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IN THE UTAH SUPREME COURT

ESPENSCHIED TRANSPORT CORP.,

Plaintiff and Appellant

vs.

WILSHIRE INSURANCE COMPANY;
FLEETWOOD SERVICES, INC.,

Defendants and Appellees.

Appellate Case No. 20160873-SC

BRIEF OF APPELLEE WILSHIRE INSURANCE COMPANY

Appeal from Third District Court, Salt Lake County
the Honorable Paige Petersen, civil no. 070913289

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-3-102(3)(j).

ISSUES PRESENTED, STANDARD OF REVIEW, AND CONTROLLING LAW

Pursuant to Rule 24(b)(1) of the Utah Rules of Appellate Procedure, Appellee Wilshire Insurance Company presents the following issues pertinent to this appeal:

Issue I. Did the trial court properly rule that Fleetwood was not Wilshire's agent where the undisputed facts are that Fleetwood is an insurance broker which was not authorized to bind coverage for Wilshire, Fleetwood acted as an agent of Espenschied, and Fleetwood placed coverage for Espenschied with various insurers over a period in excess of twenty years?

Standard of Review: "Summary judgment is appropriate when 'there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.' Utah R. Civ. P. 56(a). [The Court] review[s] the district court's grant or denial of summary judgment for correctness, drawing all reasonable inferences from the facts in the light most favorable to the nonmoving party.'" *Truck Ins. Exch. v. Rutherford*, 2017 UT 25, ¶ 5, 395 P.3d 143, 145.

Controlling Law: A moving party is entitled to summary judgment if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56.

Issue II. Did the trial court properly rule that the insurance policy did not provide coverage when the undisputed facts showed that the policy was a scheduled vehicle policy and the trailer was not scheduled on the policy?

Standard of Review: “Summary judgment is appropriate when ‘there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.’ Utah R. Civ. P. 56(a). [The Court] review[s] the district court’s grant or denial of summary judgment for correctness, drawing all reasonable inferences from the facts in the light most favorable to the nonmoving party.” *Truck Ins. Exch. v. Rutherford*, 2017 UT 25, ¶ 5, 395 P.3d 143, 145.

Controlling Law: A moving party is entitled to summary judgment if “there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Utah R. Civ. P. 56.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah R. Civ. P. 56. See Addendum.

STATEMENT OF THE CASE

This matter has been ongoing since January 30, 2005, when a trailer hauled by non-party DATS Trucking (“DATS”), an interstate motor carrier, lost dual tires while traveling on a highway. (R. 2088–92, R. 1860–61). After coming off the axle, the tires crossed a median and struck another vehicle—resulting in the death of that vehicle’s driver, Kimball Herrod (the “Accident”). (R. 2088–92, R. 1860). Prior to the Accident, DATS had purchased almost all of Appellant Espenschied Transport Corp.’s (“Espenschied”) assets. (R. 2130). For tax reasons, DATS was leasing the Espenschied trailer involved in the

Accident, while having a contractual obligation to eventually purchase the same. (*Id.*)

At the time of the Accident, DATS had liability insurance and eventually paid \$2,264,000.00 to Mr. Herrod's family in settlement of a lawsuit filed against the trucking company. (R. 2122–28). Mr. Herrod's family (the "Herrod Family") also brought suit against Espenschied, the owner of the trailer at issue (the "Trailer"). (R. 1861, R. 2112–13). Prior to the Accident, Espenschied had obtained liability coverage for certain of its vehicles through a scheduled-auto-only insurance policy issued by Appellee Wilshire Insurance Company ("Wilshire"). (R. 1920). Appellee Fleetwood Services, Inc. ("Fleetwood") was Espenschied's long-time insurance agent, and had helped Espenschied obtain the Wilshire policy (R. 1856–57, R. 1873, R. 1–2).

After Espenschied made a claim related to the Accident, Wilshire undertook an investigation and denied coverage because the Trailer was not listed on the subject policy's schedule of covered autos. (R. 2098–101, R. 2852–62, R. 1908–09, R. 2102). Neither Fleetwood nor Espenschied ever requested the Trailer's addition to the policy. (R. 2102).

Espenschied, itself, never paid a penny to the Herrod Family. Rather, in 2007, in settlement of the Herrod Family's claims, Espenschied agreed to:

- i) a confession of judgment in favor of the Herrod Family in the amount of \$1,100,000.00 (payable on the date of the Confession of Judgment in the amount of \$1,292,499.99 together with interest accruing thereafter at 10% per annum);
- ii) retain the services of the law firm representing the Herrod Family;
- iii) relinquish control of all matters pertaining to Espenschied's claims against Wilshire; and

iv) apply any proceeds from litigation against Wilshire to the Herrod Family in full satisfaction of the judgment amount before receiving any monies. (R. 2116–18, R. 2131–32). The Herrod Family, in turn, agreed not to collect the judgment from Espenschied, if to do so would expose its principals to liability. (R. 2131–32).

Thereafter, the Herrod Family brought suit against Wilshire in the Federal District Court for the District of Utah, seeking money under the Policy’s MCS-90 Endorsement on the basis that the subject policy did not provide coverage for the Action (the “Federal Action”). (R. 2171–72). The Federal Action ultimately resulted in the District Court ruling that the MCS-90 Endorsement did not apply, because Espenschied had ceased operating as an interstate motor carrier before the Accident. *Herrod v. Wilshire Ins. Co.*, 2014 WL 6871259, at *1 (D. Utah Dec. 5, 2014). The District Court therefore entered summary judgment in favor of Wilshire. *Id.* A state action brought by Espenschied against Wilshire and Fleetwood was held in abeyance during the course of the Federal Action.

