Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

2001

Dennis R. Coburn v. Givan Ford Sales, Inc and Craig D. Kempton : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2

Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
A. Dean Jeffs; Jeffs and Jeffs; Attorney for Respondent .
Worsley, Snow, and Christensen; H James Clegg; Attorneys for Appellant .

Recommended Citation
Brief of Respondent, *Coburn v. Sales*, No. 13353.00 (Utah Supreme Court, 2001).
https://digitalcommons.law.byu.edu/byu_sc2/709

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

RECEIVED
LAW LIBRARY

DEC 17 1975

IN THE SUPREME COURT OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

DENNIS R. COBURN,
Plaintiff and Respondent,

vs.

GIVAN FORD SALES, INC.
Defendant and Appellant,

and

CRAIG D. KEMPTON,
Defendant.

Case No. 13,353

RESPONDENT'S BRIEF

Appeal from Judgment of the Fourth Judicial District Court in and for Utah County
Honorable Allen B. Sorensen, District Judge

A. DEAN JEFFS of JEFFS AND JEFFS
Attorney for Respondent
90 North 100 East
Provo, Utah 84601

WORSLEY, SNOW & CHRISTENSEN,
H. JAMES CLEGG
Attorneys for Appellant
Seventh Floor, Continental Bank Bldg.
Salt Lake City, Utah

FILED
NOV 26 1973
Clerk, Supreme Court, Utah

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

Page

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT 2

RELIEF SOUGHT ON APPEAL 2

STATEMENT OF FACTS 2

STATEMENT OF POINTS:

POINT I 7

APPELLANT'S LIABILITY WAS SHOWN BY SUBSTANTIAL COMPETENT EVIDENCE TO WHICH APPELLANT MADE NO OBJECTION, AND NO ERROR WAS COMMITTED IN DENYING APPELLANT'S OBJECTIONS TO THE OTHER EVIDENCE ON LIABILITY.

POINT II 41

THE JURY VERDICT WAS AMPLY SUPPORTED BY THE EVIDENCE AS SHOWN BY THE RECORD.

CONCLUSION 46

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Page

CASES AND AUTHORITIES CITED

FEDERAL STATUTES:

Rule 26, Federal Rules of Civil Procedure 36, 38

Rule 32, Federal Rules of Civil Procedure 24, 25

UTAH STATUTES:

Rule 32, Utah Rules of Civil Procedure 23

Rule 43, Utah Rules of Civil Procedure 23

REFERENCE WORKS:

3 American Jurisprudence 2d, Agency, Section 354.. 41

The American Law Institute, Restatement of the Law, Agency 2d, Section 236 13

Federal Practice and Procedure, Vol. 8, Wright and Miller, West Publishing, Section 2145 39

Moore's Federal Practice, Vol. IV A, Matthew Bender, New York 25, 36

CASES:

Bauman v. Woodfield, 224 Md. 207, 223 A. 2d 364.. 27

Boone v. Hall, 100 Cal. App. 2d 738, 224 P. 2d 881, 883 41

Burton v. LaDuke, 61 Utah 78, 210 P. 978 14

Carter v. Bessey, 97 Utah 427, 93 P. 2d 490 14

Community Counseling Service, Incorporated v. Reilly, CA 4th, 1963, 317 F. 2d 239 39

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Page

Dexter v. United States, D.C. Miss 1969, 306 F. Supp. 415, 425 40

Dini v. Dini, 188 Cal. App. 2d 506, 512 10 Cal, Rptr. 570, 574 39

Douglas v. Duvall, 5 Utah 2d 429, 304 P. 2d 373 42

Fuller v. Chambers, 377 P. 2d 848, Calif. 1959 13

Genesee Merchants Bank and Trust Company v. Payne, 6 Mich. App. 204, 148 N.W. 2d 503.. 30, 32

Ghezzi v. Holly, 22 Mich. App. 157, 177 N.W. 2d 247 .... 29 ,30

Glenn Falls Insurance Co. v. Weiss, 150 N.Y.S. 2d 685, 588 .... 32, 33

Hall v. Blackham, 18 Utah 2d 164, 417 P. 2d 664 46

Hindmarsh v. O. P. Skaggs Foodliner, 21 Utah 2d 413 446 P. 2d 410 42

Howe v. Jackson, 18 Utah 2d 269, 421 P. 2d 159 42

Johnson v. Associated Seed Growers, 240 Wis. 278, 3 N.W. 2d 332, 334 40

Mayhood v. LaRosa, 24 Cal. Rptr. 837, 374 P. 2d 805 38

Merchants Motor Freight, Inc. v. Downing, 227 F. 2d 247 (8th Cir. 1955) 36, 39

Montgomery Production Cred. Ass'n v. Hohenberg & Co., 12 So. 2d 865 41

Murry v. Manley, 170 Cal. App. 2d 364, 367, 338, P. 2d 976, 978 39

Pfotzer v. Aqua Systems, Inc., 162 F. 2d 779 (2d Cir. 1947) 36

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Page

Pingatore v. Montgomery Ward & Co. v. F. W. Woolworth Co., 419 F. 2d 1138 40

Pursche v. Atlas Scrapper & Engineering Co., 300 F.2d 467, 488 (9th Cir. 1962) 35, 36

