

2000

Windsor Insurance Company v. American States Insurance Co. : Brief of Appellant

Utah Supreme Court

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WINDSOR INSURANCE COMPANY,
Plaintiff / Appellant,
vs.
AMERICAN STATES INSURANCE CO.,
Defendant / Appellee.

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) Appellate Case No. 20000093 - SC
)
) District Court Civil No. 980903520
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) Priority Number: 15
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PARTIES TO THE PROCEEDING IN THE DISTRICT COURT

The proceeding before the Third District Court was an action for indemnification involving Windsor Insurance Company (hereinafter “Windsor”), plaintiff and appellant, and American States Insurance Company (hereinafter “American States”), defendant and appellee, Civil number 980903520. (R. 1). The primary issue presented to the district court was whether American States owed coverage to Brenda Chambers (and thus indemnification to Windsor) under its insurance policy issued to Labor Services, Inc. (R. 4).

Pursuant to Windsor’s uninsured motorist coverage, Windsor paid the sums for which Brenda Chambers was legally liability as a result of injuries suffered by Windsor’s insured, Kathryn Zaborski. (R. 2-3). Upon paying the sums owed by Brenda Chambers, Windsor obtained a judgment against Brenda Chambers and subsequently sought indemnification from American States because it provided primary coverage for Brenda Chambers’s negligence occurring within the course and scope of her employment with Labor Services, Inc. (“LSI”).

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction in this matter pursuant to §78-2-2(3)(j), UTAH CODE ANN. (1953, as amended).

ISSUES PRESENTED FOR REVIEW
AND APPLICABLE STANDARDS OF APPELLATE REVIEW

Issue Presented for Review: Was the district court's entry of a summary judgment in favor of American States erroneous and was the district court's denial of Windsor's motion for summary judgment erroneous? (R. 174).

Standard of Review: A district court's award of a summary judgment is reviewed for correctness. Rinderknecht v. Luck, 965 P.2d 564 (Utah App. 1998) ("This appeal is from a summary judgment, which is granted only when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' Utah R. Civ. P. 56(c). 'Inasmuch as a challenge to summary judgment presents for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues, this Court reviews those conclusions for correctness, without according deference to the trial court's legal conclusions.' *Bonham v. Morgan*, 788 P.2d 497, 499 (Utah 1989) (per curiam). *Accord Universal Underwriters Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 925 P.2d 1270, 1272-73 (Utah Ct. App. 1996)."). This Court will view the facts and all reasonable inferences drawn therefrom in the light most favorable to Windsor. See United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993); Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993); K&T, Inc. v. Koroulis, 888 P.2d 623, 624 (Utah 1994).

Issue Presented for Review: Was Brenda Chambers acting within the course

and scope of her employment when she traveled to the premises of her special employer at the behest of her general employer? (R. 35).

Standard of Review: Question of law reviewed under a correction of error standard. See Drake v. Industrial Comm'n, 939 P.2d 177 (Utah 1997). When the underlying facts are not in dispute, the determination of whether an injury occurred within the course of employment is a conclusion of law. See Goodyear Tire & Rubber Co. v. Industrial Comm'n, 110 P.2d 334, 334 (1941). “The requirement that the accident arise in the course of employment is satisfied **if it occurs while the employee is rendering service to his employer, which he was hired to do**, at the time when and in the place where his employer directed him to render such service.” Walker v. U.S. Gen., Inc., 916 P.2d 903 (Utah 1996) (citing M & K Corp. v. Industrial Comm'n, 112 Utah 488, 493, 189 P.2d 132, 134 (1948)).

Also, Brenda Chambers’s travel within the course of her employment is a condition precedent under the insuring clause contained in American States’s insurance policy. Because this is a question of insurance coverage, review is for correctness and all facts are viewed in the light most favorable to a finding of coverage. See Gibbs M. Smith, Inc. v. United States Fid. & Guar. Co., 949 P.2d 337 (Utah 1997); Nielsen v. O’Reilly, 848 P.2d 664, 665 (Utah 1992). “In interpreting an insurance policy, courts have uniformly resolved ambiguities, if any there be, in a policy strictly against the insurer and in favor of the insured.” LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 858 (Utah 1988). This

Court interprets insurance contracts in favor of coverage and, where ambiguous, in favor of the insured. U.S. Fidelity & Guar. Co. v. Sandt, 854 P.2d 519, 521 (Utah 1993) (citing DiEnes v. Safeco Life Ins. Co., 442 P.2d 468, 471 (Utah 1968)).

Issue Presented for Review: Was the district court's alternative conclusion that the statute of limitations applicable to Brenda Chambers's negligence barred actions against American States regarding its contractual obligations even though Brenda Chambers's legal liability for negligence had been determined prior to the running of the statute of limitations on that issue and prior to initiating the present litigation? (R. 122).

Standard of Review: Question of law reviewed under a correction of error standard. See Cathco, Inc. v. Valentin Crane Brunjes Onyon Architects, 944 P.2d 365, 369 (Utah 1997); see also Seale v. Gowans, 923 P.2d 1361, 1375 (Utah 1996) (explaining that the Defendant bears the burden of proving every element necessary to establish an affirmative defense) because this issue was determined on summary judgment it is reviewed for correctness. Estes v. Tibbs, 979 P.2d 823, 824 (Utah 1999).

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDING, AND DISPOSITION BELOW.

This is an appeal of the district court's error in ruling that American States's insurance policy did not provide coverage based on the conclusion that "going-and-coming" rule is applicable to the undisputed facts. (R. 285 Transcript at p. 51-54).

On March 22, 1999, Windsor moved for a summary judgment based on its contention that American States's insurance policy provided primary coverage to Brenda Chambers. (R. 35). On May 21, 1999, American States, in turn, filed a cross-motion for summary judgment based on its contention that the lack of privity of contract between plaintiff and defendant precluded any recovery for plaintiff and on its contention that its contractual obligations were governed by the 4-year statute of limitations applicable to causes of action sounding in tort. (R. 76). The district court ruled from the bench subsequent to oral argument held on August 2, 1999 that American States's policy did not provide coverage for Brenda Chambers based on the Court's interpretation of the "going-and-coming" rule. (R. 285 Transcript at p. 51-54).

On September 2, 1999, Windsor filed a motion for a new trial based on its contention that the court failed to properly apply the "going-and-coming" rule to the undisputed facts. (R. 185). The district court refused to reconsider its ruling and the district court denied the motion in a signed MINUTE ENTRY DECISION which was filed in the Third Judicial District Court on December 8, 1999. (R. 264).

II. STATEMENT OF FACTS

1. On Saturday, May 15, 1993, LSI called Brenda Chambers and asked her to work at the landfill. (R. 41, Deposition of Brenda Chambers at pp. 5-8).
2. LSI always called Ms. Chambers at home when it needed her services. (R. 41,

Deposition of Brenda Chambers at p. 31).

3. Ms. Chambers accepted the assignment. (R. 41, Deposition of Brenda Chambers at p. 10).

4. Ms. Chambers advised LSI that she would need to go to the store to purchase nylons prior to going to the jobsite. (R. 41, Deposition of Brenda Chambers at p. 10).

5. LSI requires all workers in office positions to wear dresses and nylons. (R. 41, Deposition of Brenda Chambers at pp. 13-14).

6. LSI responded that the landfill would expect her to arrive at 9:30 a.m. (R. 41, Deposition of Brenda Chambers at p. 10).

7. Ms. Chambers went to the Pik 'N' Save (now MacFrugal's) near her home to purchase nylons and she put them on in her car before leaving the parking lot. (R. 41, Deposition of Brenda Chambers at p. 11).

8. If Ms. Chambers had not been required to purchase the nylons, she still would have taken the same street going Westbound. (R. 41, Deposition of Brenda Chambers at p. 22).

9. After purchasing the nylons and putting them on, Ms. Chambers began to go directly to her work assignment at the landfill. (R. 41, Deposition of Brenda Chambers at p. 37).

10. Ms. Chambers proceeded to make a left-hand turn from the parking lot in order to proceed West on 5300 South. (R. 42, Deposition of Brenda Chambers at pp. 11-

13).

11. A big, jacked-up truck was attempting to pull into the parking lot that Ms. Chambers was leaving. (R. 42, Deposition of Brenda Chambers at p. 11).

12. The truck could not enter the parking-lot driveway until Ms. Chambers vacated it, therefore the truck stopped in its lane of traffic. (R. 42, Deposition of Brenda Chambers at pp. 11-12).

13. Ms. Chambers could not see around the truck, but the truck waved to her. (R. 42, Deposition of Brenda Chambers at p. 12).

14. Ms. Chambers interpreted the wave as an “all-clear” signal, and she pulled into traffic. (R. 42, Deposition of Brenda Chambers at p. 12).

15. As Ms. Chambers pulled into traffic, she was hit by a vehicle driven by Kathryn Zaborski. (R. 42, Deposition of Brenda Chambers at p. 12).

16. Both Ms. Chambers and Ms. Zaborski were taken by ambulance to the hospital. (R. 42, Deposition of Brenda Chambers at pp. 24-25).

17. When Ms. Chambers got to the hospital she had a nurse call LSI and advise them that she had been injured and would not make it to her assignment. (R. 42, Deposition of Brenda Chambers at p. 9).

18. Ms. Chambers later told LSI’s employee, Camille, about the accident. (R. 42, Deposition of Brenda Chambers at p. 17).

19. After paying its insured for her damages, Windsor sued Brenda Chambers

and obtained a default judgment against her in the sum of \$41,299.23 on or about August 20, 1996. (R. 43).

SUMMARY OF THE ARGUMENT

The district court improperly applied the “going-and-coming” rule to the undisputed facts of this case. If Brenda Chambers was acting within the course and scope of her employment with LSI at the time of the accident giving rise to Kathryn Zaborski’s injuries, then Brenda Chambers was an insured under American States’s insurance policy (LSI was the named insured). In other words, if Brenda Chambers was acting within the course and scope of her employment with LSI, then American States must provide indemnification to Windsor based upon its express obligation to Brenda Chambers. Indemnification is owed to Windsor because Windsor defended Brenda Chambers and paid her liability under its uninsured motorist coverage whereas American States had a primary obligation to defend Brenda Chambers and to indemnify her under its liability coverage.

A temporary employee’s performance of a temporary employment agency’s only service is not transmuted into a “commute to a fixed place of employment” simply because the temporary employer does not apportion compensation to that particular part of the temporary employee’s services. An employee is acting within the course and scope of her employment when the employee’s travel provides a benefit to the employer. A temporary

employee has two employers at the same time (a special employer and a general employer). Brenda Chambers was “commuting” with respect to her special employer, but she was “traveling” with respect to her general employer. Moreover, Brenda Chambers had no fixed place of employment. Under Utah law, the “going-and-coming” rule only applies to employees who have a fixed place of employment. LSI conducted its entire business through the travel of its temporary employees to the premises of its clients; therefore, its insurance policy provides coverage for “its” actions taken by and through its employees.

ARGUMENT

I. AMERICAN STATES’S INSURANCE POLICY WILL BE INTERPRETED IN FAVOR OF ITS INSURED — BRENDA CHAMBERS.

Brenda Chambers (Windsor¹) is entitled to primary coverage from American States. See Fuller v. Director of Finance, 694 P.2d 1045, 1047 (Utah 1985) (“An insured is entitled to the broadest protection he could have reasonably understood to be provided by the policy.”); see also Geico v. Dennis, 645 P.2d 672 (Utah 1982) (“the interpretation of

¹ An action by Windsor against American States is proper under equitable principles because Windsor paid a debt which in equity and good conscience should have been paid by American States. Equity disregards unduly formalistic requirements in order to secure justice. There is no good reason why the wrongdoer insurer should be free of its contractual liability by the fortuitous event of its insured’s poverty and concomitant inability to punish the insurer’s misconduct.

the terms involved is not fixed but varies according to the circumstances of the case. * * *

[M]ost courts will interpret the terms so as to extend the coverage if this can be done under any reasonable interpretation of the facts.” (quoting Hardware Mutual Casualty Co. v. Home Indemnity Co., 241 Cal. App. 2d 303, 50 Cal. Rptr. 508, 511-12 (1976) (other citations omitted))).

American States knew that it was issuing liability coverage for the negligence of LSI’s employees because a corporation only acts through its employees. This knowledge is imputed to American States by law:

The law of agency is based on the Latin maxim “Qui facit per alium, facit per se,” variously rendered as “He who does an act through another is deemed in law to do it himself,

2A C.J.S. Agency § 2, p. 549. In other words Brenda Chambers was an insured for actions that were within the course and scope of her employment because she is deemed in law to have been acting as LSI. Therefore, the question presented to the district court was whether Brenda Chambers’s conduct giving rise to Windsor’s payment of insurance benefits to Kathryn Zaborski occurred within the course and scope of Ms. Chambers’s employment.

The unrebutted testimony of Brenda Chambers establishes² that she was called on a

² It is well-settled that a person claiming the benefits of an insurance contract has the burden to bring herself within the terms of the insuring clause. Such a rule is properly stated as follows: “The burden is on plaintiff to prove that the loss or injury sued for was due to a risk or cause which was insured against; but, where plaintiff makes out a *prima*

Saturday and asked to travel to the landfill to provide temporary clerical services. Brenda Chambers did what she was asked to do when she was asked to do it; therefore, her travel was a term of her employment, and she was American States's insured when she injured Kathryn Zaborski.

II. TRAVEL UNDERTAKEN BY BRENDA CHAMBERS TO ARRIVE AT THE LANDFILL IS EXCEPTED FROM APPLICATION OF THE "GOING-AND-COMING" RULE AND WAS WITHIN THE COURSE OF HER EMPLOYMENT.

The Defendant urged the district court to confuse the "going-and-coming" rule with this class of cases — to wit: Where a journey is the essence of the employee's service to her employer,³ the journey is within the course and scope of employment. An employee who is required to report to various or constantly changing work sites is not generally

facie case of loss or injury within the terms of the policy, it is incumbent on defendant to rebut such case." 46 C.J.S. Insurance § 1316 b(6) at p. 399; accord Griffin v. Prudential Ins. Co. of America, 133 P.2d 333 (Utah 1943). Thus, **Windsor only needs to make out a *prima facie* case that Brenda Chambers was acting within the course and scope of her employment** in order to satisfy the condition precedent contained in American States's insuring clause and to prove American States's contractual liability.

³ Examples of other professions whose travel is the essence of their job would be: truck drivers, police officers, firemen, stewardesses, pizza deliverymen, milkmen, etc. Of course, the "going-and-coming" rule could apply to travel of these workers as well as temporary workers. A truck driver could "commute" to the garage to pick up his truck. A police officer could "commute" to the jail to receive his instructions for the day. A pizza deliveryman could be required to begin his delivery schedule after "commuting" to the restaurant. And a temporary employee could be required to "commute" to the business office of the agency before traveling to the premises of the special employer.

subject to the “going-and-coming” rule.⁴ Defendant’s flat assertion that Brenda Chambers was “commuting” because she was traveling between her home and the place where she planned to work that day (and that day only) is not sufficient to invoke the preclusive effect of the “going-and-coming” rule.

Brenda Chambers “was performing for [her general] employer a substantial service required by [her] employment at the place and in the manner so required.” Moser v. Industrial Commission, 440 P.2d 23 (Utah 1968). “This case, like Moser, is distinguishable from the usual case of going to, or coming from, work” Kinne v. Industrial Commission, 609 P.2d 926 (Utah 1980). The “going and coming” rule only applies to “an employee, having identifiable time and space limits on his employment” Drake v. Industrial Comm’n, 939 P.2d 177 (Utah 1997) (quoting 1 Arthur Larson, Larson’s Law of Workmen’s Compensation § 16.11, at 4-204).

Temporary employment, by its⁵ nature, subjects temporary employees to the hazards of the street. This fact distinguishes Brenda Chambers from a traditional

⁴ It is well-settled that, generally, “traveling to and from work is not part of the employment.” Lundberg v. Cream O’Weber/Federated Dairy Farms, Inc., 465 P.2d 175, 176 (Utah 1970). Thus, negligence of an employee **while commuting to a fixed premises** does not normally give rise to an employer’s vicarious liability. See Whitehead v. Variable Annuity Life Ins. Co., 801 P.2d 934 (Utah 1989).

⁵ Windsor acknowledges that some temporary employment situations resemble permanent employment. When general terms or statements regarding “temporary employment” are used herein, such statements are meant to apply to those temporary employment situations that resemble the undisputed facts of this case.

employee who is simply going to a fixed place of work⁶ for a fixed number of hours and who, during the commute, is not yet engaged in performing any service growing out of and/or incidental to the employment terms and conditions.

Although this case centers on Brenda Chambers's status as an insured, the analysis is nearly identical to inquiring into LSI's joint and several liability for the torts of its employees under the doctrine of *respondeat superior*.⁷ American States relies on the "going-and-coming" rule to deny coverage because that rule — when applicable — may preclude the imposition of vicarious liability for the same reasons the doctrine of *respondeat superior* imposes vicarious liability.

The "going-and-coming" rule has been adopted because:

[I]t is unfair to impose unlimited liability on an employer for conduct of its employees over which it has no control and from which it derives no benefit.

⁶ "The rule excluding off-premises injuries during the journey to and from work does not apply if the making of the journey * * * is in itself a substantial part of the service for which the worker is employed." 1 Arthur Larson, Larson's Law of Workmen's Compensation § 16.00, at 4-193).

⁷ It is a longstanding rule of law that "[a] master is subject to liability for physical harm caused by the negligent conduct of servants within the scope of employment." Restatement of the law, Second, of Agency § 243. An employer assumes the torts of his employees when he enters into employment contracts with them because "[i]t would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit." Restatement of the law, Second, of Agency § 219.

Id. at 937; accord Kinne v. Industrial Comm'n, 609 P.2d 926 (Utah 1980) (holding that employer must receive some benefit).

Conversely, it is wholly appropriate to impose vicarious liability on an employer where a victim's injury results from conduct of an employee over whom the employer *does* have control and from whose actions it *does* derive a benefit. Thus, the primary focus, in determining whether or not the "going-and-coming" rule should apply, is on the benefit LSI received from Brenda Chambers's travel. See Whitehead v. Variable Annuity Life Insurance Co., 801 P.2d 934, 937 (Utah 1989) (stating that "the major focus in determining whether or not the general [going-and-coming] rule should apply . . . is on the benefit the employer receives and his control over the conduct.").

In sum, the journey-as-part-of-service principle precludes the application of the "going-and-coming" rule to Brenda Chambers's travel. Travel to the premises of the temporary employment agency's client was a necessary and interrelated part of the temporary employee's duties.⁸ Therefore, the cost of liability insurance to insure against losses arising out of the negligence of employees through whom the temporary labor

⁸ LSI chooses its business structure. It cannot avoid liability simply by asking its employees to begin the corporation's work at their homes and refusing to pay for the completion of that work. See Harline v. Barker, 912 P.2d 433 (Utah 1996) ("We do not believe it would be wise judicial policy to allow one party to create legal liability in another by a voluntary exercise of the complaining party's own personal business judgment not to seek to protect his rights in the legal forums provided him.").

service acts⁹ is a necessary and appropriate cost of providing temporary labor services.

III. BRENDA CHAMBERS WAS TRAVELING TO **HER DAY'S**
ASSIGNMENT AND WAS PERFORMING THE ONLY
BUSINESS CONDUCTED BY HER GENERAL EMPLOYER.