After resolution of the Federal Action, the Herrods (through Espenschied) resumed the prosecution of this state court case against Wilshire and Fleetwood. More specifically, Espenschied had filed claims against Wilshire for (i) breach of contract; (ii) breach of the implied covenant of good faith and fair dealing; (iii) breach of Utah Code Ann. § 31A-26-301; and (iv) breach of fiduciary duty. (R. 3–6). Importantly, each of these claims was precluded by a determination in the Federal Action that there was no coverage under the policy, which Plaintiff claims somehow survived the federal case but seems to have abandoned on appeal.

This leaves only a vicarious liability argument for Espenschied, but Espenschied

never pled that Wilshire was vicariously liable for any allegedly negligent act or omission on the part of Fleetwood. Indeed, Espenschied expressly pled that Fleetwood was *Espenschied's* agent, and did not assert anywhere in the Complaint that Fleetwood was *Wilshire's* agent. (R. 2).

Thereafter, Wilshire filed a Motion for Summary Judgment against Espenschied's claims, including any unpled allegations of vicarious liability. (R. 1824–26). Wilshire successfully asserted that there was no genuine dispute of material fact regarding whether the subject insurance policy provided coverage for the Accident because the Trailer was not scheduled on the policy. (R. 3184–85). Therefore, there could be no breach of contract, fiduciary duty, or the implied covenant of good faith and fair dealing stemming from Wilshire's declination to provide coverage for the Accident. Likewise, there could be no violation of Utah Code Ann. § 31A-26-301 (which in any event does not create a private cause of action against insurance companies). (R. 3184–87). Further, Wilshire showed that there was no genuine dispute of material fact that Fleetwood did not act as Wilshire's agent in connection with procuring insurance for Espenschied, because Wilshire did not control "the means or manner in which Fleetwood operated." (R. 3187). Thus, the Honorable Paige Petersen entered summary judgment against Espenschied and in favor of Wilshire. (R. 3187–88, R. 3207–09). The Court further found that Wilshire could not be held vicariously liable for any of Fleetwood's allegedly negligent acts or omissions in any event, because Espenschied had no viable claims against Fleetwood. (R. 3187–88).

Espenschied raises only one issue pertaining to Wilshire in this appeal: whether Fleetwood acted as an agent for Wilshire. At the trial level, Espenschied seemed to argue

that its contention that the Trailer was covered by the subject policy remained viable. However, this argument was not meritorious and, further, has not been preserved on appeal. The Complaint does not contain a claim for reformation of the subject policy. What remains of this case is simply a malpractice action against Fleetwood, Espenschied's insurance agent.

STATEMENT OF THE FACTS

Espenschied was an interstate trucking company established in 1982. (R. 1855, 1858–59). For the majority of the time that Espenschied was in business, it used Fleetwood as an insurance agent. (R. 1856–57, R. 1873, R. 1–2). Espenschied's principals considered Fleetwood their business partner and insurance broker and agent. (R. 2229, R. 2241, R. 2244).

In December 2003, Wilshire issued a commercial lines insurance policy to Espenschied, Policy Number BA2493296 (the "Policy"). (R. 1920, R. 1885-86). The Policy was a "Scheduled Vehicle Policy", meaning that in order for a vehicle to be covered under the Policy, the vehicle must be listed or scheduled on the Policy. (R. 1888, R. 1914–15, R. 1906–07). After working with Espenschied to create the list, Fleetwood provided the list of vehicles to Wilshire. (R. 1890–91, R. 1879–80, R. 2242–43). Fleetwood remitted a copy of the Policy to Espenschied, and Wilshire subsequently mailed monthly schedules of equipment to Espenschied identifying the equipment covered under the Policy. (R. 2849, R. 2916). Nonetheless, Espenschied failed to read its Policy:

Mr. Donaldson: Did you have a file at Espenschied for insurance issues, [f]or example, policies, that kind of thing?

Mr. Stark: Well, Fleetwood would typically send the policy in a book form each year.

Mr. Donaldson: Okay. So you did receive typically—

Mr. Stark: Yeah. And it would go right on the shelf.

(R. 2916).

Fleetwood did not have the authority to bind Wilshire or write insurance policies on behalf of Wilshire. Rather, Fleetwood was required to submit proposed risks to Wilshire for consideration, with Wilshire then making the decision to bind on a case-by-case basis. (R. 1886–87, R. 1873–76, R. 2848, R. 2882).

Similarly, both Wilshire and Fleetwood’s representatives testified that Fleetwood lacked any authority to bind Wilshire:

Mr. Humphreys: Who issues the binder? Is it the company or the agent?

Mr. Matousek [of Wilshire]: The company issues the authority to bind.

(R. 2882; *see also* R. 1886–87, R. 1874–76).

James Morden, who is the founder and a former owner of Fleetwood (R. 1870–72), confirmed that Fleetwood *never* had this authority, and further that Fleetwood had placed insurance coverage on Espenschied’s behalf with various insurers over the twenty-plus years that Fleetwood had worked with Espenschied. (R. 1873–76, R. 1878). John Richard Stark, one of the founders and principals of Espenschied (R. 1855), likewise testified:

Mr. Abbott: How long had you used Fleetwood?

Mr. Stark: I don’t recall how many years, but it was for the most part the only company we ever used.

Mr. Abbott: Are we talking more than ten years?

Mr. Stark: Oh, yeah.

Mr. Abbott: More than 20 years?

Mr. Stark: Yes. . . .

Mr. Abbott: And you understood that Fleetwood procured insurance through Wilshire; is that right?

Mr. Stark: During this time or always?

Mr. Abbott: At any time.

Mr. Stark: They used a lot of companies over the years, and I don't—

Mr. Abbott: Okay. So Fleetwood was a broker, essentially?

Mr. Stark: That's the way I understood it.

Mr. Abbott: They would go to different companies and obtain the best insurance?

Mr. Stark: Yeah.

Mr. Abbott: So over the years, whoever the actual insurance carrier was would have changed from time to time; is that right?

Mr. Stark: Uh-huh (affirmative).¹

(R. 1856–57, emphasis added).