Reilly v. Layton, 329 F. 2d 53, 58 (10th Cir 1964) 36, 37

Saltas v. Affleck, 99 Utah 65, 102 P. 2d 493 44

Skok v. Glendale, 3 Ariz. 252, 413 P.2d 585 28

Skornia v. Highway Pavers Inc., 34 Wis. 2d 160 148 N.W. 2d 678 26

Snowhite v. State, (1966) 243 Md. 291, 221 A. 2d 342 33

Van Vranken v. Fence-Craft, 430 P. 2d 488, Idaho, 1967 14

Wardell v. Jarmon, 18 Utah 2d 359, 423 P. 2d 485.. 42

Young v. Liddington, 50 Wash. 2d 78, 309 P. 2d 761 40

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT OF THE STATE OF UTAH

DENNIS R. COBURN, *Plaintiff and Respondent,* vs. GIVAN FORD SALES, INC. *Defendant and Appellant,* and CRAIG D. KEMPTON, *Defendant.*	Case No. 13,353

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries and property damages arising out of a traffic accident in Provo, Utah, in which Respondent, Dennis R. Coburn, claimed the negligence of defendant, Craig D. Kempton, was the cause of his injuries and that Appellant, Givan Ford

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Sales, Inc., was also liable therefor for the reason that Kempton was their employee, was driving a vehicle owned by them and was acting in the scope of his employment at the time of the accident.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury before the Honorable Allen B. Sorensen in the District Court in and for Utah County, resulting in a unanimous jury verdict and consequent judgment for special damages, general damages and costs, totaling $22,340.22. Judgment was entered against both Craig D. Kempton and Givan Ford Sales, Inc., in that amount. After the trial, Appellant, Givan Ford Sales, Inc., made motions for dismissal, for judgment notwithstanding the verdict and for a new trial, which were denied, and now Givan appeals.

RELIEF SOUGHT ON APPEAL

Respondent requests that the jury verdict and judgment entered thereon be affirmed.

STATEMENT OF FACTS

Respondent controverts and supplements Appellant's Statement of Facts as follows:

On December 4, 1970, Respondent, Dennis R. Coburn, a young married man and recent college graduate, was making business calls on his new job as an

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

insurance agent for Farm Bureau Insurance Company. He was traveling north on University Avenue in Provo in his Volkswagen automobile crossing a viaduct which carried the traffic over the railroad tracks. The weather was rainy and cold, and as he approached the intersection at the bottom of the viaduct a green Alpine Sunbeam sports car made a sudden "jack rabbit" start from a side road which entered the intersection from his right. Plaintiff was driving on a through street and the sports car came out from a stop sign, failing to yield the right-of-way. The sports car executed a left turn resulting in almost a head-on collision between the two vehicles. The driver of th Sunbeam Alpine sports car had been having difficulty with the defrosting mechanism and his windows were entirely fogged except for a small hole in the windshield which the driver had cleared with his hand. The sports car was owned by Givan Ford Sales, Inc., and driven by their employee, Craig D. Kempton, who stated that he did not see the Volkswagen automobile as he entered the intersection just before impact.

Craig D. Kempton had worked for Givan Ford Sales, Inc., for about six months prior to the time of the accident (Tr. 43). He punched a time clock each day, working from 8:00 o'clock a.m. to 6:00 p.m., with a usual work week of 44 hours (Tr. 44). Mr. Kempton worked under the Sales Department, having been hired by Ernie Earl, Givan Ford Sales Manager, who was his immediate supervisor (Tr. 44, 45 and 116). He was also subject to supervision in his work to another sales-

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

man, Mr. Denny Davis, and the owners, Mr. Larry Givan and Mr. Ed Givan (Tr. 216). Givan Ford Sales, Inc., maintained a large lot of new and used cars which occupied a large portion of a city block in Provo, fronting on both University Avenue and Second South Street (Tr. 107). Craig Kempton's duties related to the new as well as the used cars, including starting all used cars every morning and all new cars every other morning and seeing that all cars physically ran (Tr. 45 ,46). It was his responsibility to keep the cars clean, washed, vacuumed, and oil levels filled up. He had to check and charge batteries, see to the repair and maintenance of tires by delivering them to a nearby service station where the work would be done; and since it was wintertime, he had a daily responsibility to install antifreeze in all cars whose antifreeze levels were insufficient for the weather conditions (Tr. 45, 47 and 49). It was his general responsibility to see that all cars were kept in sales condition and make sure they were "running pretty good." If any car would not start or had a condition that needed repair that he could not handle himself, he was to report it to Ernie Earl or get a mechanic to have it repaired (Tr. 35, 48, 49, 106, 130 and 213).

Appellant had provided Mr. Kempton with his own personal dealer's plate which he could place on any of the new or used cars when he took them off the lot (Tr. 47). He took cars from the lot and used the plate on a daily basis (Tr. 48). His daily duties required him to run frequent errands in the community to get

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

parts or other items for the company, and in doing so he would always take one of the used cars from the lot (Tr. 47 and 131). Because the car lot of Givan Ford Sales, Inc. fronted on two streets and because Mr. Kempton's duties required him to do so, he was always moving cars somewhere, rearranging their location from one part of the lot to the other, going on errands, and otherwise driving cars on and off the lot (Tr. 107, 108 and 109).

Occasionally he was instructed to drive vehicles on errands to Salt Lake City, Ogden and American Fork (Tr. 109). Once in awhile Ernie Earl would instruct him to take a specific used car because it hadn't been out on the street for awhile in order to" loosen it up" (Tr. 47).

There was a regular practice at Given Ford Sales, Inc., for the salesmen to offer to pay Craig a "bird dog" fee for any referrals he made of people who bought a specific car. Although the company did not pay the bird dog fees, the practice was common knowledge in the company and had the company's tacit approval (Tr. 105, 106, 107, 230, 231 and 232). Craig had two or three friends who had come onto the lot and talked to him prior to the accident about looking for a car that might be used as a dune buggy. As he drove the cars about, he was often looking them over to see if he might be able to find a prospective buyer among his acquaintances (Tr. 135 and 136).

