way home when the accident occurred, but does not recall where he was coming from." [CP 77].

In response to Main's Requests for Admissions, Sander flatly denied he was on the job at the time of the collision with Main:

**REQUEST FOR ADMISSION NO. 1:** Admit Mr. Sander was operating his vehicle in the scope of his employment with Tensor at the time of the Accident with Mr. Main:

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 2:** Admit that Tensor reimbursed Mr. Sander for gas and/or mileage for operating his vehicle on April 25, 2011.

**ANSWER:** Denied. [CP 80-82 ]

On February 11, 2013, Main's counsel deposed Sander. [CP 75].

During the Deposition, the following exchange occurred:

Q: Can you tell me where you were coming from and where you were going at the time of the collision.

A: I don't remember where I was coming from, someplace south of Poulsbo on Highway 3, but I was definitely going home.

Q: Were you going home because you were off work? Had you worked that day?

A: Yes. [CP 93-94].

At the end of that Deposition, Main's counsel informed Sander that if Main's personal injury claim proceeded to trial, Sander may face personal exposure for any verdict amount in excess of his policy limits.

[Hr'g Tr. vol. 1, p. 5-6, May 2, 2014.]

Thereafter, on October 28, 2013, Main filed an Amended Complaint adding Tensor as a defendant under the doctrine of *Respondeat Superior*. [CP 15-24]. On February 20, 2014, Tensor filed a Motion for Summary Judgment on the grounds that the undisputed facts showed there was no basis for vicarious liability. [CP 31-42].

In response to the motion, Sander filed a declaration stating, “The accident that is the subject matter of this lawsuit occurred on April 25, 2011 at approximately 2:50 in the afternoon. At that time, I was returning to my home office after completing a Tensar customer sales call. However, I am not certain which customer I met with that day.” [CP 105]. On March 28, 2014, the trial court denied Tensar’s motion finding that the declaration had to be considered in conjunction with the deposition. The judge stated “I do not find that the inconsistencies are fatal.” [Hr’g Tr. Vol. 1, p. 15].

During discovery, Tensar produced Sander’s Visa card expenses and Expense Report that had been submitted to them by Sander for the time period of April 19-May 17, 2011. The only expenditures listed on the business Visa card on the day of the accident were a charge to “Little India Express” for \$8.74 and to “Regal Cinemas Poulsbo” for \$17.00. The charge for Regal Cinemas was crossed out, but the charge to Little India Express had a checkmark beside it and a note marked “10.” [CP 313]. The only expense listed in Sander’s Expense Report submitted for that day was a meal for \$10.00. [CP 317].

On April 2, 2014, Main filed a Motion for Partial Summary Judgment against Tensar asking the court to rule that Tensar was vicariously liable for the negligence of their employee, Sander, as a matter

of law. [CP 288-296]. Accompanying the motion was another Declaration from Sander. In this Declaration, he stated, “When I testified that I was ‘definitely returning home’ at the time of the accident, I was simply providing a geographic location for Ms. Popp. I did not explicitly say or intend to represent that I was off work. To the extent that any of my prior testimony could be construed to mean that I was ‘off work’ at the time of the accident, that is a misunderstanding of my testimony and would not be consistent with the facts of this case.” [CP 310].

On April 24, 2014, Tensar served Interrogatories on Sander requesting information about the movie theater he attended, and his phone, bank and credit card records from the day of the accident. [CP 427-436].