Espenschied's accountant also testified:

[E]ventually everything started becoming automatic because [Espenschied] started working with [Fleetwood] directly—not directly—consistently on here are [sic] the first couple of times. [Espenschied] would kind of go out and get bids from different carriers. But after several

¹ Mr. Humphreys objected to the use of the term “broker” as constituting a legal opinion.

times, finding out the way that [Fleetwood] worked, the way [Fleetwood] was familiar with everything, [Espenschied] found it to be more of a headache to go back in. So [Espenschied] just decided to stay with [Fleetwood] all along. [Fleetwood] shopped different carriers or different providers on that. . . . [Espenschied] just turned [Fleetwood] loose with it at that point. And [Espenschied] used different insurance companies.

(R. 2221–22).

Fleetwood was responsible for producing less than fifty percent of Wilshire's insurance policies in Utah. (R. 2881). Wilshire did not require Fleetwood to use any particular forms for submitting insurance applications, and indeed, Fleetwood used ACORD forms—forms which are standard in the insurance industry and not proprietary to Wilshire. (R. 2849, 2883). Although Wilshire held programs and meetings with insurance brokers such as Fleetwood, the purpose of the meetings was to market Wilshire's products to Fleetwood and to gain a better sense of the local market and competitor's products. (R. 2849).

On December 31, 2004, Espenschied sold its business to DATS and ceased operating as a motor carrier. As part of the deal, Espenschied agreed to lease its fleet of trailers to DATS, and DATS agreed to eventually purchase the same. (R. 2130).

Thereafter, on or about January 30, 2005, DATS was hauling one of the trailers it had leased from Espenschied when dual tires came off an axle. (R. 2088–92, R. 1860–61). The tires crossed a highway median and struck another vehicle—resulting in the death of that vehicle's driver, Kimball Herrod. (R. 2088–92, R. 1860).

The Herrod Family filed a wrongful death action against Espenschied and DATS arising from the Accident. (R. 1861, R. 2112–13). The case settled before trial, and DATS

paid the Herrod Family \$2,264,000.00 in exchange for a full release. (R. 2122–28). Espenschied, in turn, agreed to a confession of judgment in the amount of \$1,100,000.00 payable on the date of the confession of judgment in the amount of \$1,292,499.99, together with interest accruing thereafter at 10% per annum. (R. 2116–18). The settlement agreement entered into by and between Espenschied and the Herrod Family explicitly provided that the judgment could not be collected against Espenschied (if to do so would expose Espenschied's principals to liability). (R. 2131–32). Espenschied has thus never paid any money to the Herrod Family.

On or about May 16, 2006, after investigating Espenschied's claim for coverage, Wilshire determined that the Trailer was not listed on the schedule of covered autos and that the Policy, therefore, did not provide coverage for the Accident. (R. 2098–101, R. 2852–2862, R. 1908–09, R. 2102). Neither Espenschied nor Fleetwood ever requested Wilshire to add the Trailer to the Policy. (R. 2102).

Thereafter, the Herrod Family filed a Complaint against Wilshire in the Federal District Court for the District of Utah seeking policy limits from Wilshire under the Policy's MCS-90 Endorsement.² (R. 2171–72). In a summary judgment motion filed by

² “The MCS–90 endorsement constitutes such proof of requisite financial responsibility under the [Motor Carrier Act]. Consequently, every liability insurance policy issued to motor carriers of interstate commerce contains the MCS–90 endorsement. The MCS–90 endorsement, in pertinent part, provides that the motor carrier's insurer agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of ... the [MCA] whether or not the vehicle involved in the accident is specifically described in the policy. The motor vehicles that are subject to the financial responsibility requirements are those vehicles used for the transportation of property by motor carrier or motor private carrier.

the Herrods, they argued that the Trailer was not a scheduled vehicle on the Policy and that the Policy did not provide coverage for the accident as a prerequisite to the triggering of the MCS-90. (R. 2174, R. 2186).

Ultimately, the District Court entered summary judgment in favor of Wilshire on the grounds that Espenschied had ceased its transportation services prior to the Accident and was existing solely to lease its trailers to DATS, the trucking company that had purchased all of Espenschied's other assets; therefore, Espenschied was not operating as a for-hire motor carrier at the time of the Accident, rendering the MCS-90 Endorsement inapplicable. *Herrod v. Wilshire Ins. Co.*, 2014 WL 6871259, at *1 (D. Utah Dec. 5, 2014).

Prior to the decision in federal court, Espenschied had filed a motion for summary judgment in the state court action, relying on an "undisputed fact" that the Trailer "was not included on the Wilshire Policy's list of scheduled vehicles." (R. 2196). However, Espenschied withdrew this motion before it was decided. It was not until the decision in federal court adverse to Espenschied that Espenschied changed course, arguing that the

The MCS-90 endorsement is intended to impose a surety obligation on the motor carrier's insurer—in other words, the endorsement is a safety net that covers the public in the event other insurance coverage is lacking. An insurer's obligation to pay a negligence judgment against its insured pursuant to a MCS-90 endorsement is triggered only when (1) the underlying insurance policy to which the endorsement is attached does not otherwise provide coverage, *and* (2) either no other insurer is available to satisfy the judgment against the motor carrier, or the motor carrier's insurance coverage is insufficient to satisfy the federally-prescribed minimum levels of financial responsibility."

Herrod v. Wilshire Ins. Co., 499 F. App'x 753, 755–56 (10th Cir. 2012) (internal quotation marks and citations omitted).

Policy should have provided coverage to the Accident.

SUMMARY OF THE ARGUMENT

Wilshire is entitled to summary judgment as a matter of law, because the undisputed facts demonstrate that Fleetwood was not acting as Wilshire's agent with regard to the procurement of insurance coverage for Espenschied. Fleetwood never had authority to bind coverage on behalf of Wilshire. Rather, Fleetwood would fill out the initial insurance application and submit the same to Wilshire for the insurer's approval. Wilshire made the ultimate decision whether or not to issue coverage. Fleetwood only performed ministerial tasks on behalf of Wilshire.