Since it was winter, Mr. Kempton had a daily duty

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

to check the antifreeze in the cars. This was particularly true with regard to used cars which were newly arrived on the lot, which would occur several times a day (Tr. 49). If antifreeze was needed, he would pull the car off the lot into the street to drain the radiator into the gutter and then he would place the antifreeze in the cooling system. Craig usually pulled the car to be tested off the lot, would drive it for a couple of blocks, and then return back to the street, parking near the lot to perform these services (Tr. 49, 107 and 132). Givan Ford Sales, Inc., supplied Mr. Kempton with two different antifreeze testers, one that required the engine coolant to be warm when tested. When using that tester, he would usually run the motor of the car until it was warm and then run his test (Tr. 140).

On the day of the accident Mr. Kempton punched in on the time clock at 7:58 o'clock a.m. (Tr. 143). He performed his usual duties that morning with regard to starting and washing cars until a little after 11:00 o'clock a.m. The Sunbeam Alpine, which he was driving at the time of the accident, had newly arrived on the lot, and he had not yet checked the antifreeze in it. His intention was to take it off the lot, warm it up and return to test the antifreeze (Tr. 125). As he drove it off the lot, he testified that he decided to also try it out in order that he could tell the salesmen of its running condition. He thought he might have some friends who might be interested in buying it, and he thought he might look at it himself to see if he might be interested in buying it to be a dune buggy (Tr. 125, 136). He drove the

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

car three blocks to the intersection where the accident occurred at about 11:20 o'clock a.m. After the accident, he was so badly shaken up that he was told by his supervisor, Ernie Earl, that he ought to go home early and he checked off his time card when he left work at 12:15 o'clock p.m. (Tr. 137 and 144). He resumed his regular work schedule the next day (Tr. 138).

Mr. Coburn sustained permanent injuries consisting of a scalping and facial laceration from the hairline across the forehead, through the eyebrow, and across the eyelid, a bone chip in the elbow, and a severe fracture of the talus bone in the left ankle, which permanently limited the motion and use of the ankle that resulted in a lifetime of pain and a limp while walking. The medical experts estimated his loss of total body function of from 7.5 percent to 15 percent.

ARGUMENT

POINT I

APPELLANT'S LIABILITY WAS SHOWN BY SUBSTANTIAL COMPETENT EVIDENCE TO WHICH APPELLANT MADE NO OBJECTION, AND NO ERROR WAS COMMITTED IN DENYING APPELLANT'S OBJECTIONS TO THE OTHER EVIDENCE ON LIABILITY.

Appellant's assertion that the *"only"* evidence of liability on the part of Givan Ford Sales, Inc., was

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

incompetent and improperly admitted is not only erroneous, it flies in the face of the record. In making this assertion, Appellant seems to be stating what he wishes were true while choosing to neatly ignore the facts that were put into evidence. Appellant says, in effect, that had the trial court sustained Appellant's objections to certain evidence, the jury would have had no evidence from which it could determine that Craig Kempton was acting within the scope or course of his employment at the time of the accident.

While it is true that in the course of the trial counsel for Givan Ford made several objections to the introduction of some of the evidence, it is assuredly not true that the "only" evidence of liability of Givan Ford was introduced over counsel's objections. A review of the whole record will clearly demonstrate that the jury had before it adequate, substantial and convincing evidence of the liability of Givan Ford other than that which was challenged by objections of Givan Ford's counsel.

The following summary describes some of the evidence that was introduced without challenge as to competency or propriety of its admission, and amply illustrates the error of Appellant's assertion:

1.At the time of the accident, Craig Kempton had worked for Givan Ford for about six months (Tr. 43).

2. He worked about 44 hours a week, usually from 8:00 o'clock a.m. to 6:00 o'clock p.m., and punched a time clock each day (Tr. 44).

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

On the day of the accident he punched in at 7:58 a.m., and signed out about an hour after the accident (Tr. 143).

3. He was hired by Ernie Earl, Givan Ford's Sales Manager, who became his immediate supervisor, and he worked under the Sales Department (Tr. 44, 45 and 116). He was also subject to supervision by the owners, Larry Givan and Ed Givan, and Denny Davis, a salesman (Tr. 216).

4. Givan Ford maintained a large lot of new and used cars. Craig Kempton's duties included: keeping them clean, washed, vacuumed, oil levels up, checking batteries and tires, checking and installing antifreeze, starting all used cars every morning and all new cars every other morning, and seeing that all cars physically ran. If they would not start, he was to report it to Ernie Earl or get a mechanic to have them repaired. He was generally to see that the cars were kept in sales condition (Tr. 45, 48, 49, 106, 130 and 215).

5. His daily duties required him to run frequent errands in the community to get parts or other items for the company, and in doing so he would always take one of the used cars from the lot (Tr. 47 and 131).

6. Givan Ford provided Mr. Kempton with his own personal dealer's plate which he could place on any of the new or used cars when he took them off the lot (Tr. 47). He took cars from the lot and used the plates daily (Tr. 48). Sometimes he took cars without using the dealer's plate if he wasn't going far (Tr. 48).

7. The car lot fronted on two streets and Craig was always moving cars somewhere, rearrang-

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

ing their location from one part of the lot to the other or going on errands (Tr. 107, 108 and 109).

8. Occasionally he was sent on errands to Salt Lake City, Ogden and American Fork (Tr. 109).

9. Sometimes Ernie Earl would tell him to take a specific used car to loosen it up because it hadn't been out on the street for awhile (Tr. 47).

10. When a tire was flat, he would take the car a block away to Rowley's Texaco to have it repaired (Tr. 47).

11. There was a regular practice of Givan Ford for their salesmen to offer to pay a "bird dog" fee to Craig for referrals of people who bought cars. This practice was common knowledge to the company and to Ernie Earl, Craig's supervisor (Tr. 105, 106, 107, 230, 231 and 232).