On May 2, 2014, the court heard oral argument on Main’s Motion for Partial Summary Judgment to compel vicarious liability against Tensar. During argument, counsel for Tensar stated

“Because in response to Tensar’s motion for summary judgment, we received a credit card statement that indicates that he had gone to movies that day at the Poulsbo cinema, which has movies between 12:00 and 2:00. Which if he was leaving the movie and going home, would dispute his second declaration and his third declaration, and comport with his first deposition testimony and answers to interrogatories, which is he was not working, he was going home. We have not had an opportunity to depose this individual. He was deposed before our client was joined in this case. As soon as we got the information regarding the movie theater, we have now issued discovery. If court is even inclined to believe that there is not a material issue of fact, we would ask for a continuance to allow us to get that information, which has not yet

been produced. What movie did you go to? What time did you get out? And then we will depose him and determine whether or not there is – what is credible here. There is clearly a question of fact as to whether or not he was coming from an appointment, coming from the movies, going home, going home to work. Simply because he works from his home doesn't mean that every time he is going home, he is going home to work. In this case, there is nothing but a factual dispute.”

[Hr'g Tr. vol. 2, p. 7-8, May 2, 2014].

Counsel later stated, “we would ask that this Motion be denied, and in the alternative, continue to allow the completion of the discovery that is in process.” [Hr'g Tr. vol. 2, p. 10, May 2, 2014].

Despite the contradictory evidence, and despite the inability to obtain discovery concerning that evidence, the trial court granted Main's Motion for Partial Summary Judgment against Tensor, holding Tensor vicariously liable for Sander's negligence as a matter of law stating, “I denied that [M]otion for [S]ummary [J]udgment because the law was not in Tensor's favor. It was not based upon any materials or any disputed material fact.” [Hr'g Tr. vol. 2, p. 11, May 2, 2014].

#### IV. ARGUMENT

##### A. Standard Of Review

This Court reviews orders granting Motions for Summary Judgment on a *de novo* basis. *Hartley v. State*, 103 Wn. 2d 768, 774, 698 P.2d 77 (1985). A motion for summary judgment may be granted only if

the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). The trial court must consider all evidence and all reasonable inferences from the evidence in favor of the non-moving party, and summary judgment should be granted only if reasonable persons could reach only one conclusion. *Teagle v. Fischer & Porter*, 89 Wn. 2d 149, 152, 570 P.2d 438 (1977).

Further, the court cannot grant summary judgment when the credibility of the witness has been called into question. “When, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant’s evidence is impeached, an issue of credibility is present, provided the impeaching evidence is not too incredible to be believed by reasonable minds. The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied.” *Balise v. Underwood*, 62 Wn. 2d 195, 200, 381 P.2d 966 (1963).

A similar holding was made in *Meadows v. Grant’s Auto Brokers, Inc.* 71 Wn. 2d 874, 431 P. 2d 216 (1967). In *Meadows*, the driver, in his initial interview, said he was working at the time of the accident, and that the manager for the employer knew about it. Later, in counsel’s affidavit,

counsel stated that the witness told him he was not working for employer at the time of the accident.

The *Meadows* court found that summary judgment was inappropriate, stating, “The opposing affidavits are therefore contradictory and raise credibility questions about a material and decisive issue in the case. However complex and intricate the plaintiff’s problem of proof at the time of trial may be, at this stage of the proceeding, Plaintiff is entitled to all favorable inferences that may be deduced from the varying affidavits. So viewing the affidavits, we are satisfied respondents have not met their burden of demonstrating the absence of a genuine issue of material fact. Mere surmise that Plaintiff may not prevail at trial is not a sufficient basis to refuse her her day in court.” *Id* at 221.

In the present case, in reviewing the Partial Summary Judgment Motion, the trial court failed to view the testimony and evidence in a light most favorable to Tensar, the non-moving party. Sander’s questionable statements about his activities and intentions surrounding the activity are issues that should be presented to the trier of fact to determine.

**B. The Trial Court’s Order Granting Partial Summary Judgment Should Be Reversed Because Material Issues of Fact Exist Whether Sander was within the Scope of his Employment at the Time of the Motor Vehicle Accident**

The test adopted by the Washington State Supreme Court for determining whether an employee is in the course of employment, is “whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer, or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer’s interest.” *Elder v. Cisco Construction Company*, 52 Wn. 2d 241 at 245, 324 P.2d 1062 (1958.)