In *Gheri vs. Salazar*, the Utah Supreme Court addressed workers' compensation¹⁰ benefits in the context of the provision of temporary labor. The court recognized that an employee may have two employers under the loaned-employee doctrine whereby "[a] temporary labor service is a 'general employer' . . . and the business to which the employee is assigned is a 'special employer.'" *Gheri v. Salazar*, 883 P.2d 1352, 1356 (Utah 1994). In this case, LSI (American States's insured) was Brenda Chambers's "general employer" and LSI's client (the landfill) was her "special employer." This is true because "[w]hen an employee of a temporary labor service who has the right to accept or decline an assignment accepts an assignment, [s]he enters into an implied contract of hire with the special employer." *Gheri*, 883 P.2d at 1357.

Temporary labor services are general employers. A temporary labor service is in

⁹ See *Tuttle v. Hi-land Dairyman's Assoc.*, 350 P.2d 616 (Utah 1960) (explaining that a corporation must act in its affairs through its agents and representatives).

¹⁰ "Having previously adopted the 'coming and going rule' in workers' compensation cases, we here extend that principle to cases involving third-party negligence actions and hold that generally an employee is not in the scope of his employment for purposes of third-party negligence claims when he is traveling to and from work." *Whitehead v. Variable Annuity Life Ins. Co.*, 801 P.2d 934, 935 (Utah 1989).

the business of furnishing temporary help. LSI maintains an inventory of personnel which it supplies to its clients. When the client of a temporary labor service wants an employee to perform certain tasks, it calls a temporary labor service — such as LSI. LSI then selects an employee from its inventory — such as Brenda Chambers — and offers her the temporary job which the temporary employee is free to accept or reject (Brenda Chambers accepted her assignment). After the temporary employee accepts the assignment, she travels to the premises of the special employer. Thus, the temporary employee's travel to the premises of her special employer is the *sine qua non* of a temporary labor service's business.

The Utah Supreme Court declared that temporary employment services, such as LSI, do only one thing — to wit: Provide temporary employees to special employers.

[A] temporary labor service “does not perform any work for customers; it merely supplies or ‘loans’ workers who are under contract to the service to work as an employee for a client.”

Kunz v. Beneficial Temporaries, 921 P.2d 456 (Utah 1996) (quoting Gheri v. Salazar, 883 P.2d 1352, 1356 (Utah 1994)). Traditionally, workers only have value when — for example — they are in the factory actually producing widgets. Therefore the “going-and-coming” rule developed as a recognition that the typical employer gains nothing from the employee's commute from the employee's home.¹¹

¹¹ Some courts have focused on the benefit derived by the employee in choosing the place to live. The reasoning is that the employee's choice is the reason for the

In the case of temporary labor services, however, the general employer's workers only have value if they arrive at the special employer's premises. Once the temporary worker arrives at the special employer's premises, she is loaned to the special employer and has finished her duties for the general employer. Upon being loaned to the special employer — to continue the example — the temporary worker enters the special employer's factory and begins to act within the course and scope of her employment with her special employer by producing widgets.

Brenda Chambers's special employer — the landfill — did not benefit from her efforts to arrive at the landfill because she was merely attempting to transport herself to the landfill's fixed location in order to provide secretarial services. She was not performing a sales call, an errand, or a special mission for the special employer. Thus, Brenda Chambers's attempt to travel to her employment *with the special employer* falls within the general guidelines of the "going-and-coming" rule.

The *general employer*, on the other hand, conducted the substance of its business by and through Brenda Chambers's travel to the landfill. As previously stated, LSI does nothing but loan its employees to special employers and cause those employees to show up at its clients' places of business. Once LSI's employee arrives at its client's place of business, its work is done. While traveling to the landfill on the day of the accident,

commute. Therefore, the commute does not serve to benefit the employer's production of widgets, rather it serves to benefit the employee's choice of lifestyle.

Brenda Chambers was furthering the endeavor by and through which LSI stays in business.

IV. BRENDA CHAMBERS'S TRIP WAS NOT A SIMPLE COMMUTE, RATHER HER TRAVEL WAS THE ESSENCE OF HER DUTIES AS LSI'S EMPLOYEE.

Brenda Chambers was traveling directly to the landfill at the time of the accident approximately one hour after having received a call from LSI requesting that she work on a Saturday. She was performing LSI's only business. Under Utah law, Ms. Chambers was within the course and scope of her employment because her "purpose or intent, however misguided in its means, [was] to further [her general] employer's business interests." Birkner v. Salt Lake County, 771 P.2d 1053, 1057 (Utah 1989).

Employees who travel on behalf of their employer are **not** outside the course and scope of their employment. The Utah Court of Appeals has acknowledged the traveling employee rule¹² which provides that:

employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown.

Buczynski v. Industrial Comm'n, 934 P.2d 1169 (Utah App. 1997) (quoting 1A Arthur

¹² This rule was adopted in worker's compensation cases. There is no reason to believe that such a rule would not be applicable to *respondeat superior* cases. It is, at least, instructive with respect to the implementation of the "scope of employment" rule.

Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 25.00 (1996)).

Brenda Chambers's conduct falls within the scope of her employment: (1) the employee's conduct must be of the general kind the employee is employed to perform; (2) the employee's conduct must occur within the hours of the employee's work and the ordinary spatial boundaries of the employment; and (3) the employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest. Birkner v. Salt Lake County, 771 P.2d 1053, 1056-57 (Utah 1989). Brenda Chambers's conduct fits neatly into each criterion.

A. Brenda Chambers's Travel to the Premises of the Special Employer Was the General Kind of Work She Was Hired to Perform.

Brenda Chambers's travel to the premises of her special employer was not a typical daily commute; rather, it was the *substance* of LSI's business. Brenda Chambers was performing the general work she was hired to perform **for LSI** as opposed to being wholly involved in a personal endeavor. In other words, Brenda Chambers was delivering a temporary laborer to the premises of the special employer's business.

B. The Structure of Temporary Employment Is Such That Ordinary Spatial Boundaries Are the Roadways Leading to the Premises of Special Employers.

Defendant argued that Brenda Chambers's negligence did not take place at or near the landfill — the special employer. Defendant simply ignored Brenda Chambers's

relationship with LSI — her general employer.

At the risk of belaboring the point, Brenda Chambers was performing LSI's only business activity. In temporary employment, there is no such thing as a fixed place of employment or set hours.¹³

The spatial boundaries and ordinary hours requirement was best explained by the Utah Supreme Court in its analysis of a California case involving a rural deliveryman. See Whitehead v. Variable Annuity Life Ins. Co., 801 P.2d 934 (Utah 1989) (citing Moeller v. De Rose, 222 P.2d 107 (Cal. Dist. Ct. App. 1950)). The California court declined to apply the general "going-and-coming" rule to a rural deliveryman, stating: "That rule is applicable where the employee is required to perform services at a fixed place on particular premises...." The court, in *Whitehead*, distinguished between the job of an office worker who traveled to a fixed location every day, and the job of a rural deliveryman whose main service to his employer is traveling.

[The California decision concerned] a rural deliveryman who was involved in an accident while completing his rounds making collections. Unlike [the tortfeasor in *Whitehead*], he had no office, and unlike [*Whitehead*], the accident did not occur during a daily commute between home and his [fixed] place of work.

Id. Brenda Chambers, like the rural deliveryman in California, was not involved in a

¹³ The Restatement to which the Utah Supreme Court referred in developing the three-part scope of employment analysis provides that conduct is within the scope of employment if "(b) it occurs within **authorized** time and space limits." Restatement (Second) Agency § 288(1)(b).

typical daily commute to a fixed premises. The only work Brenda Chambers ever performed for her general employer, LSI, was to travel at LSI's request in order to arrive at her assignment.

Because Brenda Chambers had no fixed office and no fixed hours, she was not involved in a typical daily commute between home and work. Rather she was performing her work "substantially within" the ordinary spatial boundaries.

C. Brenda Chambers's Travel to the Landfill Was Motivated by Her Desire to Serve Her General Employer.

Brenda Chambers was not purchasing nylons at the time of the collision. She had completed her purchase and was traveling directly to the landfill. Defendant presents no fact that contradicts or challenges Brenda Chambers's sworn testimony that her "purpose or intent, however misguided in its means, [was] to further [her general] employer's business interests." Birkner v. Salt Lake County, 771 P.2d 1053, 1057 (Utah 1989).

Brenda Chambers was called at home by her employer and was instructed to immediately travel to her assignment for the day. She hurriedly got cleaned up and dressed in order to arrive on time as LSI requested. Her actions were performed for the benefit of her employer and in obedience to its directions. Therefore, Brenda Chambers's negligent act was within the course and scope of her employment, and she is American States's insured.

V. THE ANALYSIS SET FORTH BY THE UTAH SUPREME COURT IN *DRAKE*, DEMONSTRATES THAT BRENDA CHAMBERS'S TRAVEL WAS WITHIN THE COURSE AND SCOPE OF HER EMPLOYMENT WITH HER GENERAL EMPLOYER — LSI.

In *Drake*, the Utah Supreme Court affirmed the Commission's holding that Ms. Drake's commute home started after she left the Ogden office of FHP (where she made a delivery). It is important to understand that Ms. Drake was within the course and scope of her employment while traveling from Salt Lake to FHP in Ogden, but not while traveling from FHP in Ogden to her home in Ogden because the Ogden delivery had become a regular part of Ms. Drake's employment instead of being a deviation from a "going and coming" commute or a "special errand" as the Court of Appeals had ruled.¹⁴ The Utah Supreme Court set forth the following test to the facts surrounding Ms. Drake's travel to determine whether Ms. Drake's travel fell within the "going and coming" rule or whether her travel constituted a "special errand."

First, "if [the journey] is relatively regular, whether every day, . . . or at frequent intervals, . . . the case begins with a strong presumption that the employee's going and coming trip is expected to be no different from that of any other employee with reasonably regular hours and place of work." Drake v. Industrial Comm'n, 939 P.2d 177 (Utah 1997)

¹⁴ It should be noted that the Court of Appeals ruled that Mrs. Drake's travel was within the course and scope of her employment from the office to her house and its reasoning was not challenged; rather, the Supreme Court ruled that a more deferential appellate standard of review was appropriate.

(quoting 1 Arthur Larson, Larson's Law of Workmen's Compensation § 16.13, at 4-208.24 to 4-208.26). Ms. Drake had made the same trip two or three times per week for several months. Brenda Chambers, on the other hand, had never worked at the landfill before she was called on the day of the accident and asked to work there.

Second, the relative burden or “onerousness”¹⁵ of the journey on the employee should be compared with the extent of the task to be performed at the end of the journey for the general employer. Id. (citing Larson § 16.13, at 4-208.26). Brenda Chambers was not going to perform any work for the general employer (LSI) while she was at the landfill. The essence of Brenda Chambers's service for LSI was the making of the journey. When she arrived at the premises of the special employer, she would begin working for the special employer.

Third, the suddenness of the assignment from the general employer should be considered. Id. The Utah Supreme Court stated that “if an employee must suddenly drop everything to travel at the [general] employer's request, that indicates that the travel itself could be part of the service rendered.” Id. Brenda Chambers was called on a Saturday at 8:00 a.m. and asked to drop everything to arrive at the landfill by 9:30 a.m.

¹⁵ “Onerousness” includes the length of the journey, conditions of travel, time of day, day of week, and any other circumstances under which the journey is made. Id.

VI. ANOTHER TEMPORARY EMPLOYEE WOULD HAVE BEEN SENT TO THE LANDFILL IF BRENDA CHAMBERS HAD NOT ACCEPTED THE ASSIGNMENT.

The district court erred in its formulation of the question presented to it. The proper formulation is not: “Was the person traveling from her home to a workplace?” Rather, the question is: “Was the employee’s travel beneficial to the general employer and its business?” The answer is, unequivocally, yes. Distinguishing between that which is personal and that which is business-related is aided by the following analysis:

In situations where the scope of employment issue concerns an employee’s trip, a useful test in determining if the transaction of business is purely incidental to a personal motive is “**whether the trip is one which would have required the employer to send another employee over the same route or to perform the same function if the trip had not been made.**”

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1040 (Utah 1991) (quoting Whitehead v. Variable Annuity Life Ins., 801 P.2d 934, 937 (Utah 1989)); see also Birkner v. Salt Lake County, 771 P.2d 1053, 1056-58 (Utah 1989).

In order to stay in business, a temporary employee must arrive at the special employer’s premises to perform services for the general employer’s client or the temporary employer does not get paid. A temporary employment agency is in the business of delivering workers to its clients. Thus, temporary employees who deliver themselves to the premises of a special employer are not commuting to their fixed place of employment with their general employer; rather, they are performing their general employer’s business

by commuting to the special employer's business.

LSI was required to send a temporary employee to its client. If it had not sent Brenda Chambers, it would have needed to send somebody else. Brenda Chambers's trip (during which Windsor's insured was injured) was a journey for and on behalf of LSI, not a personal decision.

The character of Brenda Chambers's journey was colored, from beginning to end, by the employer-imposed requirement of delivering herself to the landfill and making it there within an hour and one-half from the time that she received her assignment. It cannot be stated too often: Brenda Chambers's travel to the landfill was the *raison d'être*¹⁶ of LSI's business.

VII. OBEDIENCE TO AN ORDER OR REQUEST ALSO REMOVES THIS FACTUAL SITUATION FROM THE APPLICABILITY OF THE "GOING-AND-COMING" RULE.

As previously explained, LSI contacted Brenda Chambers at home and directed her to travel to the landfill. Once an employer commands an employee to take a certain action, that employee's conduct in obedience to the command is within the course and scope of her employment. The supreme court has approvingly referred to the following rule:

The rule which emerges . . . is that when the employee engages in a

¹⁶ Olsten Kimberly Quality Care v. Pettey, 944 S.W.2d 524, 527 (Ark. 1997).

special activity which is within the course of his employment, and which is reasonably undertaken at the request or invitation of the employer, any injury suffered while **traveling to and from the place of such activity** is also within the course of employment and is compensable.

Drake v. Industrial Comm'n of Utah, 939 P.2d 177, 181 (Utah 1997) (quoting Dimmig v. Workmen's Compensation Appeals Board, 495 P.2d 433, 439 (Cal. 1972)).

VIII. BRENDA CHAMBERS'S DEVIATION TO BUY NYLONS DID NOT TAKE HER OUTSIDE THE COURSE AND SCOPE OF HER EMPLOYMENT.

In Larson's treatise at § 17.02[5], Larson addresses the factual situation at issue.

Brenda Chambers originated at her home to make a special errand for LSI. Brenda Chambers's destination was interrupted by a personal errand¹⁷ to purchase nylons. After the errand was completed, but before she returned to the route that would have been taken,¹⁸ Brenda Chambers's caused an accident. Larson states that the accident in this situation is a hazard of the job and is subject to "the clearest kind of coverage." Id.

¹⁷ For the sake of argument only and not as an admission that her purchase of nylons was, in fact a "personal errand."

¹⁸ Again, it is assumed that she was not fully back to the route she would have taken only for the sake of argument.

IX. THE MODERN TREND DIFFERS FROM THE MID-1980s
DECISIONS RELIED UPON BY AMERICAN STATES.

For the foregoing reasons, courts in other states have found temporary employees to be within the course and scope of their employment when traveling to their temporary assignments.¹⁹ In 1974, the Louisiana court of appeals determined that a temporary employee who followed his general employer's instructions to travel to the premises of his special employer was within the course and scope of his employment when he was involved in an auto accident. See Jackson v. Long, 289 So.2d 205 (La. 1974). Similarly, the Pennsylvania Supreme Court held that a nurse who did not have a fixed place of employment, but rather worked for a temporary labor service, was furthering her general employer's business by traveling to her temporary assignment. Thus, the court held that the temporary nurse's injuries sustained while traveling to her temporary assignment were

¹⁹ American States dismisses the better-reasoned cases by the conclusory assertion that "those are workers' compensation cases." Utah courts, on the other hand, have noted that the "going-and-coming" rule was developed in workers' compensation cases and imported into cases arising under the doctrine of respondeat superior. More importantly:

A rule of law, whether preexisting or newly established, that serves as the major premise of an adjudicatory syllogism, necessarily governs all subsequent cases properly falling within the scope of the rule. This is so even when the particular facts in subsequent cases are different and res judicata does not apply.

Salt Lake Citizens Congress v. Mountain States Tel., 846 P.2d 1245 (Utah 1992). The reasoning of the cases cited by Windsor is sound and American States's attempt to distinguish them on the basis of immaterial facts is not well-taken.

sustained within the course and scope of her employment. Peterson v. Workmen's Compensation Appeal Bd., 597 A.2d 1116, 1120 (Pa. 1991).

The modern trend of courts is to adopt the analysis presented by Windsor. In addition to the 1991 Pennsylvania Supreme Court case and the 1974 Louisiana court of appeals case, the Supreme Court of Kentucky, the Supreme Court of Arkansas and an appellate court in Ohio all recognize the special employer/general employer distinction that is based upon the fact that a temporary employee's travel to the special employer is the essence of the temporary employee's service to the general employer. See Olsten-Kimberly Quality Care v. Parr, 965 S.W.2d 155 (Ky. 1998); Olsten Kimberly Quality Care v. Pettey, 944 S.W.2d 524 (Ark. 1997); Durbin v. Ohio Bur. Of Workers' Comp. 677 N.E.2d 1234 (Ohio App. 1 Dist 1996).

Brenda Chambers had two employers at the time of the collision. Brenda Chambers had no fixed place of employment. The district court agreed with the *conclusions* of the California and Florida courts without analyzing their reasoning and without determining whether the reasoning of those courts under the law of those states is appropriate under Utah law.

The California court focused on the incidental benefit to the employer (without analyzing the different benefits and interests of special employers and general employers) and concluded that the plaintiff in that case did not provide anything special (to which employer was unclear). It is important to note that the special employer of the temporary

employee in that case was Mitsubishi and the reasonable inference drawn from the discussion is that the temporary employee had been working at Mitsubishi's plant for a significant amount of time. See Henderson v. Adia Services, Inc., 227 Cal Rptr 745, 751 (2nd Dist 1986) (stating that the tortfeasor "worked normal shifts."). Where a temporary employee is essentially a full-time employee for the special employer (the general employer's role being merely clerical), it may be reasonable to assert, as the California court did *under the facts of that case*, that the travel to the premises of the special employer is a regular task that does not provide any unusual incidental benefit on the general employer. See Drake v. Industrial Comm'n, 939 P.2d 177 (Utah 1997).

Brenda Chambers, on the other hand, was called on a Saturday at approximately 8:00 a.m. and asked to be at the landfill by 9:30 a.m. Brenda Chambers Depo. at pp. 8-10. This assignment was a rush job. Brenda Chambers was an outside employee²⁰ who always started her travel from her house (because that is how LSI decided to run its business); therefore, the Defendant's insistence that Brenda Chambers was merely commuting is without factual or legal support. More importantly, LSI always told Brenda Chambers when and where to travel and had to appear at her special employer's premises at a certain time. Brenda Chambers's travel was required by her employment, and Defendant's

²⁰ The "outside employee" vs. "inside employee" distinction merely means that the outside employee does not provide services at a fixed situs whereas an inside employee is your typical office worker or factory worker.

deliberate ignorance regarding Ms. Chambers's chosen method or route of travel does not transform its core business function into Brenda Chambers's personal errand or impenetrable legal immunity. A traveling employee is acting within the course and scope of her employment from portal to portal and no artificial distinctions may be superimposed onto that legal status by this Defendant's repetition of its assertion that LSI refused to pay its employees for performing its core work.