12. Craig had two or three friends who had come onto the lot and talked to him prior to the accident about looking for a car they might use to make a dune buggy. One approached him right after the accident in relation to seeing if he could buy the car involved in the accident for that purpose (Tr. 135 and 136).

13. It was winter, and as used cars were brought to the lot it was Craig's duty to check the antifreeze. This occurred several times a day. If anitfreeze was needed, he would pull the car off the lot into the street to drain the radiator and put antifreeze in it. Craig would usually pull the car to be tested off the lot, drive a couple of blocks, make a U-turn and go back to the lot (Tr. 49, 107 and 132).

14. Givan Ford supplied Craig with two different antifreeze testers. One required the engine coolant to be warm when tested, and the other could test while cold. When he used the tester

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

that required it to be warm, he would run the motor or else run the car until it was warm and then run the test (Tr. 140).

15. The Sunbeam Alpine Craig was driving at the time of the accident had just previously arrived on the lot and Craig had not checked the antifreeze in it. He drove it off the lot to run it before putting antifreeze in it. He also wanted to see how it ran. He intended to drive the car to the viaduct three blocks away, cross the viaduct, turn around and come back. He drove it the three blocks to the intersection at the base of the viaduct where the accident occurred (Tr. 125, 133, 134 and 140).

16. The accident occurred at about 11:20 a.m. When he finished with the police officer he went back to Givan Ford where Ernie Earl told him he ought to go home early because he looked shaken up. He then wrote the time, 12:15 p.m. on his time card and left work. He resumed his regular work schedule on the next day (Tr. 28, 29, 137, 139, 143 and 144).

Surely the foregoing evidence that came in without objection amply demonstrates that the evidence that Appellant objected to was not the "only" evidence on the liability of Givan Ford.

Appellant next insists that the evidence at the trail established that Craig Kempton was doing nothing in furtherance of Givan Ford's business nor anything reasonably incidental to his employment, and that therefore Givan Ford should be free from liability. The record flatly contradicts such an assertion. In fact, the record makes it clear that Mr. Kempton had at least four purposes in driving the car that day:

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

1. His primary purpose was to take it off the lot and warm up the engine in order to test the antifreeze.

2. In addition, he said he wanted to drive it in order to be able to answer the inquiries he expected from salesmen on how it ran.

3. He wanted to be able to check it over and see if he thought one of his friends might want it so he could get a "bird dog" fee from the sale.

4. He further wanted to see if he might be interested in buying the car himself for a dune buggy.

Clearly, all four purposes for the trip were in furtherance of the employer's business. Givan had the car for sale and all four reasons for the trip related to its potential sale. Mr. Kempton was employed as part of the staff of Givan Ford's Sales Department. He was furnished with his own dealer's plates. His direct supervisor was the Sales Manager, Mr. Ernie Earl, who testified one of Mr. Kempton's duties was to check the cars to be sure they were in sales condition. Warming up the engine to test the antifreeze was one of his specific and direct duties. It was winter, the car had just come onto the lot and he needed to get that done. He considered it to be part of his job to run the car not only so he could do his work on it, but so he could tell his supervisor or a mechanic if it needed work to put it in sales condition, and also so he could tell the salesmen about its condition. His driving only three blocks to the intersection where the accident occurred was consistent with his usual practice of driving a few blocks before checking the antifreeze, and was clearly in the scope of his employment.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Checking the car to see if he might have a friend who might want to buy it is clearly in furtherance of the employer's purposes, and so, likewise, was checking it to see if he may want to buy it. He said he had already bought one car off the lot. Neither of these additional purposes cancelled or terminated his primary purpose of getting the engine warm so he could check the anti-freeze.

Appellant seems to insist that since Craig Kempton may have had a personal reason for the trip as well as furtherance of his employer's business, this, ipso facto, takes him out of the scope of employment. Such is clearly not the law.

It is well settled that when the employee is combining his own business with that of his employer he is within the scope of his employment. The American Law Institute Restatement of the Law, Agency 2d, Section 236, Conduct Actuated by Dual Purpose, states this rule as follows:

> "Conduct may be within the scope of employment, although done in part to serve the purpose of the servant or of a third person."

Fuller v. Chambers, 377 P. 2d 848, Calif. 1959, states at page 852:

> " . . . where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

> responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master."

See also, Van Vranken v. Fence-Craft, 430 P. 2d 488, Idaho, 1967. It was stated in Carter v. Bessey, 97 Utah 427, 93 P. 2d 490:

> "Whenever reasonable minds may differ as to whether the servant was at a certain time involved wholly or partly in the performance of his master's business, or within the scope of his employment, the question is one for a jury." (page 432)

and further:

> "The question in every case is whether the act he was doing was one in prosecution of his master's business and not whether it was done in accordance with the master's instructions." (page 433)

Furthermore, it is clear that slight deviation from instructions of the master for the employee's own purposes does not take the servant out of the scope of his employment. The case of Burton v. LaDuke, 61 Utah 78, 210 P. 978, involved such a question and this court stated:

> " . . . there was some substantial evidence in the record not only tending to show that the defendant, had with knowledge, not only sent out his employee, Pedigrew, upon the streets to do his work with an auto truck dangerously defective in operation, but also tending to show that as has been seen, defendant had, at least on one previous occasion in the furtherance of his cleaning business, sent

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

> Pedigrew far beyond the district in which it was claimed his duties were to be performed. That being true, it was for the jury, under proper instruction given by the court, to find as a fact from all the evidence, and not for the court to determine as a matter of law, whether or not the defendant's servant had exceeded his authority, and was not acting within the scope of his employment nor in the furtherance of his master's business at the time when and the place where the accident complained of occurred." (page 83)