“As a general rule, an employee traveling from the place of work to his home or other personal destination, after completing his day’s work, cannot ordinarily be regarded as acting in the scope of his employment so as to charge the employer for the employee’s negligence in the operation of the latter’s own car.” *Id at 244*, citing to Annotation: Employer’s liability for negligence of employee in driving his own car. 52 A.L.R. 2d 287, 311 (1957). The court, referencing the Restatement (Second) of Agency § 228, stated “[t]he test adopted by this court for determining whether an employee is, at a given time, in the course of his employment, is whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer, or, as sometimes stated, whether he was

engaged at the time in the furtherance of the employer's interest." *Id* at 245.

There is an exception to the general rule that a workman who is traveling to or from work in a vehicle furnished by his employer as an incident to his employment pursuant to custom or contractual obligation, is in the course of his employment. *Aloha Lumber Corp., v. Department of Labor & Industries*, 77 Wn. 2d 763, 766, 466 P.2d 151 (1970), citing to *Hama Hama Logging Co. V. Department of Labor & Indus.*, 157 Wash. 96, 288 P. 655 (1930); *Venho v. Ostrander Ry. & Timber Co.*, 185 Wash. 138, 52 P. 2d 1267 (1936); *Thompson v. Department of Labor & Indus.*, 10 Wn. 2d 277, 116 P.2d 372 (1941); *Pearson v. Aluminum Co. of America*, 23 Wn. 2d 403, 161 P.2d 169 (1945).

However, even though the employer has furnished the vehicle, the trier of fact must still determine whether or not the employee is acting in the furtherance of his employer's interest, even when the employer furnishes the vehicle. "The rule will apply, and not the exception, if permissive use of the employer's vehicle is solely for the employee's convenience, and is neither incident to the contract of employment nor in furtherance of the employer's business. *Superior Asphalt & Concrete Co. v Department of Labor & Indus.*, 19 Wn. App. 800, 803, 578 P.2d 59 (Div. 3, 1978), citing to *Thompson, supra*. "The rule will also apply if the

employee is on a recreational excursion which is not incident to employment or in furtherance of the employer's interests." *Id.*, citing to *Hama Hama, supra.*

The court in *Superior Asphalt*, citing to both the general rule and the exception, found that the employee was not acting in the furtherance of his employer's interest at the time of the accident and was not within the scope of employment. *Id.* at 806. The court cited that point as distinct from *Aloha*, where the employee took no diversion away from the direct route home. The court further noted that in the event that the employee in *Aloha* had diverted from the route home, a different question would have been presented. *Id.* at 804. In this case the analysis is more important since the car was owned by Sander and the employer made a reimbursement for part of the use.

In their motion for partial summary judgment, Main relies on the holding in *Michael v. Laponsey* in concluding that an employee who works from home and receives a gas and maintenance allowance for the use of his vehicle for work is within the scope of employment when driving that vehicle home from work. [CP 288-296], *Michael v. Laponsey*, 123 Wn. App. 873, 99 P.3d. 1254 (Div. 1, 2004). But Main's reliance on that case is misplaced.

*Laponsey* merely held that, under the facts in that case, there was sufficient information to raise an issue of material fact as to whether the defendant driver was acting within the scope of his employment when the accident occurred. *Id.* at 874. See *Kuehn v. White*, 24 Wn. App. 274 at 280-81, 600 P.2d 679 (Div. 1, 1979) (holding that the determination as to scope of employment necessarily depends on the particular circumstances and facts of the case, and allowing for the possibility that “certain fact patterns may establish as a matter of law that the master is not [vicariously] liable.”) *Laponsey* does not support the proposition that, as a matter of law, an employee is conclusively in furtherance of his employer’s interests any time that employee is driving a vehicle furnished by his employer as an incident to his employment. *Id.* at 876. Rather, the specific facts will determine if it is an issue that should be decided by a jury. *Id.* Under the analysis set forth in *Aloha* and *Superior Asphalt*, there must be an analysis of whether or not the trip was in furtherance of the employer’s interest.