The Florida court's decision fares no better under a reasoned analysis and comparison of the facts of this case with Utah law and general scope of employment principles. The Florida court placed heavy emphasis on the fact that the temporary employee called Manpower instead of Manpower calling the temporary employee. See Freeman v. Manpower, Inc., 453 So.2d 208, 210 (Fla. App. 1984). More important to this discussion, that court stated that irregularity and suddenness of an assignment almost always qualifies a trip as exempt from the "going and coming" rule. Id.

X. PAYMENT OR NON-PAYMENT FOR TIME AND MILEAGE IS NOT MATERIAL TO WHETHER BRENDA CHAMBERS'S CONDUCT WAS WITHIN THE COURSE AND SCOPE OF HER EMPLOYMENT WITH LSI.

Brenda Chambers was not being paid for her time or her mileage while traveling to the premises of her special employer, but that distinction is nothing more than an assertion that LSI's refusal to pay employees for their services insulates it from any vicarious liability for acts taken at its behest (i.e., a very, very cheap insurance policy). It would be

strange, indeed, to hold that the employer may be permitted to profit from its own wrong.²¹

Presumably, the desired response to such an assertion is a conclusion that payment or non-payment determines a master's right to control the servant and, thus, determines whether the employee is within the scope of her employment. However, such an inference cannot be drawn because there is no requirement of consideration in order for an employee to be within the course and scope of her employment. See, e.g., Texaco, Inc. v. Layton, 395 P.2d 393, 396-97 (Okla. 1964) (explaining that it is not necessary that any actual contract should exist or that compensation be paid or expected).

The fact that Brenda Chambers was not paid for her services is not controlling and is such a circumstance as may be disregarded since all the other evidence points to the conclusion that she was acting as LSI's employee at the time of the collision. The Court may consider the intent of the parties and the business of the employer, in addition to compensation, direction, and control and "no single factor is completely controlling." Close ex rel. Gourdin v. Sharon's Cultural Educ. Recreational Ass'n, 845 P.2d 242, 244 (Utah 1992).

Brenda Chambers "was performing for [her general] employer a substantial service required by [her] employment at the place and in the manner so required." Moser v.

²¹ Such a holding would permit LSI to conduct its business without obeying UTAH CODE ANN. § 41-12a-301(2)(a) requiring liability insurance for the protection of the public.

Industrial Commission, 440 P.2d 23 (Utah 1968). Brenda Chambers was called at home by her employer and was instructed to travel to her assignment for the day. She hurriedly got cleaned up and dressed in order to arrive on time as LSI requested. Her actions were performed for the benefit of her employer and in obedience to its directions. Therefore, Brenda Chambers's negligent act was within the course and scope of her employment, and she is American States's insured.

XI. THE FOUR-YEAR, PERSONAL-INJURY STATUTE OF LIMITATIONS DOES NOT GOVERN AMERICAN STATES'S OBLIGATIONS ON ITS WRITTEN CONTRACT.

Windsor adopts the arguments set forth in its memorandum in opposition to American States's motion for summary disposition. The district court's alternative holding that the negligence statute of limitations is a time-bar to recovering from American States's under the terms of its written contract is abjectly erroneous.

XII. UTAH'S PUBLIC POLICY EXPRESSED BY THE FINANCIAL RESPONSIBILITY STATUTE CREATED, AS A MATTER OF LAW, AN IMPLIED CONTRACT OF INDEMNITY BETWEEN AMERICAN STATES AND WINDSOR.

Windsor's right of indemnification arises from the fact that it was compelled by the Financial Responsibility statute²² to pay American States's obligation, and if Windsor's

²² An "uninsured motorist" includes someone who has insurance but whose "coverage for an accident is disputed by the liability insurer for more than 60 days." UTAH CODE ANN. § 31A-22-305(2)(c).

right of indemnification were denied, such action would unjustly enrich²³ American States.

Utah's automobile insurance regime is sometimes referred to as owners or operators security and consists of, in general terms, liability coverage, no-fault (i.e., PIP coverage), uninsured and underinsured motorist coverage, and property damage coverage. These coverages (whether addressed collectively or individually) have been referred to herein as the "Financial Responsibility" statute. See UTAH CODE ANN. § 41-12a-101.

The comprehensive automobile insurance regime was initiated in the early 1970s and arose out of Utah's public policy favoring the protection of innocent victims by

²³ Quantum meruit has two branches, both rooted in justice. See Scheller v. Dixie Six Corp., 753 P.2d 971, 975 (Utah App. 1988). The remedy provided under quantum meruit is one of restitution designed to restore to a plaintiff a benefit unjustly enjoyed by a defendant. See Commercial Fixtures and Furnishings, Inc. v. Adams, 564 P.2d 773, 776 (Utah 1977).

A. Unjust Enrichment.

Windsor may prevail on an unjust enrichment theory by proving three elements: "(1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value." American Towers Owners Ass'n v. CCI Mechanical, Inc., 930 P.2d 1182, 1192 (Utah 1996) (citations omitted).

B. Contract Implied In Fact.

The second branch of quantum meruit, contract implied in fact, is an actual contract established by conduct. See Davies v. Olson, 746 P.2d 264, 268 (Utah App. 1987). The elements of a contract implied in fact are: (1) the defendant requested the plaintiff to provide services; (2) the plaintiff expected the defendant to compensate it for those services; and (3) the defendant knew or should have known that the plaintiff expected compensation. Id. (noting that implied contracts impose contractive duty by reason of promissory expression and are no different than express contracts, although different in mode of expressing assent, quoting 1 A. Corbin, Corbin on Contracts § 18 (1963)).

requiring all motorists to maintain required coverages. By enacting the Financial Responsibility Act (formerly the Safety Responsibility Act), the Legislature expressed its “interest in creating a more efficient process for liquidating personal injury claims and providing an incentive for persons driving Utah’s highways to obtain motor vehicle insurance.” Warren v. Melville, 937 P.2d 556 (Utah App. 1997) (citing Allstate Ins. Co. v. Ivie, 606 P.2d 1197, 1200 (Utah 1980) (stating that in coupling Utah’s no-fault statute with the Motor Vehicle Financial Responsibility Act, “the obvious legislative intent was to encourage compliance with the security provisions of the act.”))).

The adoption of the Financial Responsibility statute “substantially changed the public policy of this state by mandating that all Utah automobiles be covered by certain types of security.” Farmers Insurance Exchange v. Call, 712 P.2d 231 (Utah 1985) (invalidating a household exclusion clause below statutory minimums after the enactment of mandatory automobile liability insurance). The *Call* court rejected the argument that it should adopt the conclusions arrived at by foreign courts “since they were decided prior to the enactment of the no-fault automobile insurance laws and the requirement of mandatory automobile insurance.” Id.; see also Dairyland Insurance Co. v. Smith, 646 P.2d 737 (Utah 1982) (refusing to recognize follow Utah caselaw pre-dating the legislature’s enactment of the Financial Responsibility statute).

The comprehensive and mandatory nature of modern insurance law establishes an interrelationship between formerly unrelated entities. The relationship that is relevant to

this Motion is the UM carrier's provision of liability coverage to uninsured motorists.²⁴

Because the Financial Responsibility statute sets forth UM coverage as a required piece of the interdependent puzzle, uninsured motorists implicitly enter into a contractual relationship with the UM carrier that acts on behalf of the uninsured motorist. Were it not so, people like Brenda Chambers and insurers like American States would be encouraged to refuse to comply with the security provisions of the Financial Responsibility statute in violation of the central legislative purpose thereof.

UM coverage is only provided because of the uninsured motorist's fault in failing to maintain liability coverage or the liability carrier's refusal to fulfill its obligations. For the foregoing reasons, among others, an implied contract arises, as a matter of law, at the time a payment is made under UM coverage. No similar implied contract arises from payments under collision coverage, comprehensive coverage, or PIP coverage because the payments under those coverages are to be paid by the first-party insurer without regard to the liability of the tortfeasor and without regard to the tortfeasor's maintenance of mandatory coverage.²⁵

²⁴ See Restatement of Restitution, Title A, *Indemnity* at p. 328 (setting forth the "multiple sureties" rule); see also *Id.* at p. 348, Illustration 6 involving a suretyship relationship and the applicable statute of limitations).

²⁵ When an insurer seeks reimbursement of benefits paid under coverages other than UM coverage, the amount of reimbursement is properly determined according to principles of subrogation (i.e., tort principles and comparative negligence). However, indemnity requires "full reimbursement" of the amount of loss paid (of course, a UM

XIII. THE INTERPLAY BETWEEN THE UNINSURED MOTORIST
STATUTE AND THE REST OF THE FINANCIAL
RESPONSIBILITY STATUTE GIVES RISE TO AN IMPLIED
CONTRACT OF INDEMNITY.

Utah's public policy and statutory enactments require all motorists to maintain a minimum amount of liability insurance for the protection of innocent victims. This public policy would be frustrated if uninsured motorists were permitted to freely demand a defense and indemnification under the uninsured motorist coverage purchased by their victims or if primary carriers were encouraged to refuse payment of required benefits to their insureds. Therefore, an uninsured motorist's primary insurer must fully reimburse²⁶ a

claim is adjusted under tort principles and invoking apportionment under the comparative negligence statute) because it is an action on a contract. When the amount of reimbursement for benefits paid under other coverages is determined by the entry of a judgment against the shared insured, an action for indemnity can be brought by the secondary insurer against the primary insurer.

²⁶ Conceptually, it is instructive to consider the implied contract of indemnity and subsequent full reimbursement as the belated payment of insurance premiums by the "uninsured motorist." All motorists are required to maintain pursuant to UTAH CODE ANN. § 41-12a-301(2). Normally, an insured pays a premium for an insurance policy. This premium is calculated by the actuarial determination of the pooled risk of certain events occurring to a group of persons covered by the insurance policy. Therefore, the premiums are low. However, insurance purchased subsequent to the happening of an event will reflect the true cost of the loss rather than the anticipated cost of the loss combined with the risk of loss. Therefore, the contract of implied indemnity arises out of Utah's mandatory automobile liability insurance scheme requiring the purchase of insurance. Full reimbursement is just another way of expressing the cost of purchasing insurance to cover an event that has already happened where the costs and expenses are already determined.

UM carrier that provides insurance for the uninsured motorist lest the uninsured motorist and her insurer become freeloaders. If freeloaders were not required to indemnify those who have paid their obligations, the freeloaders would be provided an incentive to refrain from maintaining insurance or paying insurance benefits. The present system of insurance would crumble under the weight of individual and corporate freeloaders.

Where, under the direction of statute, an insurance company acts in the place of an uninsured motorist, it is upon the implicit and equitable assumption that the UM carrier is to be indemnified by the uninsured motorist or their liability carrier for expenses incurred and payments made in the course of the transaction. The duty to indemnify is imposed (without respect to the indemnitor's acknowledgment of the duty) unless there is an express agreement to the contrary. The Restatement of Restitution states the general rule as follows:

A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other .

...

Restatement of Restitution, Title A, *Indemnity* at § 76; see also Hanover Limited v. Cessna Aircraft Co., 758 P.2d 443 (Utah App. 1988) (quoting § 76 of the Restatement).

A. The Role of The Uninsured Motorist Carrier.

Windsor would not have owed any duty to its insured, Kathryn Zaborski, for her general damages and medical bills in excess of \$3,000 were it not for American States's

failure to provide liability insurance. Windsor's duty arose because of American States's fault (i.e., its unlawful failure to comply with the requirements of the Financial Responsibility statute). Windsor defended American States's insured against the claims made by Windsor's insured because its duties were exactly coextensive with American States's duties. The Utah Supreme Court explained the nature of uninsured motorist coverage and the relationship between UM carriers and uninsured motorists in *Chatterton vs. Walker* as follows:

The district court's attempt to enforce distinctions between [the uninsured motorist's] interests and [the UM carrier's] interests thus served no valid end. "The purpose of mandatory uninsured-motorist insurance is 'protection equal to that which would be afforded if the offending motorist carried liability insurance. . . . **The insurer stands in the shoes of the uninsured motorist** and must pay if [the uninsured motorist] would be required to pay.'" *Fetch*, 530 N.W.2d at 339 (*quoting* 8C John A. Appleman & Jean Appleman, Insurance Law and Practice, § 5086, at 307, 309-10).

Chatterton v. Walker, 938 P.2d 255 (Utah 1997) (discussing the right of a UM carrier to intervene in insured's action against uninsured motorist) (footnotes, etc. omitted, emphasis added). In other words, Windsor's obligations toward its insured as the substitute liability carrier for Brenda Chambers was exactly coextensive with the duties owed by American States and only arose because of its failure to provide liability coverage or a defense for Brenda Chambers.

XIV. PRINCIPLES OF IMPLIED INDEMNITY ARE PROPERLY
APPLIED TO THE RELATIONSHIP BETWEEN THE UM
CARRIER AND THE LIABILITY CARRIER.

As a preliminary matter, Windsor acknowledges that there is no reported appellate case in the State of Utah which directly addresses the interplay between the doctrine of implied indemnity and the uninsured motorist statute. However, Utah has adopted the common law. See UTAH CODE ANN. § 68-3-1 (1996) (adopting common law as rule of decision in Utah courts). And courts in other states have applied the doctrine of implied indemnity to uninsured motorist coverage. See, e.g., Coleman v. American Manufacturers Mutual Insurance Co., 930 F. Supp. 255 (N.D. Miss. 1996) (anticipating Mississippi law); See also Aetna Casualty and Surety Co. v. Nationwide Mut. Ins. Co., 471 F.Supp. 1059 (M.D. Penn. 1979) (acknowledging the right of a UM carrier to sue a liability carrier and collect full reimbursement without respect to the liability carrier's coverage limits based upon the doctrine of equitable indemnification under § 76 of the Restatement where the liability carrier wrongfully denied coverage to its insured causing the UM carrier to step into the breach caused by the liability carrier's wrongful conduct and to pay its insured under its uninsured motorist coverage).

First, Windsor discharged a legal obligation governed by UTAH CODE ANN. § 31A-22-305 and its insurance policy under which it was obligated (coextensively with American States, but contingent upon its failure to provide liability insurance) to pay the liability of Brenda Chambers for its insured's damages. Second, American States was also

liable (coextensively with Windsor, but American States's obligation was primary) to pay the damages suffered by Kathryn Zaborski. Third, as between American States and Windsor, the obligation should be paid (should have been paid originally²⁷) by American States. See Salt Lake City Sch. Dist. v. Galbraith & Green, Inc., 740 P.2d 284 (Utah App. 1987); Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 218 (Utah 1984).

Therefore, Windsor's cause of action for indemnification began to run when it settled Kathryn Zaborski's claim for damages on or about May 14, 1994. This lawsuit was filed on April 3, 1998; therefore, it was filed well within the four-year statute of limitation applicable to implied contracts.

XV. WINDSOR IS ENTITLED TO A JUDGMENT IN THE AMOUNT WHICH WOULD PROVIDE FULL REIMBURSEMENT, INCLUDING COSTS AND ATTORNEY FEES.

Windsor is entitled to recover its costs and attorney fees from American States:

[I]f the party secondarily liable on an obligation is obliged to pay the obligation, he is entitled to **full reimbursement** from the party primarily liable.

42 C.J.S. Indemnity § 20, page 595. And full reimbursement includes costs and attorney fees because Windsor is entitled to be saved harmless. "An indemnitee is not 'held

²⁷ It is the very nature of uninsured motorist coverage to be secondary. In other words, Windsor's obligation to indemnify American States's insured would not have arisen had American States fulfilled its obligation to provide liability insurance (i.e., Windsor's obligation would not have arisen in the absence of American States's fault).

harmless' . . . if it must incur expenses to vindicate its rights.” Hanover Limited v. Cessna Aircraft Co., 758 P.2d 443 (Utah App. 1988) (permitting recovery of attorney fees incurred in connection with defending against secondary liability, but denying an indemnitee attorney fees incurred in connection with enforcing the implied indemnity contract); see also South Sanpitch Co. v. Pack, 765 P.2d 1279, 1282-83 (Utah App. 1988); Collier v. Heinz, 827 P.2d 982 (Utah App. 1992) (explaining that the award of attorney fees as consequential damages, outside the context of statutory and contractual authorization — including implied contractual authorizations such as explained above — should be limited to two situations: insurance contracts and the third-party exception). Windsor is entitled to its attorney fees under the implied contract and the other two theories.

First, this is an insurance dispute where American States breached its fiduciary duty to defend Brenda Chambers. Windsor may enforce the rights of Brenda Chambers. See Auerbach Co. v. Key Sec. Police, Inc., 680 P.2d 740 (Utah 1984) (explaining that a one who has a judgment against a judgment debtor may enforce the rights of the judgment debtor).

Under the circumstances of this case, attorney fees may be considered an item of consequential damages. See Canyon Country Store v. Bracey, 781 P.2d 414, 419-20 (Utah 1989). Attorney fees are recoverable if they were “reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the [implied] contract was made.”

Beck v. Farmers Insurance Exchange, 701 P.2d 795, 801 (Utah 1985).

This litigation is a “natural consequence” or a “reasonably foreseeable” result of American States’s breach of its fiduciary obligations. It falls under the maxim that every man (or woman or insurance company) must be held to intend the natural and probable consequence of his deeds.

Second, the third-party tort rule provides for an award of attorney fees. The Utah Court of Appeals described the rule as follows:

[W]hen the natural consequences of one’s negligence is another’s involvement in a dispute with a third party, attorney fees reasonably incurred in resolving the dispute are recoverable from the negligent party^[28] as an element of damages.

South Sanpitch Co. v. Pack, 765 P.2d 1279, 1282-83 (Utah App. 1988).

In this case, Brenda Chambers negligently injured Kathryn Zaborski while Ms. Chambers was performing the business of her employer. Under these circumstances, litigation with Ms. Chambers’s employer’s insurance company is a natural consequence²⁹

²⁸ Technically, the attorney fees are recoverable from Brenda Chambers. Although a separate civil number exists for the judgment against Brenda Chambers, a court of equity may impose the attorney fees that she would owe in determining the extent of American States’s obligation.

²⁹ The Utah Supreme Court has used the phrase “natural consequence” to denote foreseeable result by defining special damages. “Special damages are a particular type of damages which are a **natural consequence of the injury caused but are not the type of damages that necessarily flow from** the harmful act.” Hodges v. Gibson Prods. Co., 811 P.2d 151 (Utah 1991) (citing Cohn v. J.C. Penney, 537 P.2d 306, 307 (Utah 1975)) (“Special damages are those which occur as a natural consequence of the harm done but

of her negligence. Moreover, the vehicle driven by Brenda Chambers was not insured at the time of her accident, therefore, the prospect of third-party litigation becomes not only natural; rather it was a foregone conclusion.

are not so certain to flow therefrom as to be implied in law.”) (emphasis added)).

In addition, the Utah Supreme Court in the case of *Richards v. Standard Accident Ins. Co.*, 200 P. 1017, 1023 (Utah 1921) (quoting *Western Commercial Travelers’ Assoc. v. Smith*, 85 F. 401, 405 (8th Cir. 1898)) “defined ‘the natural and probable consequence’ of an act as follows: ‘The natural consequence of means used [is] the consequence which ordinarily follows from their use--the result which may be **reasonably anticipated** from their use, and which ought to be expected.’” *Allstate Ins. Co. v. Patterson*, 904 F. Supp. 1270, 1279 (D. Utah 1995) (quoting *Richards*, 200 P. at 1023) (alteration in original) (anticipating Utah law in defining “accident” as used in homeowner’s policy).