If Fleetwood acted as anyone's agent, it was for Espenschied. Fleetwood obtained insurance coverage for Espenschied for over twenty years and placed coverage with various insurers for Espenschied. Because Fleetwood does not constitute an "agent" of Wilshire pursuant to well-established law, Wilshire cannot be held vicariously liable for any alleged negligent acts or omissions of Fleetwood.

Espenschied failed to properly brief the remaining issue it presented to the Court: that the Trailer could be covered by the Policy even if it was not specifically named; therefore, this issue should not be considered by the Court. In any event, there is no genuine dispute that the Trailer was not listed on the Policy's vehicle schedule and that the Policy was a scheduled vehicle policy; therefore, there can be no coverage for the Trailer under the Policy. Further, any knowledge Fleetwood had regarding adding the Trailer at issue to the Policy cannot be imputed to Wilshire, because Fleetwood was not Wilshire's agent with regard to procuring the Policy.

For the foregoing reasons, the trial court's grant of summary judgment in favor of Wilshire, and dismissal of all causes of action against Wilshire, should be affirmed.

ARGUMENT

Espenschied disputes two factual findings by the Trial Court:

- a. "The Wilshire Policy was issued and underwritten based on an application and information provided by Espenschied to Fleetwood which in turn submitted the information to Wilshire." (Appellant's Br. 31, citing R. 3184).
- b. "Fleetwood did not have the authority to bind or write insurance for Wilshire." (Appellant's Br. 31, citing R. 3184).

As to the first fact, Espenschied contends that it "submitted to Fleetwood a full list of all of its vehicles to be insured" and that "it was Fleetwood who changed the list and submitted a deficient list of vehicles to Wilshire." (Appellant's Br. 31). Notably, Espenschied does not contend that *Wilshire* changed the list or that Wilshire had knowledge of the list outside of what was provided to it by Fleetwood. Espenschied's argument thus rests on whether Fleetwood was Wilshire's agent acting within the scope of that agency at the time of the policy formation. The undisputed evidence in the record demonstrates that Fleetwood was not Wilshire's agent.

- I. **The trial court properly ruled that Fleetwood was not Wilshire's agent.**
 - A. **The "reasonable expectations" doctrine has been rejected in Utah.**

As an initial matter, in its brief, Espenschied argues:

There is adequate evidence that Fleetwood was Wilshire's agent. See Statement of Facts, ¶¶ 16-22, *supra*. Where an agent has represented the interests of both the insurer and the purchaser in a transaction for

procurement of insurance coverage, the insurer cannot later assert that the policy purchased does not cover a loss, if the purchaser expected that the policy would cover the loss and reasonably relied on the agent to ensure that the policy covered the loss. *Olszak v. Peerless Ins. Co.*, 119 N.H. 686, 406 A.2d 711 (1979).

(Appellant's Br. 32–33). In making this argument, Appellant ignores the fact that this Court has expressly rejected the “reasonable expectations” doctrine espoused in *Olszak*, a 1979 New Hampshire Supreme Court decision.

In *Olszak*, the owner of a construction business brought suit against an insurance company seeking coverage for a slip and fall claim the insurer claimed was not covered pursuant to a “completed operations” exclusion. *Id.*, 119 N.H. at 688, 406 A.2d at 713. The New Hampshire Supreme Court concluded that the loss should be covered based on the “reasonable expectations rule”: “(i)f a policy is so constructed that a reasonable man in the position of the insured would not attempt to read it, the insured's reasonable expectations will not be delimited by the policy language, regardless of the clarity of one particular phrase, among the Augean stable of print.” *Olszak*, 119 N.H. at 689–90, 406 A.2d at 714 (internal quotation marks and citations omitted); *see also Atwood v. Hartford Acc. & Indem. Co.*, 116 N.H. 636, 637, 365 A.2d 744, 746 (1976) (The “reasonable expectations” doctrine is a policy honoring the “objectively reasonable expectations of the insured . . . even though painstaking study of the policy provisions would have negated those expectations.”).

Importantly, in that case, unlike the present matter, “all parties agree[d] that [the insurance agent] was acting as agent for both the plaintiff and the [insurance] company.” *Id.* at 689, 406 A.2d at 714. Even more significantly, this Court has already expressly

rejected the “reasonable expectations” doctrine, concluding that an insured has a duty to read its policy:

In making this [“reasonable expectations”] argument, [the alleged insured] asks us to adopt a doctrine that considerably modifies the legislatively expressed public policy underlying the regulation of the insurance industry. The theory she advances essentially would allow a court to invalidate a clear provision of an insurance contract, even if the insured had not read it, if the finder of fact is convinced that the insurer’s agent knew or should have known that the insured had expectations that contradicted the policy’s language and that the agent created or helped to create those expectations. For the reasons set forth below, we decline to make such a change in Utah law.

Allen v. Prudential Prop. & Cas. Ins. Co., 839 P.2d 798, 804 (Utah 1992); *see also W. United Ins. Co. v. Heighton*, 2016 WL 4916785, at *3, n. 1 (D. Utah Sept. 14, 2016), *appeal dismissed sub nom. Western United Insurance v. PHH Mortgage* (Oct. 12, 2016) (“[T]he reasonable expectations doctrine has been rejected in Utah.”).

Moreover, this is not an instance wherein a policy exclusion was buried “among the Augean stable of print”³; rather, the schedule of vehicles explicitly did not include the Trailer. (R. 2852–62). Fleetwood remitted the completed Policy to Espenschied and Wilshire subsequently mailed monthly schedules of equipment to Espenschied identifying the equipment covered under the Policy. (R. 2849, 2916). Nonetheless, Espenschied failed to read its Policy:

Mr. Donaldson: Did you have a file at Espenschied for insurance issues, [f]or example, policies, that kind of thing?

Mr. Stark: Well, Fleetwood would typically send the policy in a book form each year.