After citing numerous cases in support of the proposition that mere deviation from his duty by an employee does not exempt his employer from liability for his negligence in the event of accident, the court further stated:

> "We have tried to show that, ordinarily, in cases of this kind, the question of whether or not the wrong complained fo was committed within the scope of the servant's employment is one primarily to be determined by the jury from the evidence in the particular case, more especially where there is doubt or conflicting evidence as to the authority conferred upon the servant byt he master and the scope of his employment." (pages 85 and 86)

The basic thrust of Point I of Appellant's brief directs itself to a claim that it was error for the trial court to allow use of the deposition of Craig Kempton at the trial. Appellant avers that Craig Kempton was not really adverse to plaintiff on the issue of the scope of his employment, and therefore the answers he gave at his deposition could not properly be used for any pur-

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

pose at the trial. Appellant appears to hope that because this court has available to it only the cold words of the record, it may not discern that Mr. Kempton was not only an adverse party to plaintiff in the proceeding, but he was uncooperative and clearly a hostile witness as the Respondent's council examined him and sought to impeach him by reference to his answers given at the deposition that contradicted some of his testimony at the trial. Though in a situation such as the instant one, the Respondent's tendency is to wish the court had available to it a sound track movie of the trial from which to view Mr. Kempton's hostile demeanor and attitude, this court has often observed that it gives deference to the advantaged position of the trial judge in that regard. Nevertheless, a review of the record will give some insight as to the circumstances in this case.

Respondent specifically called Craig Kempton to testify as an "adverse witness" without objection by appellant (Tr. 42 and 118). As Mr. Kempton answered Respondent's questions, he was often evasive and ducked his head, mumbling uncooperative and almost inaudible answers. He had to be repeatedly cautioned to speak up (Tr. 43 and 46). As counsel for Respondent observed in discussion with the trial court, Mr. Kempton clearly demonstrated by his courtroom demeanor that he considered himself to be adverse and hostile to the Respondent (Tr. 118). The trial court even specifically ruled that he was a "hostile" witness (Tr. 126).

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

An examination of the record will show that as counsel for Respondent was asking Mr. Kempton to describe his duties with relation to the used cars, Appellant was making objections designed to prevent Mr. Kempton from testifying that one of his responsibilities was to check the cars in order to keep them running well. Counsel for Appellant first tried to interpose an objection in such a way as to tell the witness he did not want him to say it was his job to keep the cars running:

> "Q. MR. JEFFS: Now you had some responsibility then to keep them running, is that it?
>
> A. Yes.
>
> MR. CLEGG: I am going to object to that. I believe he testified he was to start them, but not keep them running. That is a mechanic's job.
>
> THE COURT: You can cross-examine him and develop that, can't you?
>
> MR. CLEGG: Perhaps I can, your Honor. I think we are going . . . " (Tr. 45, lines 15 to 24)

He next objected that counsel for Respondent should not be allowed to lead this adverse witness on questions relating to scope of his employment (Tr. 45, 46 and 49). Finally he sought and received permission from the court to Voir Dire the witness on that question (Tr. 50). The consequences of Mr. Kempton's answers to Appellant's questions in that Voir Dire examination was to give the jury the impression that it was not one of Mr. Kempton's duties to see that the cars were running. This was in direct conflict with testi-

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

mony he had previously given in his deposition. The situation was ripe for impeachment. Counsel for Respondent, after Appellant's Voir Dire examination, asked Mr. Kempton if he had not testified in his deposition that it was his responsibility to see if the cars were in good running condition and report whether they were or not (Tr. 15, line 10). It is interesting to note it was then counsel for Appellant who first requested, "Could we have the deposition?" (Tr. 51, line 15), even though, now, on appeal he complains that it was error to allow the use of the deposition. In any event, the deposition was published without objection from Appellant, and the following colloquy took place:

> "Q. MR. JEFFS: Now if you will follow me on page 31, I asked you which salesman asked you about the condition of the specific cars on the lot, and you answered: 'All of them would. If I was around there they would yell, 'What kind of shape is this car in?' I would say, you know, I would tell them pretty well. Dennie liked to know just exactly. He didn't like to take the customer. He would say, 'Does this car run good? Does it eat oil or do this?' and I would tell him.'
>
> Q. Now, was that your answer at that time?
>
> A. Close enough, yes.
>
> Q. Now . . .
>
> THE COURT: Mr. Jeffs, I believe the Bailiff left a note for you.
>
> MR. JEFFS: Your honor, I have had a message that Doctor Robertson is here, and pursuant to

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

> the stipulation that we entered into, I would therefore request we interrupt the testimony of this witness and resume it after we have Doctor Robertson testify.
>
> THE COURT: Step down."

The use of the deposition for impeachment was thus interrupted before its completion as Mr. Kempton left the stand. After several hours of medical testimony by two doctors was completed, Mr. Kempton again resumed the stand and testified about his activities in connection with his work (Tr. 104 to 116). The deposition was not used in connection with that testimony. Then, as the examination returned to the issue of his duties, raised earlier by Appellant's Voir Dire examination, the testimony was again interrupted when counsel for Respondent asked:

> "Q. Okay. Now with regard to the other use of the cars, with regard to their working condition, the use of the cars I take it then that you made was also to find out how they were running, is that right?
>
> MR. CLEGG: Objection." (Tr. 109 and 110)

A harangue between counsel ensued that continued until time for the court to recess for the day (Tr. 110 to 115).