In addition, in *Pacific Coast*, the defendant had issued a bond indemnifying plaintiff title company from any loss resulting from defaults by a builder, the Court examined the rule for recovering damages for breach of contract and its emphasis on foreseeability. The Court concluded with this analysis:

[I]t could reasonably be foreseen that the natural and usual consequence of Cassady’s failure to pay the laborers and materialmen would bring about the series of events which occurred: that liens would be filed and legal proceedings instituted to enforce them; that plaintiff Title Company, having the duty to keep the titles clear, would interpose defenses and attend to some disposition of the claims, **which would require the services of attorneys.** . . .

Pacific Coast Title Ins. Co. v. Hartford Accident & Ind. Co., 325 P.2d 906, 908 (Utah 1958). The same analysis applies to the instant case as was employed in *Pacific Coast* — Windsor’s employment of attorneys to sue American States was a natural consequence of Brenda Chambers’s negligence. Therefore, equity demands that its attorney fees be recoverable from American States.

CONCLUSION

Brenda Chambers's travel on behalf of LSI was undertaken within the course and scope of her employment. Because Brenda Chambers's negligent actions occurred within the course and scope of her employment, Brenda Chambers was an insured under LSI's insurance policy which was underwritten by American States. Because American States owed liability coverage to Brenda Chambers, it must indemnify Windsor. Windsor paid the liability of Brenda Chambers, but the obligation of American States is primary and the obligation of Windsor was secondary.

The Court should reverse the district court's award of a summary judgment to American States. Brenda Chambers was acting within the course and scope of her employment when she negligently injured Kathryn Zaborski. The negligence statute of limitations has nothing to do with the facts of this case.

In addition, the Court should reverse the district court's denial of Windsor's motion for summary judgment. All material facts are undisputed and support a finding that Brenda Chambers's travel was within the course and scope of her employment. It is undisputed that Brenda Chambers was, therefore, an insured under American States's liability coverage. The Court should remand the case to the district court for a determination of the amount of attorney fees reasonably incurred by Windsor in bringing this indemnification action against American States because of the breach of its contractual and fiduciary obligations to its insured.

DATED this 2 day of May, 2000.

CARR & WADDOUPS



TRENT J. WADDOUPS

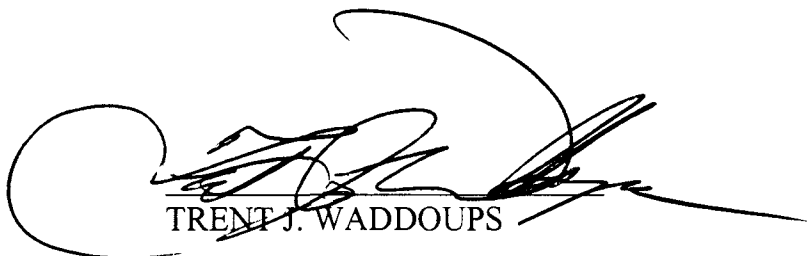
Attorneys for Plaintiff / Appellant

MAILING CERTIFICATE

I HEREBY CERTIFY that on the 2 day of May, 2000, a true and correct copy of **Brief of Appellant Windsor Insurance Company** was mailed, via U.S.

Mail, postage prepaid, to the following:

Mr. Tim Dalton Dunn
Mr. Robert C. Morton
DUNN & DUNN, P.C.
Midtown Plaza, Suite 460
230 South 500 East
Salt Lake City, Utah 84102



TRENT J. WADDOUPS

Exhibit A

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WINDSOR INSURANCE COMPANY, : Case No. 980903520

Plaintiff,

v

AMERICAN STATES INSURANCE,

Defendant.

:
:
:
:
:
:
:
:

AUGUST 2, 1999 CROSS MOTIONS FOR SUMMARY JUDGMENT

BEFORE

THE HONORABLE WILLIAM B. BOHLING

COPY

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
652 Jefferson Cove
Sandy, Utah 84070
801-567-1157

APPEARANCES

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* * *

1 SALT LAKE CITY, UTAH; MONDAY, AUGUST 2, 1999; 10:23 A.M.

2 HONORABLE WILLIAM B. BOHLING, JUDGE PRESIDING

3 P R O C E E D I N G S

4 THE COURT: Let's call the matter of Windsor
5 Insurance versus American States Insurance. This is case
6 number 980903520.

7 Counsel, would you enter your appearances,
8 please?

9 MR. WADDOUPS: Trent Waddoups appearing for the
10 plaintiff, Windsor Insurance.

11 MR. MORTON: Your Honor, Robert Morton
12 appearing for American States Insurance.

13 THE COURT: The parties have filed
14 cross-motions for summary judgment. I believe,
15 Mr. Waddoups, you filed the first one, so -

16 MR. WADDOUPS: Yes, I did.

17 THE COURT: - the way I propose to proceed is
18 to allow each side two arguments, and ask the last
19 argument by Mr. Morton to not include anything about your
20 motion, Mr. Waddoups, so we can conclude it with that
21 series of arguments.

22 MR. WADDOUPS: Okay. I think, first of all, we
23 ought to address the general, overarching theme of this
24 lawsuit, what's going on here, because I think it might
25 have been a little bit obscured.

1 I thought it was clear, until I read
2 Mr. Morton's reply memo to his cross-motion, and at that
3 point I thought maybe we're not all on the same page.
4 What this is an issue of is coverage. It's not an issue
5 of liability; it's an issue of coverage.

6 What the coverage is dependent upon is whether
7 the corporation, Labor Services, Inc., the named insured
8 of American States Insurance - whether the corporation
9 was deemed in law to have been driving Brenda Chambers'
10 car at the time of the accident. If it was deemed in law
11 to have been driving that car, then this is an insurable
12 event, and American States owed primary coverage for the
13 liability incurred by the tort-feasor, which was Brenda
14 Chambers.

15 Now, this question turns on whether there was a
16 respondeat superior relationship between Brenda Chambers
17 and Labor Services, Inc. If so, the Latin phrase *qui*
18 *facit per alium facit per se* - he who does someone
19 through another is deemed in law to have done it himself.
20 That's what we're going on here.

21 So, on the day of this accident, Brenda
22 Chambers was called at home. Brenda Chambers was asked
23 whether she would go work at the landfill. She said yes.
24 She got ready. She hopped in her car. She was driving
25 to the landfill. She injured Catherine Zaborski.

1 Now, another misconception that I think I need
2 to address that American States seemed to have. At one
3 point in one of their briefs they seem to acknowledge
4 propriety of this lawsuit and the procedural format, and
5 basically that all of their objections are not relevant,
6 because what they said on page 7 of their memorandum in
7 support of their motion for summary judgment, their
8 initial memorandum, page 7, near the bottom he says:

9 "There is no contractual relationship
10 between the parties,"
11 which ignores, of course, that contractual relationships
12 are not important here.

13 "This is not a case where a primary
14 and secondary insurance company are seeking
15 an adjudication of their rights as to who
16 should have borne responsibility for the
17 defense of a common insured."

18 Absolutely wrong. That is a misunderstanding
19 of what uninsured-motorist coverage is. This is exactly
20 a case of two companies, both obligated to defend Brenda
21 Chambers. The privity of contract is absolutely
22 irrelevant. It's whether coverage was owed for the
23 liability of Brenda Chambers. That's what
24 uninsured-motorist coverage is.

25 Windsor stepped into the shoes of the uninsured

1 motorist, but what we're saying is that she wasn't
2 uninsured. We owed, in essence, secondary coverage to
3 Brenda Chambers for her negligence, but American States
4 owed primary insurance coverage because she was acting as
5 LSI. She was doing LSI's work.

6 THE COURT: Let me explore that with you just
7 for a moment, Mr. Waddoups. If I understand correctly,
8 Mr. Morton has indicated to me that there's no Utah law
9 indicating that a temp-services employee is entitled to
10 coverage for transportation to the site. But there are
11 two cases he provides me, one from Florida, and I forget
12 where the other one's from, indicating that other states
13 have addressed the issue and have found there is no
14 coverage.

15 Now, I've read your argument, which is an
16 attempt to address factually why the Court should
17 consider coverage available and not subject to the normal
18 rule of law for employers, but I'm wondering if you have
19 any cases that are contrary to the ones that have been
20 provided me by Mr. Morton.

21 MR. WADDOUPS: Yes. I cited two cases in my
22 initial memorandum, and I gave you copies of them. One
23 is a Louisiana case from 1974. One was a Pennsylvania
24 case from 1995-'92. Both of those cases follow the
25 reasoning of the Utah Supreme Court with respect to

1 special employers and general employers. The cases cited
2 by Mr. Morton don't make the pivotal distinction between
3 general employers and special employers, and that's the
4 key factor, and both the Louisiana case and the
5 Pennsylvania case did that. And Utah has adopted that
6 same idea with respect to special employers and general
7 employers.

8 And what the argument comes down to is that all
9 a temporary-service agency does is send people out to the
10 job. That's all they do. They deliver employees to the
11 premises of the special employer. If I were suing the
12 landfill, Mr. Morton's argument would be completely
13 correct, and I have acknowledged as much.

14 She was just getting ready to get to the
15 landfill to begin providing services for them. Her
16 travel between her house and the landfill would have
17 served no business purpose for them. If you read
18 Mr. Morton's arguments, he just kind of glosses over that
19 fact. He says, well, what we have here is - well, let me
20 look at the ALR. I've got it highlighted.

21 And what those cases said is - they said -
22 okay.

23 "The court stated" -
24 this is reading in the ALR cited by Mr. Morton. It says:

25 "The court stated that the question

1 involved in the present case was whether
2 the employee's trip involved an
3 incidental benefit to the employer not
4 common to commute trips made by ordinary
5 members of the work force."

6 I have no problem with that question being the
7 pivotal question here. What those cases in California
8 and Florida failed to do is distinguish between which
9 employer they were talking about. We have two employers
10 here, and that cannot be stressed too much. Yes, was it
11 just a normal trip to the premises of the special
12 employer? Yes. Absolutely. Was it doing the
13 fundamental -- was Brenda Chambers performing a
14 fundamental work of Labor Services, Inc.? The answer to
15 that question is yes.

16 There's nothing else that LSI does except
17 deliver employees. To say that they are not responsible
18 for doing the only thing that they do would be absolutely
19 absurd, which is why it's just glossed over in these
20 other cases and by American States. And that's what the
21 California and the Pennsylvania courts said.

22 If you look at the Pennsylvania case that I
23 sent with the --

24 THE COURT: You didn't send any cases, Counsel.

25 MR. WADDOUNS: Yes, I did, with courtesy

1 copies. I submitted them about ten days ago, a stack
2 about this big.

3 THE COURT: I'm certainly not finding them in
4 the file here.

5 MR. WADDOUPS: I brought them up here to the
6 receptionist's desk but I don't know what happened.

7 But anyway, to address your question, the
8 Pennsylvania court addressed it. They said:

9 "Regardless of this appellee's attempt
10 to disguise the true nature of its
11 employees' status by assigning them" -

12 Well, that's discussing when they assigned
13 them, which is not really relevant here. But they go on
14 to say:

15 "A temporary employee never has a
16 fixed place of work. Consequently, when
17 the agency employee travels to an
18 assigned workplace, the employee is
19 furthering the business of the agency."

20 That's what it comes down to, is that issue
21 right there. No matter how much LSI attempts to disguise
22 what their relationship with their employees are by, for
23 example, not paying them, that does not give them the
24 right to subject the public to all these uninsured
25 motorists running around, and then claiming that they

1 don't even provide secondary insurance coverages when the
2 performance of their business injures innocent third
3 parties. That's what it really comes down to here.

4 And I'd also refer to the case -- the Louisiana
5 case at page 208, and they addressed the proper issues
6 also. They said:

7 "However, this case does not involve
8 the ordinary employment situation."

9 See, the coming-and-going rule is only relevant
10 where a person is traveling to his employment at a fixed
11 place of employment for fixed hours. In this case,
12 there's no such thing as a fixed place of employment, no
13 such thing as fixed hours. In the Louisiana case, the
14 court said:

15 "Manpower employed plaintiff not just
16 as a cook, but as a cook to be dispatched
17 in accordance with the customer's order.
18 Furthermore, Manpower received no
19 contractual fee unless the employee
20 reached the assigned place and performed
21 the services. Manpower is thus much more
22 concerned with the employee getting to
23 his place of work than was the ordinary
24 employer, despite the fact that Manpower
25 had attempted to disassociate itself

1 from any responsibility for transporting
2 its employees. Consequently, Manpower's
3 employee, while traveling to the assigned
4 workplace, was actually furthering his
5 employer's business interest, and in that
6 respect the trip can be regarded as a
7 necessary and required part of his
8 employment."

9 That's the proper question. Was the work of
10 LSI being performed during this travel, or is this a
11 typical daily commute? That's the two sides of the coin
12 that we're talking about here. And if you read through
13 *Kunz v. Beneficial Temporaries* and *Garicy v. Salazar*,
14 Utah courts have set forth very clearly what the
15 difference between the two are, that they are two totally
16 separate employment relationships at the same time, and
17 then you just have to look at fundamental agency
18 principles, and it's really just that simple.

19 What we -- well, I don't know if there are any
20 other questions you have on that point of law. I think
21 I've --

22 THE COURT: No. You have made it clear.

23 MR. WADDOUPS: I have made it clear what my
24 theory is. I will attempt to respond to anything that
25 Bob will say in the future on that.

1 The second point is, is there a question of
2 fact raised by the defendant as to whether Brenda
3 Chambers was actually called and sent to the landfill on
4 the day of the accident? And American States attempts to
5 raise a disputed issue by filing an affidavit, but that
6 affidavit is wholly insufficient to raise a material
7 fact, because the affidavit only says, "Normally, the
8 landfill is not open on Saturday. I don't know why an
9 employee would be called on a Saturday, and I have no
10 knowledge of anything else, and upon information and
11 belief," these sorts of statements.

12 Those sorts of statements do not present
13 specific facts that are capable of raising a material
14 disputed issue, and that is the only evidence they have.
15 What Windsor has presented, in order to prove the facts
16 of this case, are Brenda Chambers' express testimony that
17 she was called, that she was sent there, that she was
18 driving directly to the landfill at the time of this
19 accident. And simply saying, "Hmm, as far as we know, it
20 didn't happen," that's not enough to raise a material
21 disputed issue. Therefore, the facts are undisputed in
22 this case.

23 There is a second way of looking at this, and
24 I've included that in my initial memorandum. It's a lot
25 simpler, and it really gets beyond all of this

1 going-and-coming rule, because the going-and-coming rule
2 just never comes into play in this case. We've addressed
3 it a lot, and I don't want to give it too much credence
4 by spending too much time on it because it really never
5 comes into play in this case.

6 She's not commuting to LSI. She is traveling
7 to her employer. The fact that she started at home is
8 not material. She was called at home. She was asked to
9 take this job, and she immediately traveled there to
10 deliver herself. And after delivering herself, then she
11 transferred her employment over to the special employer,
12 or would have, had she arrived.

13 But if you go back to the beginning, where she
14 was called at home, she was called and asked to report to
15 the landfill to work for the special employer on that
16 day. In *Drake v. Industrial Commission of Utah*, the Utah
17 Supreme Court addressed a rule that has the most
18 applicability in this case. The rule which emerges is:

19 "When the employee engages in a
20 special activity which is within the
21 course of his employment, and which is
22 reasonably undertaken at the request or
23 invitation of the employer, any injury
24 suffered while traveling to and from
25 the place of such activity is also

1 within the course of employment and is
2 compensable."

3 That's what happened here. The fact that she
4 was not on the premises of LSI at the time she was called
5 has absolutely no relevance. That is only relevant to
6 the general business structure that LSI chose to employ.
7 But just because it chooses to employ that certain
8 business structure does not insulate them from liability.
9 Just because they choose to not pay their employees while
10 they're doing their business does not insulate them from
11 liability towards innocent third parties that their
12 employees are likely to injure.

13 That's the point here. They called her. They
14 asked her to do something on their behalf, report to this
15 employer so that we can make a living. She was driving
16 there, and she injured an innocent third party. That
17 invokes the insurance coverage of American States'
18 insurance policy, which, of course, is primary over
19 Windsor's uninsured-motorist coverage.

20 But both of those are to insure the tort-feasor
21 for the benefit of the injured victim. Therefore, what
22 you have is two insurance companies with a duty to defend
23 the tort-feasor, and now Windsor Insurance is entitled to
24 reimbursement of all of its costs, and also the attorney
25 fees that they've expended in order to bring this to

1 court and make American States step up to the plate and
2 accept its obligations that it assumed when it received a
3 premium from LSI.

4 THE COURT: How much do you claim that, if you
5 were to prevail, Windsor would be owed? Would it be the
6 amount that was paid to the victim in the case?

7 MR. WADDOUPS: What I would claim is that the
8 default judgment entered against Brenda Chambers, they
9 owe us that, and they owe our attorney fees in
10 prosecuting this, which would bring it up to around
11 63,000, \$64,000.

12 And I think that addresses my main arguments,
13 unless you have some other questions.

14 THE COURT: Thank you, Mr. Waddoups.

15 MR. MORTON: If it please the Court and
16 counsel. Your Honor, I'm not sure how you want us to
17 proceed. Do you want me to respond to his argument or -

18 THE COURT: I think you need to respond to his
19 argument, then make your argument, and he can respond to
20 it, and then you can make your final. I think that -

21 MR. MORTON: And you want me -

22 THE COURT: I recognize there's some overlap,
23 and I'll certainly make allowances for the need to just
24 be efficient in how you argue your case.

25 MR. MORTON: But you want me to do that all in

1 this standing, address his argument and then make my own?

2 THE COURT: Exactly.

3 MR. MORTON: Well, your Honor, one thing, when
4 we talk about this case that's - and we're glossing over
5 issues and so forth, is a threshold question of statute
6 of limitations. And there are some important dates that
7 I'm sure that the Court is aware of, and first being is
8 that this accident occurred on May 15th, 1993.

9 Two years after the accident, they filed a
10 lawsuit. That was on May 17th, 1995, two years and two
11 days. In that lawsuit, Ms. Zaborski and Windsor were
12 plaintiff, and Chambers was the defendant, and in that
13 lawsuit American States wasn't a party. American was not
14 alleged in that lawsuit. Temporary Services, Inc. was
15 not a party to that lawsuit, and there were no
16 allegations in that lawsuit whatsoever that Brenda
17 Chambers was acting in the course and scope of her
18 employment at the time of the accident.

19 So two years after the accident they file their
20 lawsuit. No answer is filed. They don't take a default
21 judgment at that particular point in time. They wait
22 another two years and three months to take a default
23 judgment. We're now four years and three months after
24 the accident. Then they take a default judgment, not
25 against Temporary Services, Inc., not against American

1 States, but they take it against Brenda Chambers only.
2 There's no adjudication in that initial lawsuit that says
3 Brenda Chambers was an employee, traveling to work, or
4 anything.

5 They then do a supp - I'm assuming they do a
6 supp hearing to find out how they're going to collect
7 their judgment, and they find out that she suddenly
8 says - now that she's confronted with a \$43,000 judgment,
9 she says, "Well, I was going to work out at the dump four
10 years ago," and this is the first time she's asked to
11 recall this incident, four years, three months after the
12 accident.

13 It's not until almost five years after the
14 accident that Temp Services, Inc. or American States are
15 even notified about the accident. Temp Services, Inc.
16 isn't even named a party, never has been named a party to
17 any action.