Moreover, in comparing the instant matter to *Laponsey*, Main fails to address an important factual distinction under the *Kuehn* analysis as set forth above. *Kuehn* at 280-81, [Hr’g Tr. vol. 2 , p. 4, May 2, 2014.] The determination as to whether the tortfeasor was travelling *to work or from work* at the time of the injury is, under *Kuehn*, a fact that “. . . may

establish as a matter of law that the master is not [vicariously] liable.”  
*Kuehn* at 280-81, *See Laponsey* at 874. Here, Sander was travelling home from work. *Laponsey* at 874, [Hr’g Tr. vol. 1, p. 13-14, March 28, 2014], (distinguishing *Laponsey* where vicarious liability existed in part because it was undisputed that the tortfeasor was on his way *to work* at 8:00 in the morning). Here, in contrast to *Laponsey*, there are significant disputed material facts as to whether Sander was “off work” at the time of the collision. [CP 93-94].

Because Tensar’s only physical presence in the State of Washington is located at Sander’s residence, it is necessarily an issue of material fact as to whether Sander was on his way home in furtherance of the interests of the master, or whether the tortious conduct does not occur “substantially within the authorized time and space limits . . . or too little actuated by a purpose to serve the master.” Restatement (Second) of Agency § 228 (1)(b), (2) (1958), [Hr’g Tr. vol. 1, p. 13-14, March 28, 2014.] (noting that by virtue of having a home office, Sander could hypothetically claim vicarious liability any time he is in an accident). It is safe to say that the holdings in *Kuehn* and *Laponsey* do not intend that Tensar is liable under *respondeat superior* in any circumstance where Sander is driving home and finished working for the day. Indeed, the instant case may be one where “certain fact[s] . . . establish as a matter of

law that the master is not liable.” *Kuehn* at 280-81. Tensar should be permitted to conduct discovery on that issue.

Sander has stated under oath three different times that he was not under Tensar’s employ at the time of the collision: at his deposition, in answers to Interrogatories and in response to Requests for Admissions. [CP 93-94; 77; ]. Tensar maintains that Sander’s subsequent inconsistent statements claiming he was on his way from a sales call to his home office does not end the dispute over Sander’s status, and that the issue should go before a jury.

Also relevant to that disputed issue is the fact that Sander did not report the collision to his employer. [CP 44]. It does not follow common sense that Sander would not report the accident to his employer, if in fact he was acting in the scope of his employment, in furtherance of his employer’s interests, at the time of the collision. *Id.*

When Tensar was added as a defendant in the Amended Complaint, competing Motions for Summary Judgment were filed and Sander filed contradictory Declarations stating that he was definitely coming from a work call, but could not remember the client, and was definitely going to his home office, asserting that he was simply referring to a geographical location when he said he was going home. [CP 105, CP 310]. In any event, Sander’s Declarations of contrary statements,

submitted after Tensar is impleaded into the lawsuit, are not credible because he has a financial reason to assert that his employer bears responsibility for the injury to Main. In his Deposition, Sander was advised that his insurance policy limits may be inadequate to cover Main's personal injury damages, which would expose Sander's personal assets. [Hr'g Tr. vol. 1, p. 5-6, May 2, 2014.]

Sander's business Visa shows he purchased movie tickets at the Regal Cinemas in Poulsbo on April 25, 2011, the date of the accident. Even though he put the movie tickets on his business Visa card, Sander did not claim the movie tickets on his Expense Report. [CP 317]. This fact is perhaps only meaningful if Tensar is permitted to depose Sander as to this issue, to determine if Sander attended a movie in the middle of the workday. Conduct is not within the scope of employment if it does not occur "substantially within the authorized time and space limits" or if it is different "in kind . . . or too little actuated by a purpose to serve the master." Restatement (Second) of Agency § 228 (1)(b), (2) (1958).