The following day Mr. Kempton resumed the stand and counsel for Respondent resumed the use of the deposition and impeachment process that had begun before the interruptions of the day before (Tr. 116). Council for Appellant objected that it appeared to be

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

an attempt at impeachment when to his view the witness was not in a position for impeachment. Giving counsel for Appellant the benefit of the doubt, he had apparently forgotten that the use of the deposition for impeachment of the previous day had been interrupted and did not recognize this as a resumption of that questioning process (Tr. 117). After another extended debate between counsel on the question of the use of the deposition, the court allowed Respondent's counsel to read to the witness two more of his answers from the deposition in which he had stated it was his duty to keep the cars running and to ask if he had not in fact made those statements.

Not only does Appellant erroneously assert that the deposition was not used for impeachment, but he would have this court believe that counsel for Respondent had been unable to adduce direct testimony that Mr. Kempton was acting in the scope of his employment and so he resorted to reading into the record extensively from Mr. Kempton's deposition to superimpose it on the direct testimony. Such an assertion is simply **not true.**

We have already set forth herein some of that direct testimony Appellant hopes to ignore, but even more, the record shows the total use of the deposition was as follows: (Tr. 52, line 29 to 53, line 10)

> "Q. MR. JEFFS: Now if you will follow me on page 31, I asked you which salesman asked you about the condition of the specific cars on the lot, and you answered 'All of them would. If

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

I was around there they would say, they would have a customer and they would yell, 'What kind of shape is this car in?' I would say, you know, I would tell them pretty well. Dennie liked to know just exactly. He didn't like to take the customer. He would say, 'Does this car run good? Does it eat oil or do this?' And I would tell him.'

Q. Now was that your answer at that time?

A. Close enough, yes."

Tr. 122, line 22 to 123, line 6:

"Q. MR. JEFFS: Now, Mr. Kempton, we were talking about what Ernie Earl told you your responsibilities were, and in your deposition you said: 'All he told me was that I was supposed to keep the cars running pretty good and then he just gave me a few things to do. He said, 'We will keep you busy. You come and ask me what to do, and I will keep you going for a few days, and from then on you are on your own.' He said, 'You will know what to do by then.' "

Now that was your statement, was it not?

A. Yes, it was.

Q. Okay. Then I asked you to describe for me what your duties were during the course of your employment, and if you will go to page 4, please, on line 9, you answered: 'Well, all I was—' "

Counsel for Appellant interrupted with an objection and after the court ruled, the questioned continued (Tr. 123, line 17 to 29):

"Q. MR. JEFFS: You answered, Mr. Kempton: 'Well, all I was ever told was to keep cars

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

washed and cleaned and make sure all of them were running good, and check the antifreeze and the oil, and just general keeping them in sales condition.'

THE COURT: Hasn't he already said that yesterday, Mr. Jeffs?

MR. JEFFS: If he did, I apologize, Your Honor.

THE COURT: Go ahead. Ask the question.

Q. MR. JEFFS: That's what you were to do in connection with your work, is that right?

A. That is right."

Therefore, as the foregoing review of the record illustrates, although there were several protracted arguments to the court relative to use of the deposition (most of which took place out of the hearing of the jury), the actual use of the deposition before the jury was limited to reading three brief answers of the witness and to query him as to their truthfulness. All three contradicted the statements he had made during Appellant's Voir Dire examination to the effect that he had no duties to check the cars to keep them running.

Appellant's brief seeks to dispose of the facts disclosed in the record by the mere statement that "the questions were not cast to impeach," choosing to ignore the fact that the deposition really was used for impeachment. Counsel for Respondent so stated at the time it was done (Tr. 119) and in fact it was used to show that the three answers the witness gave in his deposition

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

contradicted the witnesses's testimony given during counsel for Appellant's Voir Dire examination.

Rule 32 (a) (1) of the Utah Rules of Civil Procedure provides as follows:

> "(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness . . . "

And, Rule 43(b) of the Utah Rules of Civil Procedure provides as follows:

> "(b) *Scope of Examination and Cross-Examination.* A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party . . . and interrogate him by leading questions without being bound by his testimony and may contradict and impeach him in all respects as if he had been called by the adverse party . . . "

But even if the deposition had not been used for impeachment, Rule 32 (a)(2), Utah Rules of Civil Procedure would apply. It reads as follows:

> "The deposition of a party . . . may be used by an adverse party for any purpose."

Appellant insists this court must construe the latter Rule so as to limit its application to parties adverse on the issue developed. Appellant insists that Mr. Kempton was not adverse to plaintiff on the question of liability of his employer, Givan Ford, and therefore, the trial court should not have allowed any of the deposition to be read. Appellant's reasoning in that regard seems rather elusive since the facts at trial demonstrate

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

that Mr. Kempton was clearly the adversary against whom plaintiff was seeking and did receive a judgment on each of the issues alleged in the complaint, and since the employer's liability would necessarily be derivative arising only out of a finding of liability on the part of Mr. Kempton. In the court's instruction No. 12, the jury was specifically directed that if they did not find Craig Kempton to be liable to plaintiff, it would be unnecessary for them to consider the issue of his agency for Givan Ford, since Given Ford would not be liable. The suggestion that the interest of Mr. Kempton on the issue of the liability of his employer somehow crosses over in the lawsuit and becomes the same as the interest of the plaintiff is tantamount to saying that Mr. Kempton would somehow benefit from helping plaintiff prove the liability of his employer. Of course this is not true. Mr. Kempton could not be relieved from liability or in fact be benefitted in any way by helping plaintiff prove the liability of Givan Ford. His demeanor in the course of the trial, including uncooperative answers to the questions posed by Respondent's counsel and his hostile manner amply demonstrate the error of appellant's position as related to this defendant.

Even if the record did not demonstrate Appellant's error on this point, careful examination of the authorities cited by Appellant in support of his theory will do so.