18 There's obviously a four-year statute of
19 limitations that applies to this case. They had plenty
20 of opportunity to pursue this argument that she was an
21 employee of Temp Services, Inc., and they failed to do
22 so. And they had plenty of time to do it. So now they
23 come back, five years, three months after the fact. They
24 file a lawsuit, and they name American States.

25 And just right out of the fact that is - in a

1 case that I think just falls right on all fours, Judge,
2 is the case of *State Farm Mutual Insurance v. Holt*, a
3 Utah Supreme Court case. And in that case, an insurance
4 company filed an action with the court saying it's a dec.
5 action, and they ask the court, "Would you please help us
6 interpret whether or not the person who caused this
7 action is a named insured," it was a declaratory judgment
8 action. The court then determines that the insurance
9 company's — the individual was a named insured under the
10 policy, and then proceeds to enter judgment against the
11 insurance company for the full amount.

12 The Supreme Court said, "You can't enter
13 judgment against the insurance company at this point in
14 time because the insured, who was determined to be a
15 named insured under the policy, the whole purpose of the
16 underlying dec. action, has never been notified or
17 advised of this lawsuit."

18 Judge, in this case, they haven't even met the
19 two threshold questions. First of all, they've never
20 served the insured, the named insured, which is Temp
21 Services, Inc., and plus they've never made a
22 determination of coverage, scope of employment, and those
23 things.

24 The Supreme Court in that case stated:

25 "The answer to this claim is that

1 Yotsie" -

2 That was the person that they wanted to find if
3 he was covered under the policy.

4 - "has a right to be heard before
5 judgment can be found against him.
6 Yotsie has never been served in the case,
7 and no judgment has ever been rendered
8 against him for damages to any party."

9 And then it goes on to say:

10 "Therefore, no legal obligation on
11 the part of the plaintiff insurance
12 company to pay any money pursuant to the
13 insurance policy" -

14 There's no obligation to pay money under the
15 policy to anyone. This case, there's been no
16 determination that they've been served or made a party to
17 the lawsuit. There's been no determination that the
18 plaintiff in this case was in the course and scope of her
19 employment. So they haven't even met the two threshold
20 questions of *State Farm v. Holt*, let alone the second
21 issue of course and scope of employment.

22 And those are just an absolute essential
23 question in this case which can't be addressed - I mean,
24 again, this underlying action arises out of a tort claim,
25 and they step into the shoes of their insured. They step

1 into Ms. Chambers' shoes when they bring this action.
2 They gain no greater rights, no less rights, than their
3 insured, Ms. Chambers. And so they're required under the
4 statute to initiate their action within the four-year
5 period, and they didn't do it. And they had plenty of
6 opportunity to do it.

7 They sat back for extended periods of time to
8 file the lawsuit. They sat back for extended periods of
9 time, two years, to enter the default judgment. Even
10 after the default judgment is entered, they sit back and
11 they wait to do a supp. order. And the reason that we
12 have statute of limitations is so that -- to avoid this
13 very thing, where people aren't brought in five years
14 after the fact and said, "By the way, you now have to
15 come in and defend the claim that you have not had the
16 opportunity to investigate."

17 The plaintiff wants it even better than that.
18 They want to come in and say, "Five years after the fact,
19 now you have to come in and pay a claim. You have to pay
20 a claim that you never had opportunity to defend, never
21 had an opportunity to investigate, never had an
22 opportunity to even interview the people involved."

23 It's inherently unfair, and it just -- it flies
24 in the face of the whole purpose of the statute of
25 limitations. And that goes sort of to the tolling issue,

1 but I'm sure that counsel will try and bring to the -
2 will provide counter-argument to the Court.

3 THE COURT: Now, is it your claim that - you
4 have now argued two separate points, the statute of
5 limitations and the *State Farm v. Holt*, which requires
6 service to the main insured and a determination of
7 coverage, or what are we looking at?

8 MR. MORTON: Well, I mean they are two separate
9 points. The party that they're seeking to recover money
10 from, the person who is legally responsible - I mean the
11 insurance company goes out and they write a policy for
12 Labor Services, Inc., and the policy says, "We will
13 provide coverage and pay those damages for which, those
14 damages for which you're liable."

15 Well, there's been no determination that
16 Temporary Services, Inc. has been - is liable for that.
17 There's been no judicial determination of that. They've
18 never been served as a party. So, yes, the first
19 question under the *State Farm* case, where they've never
20 been named a party, they can't be responsible for damages
21 to a third person.

22 THE COURT: Well, couldn't they cure that
23 problem by amending this complaint and adding LSI as a
24 party?

25 MR. MORTON: They can't, your Honor, because

1 that should have been done in the first litigation. This
2 is not a tort claim. They're now bringing a contract
3 action. Their theories are not tort. Their theories are
4 a contractual obligation to the insured's statutory
5 liability in a dec. action. All of those are going to
6 stem out of the underlying lawsuit.

7 Judge, if you allow them to do this, it
8 circumvents the whole statute of limitations on the tort
9 issue. But I think they have to initially go through
10 there. If we would have denied coverage -- theoretically,
11 if they would have named Labor Services, Inc. initially
12 in that lawsuit, and we had denied coverage, then we
13 could come back and we'd be appropriately before this
14 Court. We have denied coverage.

15 There was a determination -- we could make all
16 the arguments that we're making now. It would be an
17 appropriate action under an indemnification, contractual
18 obligation, things like that. But we were never even
19 given a chance in the underlying litigation to even
20 participate, and plaintiff's counsel has conceded in
21 their brief. We didn't know about this lawsuit until
22 well after the four-year statute of limitations had
23 expired.

24 So they can't suddenly -- now, I'm not trying to
25 quote James Morton, who's no relationship, but I always

1 call him Brother Jim. As he said to the court before,
2 "They're trying to make a pig into a horse." They're
3 trying to make a cause of action that's a tort claim that
4 they've missed the statute of limitations into another
5 animal and bring before the court and try to provide
6 coverage.

7 And then let me just jump to the
8 coming-and-going rule. It is critical to this case, your
9 Honor. The only way that vicarious liability attaches to
10 Labor Services, Inc. is if she's working in the course
11 and scope of her employment. It's a huge issue that's
12 never been litigated, never been tried, and plaintiff's
13 counsel just assumes that it's fact in all of his
14 argument before the Court.

15 The cases — and I gladly support — would cite
16 the Court the *Drake* decision from the state of Utah,
17 which again had much more favorable facts than plaintiff
18 has in this case. In *Drake* it was undisputed that this
19 lady was — when she was driving home. She lived in Salt
20 Lake. I believe she lived in — she worked in Salt Lake,
21 lived in Ogden. Three days of the week she would drive
22 from Salt Lake to Ogden, and was asked by her employer to
23 please deliver papers or mail to a particular location.

24 It took her out of her normal route of travel.
25 She would drive to that particular location, drop off the

1 mail, and in the process of doing that was involved in an
2 accident. And the Supreme Court said not in the course
3 and scope of her employment. Not in the coming-and-going
4 rule, because once she dropped off the mail, even though
5 she was out of her normal route and took off, there's no
6 coverage. Or there's no - under the state statutes. And
7 so they denied that claim.

8 The facts in this case are even worse. In this
9 particular case, she hasn't been asked by her employer to
10 take a particular route and do a particular favor. She's
11 going to the landfill to be a secretary. And the
12 employer doesn't say how to go there, when to go, other
13 than "You get paid when you show up and when you leave."

14 Other of significance here is that she wasn't
15 driving directly to the landfill when this happened. As
16 is similar to the Drake decision, she decides to pull
17 into a local store to buy a pair of nylons. Again, this
18 is somewhat disputed, but giving plaintiff the benefit of
19 the doubt, that she says she has to buy nylons to go work
20 at the dump in a trailer out there.

21 That's a disputed fact, but giving them the
22 benefit of the doubt, assuming that happened. She goes
23 into the store to buy her nylons, and as she's coming out
24 of that store, that's when the accident occurs. So at
25 that particular point she's on a little errand on her own

1 to buy nylons, and it doesn't have anything to do with
2 her employment at this point.

3 Again, the facts there are less favorable than
4 the *Drake*. It's not the coming-and-going rule, and there
5 shouldn't be coverage. We have provided you the two
6 cases which the Court noted from California and Florida.
7 Those both dealt with personal injury tort claims, and
8 they didn't have the underlaying statute of limitations
9 problems that plaintiffs have here, but even in those
10 cases the coming-and-going rule is no coverage.

11 The cases that Windsor cites in this particular
12 case are work comp cases out of Louisiana and do not deal
13 with tort claims. And again, they weren't confronted
14 with statute of limitations problems. But they found,
15 because of the unique situation and setting of a work
16 comp case where the injured party was the plaintiff
17 making a claim under the work comp statutes that they
18 were going to afford coverage, which is a far cry from
19 whether or not there's liability attaching to a named
20 defendant in a tort claim.

21 So those cases can be distinguished, but I
22 think each state should be allowed to interpret this,
23 these statutes, as we go along, and we're not necessarily
24 bound by them. But the two best cases that we have that
25 are right on point, Judge, right on point, are the

1 California case and the Florida case. And they look at
2 the very issues that Mr. Waddoups tries to tell the Court
3 that you can set aside.

4 Are they absolutely controlling? No, but
5 they're factors. Was she paid to drive her car? No.
6 Was she reimbursed for mileage? No. Was she told what
7 direction she should travel? No. Was she told - she
8 could have taken the bus, and in fact the evidence was in
9 the past she had taken the bus.

10 Well, are they determinative? I mean are they
11 absolutely controlling? No, but they're factors, one of
12 many, that the Court has to look at. And in this
13 situation, we don't control her. At the time of this
14 accident, she was driving her boyfriend's car, driving to
15 work, stopping on the way to run and errand, and then
16 pulled out and went on to the dump - or was trying to go
17 on the dump when she had the accident coming from a
18 specific errand.

19 I've sort of covered quite a few areas, Judge,
20 but I don't have any other points that I think need to be
21 made because I think I'd start repeating myself. I would
22 just say that there's some very significant points that
23 the Court has to recognize here. Labor Services, Inc.
24 has never been a party to any litigation, not a party to
25 this litigation, not a party to the prior litigation.

1 American States Insurance was never notified or
2 requested to provide a defense to the claim of
3 Ms. Chambers until they were sued in this action. It's
4 not as though we were -- the defense was proffered, they
5 were notified about the lawsuit, and they declined
6 coverage. They just didn't know about it, and they were
7 never told about it.

8 It's never been adjudicated that defendant
9 Chambers was acting in the course and scope of her
10 employment. That absolutely kills every claim that
11 plaintiff is making now. And I think those are just
12 points that constantly undermine all of the arguments
13 that Windsor is currently making before the Court.

14 THE COURT: Thank you.

15 MR. WADDOUPS: Judge, there's absolutely no
16 statute of limitations problem here. We sued Brenda
17 Chambers within the four-year statute of limitations.
18 That's when the tort statute of limitations was
19 applicable. What we're saying is that Brenda Chambers
20 was acting within the course and scope of her employment.
21 We're litigating that here today. And because of the
22 fact that she was acting within the course and scope and
23 her employment, she was insured under American States'
24 policy.

25 As American States' insured, she is entitled to

1 coverage and indemnification for the sums to which she
2 has become liable for actions taken within the course and
3 scope of her employment with LSI. It doesn't matter that
4 we never sued LSI; we didn't have to. It doesn't matter
5 that we haven't litigated the course and scope of her
6 employment before. That's why we're here.

7 THE COURT: How do you get around this *State*
8 *Farm v. Holt* argument, counsel?

9 MR. WADDOUPS: That's the old direct action
10 rule, and it doesn't apply to intercompany litigation.
11 It simply doesn't. It's been directly address by the
12 [inaudible] Supreme Court. I cited the case three or
13 four times, but American States shows that there's more.
14 The case is *State Farm v. Northwestern Mutual*, Utah
15 Supreme Court, 1996. The direct action rule does not
16 apply to intercompany arbitration, I mean litigation. We
17 have every right to sue State Farm directly, and there a
18 lot of good policy reasons for that.

19 May I approach?

20 THE COURT: You may.

21 MR. WADDOUPS: See, the big point here is why
22 can insurance companies sue each other directly? Because
23 there are a lot of insurance companies who like to refuse
24 to pay coverage. People like Brenda Chambers are not
25 going to sue them; insurance companies are. Therefore,

1 the court allows insurance companies to sue each other to
2 say, "We paid this, and there's a policy for that,"
3 because the court has said time and again that what's
4 important is provide the coverage, worry about who's
5 going to ultimately pay for it later.

6 What happened here is we paid it. Now we're
7 entitled to sue them and make them give it back to us.
8 *State Farm v. Holt* has absolutely no applicability
9 whatsoever. What we're talking about here is not the
10 liability of Brenda Chambers. That's been established.
11 We have a judgment against Brenda Chambers. Is she
12 American States' insured? That's the question.

13 Now, under their contract, she is an insured -
14 that's never been disputed by American States - if she
15 was performing LSI's work, i.e., if she was within the
16 course and scope of her employment. That's the question
17 here before you today, not the tort liability statute.
18 It's been litigated. We sued Brenda Chambers; we got a
19 judgment against her. That's been litigated.

20 THE COURT: Anyway, with a default judgment,
21 there's no defense, and so American States never had an
22 opportunity to raise any issues on behalf of Labor
23 Services. And you say that doesn't make any difference?

24 MR. WADDOUPS: No. They had a chance to
25 defend, but they chose not to.

1 THE COURT: Without a notice?

2 MR. WADDOUPS: Yes. I, as soon as I figured
3 out that they had a policy insuring LSI, who was Brenda
4 Chambers' employer, I wrote them a letter. I said,
5 "We'll set aside the default judgment. Go ahead and step
6 in. Defend it with a reservation of rights if you want
7 to. But step in, defend Brenda Chambers. We'll set
8 aside the default. We'll litigate all the issues."

9 But they said, "No. We would rather just let
10 you sue us," so I did. They can't now say that they
11 didn't have an opportunity to defend because they didn't
12 choose to accept the opportunity that I gave them. I
13 always give the insurance companies a right -- the offer
14 that they'll set it aside for them. I'll set aside the
15 default judgment if they'll step in and take part.

16 But if they choose not to take part, they can't
17 just run away and think that I can't sue them directly.
18 I certainly can. I certainly do, and I certainly have,
19 and that's the issue. Now they're saying, "We decided we
20 don't have coverage. We don't to dispute the underlying
21 facts of the tort case. We choose not to."

22 Therefore, the only issue to be resolved is the
23 coverage issue. And Mr. Morton keeps wanting to go back
24 to the liability, the four-year statute of limitations.
25 That's been litigated. It doesn't matter on an issue of

1 coverage. All we're trying to see is if she was within
2 the course and scope of her employment to bring her
3 within coverage under their policy. That's it.

4 At best, that's subject to the six-year statute
5 of limitations that applies to written contracts, if
6 anything. But the best case on that was the *Sharon Steel*
7 case, where, just like here — *Sharon Steel v. Aetna*
8 *Casualty & Surety Company*. Just like here, there were
9 two insurance companies providing coverage for the same
10 event. One paid; one refused to pay. So the one that
11 refused to pay got sued.

12 The one that got sued attempted to raise as an
13 affirmative defense the statute of limitations. The
14 Supreme Court said, "No. This relates back to the filing
15 of the original complaint against the insured." Why?
16 Because these people — Brenda Chambers and American
17 States Insurance Company have an identity of interest,
18 that interest being insured and insurer, where there's a
19 fiduciary obligation, not just privity of contract.

20 The fiduciary duties underlying the duty that
21 American States had to defend and refused to comply with
22 makes them have an identity of interest with Brenda
23 Chambers sufficient to make the statute of limitations
24 relate back to the filing of the initial complain against
25 Brenda Chambers. That's what *Sharon Steel* said.

1 THE COURT: Now, let me explore that with you.

2 MR. WADDOUPS: Okay.

3 THE COURT: I understand their argument, but
4 there's been -- they would dispute that she was operating
5 within the course and scope of her employment. They
6 would dispute that LSI had any idea about this lawsuit.
7 They would say that to jump to the conclusion that they
8 have an identity of interest is a huge leap, given the
9 fact that there's no adjudication whatever establishing
10 that coverage, or LSI even conceiving it or anything
11 else.

12 How do you get around to all those problems
13 that they've raised to suggest an identity of interest?

14 MR. WADDOUPS: That's what we're doing here
15 today, is deciding that issue.

16 THE COURT: Well, I understand that, but I
17 mean --

18 MR. WADDOUPS: Okay.

19 THE COURT: -- it doesn't -- it comes after
20 considerable analysis. You don't just say they had an
21 identity of interest and the Court accept that
22 conclusion.

23 MR. WADDOUPS: Well, there was considerable
24 analysis in my memoranda, I thought. What it comes down
25 to, you go all the way back to *Allstate v. Ivy*, an

1 insurer and an insured, and *Beck*, where they explain the
2 difference between first-party bad faith and third-party
3 bad faith. An insurer who has the obligation to defend
4 an insured has a fiduciary relationship with that person
5 to act in that person's best interests. That is the
6 identity of interest sufficient to make what is done with
7 one person relatable to the other person.

8 *Allstate v. Ivy* said it best. They said the
9 principles of *res judicata* and collateral estoppel have
10 to apply because of the fiduciary type relationship
11 between the insurer, who owes a duty to defend to their
12 insureds.

13 THE COURT: So now you're saying that Labor
14 Services had a fiduciary duty to Chambers?

15 MR. WADDOUPS: No. American States has a
16 fiduciary duty to Chambers if she was acting within the
17 course and scope of her employment, thus making her an
18 insured. That's the principle issue.

19 Let me concede one thing, and I didn't think it
20 was at all disputed. Yes, if Brenda Chambers was not
21 within the course and scope of her employment with LSI on
22 the day of this accident, at the time of this accident,
23 then American States had no obligation to defend her, has
24 no coverage, has no liability in this case. Over and
25 done with. That's simple enough.

1 The issue — the primary issue — is was she
2 acting within the course and scope of her employment. I
3 think it's very clear that she was, because she was
4 performing LSI's work. The benefits that go to LSI for
5 her delivering herself to the special employer are huge.
6 In fact, that's all LSI does. Therefore, she was within
7 the course and scope of her employment. You don't need
8 to get beyond that. The going-and-coming rule would
9 apply to commuting. This is traveling; this is not
10 commuting. And that's the fundamental distinction.

11 Okay. Now you've got her in there as an
12 insured because she was acting within the course and
13 scope of her employment. So she's American States'
14 insured. Now, you can address the statute of limitation
15 issue after you get to that point. The statute of
16 limitation issue is pretty simple.

17 American States is wrong five ways from Sunday.
18 I've set forth five arguments, all of which are better
19 than American States' argument. The only argument
20 American States brings up is that the tort statute of
21 limitation applies because we step into the shoes of the
22 employer.

23 Without getting into how simplistic an analysis
24 of subrogation that is, I'll just blow that aside for a
25 second to make the main point here. The main point is

1 that we sued Brenda Chambers within the four years.
2 That's settled. Can we sue American States? Well, yeah.
3 There are plenty of theories under which we can sue
4 American States. We can garnish American States.

5 If you want to take it to its simplest form
6 here, we have a judgment against American States -- I
7 mean against Brenda Chambers. If she is an insured,
8 i.e., if she was acting within the course and scope of
9 her employment, we can garnish American States as the
10 garnishee because her liability insurance that she's owed
11 under the contract is available as her asset. That's the
12 simplest way to look at it, if you wanted to look at it
13 that way.