Sander has no recollection of the work site from whence he came prior to his purchasing the movie tickets. Sander has only been able to recall that he was coming from the Poulsbo area at the time of the accident [CP 93-94]. Tensar was precluded from questioning Sander about his attendance at the movie, and precluded from obtaining discovery on his

changed testimony, before the Court ruled on Main's Partial Summary Judgment Motion. . [Hr'g Tr. vol. 2 , p. 9-11, May 2, 2014.]

The movie charge was not the only charge that day. Sander claims he had a business appointment because he had a lunch in Tacoma that was reimbursed. [CP 103-105]. However, the record is clear it was for only \$10 (including tip) so that could not have been for more than one person . [CP 317]. This would lead one to believe it was not with a client. The purpose of the trip is so vague it is impossible for a decision to be made about it without the jury weighing the credibility of Sander and reviewing all of the evidence. Should his trip not been for any business purpose at all, that dramatically changes this case. Tensar should not be the insurer regardless of what the trip is about. The problem with Sander's assumption in his Declaration was brought to the trial court's attention in the Motion to Strike. [CP 166-174].

Tensar again maintains that it is a disputed issue of material fact as to whether it is reasonable that Sander, at the time of his initial statements under oath, and after considerable time to reflect on the events in question, has no recollection as to where he was coming from on the same day that he purchased a movie ticket.

The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied. *Balise v Underwood*, 62 Wn. 2d 195, 200, 381 P.2d 966 (1963).

In *Balise*, Morrison-Knudsen employed Underwood as a welder-mechanic. Underwood drove his own vehicle to and from the jobsite in Skykomish to his home in Edmonds. The union contract provided lodging and daily remuneration for the job in Skykomish. *Id* at 197. Underwood left the job at 2 pm, and was traveling towards his home in Edmonds when the accident occurred at 3 pm. *Id* at 197-198.

Immediately after the accident, Underwood's supervisor came to the scene and sought release of the tools in Underwood's truck as belonging to Morrison-Knudsen. Underwood thereafter filed a Claim for workmen's compensation alleging he was in the course of employment. Later, when suit was filed, Underwood abandoned the claim that he was in the course of employment, stating in his Deposition an undefined fear for his job. He also modified his Answer to the lawsuit to reflect his changing claim of employment at the time of the accident. *Id*.

There, Respondent Morrison-Knudsen claimed that the change in position had been satisfactorily explained. Appellant Underwood asserted that the witness's credibility was that in issue. The *Balise* court held that

under such circumstances, there were material issues of fact and summary judgment for the employer was reversed. *Id* at 201.

A similar issue arose in *Meadows v Grant's Auto Brokers, Inc.*, 71 Wn. 2d 874, 431 P. 2d 216 (1967.) In *Meadows*, the driver, in his initial interview, said he was working at the time of the accident, and that the manager for the employer knew about it. Later, in counsel's affidavit, counsel stated that the witness told him he was not working for employer at the time of the accident. *Id* at 877.

Regarding the adequacy of employee's counsel's affidavit about sworn testimony, the court stated,

"Although the rule, in this respect, makes no distinction between affidavits of the moving and nonmoving party, it is almost the universal practice—because of the drastic potential of the motion—to scrutinize with care and particularity the affidavits of the moving party while indulging in some leniency with respect to the affidavits presented by the opposing party." *Id* at 877-878.

The *Meadows* court found that summary judgment was inappropriate, stating,

"The opposing affidavits are therefore contradictory and raise credibility questions about a material and decisive issue in the case. However complex and intricate the plaintiff's problem of proof at the time of trial may be, at this stage of the proceeding, plaintiff is entitled to all favorable inferences that may be deduced from the varying affidavits. So viewing the affidavits, we are satisfied respondents have not met their burden of demonstrating the absence of a genuine issue of material fact. Mere surmise that Plaintiff may not prevail at trial is not a sufficient basis to refuse her her day in court." *Id* at 881-82.