³ *Olszak*, 119 N.H. at 689–90, 406 A.2d at 714.

Mr. Donaldson. Okay. So you did receive typically—

Mr. Stark: Yeah. And it would go right on the shelf.

(R. 2916)

After failing to review the Policy and corresponding vehicle schedule, Espenschied cannot now claim that it “reasonably expected” the Trailer to be covered. *See Kramer v. State Ret. Bd.*, 2008 UT App 351, ¶ 25, 195 P.3d 925, 931 (“[The insurer] could not have violated the reasonable expectation doctrine because such a doctrine does not exist under Utah law.”); *id.* at ¶ 25 (holding that insureds had a duty to review Master Policy before signing enrollment form because it was identified in the form as the actual contract of insurance).

B. Fleetwood was not acting as Wilshire’s agent in connection with the procurement of the Policy.

Further, there is no genuine dispute regarding the fact that Fleetwood could not bind coverage on behalf of Wilshire; that Fleetwood served as Espenschied’s insurance agent, rather than as an agent for Wilshire; and that Fleetwood had placed coverage with various insurers on behalf of Espenschied for over twenty (20) years. Thus, the record clearly demonstrates that Wilshire did not control the “means or manner in which Fleetwood operated” (R. 3187) and that Fleetwood was not acting as Wilshire’s agent as to the procurement of the Policy. *See Vina v. Jefferson Ins. Co. of N.Y.*, 761 P.2d 581 (Utah Ct. App. 1988).

In *Vina*, a lessee and sublessee of a tavern met with an insurance agent to discuss obtaining insurance coverage on the tavern and equipment therein. *Id.* at 583. The

insurance agent obtained a quote for insuring the tavern from an insurance company, and then filled out and submitted a questionnaire to the insurer on behalf of the alleged insureds. *Id.* The insurance company (through a general agency) issued a policy based on the questionnaire. *Id.* Thereafter, the sublessee cancelled the insurance without the lessee's consent or knowledge. *Id.* The trial court held that the insurers were entitled to rely on the insurance agent's representation that the sublessee had the power and authority to cancel the insurance policy without the lessee's authorization. *Id.* at 584. On appeal, the plaintiff argued that the trial court erred in concluding that the insurance broker was not an agent of the insurer:

According to [the lessee], [the insurance agent] was the agent of [the insurer] and [the general agency] and his negligence in misinforming [the insurer] that [the lessee] and [the sublessee] were a partnership and in cancelling the policy without [the lessee's] knowledge or consent should be attributed to [the insurer] and [the general insurance agency].

Id. Examining the argument under Utah's "statutory⁴ and general agency law" the Utah Court of Appeals upheld the trial court's findings. *Id.* The court noted that the insurance agent "had no authority from [the general insurance agency] to bind insurance coverage or to issue a policy, but could only do so with [the agency's] express permission on a case by case basis." *Id.* The Court also examined general agency law:

An agent is a person authorized by another to act on his behalf and under his control. The existence of an agency relationship is determined from all the facts and circumstances in the case. An insurance agent, so far as the insurer is concerned, is a person expressly or impliedly authorized to represent it in dealing with third persons ... [and] is commissioned and employed by an insurance company to solicit and write insurance by and in the name of the

⁴ The statute discussed in *Vina v. Jefferson Ins. Co. of N.Y.*, 761 P.2d 581 (Utah Ct. App. 1988), Utah Code Ann. § 31-17-2 (1985), has been repealed.

company. However, [a]n insurance broker, like other brokers, is primarily the agent of the first person who employs him and is therefore ordinarily the agent of the insured as to matters connected with the procurement of the insurance. Further, an independent agent who solicits insurance for the insured and places that insurance with an ... insurance company is, if anyone's agent, the agent of the insured and not of the insurance company.

Id. at 585 (internal quotation marks and citations omitted). Applying these principles, the Court concluded that the insurance agent had acted on behalf of the lessee, not the insurance company. *Id.* The Court reasoned that “[t]he circumstances establish a course of conduct . . . where [the plaintiff] authorized [the agent] to act for him in regard to all of his insurance needs. Furthermore, the facts do not indicate that [the general agency] or [the insurer] authorized [the insurance agent] to act for them to any significant degree, except to perform ministerial acts. He could not act on their behalf to establish or alter the business relationship between [the insurer] and [the plaintiff].” *Id.* at 586.

Likewise, in *PHL Variable Ins. Co.*, a Utah federal district court noted that

Utah courts draw a distinction between insurance agents and insurance brokers. An insurance agent is typically a person expressly or impliedly authorized to represent [the insurer] in dealing with third persons ... [and] is commissioned and employed by an insurance company to solicit and write insurance by and in the name of the company. An insurance broker, by contrast, is ordinarily the agent of the insured as to matters connected with the procurement of the insurance. An independent agent who solicits insurance for an insured and places that insurance with an insurance company is, if anyone's agent, the agent of the insured and not of the insurance company.

PHL Variable Ins. Co. v. Sheldon Hathaway Family Ins. Tr. ex rel. Hathaway, 2013 WL 6230351, at *6 (D. Utah Dec. 2, 2013), *aff'd*, 819 F.3d 1283 (10th Cir. 2016) (internal quotation marks and citations omitted).

Applying these principles, the court held that an insurer was not bound by the

representations of a licensed insurance producer and a broker, in spite of the existence of written agreements between the producer and insurance company and the broker and insurance company—agreements which were respectively titled “Independent Producer Contract” and “Brokerage General Agent Agreement”, and contained provisions “about the use of company property, indebtedness and indemnification, and refund of premiums. . . .” *Id.* The court concluded that without the ability to “unilaterally bind [the insurer] into issuing an insurance policy to [the alleged insured] before [the alleged insured] first submitted an application to [the insurer]” the producer and broker could not be agents of the insurer. *Id.*; *see also Myers v. All. for Affordable Servs.*, 371 F. App’x 950, 956 (10th Cir. 2010) (“[A]n agent who is limited to receiving and accepting proposals for insurance is not a general agent and has no power to bind an insurance company or write insurance.”).