14 Therefore, would the tort statute of
15 limitations come into play as against the garnishee,
16 where we've already got judgment against the tort-feasor?
17 Of course it doesn't. That's absurd to confuse coverage
18 and liability. That's what American States is doing.
19 They're not acknowledging the distinction.

20 So that's the easiest way to explain it, if it
21 comes to that, but there are five or six other analyses
22 that are much better than the tort liability statute of
23 limitations also. The six-year statute of limitations
24 with respect to written contracts. If she had coverage
25 under this contract, American States can be sued for its

1 owing of coverage under that contract for up to six
2 years.

3 That's what we've done. We have sued them for
4 benefits of the insurance policy, the liability coverage
5 that they owed to Brenda Chambers. He says, "Well, we
6 haven't figured out if Brenda Chambers was an insured."
7 Exactly. That's why we're here. We're arguing whether
8 traveling to the premises of the special employer is
9 within the going-and-coming rule. Is it commuting? Is
10 it going to a fixed premises for fixed hours, like a
11 normal person in a factory? No, of course it isn't.

12 The going-and-coming rule only came about
13 because you've got all of these factory workers who are
14 trying to get to the factory. They don't do the employer
15 any good while they're driving to the factory. They only
16 do the employer any good once they get there.

17 Now, that's a situation with the landfill. She
18 didn't provide any secretarial services for him. She
19 wasn't going to file anything for him. She wasn't going
20 to copy anything for him until she got to the landfill.
21 LSI is completely different. We have to acknowledge the
22 two different employment relationships.

23 She was doing LSI's business. LSI's business
24 is the delivery of temporary help to people like the
25 landfill. Therefore, the only thing it ever does is what

1 Brenda Chambers was doing. Therefore, you never get into
2 the coming-and-going rule. You look at whether a benefit
3 was bestowed upon LSI or was to be bestowed upon LSI by
4 this travel.

5 THE COURT: How do you distinguish the Florida
6 and California cases from your argument here?

7 MR. WADDOUPS: They did not distinguish the
8 general employer, special employer difference. They just
9 referred to "the employer," without acknowledging that
10 there are two different employers here. And they just
11 said, "Well, is it really that much different if you're
12 traveling to a landfill one day and a factory the next
13 day and another factory the next day? Is it that much
14 different?"

15 Well, if you're only looking at the place where
16 they worked and that employer, which is the special
17 employer, then they're right. I would agree with that
18 analysis. But what they fail to acknowledge is that
19 what's important here is the benefit bestowed upon the
20 temp agency. The temp agency did all its work through
21 this traveling around.

22 They're no different than an ice-cream vendor
23 that goes to deliver ice cream to a child on the street
24 corner. There is no distinction. One is delivering ice
25 cream to the child on the street corner. The other is

1 delivery a temporary laborer to the site of the
2 employment. And that's the distinction, and I don't
3 think the Florida case or the California case got into
4 this distinction.

5 But the Utah Supreme Court has made the
6 distinction extremely clear in *Garicy v. Salazar* and
7 *Kunz v. Beneficial Temporaries* that you've got to
8 acknowledge the two distinct employment relationships.
9 And American States never bothered to acknowledge the two
10 distinct employment relationships. They just have glossed
11 over the fact that she wasn't providing temporary labor -
12 temporary - she wasn't providing secretarial services.
13 Well, that's relevant to the landfill. It's not relevant
14 to LSI. That's the distinction.

15 THE COURT: Now, I heard an argument being made
16 by Mr. Morton on - is it the *Drake* case?

17 MR. WADDOUPS: Yes.

18 THE COURT: How would you meet with argument on
19 that case?

20 MR. WADDOUPS: Yes. Well, the easiest way to
21 address to the *Drake* case is that you've got to understand
22 the procedural nature of that case. What happened is,
23 *Drake* went before the Industrial Commission. The
24 Industrial Commission denied her benefits. Went to the
25 Court of Appeals. The Court of Appeals interpreted it in

1 one standard. They gave it a less deferential standard.
2 They said basically, "We're going to re-look at this, and
3 we're going to give our own analysis to it."

4 Their analysis is correct, but what happened is
5 then the Industrial Commission appealed to the Supreme
6 Court, and the Supreme Court said, "They applied the wrong
7 analysis. The Court of Appeals should have been more
8 deferential to the Industrial Commission."

9 So all the parties agreed that the Court of
10 Appeals' analysis was correct, but given the fact that
11 they declared that they were obligated to give more
12 deference to the Industrial Commission, they gave a
13 different analysis based on the deference to the
14 Industrial Commission, and therefore they went the way
15 they went, which could be interpreted as being against my
16 position. I don't think even the Supreme Court's is
17 against my position.

18 But certainly, if you understand the background
19 of *Drake v. Industrial Commission*, she should have had
20 workers' compensation benefits, but given the nature of
21 the power vested in the Industrial Commission, the proper
22 analysis was never applied. And so I would urge the
23 adoption of the Court of Appeals' analysis with respect to
24 whether someone's within the course and scope of their
25 employment while providing services to their employer.

1 But again, that case also has huge, huge factual
2 dissimilarities with what we're talking about here today.
3 She did work at a normal company where she'd go to a fixed
4 premises every day, and so she was performing additional
5 services during the commute. There was no commute here.
6 You can't call this a commute. She worked out of her home
7 for LSI. She was called at home. They said, "Go here."

8 It doesn't matter that she started at home.
9 That doesn't make it a commute. If LSI had wanted to take
10 the commute out of it, and if American States wanted to
11 force their insured to run their business in a fashion in
12 which they would not be held liable from the time that a
13 temporary employee leaves his house to the point where he
14 gets to the special employer, they could do that.

15 They could force all their temporary employees
16 to show up at LSI. Then they could give them their job
17 assignment for the day at LSI. Then, from the time that
18 they left LSI, LSI would be liable, but not during the
19 time when the temporary employee is going from his house
20 to the temporary service agency.

21 They could do things this way. The fact that
22 they choose not to because they think it's better business
23 and they can make more money if they'd call them at home
24 has absolutely no relevance to whether they are in fact,
25 as a matter of law, liable for the travel between their

1 homes and the premises of the special employer, because
2 the fact remains that that travel is not a commute. It is
3 LSI's business. LSI does nothing else but deliver people
4 to special employers. And that's so fundamental to this,
5 but it's only been argued on one side.

6 I'll address two things with respect to the
7 direct action rule. One, we never served the insured.
8 Yeah, we did. We served Brenda Chambers, and we have a
9 judgment against her. The question here is was she an
10 insured. She wasn't the named insured, but it's pretty
11 naïve to say that the only insured parties are the named
12 insured.

13 Second, there's never been a determination of
14 coverage. Well, that's why we're here. That's what this
15 lawsuit is, is to determine whether Brenda Chambers was
16 owed coverage. That's how I addressed the direct action
17 rule. All this tort statute of limitations is completely
18 irrelevant with respect to LSI and with respect to
19 American States. They owe coverage to Brenda Chambers.

20 They were allowed to defend, as I just
21 explained, even though they chose to not accept it as
22 such. And I think that's their argument, is, well, a
23 defense was never tendered to us by Brenda Chambers. So
24 what? That completely ignores the duty to defend of an
25 insurance company. They owe a duty to defend once they

1 understand facts that might be providing coverage under
2 the policy. Anytime they are aware of those
3 circumstances, they owe a duty to defend.

4 There's no obligation that it be tendered and
5 signed in blood before they owe any obligation to defend.
6 That's just not true. And I have a copy *U.S. F&G v. Sant*,
7 which is the seminal case on that issue, if you'd like to
8 view it.

9 So course and scope of employment is relevant.
10 The coming-and-going rule is not relevant. I mean you
11 could sum up my argument by looking at that single issue.
12 If she was traveling and doing the work of LSI, then she
13 was within the course and scope of her employment. If she
14 was commuting, then the coming-and-going rule might apply.
15 But, as I explained, it's not commuting; it's traveling.
16 And plus, she was called and asked to travel. Therefore,
17 she was acting in direct obedience to the instructions of
18 her employer.

19 Another thing Bob said is that she was buying
20 nylons. She wasn't buying nylons; she was done buying
21 nylons. She was traveling directly to the place of
22 employment. Nevertheless, there's plenty of case law that
23 says if you attended to certain personal needs, that does
24 not take it outside the course and scope of employment
25 unless it is a clear and distinct deviation from the needs

1 of the business, which would be an affirmative defense on
2 behalf of American States, and they have not even come
3 close to proving all the elements of that or even alleging
4 all of the elements of that.

5 With respect to LSI's decision not to control
6 Brenda Chambers. They didn't pay her. They didn't tell
7 her which route to take. They didn't exercise any control
8 over her. I have no qualms with that assertion that no
9 control over her actions was exercised. But exercise of
10 control is not the question; right of control is the
11 question.

12 Certainly as the employee, who can be told where
13 to go, when to come home, for whom to work, whom they
14 should obey, has enough control to say, "Drive here and
15 take this road," or "Come to LSI. We'll drive you over,"
16 or even better, "Do you have insurance on your car,
17 Ms. Chambers? If not, we'll send a van to pick you up,
18 because it's so important to our business that you get
19 there, that we will be willing incur that additional
20 cost." You know, they don't do that. That would cut into
21 profit margins.

22 What they do is they subject the public to all
23 these temporary employees who are likely to not have
24 coverage, and then they say, "Well, they weren't doing our
25 work, because we didn't pay them during that time." They

1 can attempt to set up their business however they want,
2 and it probably makes good business sense to do it the way
3 they're doing it. That doesn't mean that they can avoid
4 liability.

5 These people all traveling around on the streets
6 doing LSI's business are putting the public at risk.
7 Therefore, the cost of liability insurance to cover these
8 people should be a cost of the enterprise, a cost of doing
9 business in temporary labor services. They in fact
10 purchased liability insurance coverage. That is secondary
11 liability insurance to the car owners' own insurance
12 coverage.

13 They, in fact, did spend this money as part of
14 their business, but American States refuses to provide
15 coverage, and then their only defense is, "You can't sue
16 us, and we can get away with it." That's absolutely
17 wrong.

18 And that's what the Supreme Court set forth in
19 *State Farm v. Northwestern Mutual*. They said, "We've
20 extended the right of subrogation, not to just suing in
21 the name of an insured for money they've paid out, but
22 also for suing insurance company to insurance company,"
23 because the policy that affects is that when an insurance
24 company thinks about running out on their obligation of
25 providing coverage, they might run out on a Brenda

1 Chambers, who won't sue them. They might run out on a
2 17-year-old single mother, which was a case I litigated
3 against another insurance company who ran out on her.

4 They might try all these things because those
5 people are unlikely to sue them. That's why
6 uninsured-motorist carriers are absolutely entitled to sue
7 these companies directly so that there is coverage
8 provided when it's due, and that a company can't simply
9 just run out on it's liability coverage obligation.

10 These are the public-policy concerns that led
11 the Supreme Court to acknowledge Windsor's right to sue
12 American States directly, and I would suggest that you
13 read that case. It's directly on point. *State Farm v.*
14 *Holt* is completely off point.

15 Let me see if there's anything else with respect
16 to opposing their motion that I need to address. And
17 again, another — like I say, I had five or six theories
18 that would allow us to sue them. The one is the
19 subrogation under *State Farm v. Northwestern Mutual*.
20 That's the main one. That's the main one I would rely on.
21 I think that's the best.

22 The second best one is that American States is a
23 garnishee, and this could be viewed as a declaratory
24 judgment action.

25 The third is that this is an indemnity action,

1 and that the statute of limitations is based on
2 quasi-contract, and it begins to run from the time that a
3 payment is made to the third party, and that's exactly
4 what happened here. And it's well within the four-year
5 statute of limitations for quasi-contracts.

6 The fourth is that this is based on the six-year
7 statute of limitations applicable to written contracts
8 that we're well within.

9 And the fifth is that American States may not
10 raise an affirmative defense of statute of limitations,
11 because if they owe coverage, if they owed coverage to
12 Brenda Chambers, if she was their insured — and I gave
13 them a right to enter the litigation, set aside the
14 default, and litigate that litigation. I gave them that
15 right. They chose not to.

16 If she's an insured, then they owed her
17 fiduciary obligations, and it's well settled that a
18 trustee cannot claim the affirmative defense of statute of
19 limitations as against his beneficiary, and we would have
20 that situation here too. That's a good argument.

21 And fifth, the discovery rule would apply.
22 That's the worst argument because then you would be
23 accepting that this has anything to do the tort, and it
24 has nothing to do with the tort. Again coverage, not
25 liability.

1 The last thing is Mr. Morton said something
2 about how long we took, two years to take a default after
3 Brenda Chambers didn't file an answer. Well, that's
4 simply procedural problems. The insured, Catherine
5 Zaborski, moved off to Indiana. We got affidavits from
6 the insurance representative, and Judge Hanson said,
7 "That's not good enough." We sent our own affidavit;
8 that's not good enough. We tried three or four things.

9 Finally, he decided that Catherine Zaborski's
10 affidavit was good enough. He examined the complaint,
11 followed the procedures of Rule 55 in order to enter the
12 default judgment, and so that's why it took two years.
13 And then the supp. order was at earliest convenience after
14 she could get served.

15 So the assertion that we were somehow - I guess
16 the assertion is that we were negligent in finding out
17 that they should have provided coverage, but that
18 argument - and I don't know what they think the legal
19 significance of that would be, but it's certainly not
20 true, at any rate.

21 Thank you.

22 THE COURT: Thank you.

23 MR. MORTON: Judge, I'll try not to cover old
24 territory and address the issues Mr. Waddoups has brought
25 to the Court.

1 First of all, it's important that the Court
2 know, which Mr. Waddoups has not told this Court, as to
3 how the opportunities - he said where they were given
4 notice of an opportunity to defend, and they refused to do
5 so. That was after the judgment was entered, after the
6 four-year statute of limitations had run, and when
7 Mr. Waddoups wrote them a letter after he took the supp.
8 order and said, "Geez, we'll be nice enough to set aside a
9 judgment against a party that's never been determined to
10 be your named insured. We'll be glad to set it aside" -
11 this was some five years after the fact - "and we'll now
12 allow you to come in and defend this claim," when they
13 obviously had other defenses.

14 THE COURT: He claims that it doesn't matter
15 anyway because of this *Northwestern* case. How do you
16 respond to that?

17 MR. MORTON: The *State Farm/Northwestern* case is
18 a totally different situation, Judge. In that case we
19 have two insurance companies - and I'll stand corrected if
20 I'm wrong - that have the identical named insured. And
21 the question became a primary or secondary coverage and
22 who had the obligation to pay.

23 In this situation, Mr. Waddoups makes a huge
24 leap time after time after time when he says that
25 Mrs. Chambers is a named insured. She is not a named

1 insured. She is not a named insured under the policy.
2 She is potentially covered under the policy, but she is
3 not a named insured.

4 THE COURT: Oh, I don't think he said she was
5 named. I think he said she wasn't named.

6 MR. MORTON: But there's been no determination
7 that that's in effect. In the *Northwestern* case, we have
8 two people who are both named insured named in a lawsuit.
9 One denies coverage and says, "We're not going to defend.
10 You defend." The other insurance company goes in and
11 defends, and then comes back later and says, "You were
12 wrong." Both of them had an opportunity to go in and
13 defend the underlying claim in a timely manner.

14 And I agree with him. There's a direct cause of
15 action there, because one was put on notice, one declined
16 to defend, and the other insurance company sued the one,
17 saying, "You didn't do it at the time. You had the
18 opportunity to do so." We were never given the
19 opportunity to even respond. It's a totally different
20 fact situation than here.

21 THE COURT: How do you respond to his argument
22 on the *Salazar* case, which goes to the coming-and-going
23 rule in the state? [Inaudible.]

24 MR. MORTON: Those rules are -- those are
25 different tort claims that -- are you talking about the

1 distinction between the special employee versus the
2 general employee?

3 THE COURT: Right.

4 MR. MORTON: Those cases did not deal with the
5 coming-and-going rule. They dealt with the liability of
6 the temp agency while the employee is on the job. They're
7 not talking about coming and going in those particular
8 rules, and I'll tell you, Utah doesn't have a
9 coming-and-going rule.

10 Those cases dealt with a guy at a lumberyard and
11 whether or not he may have been properly trained. And it
12 was who had the duty to train him, and so forth, and
13 whether or not he was immune under work comp statutes
14 because he may not have been -- the employer he's worker
15 for's statute, he may have been the temp agency's. But
16 those cases don't have anything to do with the
17 coming-and-going rule. I mean they don't -- they make a
18 distinction between a special employer and a general
19 employer for liability, on-the-job accidents with work
20 comp.

21 But one thing I would tell the Court is that the
22 California case did make the distinction that Mr. Waddoups
23 says they didn't. And they do make a distinction between
24 general employers and special employers, and so forth. In
25 the *Henderson* California case they said:

1 "The court rejected the temporary
2 employee's contention that the
3 foreseeability of the employee's use
4 of his personal automobile in traveling
5 to the job site as an employee of a
6 temporary agency established that his
7 journey was within the scope of his
8 employment. The employee argued that
9 the fact he did not report to the same
10 location each day he worked rendered
11 the employee's journey to his job site
12 a special errand or a special mission.
13 The court rejected this argument,
14 indicating that it was not enough
15 that the employer could perceive that
16 the employee would use his personal
17 automobile."

18 And the court rejected these special kind of
19 employment, special errands distinction because it would
20 virtually eliminate the going-and-coming rule. So
21 the California court did that, and really what -
22 Mr. Waddoups' argument would do the same thing in Utah.
23 It would virtually eliminate the coming-and-going rule.
24 And so the California court had the opportunity to address
25 that.

1 When I heard the argument of plaintiff's counsel
2 when he says, "If she's an insured, if she is acting in
3 the course and scope of employment" - then he goes on to
4 say these things - these things have not been determined.
5 And it's not appropriate for this Court to determine in
6 this context because - does that mean at that point we're
7 bound by the judgment on the damages? Are we bound for
8 the liability issues that maybe there was some comparative
9 fault of the plaintiff in this matter?

10 I mean I can't answer those questions, and the
11 reason why I can't answer those questions is because we
12 weren't given an opportunity to defend it in the
13 underlying lawsuit. Are we bound by that judgment? If he
14 comes in and says, "She was acting in the course and scope
15 of her employment." Now you're bound by the judgment. I
16 mean if we weren't even given an opportunity to assert the
17 various defenses, even if she was acting in the course and
18 scope, I don't think we're tied to those.

19 I don't know what else. I think I'm going to be
20 going over some old issues, your Honor, but the
21 opportunity to defend was not in the formal proceeding.
22 It was from Mr. Waddoups after he found out about the
23 insurance, after the statute of limitations had run, and I
24 would suggest that maybe to overcome some of those
25 problems. And it's not as though that our insured was

1 served with a copy of the complaint.

2 As in the Northwestern case that the Court asked
3 about, where their insured was served a copy of the
4 complaint. It was tendered to the insurance company.
5 They came back; they reviewed the policy. And they come
6 in and they say, "Geez, do we want to defend it?" We were
7 never given that opportunity. Never. Never within the
8 underlying option.

9 And we can't be held to this judgment. And
10 the - what is it? - the Yates case is a good case on point
11 to that. We can't be held liable for a judgment that
12 we've never been a party to.