Appellant cites as authority for that proposition, a comment relating to Rule 32(a), Federal Rules of

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Civil Procedure, found in Volume IV A, Moore, Federal Practice (2d Ed), 32-16 and 32-17, which reads as follows:

> " . . . The deposition of a *party* may be used for any purpose only by an *adverse party;* and the deposition of a party may not be used by anyone other than an adverse party for any purpose except impeachment of the testimony of the deponent as a witness as provided in Rule 32(a)(1), unless the court finds the existence of one of the conditions enumerated in Rule 32 (a)(3). 'Adverse party' as used in this Rule is a term of art, and means a party whose interest in the case is adverse to that of another party, even though they may be both nominally aligned as co-parties. Thus, where a defendant has served an answer upon a co-defendant which states a cross-claim against him, they are adverse parties as to the cross-claim, even though nominally they are co-defendants."

Appellant's brief conveniently leaves out that explanatory last sentence. Nevertheless, even a very strained construction of the language quoted by Appellant could not result in the conclusion that where a plaintiff is seeking a judgment against a defendant, that defendant's interest could somehow cross over in the lawsuit and become synonymous with that of the plaintiff so as to prevent use of his deposition at trial. It seems obvious that the author's intention is to say that as to co-parties (that is those nominally named on the same side of the lawsuit) there should be a determination of adverse interest before such a party's deposition could be used by the other co-party under

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Rule 32(a)(2). Furthermore, if Appellant's reasoning were followed, the burden of the trial judge would be greatly increased by placing upon him the responsibility of determining in the course of the trial, the shades or degrees of interest a party may have as to every issue and every party in the lawsuit.

Appellant cites several cases as authority for his claim that the trial court should have determined that Craig Kempton was not adverse to plaintiff on the issue of the scope of his employment and should have refused to allow any questions from his deposition relating to that issue. Appellant's brief quotes language from Skornia v. Highway Pavers, Inc., 34 Wis. 2d 160; 148 N.W. 2d 678, which he urges supports that thesis. The Skornia case in no way espouses the rule that Appellant urges this court to adopt. In that case, Skornia, a highway workman employee of a subcontractor, sued Allan Axt, a crane operator employee of the general contractor together with his employer, Highway Pavers, Inc., for injuries sustained on the job. At the trial, Highway Pavers, Inc., claimed that Allan Axt was not their employee but was, in fact, doing work for the subcontractor employer of Skornia at the time of the accident. The trial judge denied the motion of Highway Pavers, Inc., to examine their co-defendant, Allan Axt, as an adverse party and to examine an employee of plaintiff's workman's compensation carrier (who was not a party) as an adverse witness.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

The rule of this case is simply this: As to the plaintiff's workman's compensation carrier, a person, though not a party to the action, nevertheless may be called as an adverse witness by a defendant upon the showing that the witness has a financial interest in the outcome of plaintiff's case and an equal voice with plaintiff in the prosecution of the case; and, as between two co-defendants, wherein one of them seeks at the trial to call the other as an adverse witness, he may do so upon a showing that the financial interest of the co-defendant is adverse to the party calling him, and that the pleadings demonstrate that the witness claims opposite to the party seeking to call him on the issue upon which the examination is to be conducted. This case in no way suggests that where a person is called as an adverse witness by a party on the opposite side of the lawsuit, the court can or ought to refuse to let his deposition be introduced on the theory that his interest may be adverse to a co-defendant in the action.

Again, in citing the opinion of Bauman v. Woodfield, 224 Md. 207, 223 A. 2d 364, Appellant seeks to reach a different result than did the court by quoting language of the opinion out of context. That case involved a Maryland statute similar to the Utah Rule allowing the use of the deposition of an adverse party for any purpose at the trial. Plaintiff appealed, claiming the trial court erroneously allowed defendant to read into evidence portions of plaintiff's pretrial deposition but had refused to let plaintiff read the balance of the deposition so as to complete the context. After the

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

reading of the deposition, the court had allowed the deponent plaintiff to testify extensively on the issues covered by the deposition. After the language quoted by Appellant's brief, the court emphasized that the parties were in fact on opposite sides of the lawsuit, being plaintiff and defendant respectively, and ruled that the deposition of such an adverse party *could* be read at the trial, notwithstanding that the witness had already testified in the course of the trial. The court ruled that the words "any purpose" as used in the statute do not mean that the use of the deposition is limited to purposes of impeachment or contradiction, but rather that the party may introduce the deposition of his adversary as part of his substantive proof. The ruling of that case is opposite to appellant's thesis and nothing in the decision can in any way appropriately be read to infer that when a plaintiff seeks a judgment against a defendant and offers defendant's deposition into evidence, the trial court should exclude the deposition testimony unless the defendant is opposite to plaintiff in every issue of the pleadings.

Appellant's representation that Skok v. Glendale, 3 Ariz. App. 252, 413 P. 2d 585, supports his theory is also unfounded. In that action, the city of Glendale, Arizona, brought suit against co-tenants of certain real property for the costs of extension of sewer lines and services to their real property. The case arose from facts in which the city claimed that one William Barclay, one of the owners of the land, entered into a contract with the city on behalf of himself and the other

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

co-tenants obligating them all to pay for installation of the sewer lines. The other co-tenant defendants claimed Barclay had no authority to bind them by his contract. Although Barclay had been among the original defendants when the action commenced, by the time of trial he had received a discharge in bankruptcy as to the liability in question. The trial court, applying a rule the same as our own, allowed the city to read the deposition of Barclay into evidence on the theory it was the deposition of an adverse party. The Arizona Supreme Court ruled the trial court committed error in allowing the deposition to be read into evidence because at the time of trial Barclay was no longer a "party" to the action and had no interest adverse to the city by reason of his discharge in bankruptcy.