The undisputed facts in the matter at hand are similar to the circumstances in *Vina* and *PHL*. As an initial matter, Fleetwood NEVER had the authority to bind coverage on behalf of Wilshire, as testified by representatives of Fleetwood and Wilshire.

Espenschied argues that an excerpt from the written contract between Fleetwood and Wilshire gives Fleetwood the authority to bind. However, the agreement specifically limits this “authority” to that “granted by the most current written instructions from the Company Underwriting Department.” (R. 2206). Wilshire never gave Fleetwood the authority to bind coverage, and instead required that Fleetwood submit proposed risks for approval on a case-by-case basis. (R. 1886–87, R. 1873–76, R. 2848, R. 2882). As set forth above, representatives of both Fleetwood and Wilshire—the only parties to the contract—testified that Fleetwood never had the authority to bind Wilshire. As to this issue, there is

thus no material dispute of fact. Rather, the undisputed facts show that the contract between Wilshire and Fleetwood is similar to the relationship described in *Vina v. Jefferson Ins. Co. of N.Y.*, 761 P.2d 581 (Utah Ct. App. 1988), *i.e.*, Fleetwood could only bind insurance on a case by case basis after receiving written instructions from the Wilshire underwriting department. As stated in *Vina*, this does not create an agency relationship.

In addition, the agreement specifically provides that Fleetwood “is an independent contractor and not an employee of [Wilshire]” and that Fleetwood is “free to exercise his own judgment as to the persons to whom he shall sell insurance and the time, place and manner of such solicitations. [Fleetwood] shall have exclusive control of his time, the conduct of his agency and the selection of companies he will represent.” (R. 2206). Fleetwood’s role was thus relegated to ministerial tasks such as preparing the paper binder and submitting the application and information to Wilshire:

Mr. Humphreys: Who issues the binder? Is it the company or the agent?

Mr. Matousek:⁵ The company issues the authority to bind.

(R. 2882).

Mr. Humphreys: To what extent did Fleetwood, based on your understanding, have authority with Wilshire to write or bind risks?

Mr. Morden⁶: My recollection of the Wilshire contract was that it did not extend binding authority to the agents. . . .

Mr. Humphreys: . . . I’m trying to get an understanding of why it was that you entered into a contract if you had no binding authority. What

⁵ At the time of the deposition, Mr. Matousek was a vice president of Wilshire Insurance Company. (R. 2848).

⁶ Mr. Morden is the former owner of Fleetwood. (R. 1870–72).

authority did you have that was granted to you as you understood it?

Mr. Morden: In our business, markets were king. If you had the market you ruled. They gave us the opportunity to have them as a market. . . .

Mr. Humphreys: So specifically gave you the exclusive right in your market area to write the Wilshire policies.

Mr. Morden: There was nothing—no agreement that it was exclusive. But if we were able to produce an adequate amount of business for them, they would have no need to ask another agent to also have a contract. . . .

Mr. Humphreys: Did Fleetwood ever have the authority to bind with any company?

Mr. Morden: Fleetwood itself, I don't believe so.

Mr. Humphreys: Why do you qualify it? Were there individuals?

Mr. Morden: Because I, as an individual, had binding authority with Farmers Insurance Group. . . .

Mr. Humphreys: In terms of your historical experience with Espenschied—I understand you had various insurers that insured them over time—

Mr. Morden: We had them insured with Farmers Insurance for a long time

(R. 1874–76, 1878).

Espenschied's representative likewise understood that Fleetwood had acted as *its* agent in procuring insurance, and indeed had procured coverage for Espenschied for over twenty years from various insurers:

Mr. Abbott: How long had you used Fleetwood?

Mr. Stark: I don't recall how many years, but it was for the most part the only company we ever used.

Mr. Abbott: Are we talking more than ten years?

Mr. Stark: Oh, yeah.

Mr. Abbott: More than 20 years?

Mr. Stark: Yes. . . .

Mr. Abbott: And you understood that Fleetwood procured insurance through Wilshire; is that right?

Mr. Stark: During this time or always?

Mr. Abbott: At any time.

Mr. Stark: They used a lot of companies over the years, and I don't—

Mr. Abbott: Okay. So Fleetwood was a broker, essentially?

Mr. Stark: That's the way I understood it.

Mr. Abbott: They would go to different companies and obtain the best insurance?

Mr. Stark: Yeah.

Mr. Abbott: So over the years, whoever the actual insurance carrier was would have changed from time to time; is that right.

Mr. Stark. Uh-huh (affirmative). (Objection by Mr. Humphreys).

(R. 1856–57).

Although the record clearly demonstrates that Fleetwood was not acting as Wilshire's agent in procuring insurance coverage on behalf of Espenschied, Espenschied attempts to create a factual dispute where none exists. Specifically, Espenschied alleges that Fleetwood "produced almost all of Wilshire's Utah business" (App.'s Br. 35). This is plainly contradicted by the record. Wilshire used various brokers in Utah to place coverage

(R. 2879–81) and Wilshire’s representative estimated that Fleetwood was responsible for producing less than fifty percent of Wilshire’s insurance policies in Utah. (R. 2881). Further, as demonstrated by the record cited above, Wilshire and Fleetwood never had an exclusive relationship.

Espenschied also argues that Wilshire provided Fleetwood with certain forms it had to use; that Wilshire held training meetings for its producers; and that Wilshire “provided requirements with which it expected its producers to comply.” (App.’s Br. 35–36). However, the forms submitted by Fleetwood to Wilshire were ACORD forms—forms which are standard in the insurance industry and which were not required by Wilshire. (R. 2849, 2883). Moreover, the purpose of the meetings between Wilshire and Fleetwood was to market Wilshire’s products to Fleetwood and to gain a better sense of the local market and competitor’s products. (R. 2849). There is no evidence that Wilshire controlled the means and method over which Fleetwood procured insurance coverage on behalf of its clients.