13 THE COURT: Thank you.

14 Thank you, counsel. This has been a very
15 interesting argument, and I'll have to say it's a
16 complicated area. It's not absolutely clear to the Court.
17 Having heard the arguments of counsel and having an
18 opportunity to review the parties' memoranda, the Court is
19 going to at this time grant the motion for summary
20 judgment of American States and deny the motion for
21 summary junction of Windsor Insurance Company.

22 My reasoning is - essentially the reasoning is
23 outlined by counsel for the defendant. It is my view, now
24 having heard the argument and having an opportunity to
25 consider the cases that were submitted from California and

1 Florida, that the best law, if there is dispute as to the
2 law in the country, is the law that the coming-and-going
3 rule is as applicable to temporary service agencies as it
4 is anyone else.

5 I don't find myself persuaded by Mr. Waddoups'
6 arguments when there's no - when the person that has been
7 engaged by the temporary service is not paid, there are no
8 directions given, there's no control, all of the other
9 factors that have been listed in the cases that have been
10 referred to, then the Court believes that the
11 coming-and-going rule should be as applicable there as
12 otherwise, and that the distinction of special and general
13 employment, that the Court does not find is a rule that is
14 applicable to define what the coming-and-going rule is.

15 The Court is also unpersuaded by the argument
16 that somehow American States was covered, absent notice,
17 absent being a named insurer, and believes that the fact
18 that the statute has run without any notice being given
19 and without there being any clear coverage - coverage that
20 is a subject that requires adjudication is a secondary
21 basis on which the Court would rule in the favor of the
22 defendant.

23 Mr. Morton, I'd ask that you prepare an order,
24 and perhaps include in the order the basic reasonings that
25 have been set forth in your argument as articulated by the

1 Court so I'll have some kind of a record for that.

2

3 MR. MORTON: Thank you, Judge.

4 MR. WADDOUPS: Would you reiterate that last one
5 concerning about the notice and the running of the statute
6 of limitations. I didn't quite follow you there.

7 THE COURT: Well, I guess what I'm saying is I
8 agree with Mr. Morton's argument. It seems to me that
9 when you don't have a named insured, you don't have
10 notice, when you don't have them -- the insured -- some kind
11 of adjudication before the insurance has run indicating
12 that in fact American States did bear some insurance
13 responsibility to Ms. Chambers in the case, and it seems
14 to the Court that that's a second -- that's a collateral
15 reason.

16 MR. WADDOUPS: And that's based on the four-year
17 tort statute of limitation. Is that what you're saying?

18 THE COURT: Yes.

19 MR. WADDOUPS: Or the running of the four-year
20 tort statute of limitations?

21 THE COURT: It seems to me that you've got to
22 have them -- you've got a name of an insured. I find the
23 argument in the *State Farm v. Northwestern* case, where
24 they're a named insured and they're -- and the fact of
25 insurance, persuasive in that case is not applicable here,

1 because it seems to me that what you're arguing to the
2 Court is there's a need for LSI to step up and for LSI's
3 insurer to step up to defend Ms. Chambers when, long past
4 the running of the tort statute of limitations, suddenly
5 there's notice given to them that they have some
6 responsibility, I think you have to do that before the
7 statute runs. That's what I'm saying.

8 MR. WADDOUPS: Okay.


9 THE COURT: We're in recess.

10 (Proceedings concluded at 11:35 a.m.)
11
12
13

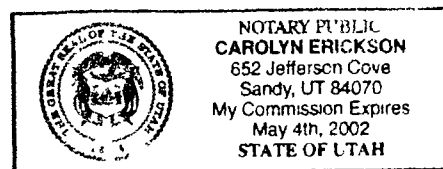
CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge William B. Bohling was transcribed by me from a videotape and and is a full, true and correct transcription of the proceedings as set forth in the preceding pages to the best of my ability.

Signed this 7th day of February, 2000 in
Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002



In The Matter Of:

*Windsor v.
American States*

*Brenda Chambers
July 30, 1998*

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*Original File CHAMBERS.TXT, 40 Pages
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Word Index included with this Min-U-Script®

Exhibit B

IN THE THIRD JUDICIAL COURT
THIRD JUDICIAL DISTRICT
STATE OF UTAH

WINDSOR INSURANCE)
COMPANY,)
) Civil No. 980903520DC
Plaintiff,)
) Deposition of:
vs.)
) BRENDA CHAMBERS
AMERICAN STATES INSURANCE)
COMPANY,)
Defendant.)

BE IT REMEMBERED that on the 30th day
of July, 1998, the deposition of BRENDA CHAMBERS,
was taken before Marsha Romney, a Certified
Shorthand Reporter and Notary Public in and for
the State of Utah, commencing at the hour of 10:39
a.m. of said day at the law offices of Dunn &
Dunn, 230 South 500 East, Salt Lake City, Utah.

Page 2

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[8]
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[23]
[24]
[25]

Page 3

PROCEEDINGS

[1]
[2]
[3] BRENDA CHAMBERS,
[4] called as a witness by and on behalf of the
[5] defendant, being first duly sworn, was examined
[6] and testified as follows:
[7]
[8] EXAMINATION
[9] BY MS. DUNN:
[10] Q: Have you ever had a deposition taken
[11] before?
[12] A: No.
[13] Q: Do you know what a deposition is?
[14] A: Vaguely.
[15] Q: Well, let me explain to you what it
[16] is. I am going to ask you some questions, and
[17] Marsha is going to take down everything that you
[18] say. That's what she is doing right now. You'll
[19] need to answer all the questions truthfully. If
[20] you don't understand something I ask, just ask me
[21] to restate it or reword it and I'll say it again.
[22] A: Okay.
[23] Q: We just need some information from you
[24] and that's what this is. It's like a little
[25] interview. Do you have any questions?

Page 4

[1] A: Huh-uh (negative).
[2] Q: After I am done asking questions,
[3] Trent will probably ask you some questions also.
[4] A: Okay.
[5] Q: Can you please state your name.
[6] A: Brenda DeeAnn Chambers.
[7] Q: And your date of birth?
[8] A: July 3rd, 1963.
[9] Q: Where do you currently live?
[10] A: 228 South 300 East, apartment 20.
[11] Q: And your phone number?
[12] A: 539-1062.
[13] Q: Do you recall where you were living in
[14] 1993?
[15] A: It was 5887 South Baneberry Way.
[16] Baneberry is 3700 West approximately. It's in an
[17] apartment complex.
[18] Q: What apartment number would you have
[19] been in?
[20] A: It was 5187. Excuse me, 5187 I think.
[21] Q: Okay. And do you recall the date of
[22] the accident?
[23] A: I don't.
[24] Q: Do you know what day of the week it
[25] would have been?

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[1] A: It was a Saturday because it wasn't a
[2] usual workday.
[3] Q: And so you usually do not work on
[4] Saturday?
[5] A: Correct.
[6] Q: Why were you going to work on this
[7] Saturday?
[8] A: I needed the money.
[9] Q: Had you been working that week?
[10] A: I worked like two days that week.
[11] Q: Do you recall what days those were?
[12] A: I don't.
[13] Q: Do you recall where you worked that
[14] week?
[15] A: It was through LSI.
[16] Q: And where did you work through LSI?
[17] A: They had me temping at several offices
[18] all over the county.
[19] Q: And can you tell me about your
[20] employment at Labor Services, Inc.?
[21] A: I worked from 1991 through about '95
[22] through them.
[23] Q: And what jobs were you required to
[24] perform?
[25] A: Receptionist mostly.

[1] A: Part of the slip went to them, and
[2] part went back to Labor Services.
[3] Q: So you returned the slip to Labor
[4] Services?
[5] A: Correct.
[6] Q: Would you return the slip that day or
[7] another day?
[8] A: Usually. Usually it was that day.
[9] Q: Where?
[10] A: 1160 South Main.
[11] Q: Did you ever have to go to Labor
[12] Services before going to a workplace?
[13] A: Only to pick up slips because I was
[14] working on the phones. I was like their
[15] troubleshooter. They'd throw me into that place
[16] if everything was going wrong with the client
[17] because I could fix it.
[18] Q: Now, on the day of the accident, what
[19] happened that day?
[20] A: They called me up and asked me if I
[21] would go out to Salt Lake County Landfill.
[22] Q: Where is that located at?
[23] A: I don't recall the address. It's been
[24] long enough that —
[25] Q: Approximately where would that be

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[1] Q: Did you ever do any jobs that required
[2] driving?
[3] A: No.
[4] Q: And did you ever get paid for any
[5] mileage?
[6] A: No, they don't do that.
[7] Q: Or any hours that you drove or
[8] commuted?
[9] A: No, they don't do that.
[10] Q: Can you tell me how you would get
[11] these job assignments?
[12] A: They would call me on the phone. I
[13] already had the slips, and I'd just go out to the
[14] job site.
[15] Q: And what were these slips?
[16] A: They were pay slips where you fill out
[17] your name and your Social Security number, and
[18] then they would have how many hours you worked.
[19] You had to have it signed by the person you worked
[20] for.
[21] Q: So whoever you worked for that day,
[22] you'd take the slip to them?
[23] A: Uh-huh (affirmative).
[24] Q: Would you turn over the slip to them
[25] at that time?

[1] located?
[2] A: It was like on 5800 West. Out in that
[3] area.
[4] Q: Do you recall approximately what south
[5] it would have been on?
[6] A: It was 41st.
[7] Q: What time did they call you?
[8] A: About 8:00.
[9] Q: Who called you?
[10] A: It was the labor side, so I don't
[11] remember who it was. Usually I was in the office
[12] side.
[13] Q: What does that mean, labor side?
[14] A: Going out and actually doing labor
[15] rather than — I was receptionist/secretary.
[16] Q: So on this day you were going to go to
[17] the Salt Lake County Landfill, what were you going
[18] to be doing there?
[19] A: I was going to do filing, get their
[20] files in order.
[21] Q: Was the office open on that day?
[22] A: LSI?
[23] Q: The Salt Lake County Landfill?
[24] A: Yeah.
[25] Q: This was a Saturday?

[1] A: Uh-huh (affirmative), as close as I
 [2] can remember.
 [3] Q: Did you ever work at Salt Lake County
 [4] Landfill before this day?
 [5] A: No.
 [6] Q: Did you have any contact with anyone
 [7] at Salt Lake County Landfill on this day?
 [8] A: No. Actually I had the nurse at the
 [9] hospital call Labor Services to tell them that I
 [10] would not be there because I was in the hospital.
 [11] Q: And do you remember the nurse's name?
 [12] A: Huh-uh (negative).
 [13] Q: Do you recall —
 [14] A: I don't. I was really in shock.
 [15] Q: Do you recall what hospital it was at?
 [16] A: Yeah, it was Pioneer Valley.
 [17] Q: Was it a male or female nurse?
 [18] A: Female.
 [19] Q: Now, the date of the accident that I
 [20] have is May 13th, 1993. Does that sound about
 [21] correct?
 [22] A: Uh-huh (affirmative), yes.
 [23] Q: So they called you at 8:00 a.m. that
 [24] morning?
 [25] A: Uh-huh (affirmative).

[1] Q: What conversation took place?
 [2] A: It was just would you go out and work
 [3] here? They always asked, would you do this? I
 [4] said yeah, because I needed the money, because my
 [5] daughter's birthday was May 14th, so I wanted to
 [6] get her something special.
 [7] Q: So her birthday was the day prior to
 [8] this accident?
 [9] A: It was the day after.
 [10] Q: May 14th was your daughter's birthday?
 [11] A: 16th, excuse me. I'm sorry.
 [12] Q: May 16th, so her birthday was going to
 [13] be the next day? Do you recall anything else
 [14] about the conversation?
 [15] A: I told them it would take me a few
 [16] minutes because I had to go and get some nylons.
 [17] They said fine, they will expect you about 9:30.
 [18] They did all the contacts to the employer before
 [19] we even got out there.
 [20] Q: And why did you have to go get nylons?
 [21] A: I was wearing a dress.
 [22] Q: Can you tell me what you did after you
 [23] got off the phone?
 [24] A: I got dressed. I showered and
 [25] dressed. I lived about a block and a half away

[1] from Macfrugal's. It was Pick N' Save at the
 [2] time.
 [3] Q: So what time did you leave your home?
 [4] A: Approximately 9:45 — or 8:45, I'm
 [5] sorry.
 [6] Q: And what route did you take?
 [7] A: I went up 5300 South going westbound,
 [8] and went to Macfrugal's.
 [9] Q: And what's the address of Macfrugal's
 [10] approximately?
 [11] A: It's 40th West and 5300 South.
 [12] Q: And you went to Macfrugal's; is that
 [13] correct?
 [14] A: Yeah. I had already gone in, got the
 [15] nylons and put them on in my car.
 [16] Q: Did you purchase anything else?
 [17] A: Huh-uh (negative).
 [18] Q: Who paid for the nylons?
 [19] A: I did.
 [20] Q: After you left you put them on in your
 [21] vehicle, then what did you do?
 [22] A: I proceeded to pull out of the parking
 [23] lot, and there was a big — one of those big
 [24] jacked-up trucks coming in. They couldn't get in
 [25] until I went out, and I kept trying to see around

[1] him. Finally he waved me, like go ahead, it's
 [2] clear. I guess there was someone coming up behind
 [3] him, but it was in his lane so he figured they
 [4] would stop, but they didn't. So I got out —
 [5] just my front of my car was out, and the lady had
 [6] swerved around and hit my car.
 [7] Q: The front of your car was out into the
 [8] second lane; is that correct?
 [9] A: Uh-huh (affirmative).
 [10] Q: And you're stating that she swerved
 [11] around?
 [12] A: Swerved around the truck.
 [13] Q: Into the second lane?
 [14] A: Correct.
 [15] Q: And collided with you?
 [16] A: Correct.
 [17] Q: And what damage was caused to your
 [18] vehicle?
 [19] A: It was an old car. It dented in
 [20] pretty well. The officer I think said she was
 [21] going like 40 and she didn't know I was there. I
 [22] didn't know she was there, so it was like a — it
 [23] was kind of a fast accident. I know that I had
 [24] pressed on the brakes so hard that my leg muscles
 [25] hurt for like a month afterwards because I stomped

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[1] on the brake as soon as he honked. He was honking
[2] to let me know she was coming around.
[3] Q: You turned left onto 5300 South?
[4] A: Uh-huh (affirmative).
[5] Q: Were you going eastbound or westbound?
[6] A: Westbound.
[7] Q: Where was your child at this time
[8] after you left your home?
[9] A: With my ex.
[10] Q: Your ex-husband was there?
[11] A: My ex — we lived together for ten
[12] years.
[13] Q: Your ex-boyfriend?
[14] A: Yeah.
[15] Q: So you didn't have to take the child
[16] to daycare?
[17] A: Right, it was just me.
[18] Q: This was your first stop?
[19] A: Uh-huh (affirmative).
[20] Q: And was it required that you go get
[21] these nylons?
[22] A: On all office positions we were
[23] supposed to wear nylons.
[24] Q: But they did not direct you that day
[25] to go purchase them?

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[1] A: No, they knew I was going because I
[2] told them I have to stop and get nylons first
[3] because all my nylons were shot.
[4] Q: Who was in charge of the route you
[5] took from your house to the workplace?
[6] A: Just me. They don't tell us how to
[7] get there unless it's like in a odd position.
[8] Q: They don't tell you directions on
[9] that —
[10] A: They just give you the address.
[11] Q: So you can choose what route to take,
[12] where to go?
[13] A: Correct.
[14] Q: They had no control over you in that
[15] way?
[16] A: Right.
[17] Q: And they had no control over whether
[18] you could stop to buy these nylons or not; is that
[19] correct?
[20] A: Well, if I hadn't, then I wouldn't
[21] have been able to go to the job site.
[22] Q: Could you have worn pants that day?
[23] A: No, they required dresses when we were
[24] in — especially the workplaces.
[25] Q: And when you came out of the parking

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[1] lot, was there any other route that you could have
[2] taken?
[3] A: I could have went out on 40th West and
[4] then turned. I had to make a left out onto 40th
[5] West to the left at 53rd.
[6] Q: Did you ever make it to the workplace
[7] that day?
[8] A: No.
[9] Q: So you —
[10] A: I ended up with whiplash. In fact, I
[11] have arthritis in my neck and have physical
[12] therapy for it, plus I have severe headaches.
[13] Q: So you provided no benefit to Labor
[14] Services that day?
[15] A: No.
[16] MR. WADDOUPS: I'll object to that,
[17] just for the record. Calls for a legal
[18] conclusion.
[19] Q: BY MS. DUNN: Did you get paid for
[20] working that day?
[21] A: No.
[22] Q: Did you get paid for your mileage that
[23] day?
[24] A: No.
[25] Q: Did you get paid for any time

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[1] commuting on this day?
[2] A: No.
[3] Q: When you were served with a complaint,
[4] did you notify Labor Services?
[5] A: No, I didn't.
[6] Q: Did you notify American States
[7] Insurance Company?
[8] A: I did.
[9] Q: And who did you notify there?
[10] A: I don't remember at all.
[11] Q: And how did you notify them?
[12] A: By phone.
[13] Q: And who did you speak to?
[14] A: I cannot remember.
[15] Q: How do you know it was American States
[16] Insurance Company?
[17] A: It was on the paper.
[18] Q: Which paper was that?
[19] A: That was brought to me by the deputy
[20] sheriff.
[21] Q: So the first complaint that you were
[22] served with when you were getting sued by the
[23] other woman, you contacted the insurance company
[24] listed on there?
[25] A: I told them that I had no means of

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[1] income because I was in a neck brace. I
 [2] couldn't —
 [3] **Q:** So that would have been Windsor
 [4] Insurance Company?
 [5] **A:** Right.
 [6] **Q:** Not American States?
 [7] **A:** Okay. I get confused.
 [8] **Q:** You notified the insurance company on
 [9] the document itself?
 [10] **A:** Uh-huh (affirmative).
 [11] **Q:** You didn't notify the insurance
 [12] company of Labor Services?
 [13] **A:** No, I didn't. I didn't realize
 [14] that —
 [15] **Q:** Did you tell anyone at Labor Services
 [16] about this accident?
 [17] **A:** Yes, I did.
 [18] **Q:** Who did you speak with?
 [19] **A:** I think it was — I think Camille was
 [20] the secretary at the time.
 [21] **Q:** What did you tell her?
 [22] **A:** I just told her I had been in an
 [23] accident and would not be available for work for a
 [24] while.
 [25] **Q:** Did you fill out any workers'

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[1] Services do that.
 [2] **Q:** Why didn't you answer the complaint
 [3] when it was served on you?
 [4] **A:** At the time I was in the process of
 [5] breaking up with my boyfriend, moving out of my
 [6] apartment. Everything was in chaos. I was
 [7] homeless for a while after that.
 [8] **Q:** Are you aware that Windsor Insurance
 [9] Company has received a default judgment against
 [10] you?
 [11] **A:** No, I didn't know that.
 [12] **Q:** According to the court documents, they
 [13] have a judgment against you around \$39,000 or
 [14] 41 —
 [15] **MR. WADDOUPS:** 41,299.
 [16] **Q:** BY MS. DUNN: Are you aware of that?
 [17] **A:** I think I received some papers on that
 [18] because they were going to court and I called the
 [19] lawyer.
 [20] **Q:** Would that be Trent Waddoups?
 [21] **A:** I think it was that morning.
 [22] **MR. WADDOUPS:** Didn't you call the
 [23] court?
 [24] **THE WITNESS:** Yeah, I think I did.
 [25] **Q:** BY MS. DUNN: You called the court

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[1] compensation forms or reports?
 [2] **A:** I didn't even think about that.
 [3] **Q:** Did you inform them that they should
 [4] tell their insurance company?
 [5] **A:** No, I didn't.
 [6] **Q:** Now, I want to ask you more about the
 [7] Salt Lake Landfill. Have you ever worked there
 [8] since?
 [9] **A:** No.
 [10] **Q:** And you never worked there on that
 [11] day?
 [12] **A:** No.
 [13] **Q:** This was a Saturday?
 [14] **A:** Uh-huh (affirmative).
 [15] **Q:** Would it surprise you that the Salt
 [16] Lake Landfill office is closed on Saturday?
 [17] **A:** That would surprise me.
 [18] **Q:** And that you could not possibly have
 [19] been working there that day?
 [20] **A:** That does surprise me. The way they
 [21] made it sound is they wanted me to do some filing
 [22] there.
 [23] **Q:** And so you never contacted the Salt
 [24] Lake Landfill yourself on that day?
 [25] **A:** No, I asked the nurse to have Labor

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[1] regarding the default? Did you ever notify Labor
 [2] Services about this?
 [3] **A:** No, I didn't.
 [4] **Q:** Did you ever notify American States
 [5] Insurance Company, Labor Services' insurance —
 [6] **A:** No.
 [7] **Q:** On the day of the accident, what was
 [8] the work that you were authorized to do by Labor
 [9] Services?
 [10] **A:** Lifting boxes and filing, as far as I
 [11] can remember.
 [12] **Q:** And what time frame were you supposed
 [13] to work from?
 [14] **A:** It was supposed to be from 8:00 to
 [15] 5:00, but the person they had already to go out
 [16] there called in sick or something, and I was
 [17] always the —
 [18] **Q:** So you were supposed to be a backup
 [19] for someone else?
 [20] **A:** I was always the backup because I
 [21] would go.
 [22] **Q:** The person that they had called in.
 [23] Do you mean another person from Labor Services was
 [24] to go in?
 [25] **A:** That's the impression I got was they

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[1] had a person lined up, then they didn't show.
[2] Q: So then they called you as a backup?
[3] A: Right.
[4] Q: Whose vehicle were you driving on this
[5] day?
[6] A: It was my boyfriend's.
[7] Q: What was his name?
[8] A: His name is Ryan Draper, but the car
[9] was in my name. He couldn't have a car in his
[10] name.
[11] Q: So the title was in your name?
[12] A: Correct.
[13] Q: And did you have any insurance on the
[14] vehicle?
[15] A: No, I did not.
[16] Q: And did you have a valid driver's
[17] license?
[18] A: What I understood is that I did
[19] because I had gone down to Carbon County, I had
[20] gotten one ticket my whole life and it was in
[21] Carbon County. The way they made it sound is they
[22] didn't take my driver's license or anything, so I
[23] supposed that it was still valid.
[24] Q: You assumed that and you told Labor
[25] Services you had a driver's license at that time?