In the present case, in reviewing the Partial Summary Judgment Motion, the trial court failed to view the testimony and evidence in a light most favorable to Tensar, the nonmoving party. Sander's questionable statements about his activities and intentions surrounding the activity are issues that should be presented to the trier of fact to determine.

**C. The Trial Court's Failure to Grant a Continuance Pursuant to CR 56(f) was an Abuse of Discretion**

CR 56 (f) provides for a continuance of the hearing on a motion for summary judgment when further discovery needs to be undertaken. A trial court's denial of a continuance pursuant to CR 56(f) is reviewed for abuse of discretion. *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899 at 902, 973 P.2d 1103 (Div. 1, 1999.) *See Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (Div. 1, 1990) (holding that the primary consideration in the trial court's decision in a motion for a continuance should be justice.) In *Coggle*, the court looked in depth at the standard for abuse of discretion in the context of a CR 56(f) continuance request. There, the court found abuse, commenting that

“We fail to see how justice is served by a draconian application of time limitations here. The case had been filed 2 years earlier. Little discovery had been pursued. The process could have been speeded by the court after a short continuance and the consideration of Coggle's materials in response to the motion for summary judgment. Snow has not argued that he would have suffered prejudice if the court had granted a continuance, nor do we perceive any prejudice. We cannot discern a tenable ground or

reason for the trial court's decision. We hold that the trial court improperly exercised its discretion in denying the motion for a continuance." *Coggle* at 508.

Here, Tensar had outstanding discovery directly relevant to the issue of where Sander had been just prior to the accident, an issue that is critical in determining whether or not Sander was working in furtherance of Tensar's interest at the time of the accident. Although there was substantial material conflicting information concerning Sander's claims of his activities at the time of the accident, the trial court, at the very least, should have allowed a continuance for Tensar to obtain responses to the additional discovery. The trial court's primary consideration should have been fairness and justice. The court abused its discretion in failing to grant the continuance.

## V. CONCLUSION

Tensar presented material disputed facts as to whether Sander was on the job at the time of the auto accident. The trial court should have weighed the evidence in a light most favorable to Tensar, and should have denied Main's motion for partial summary judgment.

Further, before making a ruling, the trial court should have granted Tensar a continuance to obtain answers to the discovery relevant to Sander's activities at the time of the accident. The trial court's failure to grant a continuance under those circumstances was an abuse of discretion.

RESPECTFULLY SUBMITTED this 6 day of April, 2017.

DYNAN & ASSOCIATES

By 

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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

BY \_\_\_\_\_

DEPUTY

NO: 49727-1-II

DECLARATION OF SERVICE

JEFFREY AND LORI MAIN,  
husband and  
wife and the marital community  
composed  
thereof,

Plaintiffs,

v.

GERHARD J. SANDER AND  
JANE DOE  
SANDER, husband and wife and  
the marital community thereof;  
and TENSAR  
INTERNATIONAL  
CORPORATION, a Georgia  
corporation,

Defendants.

On this day, the undersigned served pursuant to CR5(b) all parties  
listed below with copies of:

1. Brief of Appellant Tensar International Corporation; and
2. Declaration of Service.

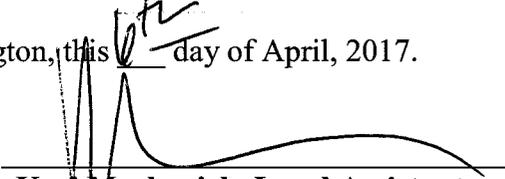
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The listed pleadings were delivered via email, legal messenger, and/or U.S. Mail.

I certify under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington, this 12 day of April, 2017.

By:   
Print Name: **Kari Markovich, Legal Assistant**