In sum, the record clearly demonstrates that Fleetwood could not bind Wilshire except on a case by case basis after having received written authorization from the underwriting department; that Espenschied expected Fleetwood to obtain the best insurance it could for Espenschied; that Fleetwood procured insurance on behalf of Espenschied from various insurers over a twenty-plus year period; and that Fleetwood had

no authority to act on behalf of Wilshire to any significant degree.⁷ Accordingly, this Court should affirm the trial court's grant of summary judgment in favor of Wilshire as to Espenschied's unpled vicarious liability claim.

C. **Espenschied failed to plead any agency or vicarious liability theories in its Complaint against Wilshire.**

Although not relied upon by the Trial Court in its Findings of Fact and Conclusions of Law in re Wilshire's Motion for Summary Judgment (R. 3183–89), this Court should affirm the grant of summary judgment in favor of Wilshire, because all of the causes of action against Wilshire are precluded and Espenschied failed to plead vicarious liability in its Complaint against Wilshire. Espenschied pled that Fleetwood “acts as an agent *for insureds* in obtaining and managing their insurance needs” (R. 2, emphasis added) and that “Defendant Wilshire has been the insurer of plaintiff and Fleetwood has been the specific agent *who has been acting in [sic] behalf of and for plaintiff regarding its insurance needs*” (R. 2, emphasis added). Revealingly, the Complaint does not contain any similar allegations regarding the relationship between Fleetwood and Wilshire—that is, that Fleetwood acted as *Wilshire's* agent at any time or that Wilshire should be held vicariously liable for any negligence on the part of Fleetwood. Likewise, there are no causes of action asserted against Wilshire for statutory liability or liability under an agency theory. Moreover, the Court did not allow Espenschied to amend its Complaint to add any

⁷ In any event, as an insurer, Wilshire cannot be held vicariously liable for a breach of an insurance agent's duty to procure insurance, because an insurer has no duty to procure insurance.

allegations of vicarious liability or agency.⁸ Espenschied is therefore barred from bringing any claims against Wilshire based on a vicarious liability theory this late in the litigation.

For example, in *Big Sky Fin. Co. v. Lawyers Title Ins. Corp.*, 2006 UT App 337, an appellant argued, *inter alia*, that the district court erred in holding that an amended complaint failed to sufficiently plead claims for liability under an agency theory. The appellant asserted that under Utah's liberal pleading rules, the appellee had been put on notice of the vicarious liability claim. However, the Court of Appeals affirmed the district court, reasoning:

[T]he 2002 Amended Complaint makes no mention or reference to any statutory or agency theory claims, and does not articulate a single fact that would support such liability. Indeed, it does not even assert that [the alleged agent] was [appellee's] agent for escrow purposes. Thus, [appellee] did not have notice of either the statutory or agency theory claims, and the district court did not err in concluding that the 2002 Amended Complaint asserted only a fraudulent nondisclosure claim against [appellee].

Id.; see also *William Chase Wood v. World Wide Ass'n. of Specialty Programs & OSchoolds, Inc.*, 2007 WL 1202714, at *2 (D. Utah Apr. 20, 2007) ("The Complaints are also devoid of any specific allegations regarding any basis for vicarious liability. To establish vicarious liability, it is not enough to allege that an entity is vicariously liable for the actions of another. Instead, Plaintiffs must allege all of the elements of the particular theory, such as alter ego, upon which such vicarious liability is based.").

Thus, because Espenschied failed to plead any cause of action against Wilshire

⁸ Espenschied actually moved the trial court to allow it to amend the pleadings "to conform to the evidence of an agency relationship" in its response to Wilshire's Motion for Summary Judgment. (R. 2612–13). The court never granted this request.

based on agency, or even plead that Fleetwood was Wilshire's agent, Espenschied is precluded from bringing any claims against Wilshire arising from Fleetwood's alleged negligent acts or omissions.

D. If the trial court's grant of summary judgment to Fleetwood is affirmed, the grant of summary judgment to Wilshire must likewise be affirmed.

Finally, if this Court affirms the trial court's grant of summary judgment to Fleetwood, the grant of summary judgment to Wilshire must also be affirmed on the basis that Wilshire cannot be vicariously liable for any allegedly negligent act or omission on the part of Fleetwood if it is determined that Fleetwood has no liability.

II. The Policy does not provide coverage for the Accident, because the Trailer was not scheduled on the Policy which was a scheduled vehicle policy.

A. Espenschied has failed to brief this issue; therefore, it is not preserved for review.

In its "Issues Presented for Review" Espenschied notes the following issue: "Did the trial court err by ruling as a matter of law that there could only be coverage under the Wilshire insurance policy if the trailer in question was specifically named in the policy?" (Appellant's Br. 2). However, Appellant does not actually brief this issue in the Argument section of its brief. Under the Utah Rules of Appellate Procedure, R. 24, Appellant must identify the issues for review. In addition, the Utah Supreme Court has held:

[P]etitioners seeking judicial review must identify the legal or factual errors of the lower court or agency. We have consistently declined to review issues that are not adequately briefed. And we have long held that it is improper to mak[e] blanket assertions and leav[e] the responsibility to the court to ferret out evidence from the record to support [them].

In re Questar Gas Co., 2007 UT 79, ¶ 40, 175 P.3d 545, 555 (internal quotation marks and citations omitted); *see also Utah Physicians for a Healthy Env't v. Exec. Dir. of the Utah Dep't of Env'tl. Quality*, 2016 UT 49, ¶ 19, 391 P.3d 148, 154 (“As part of their burden of persuasion, the Petitioners were required, in their opening brief, to indicate the specific parts of the [] final order they believed were incorrect and present supporting evidence. They completely failed to do so, and an appellant may not thereby dump the burden of argument and research on the appellate court.” (internal quotation marks and citation omitted)).