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[1] A: Right. When I first started working
[2] for Labor Services I was riding the bus anyway.
[3] Q: And you used to ride the bus to the
[4] different places?
[5] A: Uh-huh (affirmative), or I would get a
[6] ride.
[7] Q: How long had you been driving this
[8] vehicle back and forth to different places?
[9] A: Probably about four or five months.
[10] Q: Did you inform Labor Services that you
[11] were driving this vehicle?
[12] A: I don't remember that I did.
[13] Q: Did the employer pay you for any time
[14] or use of the vehicle?
[15] A: No.
[16] Q: Where was the place that you were
[17] authorized to work at on that day?
[18] A: Salt Lake County Landfill.
[19] Q: Did you run any other errands prior to
[20] the accident?
[21] A: No.
[22] Q: If you would not have stopped to get
[23] these nylons, would you just have been on that
[24] same street going westbound?
[25] A: Yeah, I would have.

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[1] Q: You would not have had to make the
[2] left-hand turn?
[3] A: Correct.
[4] Q: You had not reached the job site yet
[5] prior to this accident?
[6] A: No.
[7] Q: Were you aware that Labor Services had
[8] transportation that they could provide to you if
[9] needed?
[10] A: Yes, I was aware of that.
[11] Q: What was that arrangement?
[12] A: You had to pay them money to come and
[13] take you to the job site, then to pick you up and
[14] bring you back.
[15] Q: How much was that?
[16] A: At the time I think it was \$2 each
[17] way. I'm not for sure.
[18] Q: Did you ever use that service?
[19] A: No, I never did. Oh, excuse me. Yes,
[20] I did when I was working in Park City for them. I
[21] didn't want to drive up and down the mountain in
[22] the winter.
[23] Q: When you used that service, they were
[24] in control of the route taken because they would
[25] come and pick you up; is that correct?

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[1] A: Correct.
[2] Q: On the day of the accident you didn't
[3] render any services to this employer; is that
[4] correct?
[5] A: That's correct.
[6] MR. WADDOUPS: Calls for a legal
[7] conclusion. I'll object on that basis.
[8] Q: BY MS. DUNN: Did you do any work for
[9] Labor Services on that day?
[10] A: No.
[11] Q: Did you do any work for the Salt Lake
[12] Landfill on that day?
[13] A: No, I did not. I was in the hospital
[14] most of the day.
[15] Q: I noticed that you have a daytimer.
[16] Would you have kept the daytime —
[17] A: Not then.
[18] Q: Did you keep a diary of any sort?
[19] A: No. Everything that I did have at
[20] that time was lost in storage.
[21] Q: What did you do after the accident,
[22] immediately following?
[23] A: I was in the hospital.
[24] Q: Did they take you there by ambulance?
[25] A: Yes, they did.

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[1] Q: And what about the other driver?
 [2] A: She was in the ambulance too
 [3] Q: With you?
 [4] A: Uh-huh (affirmative).
 [5] Q: Did you have any conversation with
 [6] her?
 [7] A: I do not recall. I was in shock. I
 [8] had never been in an accident before
 [9] Q: And have you had any contact with her
 [10] since?
 [11] A: No
 [12] Q: What citations did you receive from
 [13] the officer on that day?
 [14] A: Improper lookout, and driving with no
 [15] insurance
 [16] Q: Are you aware you also received a
 [17] driving with a suspended license citation at that
 [18] time?
 [19] A: Yeah That's what I meant by the
 [20] drivers —
 [21] Q: Oh, no insurance?
 [22] A: No, and — yeah, driving with no
 [23] license That's what I meant, that it was
 [24] suspended.
 [25] Q: Was the car ever used by Labor

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[1] Services, Inc. themselves?
 [2] A: No
 [3] Q: Did they rent the vehicle from you?
 [4] A: No
 [5] Q: Did they ever lease the vehicle from
 [6] you?
 [7] A: No.
 [8] Q: Did they ever borrow the vehicle from
 [9] you?
 [10] A: No
 [11] Q: Did they ever hire the vehicle from
 [12] you?
 [13] A: No
 [14] Q: What was your agreement with Labor
 [15] Services regarding employment?
 [16] A: Just that I would go to the job site
 [17] if I promised to go there, and if I had any
 [18] problems to call them
 [19] Q: And when you were at the job site, did
 [20] they have any control over you at that job site?
 [21] A: No It was entirely in the hands of
 [22] the employer
 [23] Q: How were you paid?
 [24] A: I was paid whenever I wanted to be
 [25] actually because I was one of their better

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[1] workers So I was paid — like if I needed to get
 [2] paid that day, I could get paid that day
 [3] Q: For the amount of hours you would
 [4] work?
 [5] A: Correct
 [6] Q: You were paid hourly?
 [7] A: Correct.
 [8] Q: What was your hourly wage?
 [9] A: Anywhere from 7 to \$9 an hour.
 [10] Q: Did you receive any benefits?
 [11] A: No I had medical insurance already,
 [12] so —
 [13] Q: Now, I noticed that you had filled out
 [14] an affidavit in this case. Do you remember
 [15] signing that? Mr. Waddoups brought it over to
 [16] you.
 [17] A: Yeah.
 [18] Q: Now, I am going to go through this
 [19] with you and we'll discuss some issues on here
 [20] A: Okay
 [21] Q: First it states that you signed this
 [22] under penalty of perjury as follows, that on the
 [23] morning of May 15th, 1993 at or about 5415 South
 [24] and 4020 West, you caused an accident in which my
 [25] vehicle collided with the vehicle of Kathryn

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[1] Zaborski Did you fill out this form yourself?
 [2] A: No
 [3] Q: Did you provide the information for
 [4] this form to anyone?
 [5] A: I don't recall to be honest with you
 [6] I am on all kinds of medications right now
 [7] Q: Do you believe that you caused this
 [8] accident?
 [9] A: By not driving with insurance, yeah
 [10] I should have been driving with insurance
 [11] Q: Do you think your pulling out caused
 [12] the accident?
 [13] A: Well, actually I guess it was kind of
 [14] a toss-up because he was waving me, basically
 [15] telling me it was clear I could not see around
 [16] him or around at all
 [17] Q: What about the other woman that was
 [18] driving, do you think she contributed to the
 [19] accident?
 [20] A: Maybe a little just by —
 [21] Q: Going around?
 [22] A: Going around.
 [23] Q: Now, the next paragraph states you
 [24] were contacted by Labor Services about one hour
 [25] prior to this to work at the Salt Lake Landfill.

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[1] A: Uh-huh (affirmative).
[2] Q: You say earlier you do not recall who
[3] contacted you?
[4] A: I don't. They have gone through
[5] several people since. I've worked for them since
[6] then.
[7] Q: Would it have been a man or woman?
[8] A: A woman.
[9] Q: And the next statement says you
[10] immediately started to prepare for that day's work
[11] assignment. What would you have done to prepare
[12] for the workday assignment?
[13] A: Shower. I had a perm in my hair so I
[14] didn't have to do much with it. I put on my
[15] makeup and —
[16] Q: Just normal hygiene things?
[17] A: Yeah.
[18] Q: Nothing that you were getting paid for
[19] or reviewing documents or —
[20] A: No.
[21] Q: — working in any way?
[22] A: No.
[23] Q: Just mainly getting dressed and ready
[24] and leaving the house?
[25] A: Uh-huh (affirmative).

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[1] Q: Would you agree to that?
[2] A: Yes.
[3] Q: And said that you were familiar with
[4] the requirements of Labor Services as you had
[5] worked for them for approximately one and a half
[6] years prior to the accident.
[7] A: Correct.
[8] Q: What were the requirements?
[9] A: To be prompt, show up for work when
[10] you said you would, on days that you specified
[11] that you would work. We were free to refuse any
[12] assignment and it did not affect whether they
[13] would call us again. That's about it. I mean,
[14] they really can't —
[15] Q: The next statement says you provided
[16] temporary secretarial services for businesses who
[17] contracted with your employer, Labor Services.
[18] Would you consider Labor Services your employer?
[19] A: Yeah, it was my employer.
[20] Q: And the only services you were
[21] providing were temporary secretarial services?
[22] A: Correct.
[23] Q: So you were never contracted to drive?
[24] A: I think I went once and worked in
[25] Lynn Wilson's rolling up —

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[1] Q: Tortillas?
[2] A: Yeah.
[3] Q: But you were never contracted as a
[4] driver for Labor Services?
[5] A: No.
[6] Q: Says you were always called at home
[7] and asked to go directly to your work assignment?
[8] A: Correct.
[9] Q: And directly meaning no stops; is that
[10] correct?
[11] A: Actually, like I said, I told them I
[12] was going for nylons or told them I had to stop.
[13] Q: You might be running late?
[14] A: I always called them if I had any
[15] problems, like if my car wouldn't start or if like
[16] my child was sick. That's why I was working temps
[17] is because I have an ADH child and he really kind
[18] of ran the gamut on daycares.
[19] Q: On the day of the accident Labor
[20] Services, as it was accustomed, called me at home
[21] and asked me to go directly to my assignment; is
[22] that correct?
[23] A: Uh-huh (affirmative).
[24] Q: You were supposed to be at your
[25] assignment at the landfill at 9:00 a.m.?

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[1] A: Yeah.
[2] Q: You were running late when the
[3] accident occurred at 9:10. Is that approximately
[4] when the accident occurred?
[5] A: Yeah. There was a lot of people at
[6] the store
[7] Q: The next statement says I was
[8] traveling directly to Salt Lake Landfill as
[9] directed by Labor Services when the accident
[10] occurred. From what you stated today that's
[11] incorrect?
[12] A: Yeah.
[13] Q: You actually stopped somewhere?
[14] MR. WADDOUPS: Objection, calls for a
[15] conclusion.
[16] Q: BY MS. DUNN: Isn't it true you
[17] stopped somewhere, you didn't go directly —
[18] A: Yeah, I stopped to get nylons.
[19] MR. WADDOUPS: Objection, again, it's
[20] putting words in the witness's mouth, leading, not
[21] consistent with the evidence.
[22] Q: BY MS. DUNN: Isn't it true you did
[23] not go directly to the Salt Lake Landfill?
[24] A: That's true.
[25] MR. WADDOUPS: Objection, the

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[1] affidavit says at the time of the accident.
 [2] **MS. DUNN:** Your objection is noted.
 [3] **Q:** BY **MS. DUNN:** You had stopped,
 [4] correct?
 [5] **A:** Correct.
 [6] **Q:** And the next statement says that you
 [7] were taken to the hospital and treated for your
 [8] injuries; is that correct?
 [9] **A:** Yes, that's correct.
 [10] **Q:** And then the hospital staff called
 [11] Labor Services and advised them that you would be
 [12] unable to work because of your injuries; is that
 [13] correct?
 [14] **A:** Correct.
 [15] **Q:** Do you remember signing this document?
 [16] **A:** I do.
 [17] **Q:** And did you review the document at
 [18] that time?
 [19] **A:** Yes, I did.
 [20] **Q:** Do you know who drafted up this
 [21] document?
 [22] **A:** I would suppose it was someone in the
 [23] office. I don't know.
 [24] **Q:** Did you have any other conversation
 [25] with anyone beside myself before this deposition

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[1] regarding this accident?
 [2] **A:** I did call and tell them that I
 [3] wouldn't be in court. I have problems at my house
 [4] right now.
 [5] **Q:** When you signed this affidavit, did
 [6] you talk to Mr. Waddoups here today?
 [7] **A:** Uh-huh (affirmative), I think so.
 [8] **Q:** Do you recall any conversations that
 [9] you had with him on that day?
 [10] **A:** Not really. I have been on — I am on
 [11] medications.
 [12] **Q:** What are those medications.
 [13] ****Ignore this, I have to call the wit.**
 [14] **A:** Darvocet, Valium, Serzone, Prilosec,
 [15] Claretin, and I don't remember the other one right
 [16] now. I'm sorry.
 [17] **Q:** And why are you on these medications?
 [18] **A:** I have got post-traumatic stress
 [19] syndrome from after — well, actually it was
 [20] before I worked for Labor Services, but it wasn't
 [21] something that I was aware of really until I ended
 [22] up at the hospital.
 [23] **Q:** On this day?
 [24] **A:** No.
 [25] **Q:** Another time?

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[1] **A:** Another time. I'm under the care of a
 [2] neurologist for headaches caused from the
 [3] arthritis in my neck.
 [4] **Q:** Now, on this day after you got in the
 [5] accident and they called Labor Services, do you
 [6] know if Labor Services sent someone else out?
 [7] **A:** I have no idea. They did not tell me.
 [8] **Q:** Would they usually have to send
 [9] someone out in these circumstances?
 [10] **A:** Yeah, they try and fill a position.
 [11] **Q:** So they would have had to go through
 [12] extra work because you got in this accident?
 [13] **A:** Yeah.
 [14] **Q:** Because of the route you took on this
 [15] day?
 [16] **A:** Correct.
 [17] **Q:** At the time of the accident, would you
 [18] consider yourself working for Labor Services at
 [19] that time?
 [20] **A:** Yes, because I was going to their job
 [21] site.
 [22] **Q:** But you weren't getting paid at that
 [23] time?
 [24] **A:** No, I wasn't getting paid at the time.
 [25] **Q:** They didn't have any control over you

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[1] at that time?
 [2] **A:** No, they didn't.
 [3] **MR. WADDOUPS:** Objection, calls for a
 [4] legal conclusion, leading.
 [5] **MS. DUNN:** You can lead under these
 [6] circumstances.
 [7] **MR. WADDOUPS:** I know, and I can put
 [8] the objection on the record.
 [9] **Q:** BY **MS. DUNN:** So they had no control
 [10] over you at this time?
 [11] **A:** Not —
 [12] **MR. WADDOUPS:** Same objection. Go
 [13] ahead and answer.
 [14] **THE WITNESS:** I'm getting confused.
 [15] **Q:** BY **MS. DUNN:** They didn't tell you
 [16] what to do at that time?
 [17] **A:** Well, they told me that it was okay
 [18] that I stop and get nylons. They knew that I was
 [19] going to —
 [20] **Q:** Did you ever sign a contract with
 [21] Labor Services?
 [22] **A:** I filled out an application and — I
 [23] had been working for them for a while. I
 [24] worked — I would work most days and days that I
 [25] wanted to work. In fact, they had me come into

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[1] the office and work in their office for
[2] secretarial work for the collections department
[3] and answering phones.

[4] Q: Now, you would not get paid until you
[5] actually reached —

[6] A: Right.

[7] Q: — the special employer for that day?

[8] A: Correct.

[9] MS. DUNN: I think that's all the
[10] questions I have at this time.

[11] EXAMINATION
[12] BY MR. WADDOUPS:

[13] Q: I just have one question. It refers to
[14] your mental state just prior to the accident. You
[15] had just gone into Macfrugal's, you purchased your
[16] nylons and then you put the nylons on in the car.
[17] As you were leaving the parking lot, were you
[18] heading directly to your job site?

[19] A: Yes, I was.

[20] Q: You had not planned on making any
[21] other stops prior to arriving at the job site?

[22] A: No.

[23] MR. WADDOUPS: That's all the
[24] questions I have.

[1] CERTIFICATE

[2] STATE OF UTAH)
[3]) ss.
[4] COUNTY OF SALT LAKE)

[5] This is to certify that the deposition
[6] of BRENDA CHAMBERS, the witness in the foregoing
[7] deposition named, was taken before me, MARSHA
[8] ROMNEY, a certified shorthand reporter and notary
[9] public in and for the State of Utah, residing at
[10] Salt Lake City, Utah.

[11] That the said witness was by me, before
[12] examination, duly sworn to testify the truth, the
[13] whole truth and nothing but the truth in said
[14] cause.

[15] That the testimony of said witness was
[16] reported by me in stenotype, and thereafter caused
[17] by me to be transcribed into typewriting, and that
[18] a full, true and correct transcription of said
[19] testimony so taken and transcribed is set forth in
[20] the foregoing pages numbered from 3 through 38,
[21] inclusive, and said witness deposed and said as in
[22] the foregoing annexed deposition.

[23] I further certify that after the said
[24] deposition was transcribed, the original of same
[25] was retained by me for filing with the clerk of

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[1] (Whereupon the deposition concluded at
[2] 11:19 a.m.)

[1] said court.

[2] I further certify that I am not of kin
[3] or otherwise associated with any of the parties to
[4] said cause of action, and that I am not interested
[5] in the event thereof.

[6] Witness my hand and official seal at
[7] Salt Lake City, Utah, this 7th day of August,
[8] 1998.

[9] MARSHA ROMNEY
[10] My Commission Expires:

[11] June 29, 1997

Lawyer's Notes

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