Here, Appellant has failed to present any substantive argument on this issue; therefore, this issue is not preserved for appeal and the Court should decline to hear any argument pertaining to the same.

B. There is no evidence in the record that the Trailer was scheduled on the Policy.

Even if the Court does consider this issue, the trial court’s grant of summary judgment in favor of Wilshire must be affirmed. “An insurance policy is merely a contract between the insured and the insurer and is construed pursuant to the same rules applied to ordinary contracts.” *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1274 (Utah 1993). “[I]f the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language.” *Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 14, 140 P.3d 1210, 1213.

Here, the policy of insurance issued by Wilshire to Espenschied was a “Scheduled Policy.” (R. 1888–89; R. 1914; R. 1906–07). In this regard, the Policy provides that

Wilshire “will pay all sums an ‘insured’ legally must pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies, caused by an ‘accident’ and resulting from the ownership, maintenance or use of a covered ‘auto.’” (R. 1935–36). “This policy provides the following coverages for which an entry in the premium section is indicated. . . . Only those ‘autos’ described in Item Three of the Declarations for which a premium charge is shown (and for Liability Coverage any ‘trailers’ you don’t own while attached to any power unit described in Item Three).” (R. 1933–35). Thus, under the unambiguous policy language, in order for the Policy to provide coverage for bodily injuries arising from an accident, the involved vehicle must be scheduled on the Policy. Here, it is undisputed that the Trailer was not scheduled on the Policy at the time of the Accident. (R. 2848–2862,⁹ R. 2097–2101, R. 2108–09). Moreover, as set forth in detail above, Fleetwood was not acting as Wilshire’s agent in connection with the procurement of the Policy, and any alleged knowledge on the part of Fleetwood regarding Espenschied’s desire to schedule the Trailer cannot be imputed to Wilshire.¹⁰ Therefore, there is no coverage under the Policy for the Trailer and Wilshire is entitled to summary judgment as a matter of law on this issue.


CONCLUSION

⁹ The Trailer at issue was identified in Plaintiff’s Complaint as a “1986 Timpfe trailer” (R. 2). This trailer is not listed on the Policy’s schedule.

¹⁰ In addition, the testimony on record reveals that Espenschied sent Fleetwood three separate vehicle lists, all of which listed different equipment. (R. 2899–2900). Mr. Morden, of Fleetwood, then visited with Espenschied to determine the equipment to schedule (R. 2900). The final equipment list submitted to Wilshire did not include the Trailer. (R. 2848–2862, R. 2097–2101, R. 2108–09).

In sum, the Honorable Paige Petersen properly granted summary judgment in favor of Appellee Wilshire Insurance Company, because Fleetwood was not acting as Wilshire's agent with regard to the formation and procurement of the Policy, and as such, cannot be held vicariously liable for any of Fleetwood's allegedly negligent acts or omissions. In addition, any knowledge of Fleetwood cannot be imputed to Wilshire. Therefore, Wilshire requests that this Court affirm the grant of summary judgment in favor of Wilshire and the dismissal of all causes of action against Wilshire.

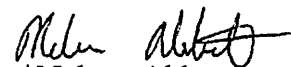
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CERTIFICATE OF COMPLIANCE WITH UT. R. APP. P. 24(f)(1)(C)

Counsel hereby certifies the *Brief of Appellee Wilshire Insurance Company* complies with the type-volume limitation: 7,926 words are contained herein, in compliance with UTAH R. APP. P. 24(f)(1)(A) as determined by the word processing system used to prepare *Brief of Appellee Wilshire Insurance Company*.


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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies, postage pre-paid, of the foregoing *Brief of Appellee Wilshire Insurance Company* with attachments, on this 2nd day of August, 2017, to the following:

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ADDENDUM

Findings of Fact and Conclusions of Law in re Wilshire's Motion for Summary Judgment

See Addendum of Appellant Espenschied Transport Corp.

Utah R. Civ. P. 56

(a) Motion for summary judgment or partial summary judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

(a)(1) Instead of a statement of the facts under Rule 7, a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(a)(2) Instead of a statement of the facts under Rule 7, a memorandum opposing the motion must include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional materials facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(a)(3) The motion and the memorandum opposing the motion may contain a concise statement of facts, whether disputed or undisputed, for the limited purpose of providing background and context for the case, dispute and motion.

(a)(4) Each material fact set forth in the motion or in the memorandum opposing the motion under paragraphs (a)(1) and (a)(2) that is not disputed is deemed admitted for the purposes of the motion.

(b) Time to file a motion. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move for summary judgment at any time after service of a motion for summary judgment by the adverse party or after 21 days from the commencement of the action. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move for summary judgment at any time. Unless the court orders otherwise, a party may file a motion for summary judgment at any time no later than 28 days after the close of all discovery.

(c) Procedures.

(c)(1) *Supporting factual positions.* A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B) showing that the materials cited do not establish the absence or presence of a genuine dispute.

(c)(2) *Objection that a fact is not supported by admissible evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3) *Materials not cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(c)(4) *Affidavits or declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) When facts are unavailable to the nonmoving party. If a nonmoving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(d)(1) defer considering the motion or deny it without prejudice;

(d)(2) allow time to obtain affidavits or declarations or to take discovery; or

(d)(3) issue any other appropriate order.

(e) Failing to properly support or address a fact. 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 paragraph (c), the court may:

(e)(1) give an opportunity to properly support or address the fact;

(e)(2) consider the fact undisputed for purposes of the motion;

(e)(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the moving party is entitled to it; or

(e)(4) issue any other appropriate order.

(f) Judgment independent of the motion. After giving notice and a reasonable time to respond, the court may:

(f)(1) grant summary judgment for a nonmoving party;

(f)(2) grant the motion on grounds not raised by a party; or

(f)(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to grant all the requested relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or declaration submitted in bad faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. The court may also hold an offending party or attorney in contempt or order other appropriate sanctions.