Regardless of how Appellant would like to stretch the language of the opinion to say more than was decided by the court, that case simply stands for the proposition that a deponent, who was formerly a defendant in the action but is no longer a party at the time of trial and has no interst adverse to the plaintiff and whose deposition is offered into evidence, is not an adverse party under Rule 32(a)(2).

In order to persuade this court that even though the deposition of one adverse defendant may be admissable against himself, it should not be admissable against his co-defendant, Appellant relies heavily upon language found in two Michigan decisions. He quotes from the opinion in Ghezzi v. Holly (1970), 22 Michi-

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

gan App. 157, 177 N.W. 2d 247, which in turn quotes from Genesee Merchants Bank and Trust Company v. Payne (1967), 6 Mich. App. 204, 148 N.W. 2d 503. The Ghezzi case is clearly distinguishable from the case before the court and the Genesee Merchants bank decision conforms to what was done by the trial court in this action. The Ghezzi case involved a claim of malpractice. The patient, Ghezzi, claimed Holly, a radiologist, failed to notify him or his treating doctor that x-rays showed a broken arm and so it was not immobilized and he continued to use it extensively. Traumatic arthritis developed. Ghezzi claimed Holly's failure to communicate the x-ray results was the cause. The deposition of the treating physician, Dr. Mulder, was taken in which in response to a hypothetical question, he testified it was his opinion that failure to immobilize a non-displaced fracture could cause traumatic arthritis. Although at the time of taking his deposition Dr. Mulder was not a party to the action, he was thereafter joined as a co-defendant because Holly claimed that the x-ray results had been timely communicated to Dr. Mulder's office. Plaintiff sought and received permission to join Dr. Mulder, alleging that if he had received the results of the x-ray examination, then he was negligent in failing to treat the condition. At the trial plaintiff sought to introduce Mulder's deposition as expert opinion evidence against Holly on the question of causation. That deposition contained the only testimony offered at the trial to substantiate the alleged connection between a failure to immobilize plaintiff's

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

arm and the arthritic condition subsequently found to exist. After being joined as a defendant, Dr. Mulder had, by his answer, and at the trial, denied any relationship between the alleged malpractice and the arthritic condition. The deposition statement therefore constituted an admission by Dr. Mulder which was inconsistent with his position at trial.

The case is not controlling in our instant situation not only because Dr. Mulder was not a party when his deposition was taken but also because, as the court noted in its opinion, the action really involved two lawsuits that were being tried together. The claimed negligence of Holly was entirely independent of the claim of negligence by Dr. Mulder and therefore the expert opinion evidence on the question of causation constituting an admission by Dr. Mulder would not, under the rules of evidence, be admissable as an admission against Holly. The appellate court noted that the plaintiff should not be permitted to discredit his opponent's claims merely by joining as a co-defendant any person from whom he could obtain a deposition statement contrary to the position of the original defendant. There was no common interest as between the defendants, Holly and Mulder. They operated their businesses entirely independently. There was no claim of an agency between them and the liability of each of them would be independent of the question of liability of the other. The distinguishing difference seems to be the lack of common interest between Dr. Mulder and Holly to form the basis to allow the admission of one against the other.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

As previously stated, Appellants reliance on the language contained in the Genesee Merchant's Bank and Trust Company v. Payne is not well founded, because the decision of that court supports what was done in this action by the trial court. The case involved a suit for injury consisting of a cut on the Achilles tendon of a child, Mary Ann Blaisdell, while on the premises of defendants, Carroll Payne and Margaret Payne. The plaintiff bank, acting as guardian for the minor child, brought the action on behalf of the child claiming that the child's parents had left the child in the care of Mr. and Mrs. Payne while they visited another child in the hospital. In the course of the afternoon, Mary Ann cut her Achilles tendon on some object in Paynes' yard. Sometime after the injury, a piece of glass (the top of a fruit jar) was discovered in the vicinity of the injury. From a jury verdict in favor of plaintiff, defendants appealed, asserting that it was error for the trial court to allow introduction of the discovery depositions of both defendants. After a discussion of the plaintiff's use of the depositions of both defendants as substantive proof in the action, the court ruled as follows:

> "Here, then, it was proper to admit the discovery deposition of defendants, Carroll Payne and Margaret Payne. These deponents were adverse parties and their statements are no less admissable as depositions than if they had been made under any other circumstances."

Again, Appellant's brief quotes language from Glenn Falls Insurance Co. vs. Weiss, 150 N.Y.S. 2d

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

685, 688 (1956), which he urges supports his theme. That case involved a claim against five defendants, some corporate, some individuals, to set aside alleged fraududent conveyances of real estate. The court had before it a motion to compel the taking of depositions of two of the individual defendants who had previously failed to appear for examination, allowing their defaults to be entered.

The language quoted by Appellant is simply dicta relating to what use might possibly be made of the depositions at an eventual trial. The legal question before the court was the issue of the sufficiency of the notice and the court ruled that:

> " . . . if a plaintiff desires to take the testimony of one defendant as a witness against a co-defendant, the latter is 'entitled to plain notice to that effect,' and the notice to take the deposition of one defendant as a party is not sufficient."

The ruling of the court goes to the sufficiency of the notice for the taking of the deposition and in no way relates to the issue before this court.

Although the authorites cited by Appellant are not in point, there is one case that has squarely met the issues raised by Appellant. The decision was contrary to the position taken by the Appellant. In Snowhite v. State (1966) 243 Md. 291, 221 A. 2d 342, the court dealt with a fact situation precisely on all fours with the matter presently before this court. The action involved a wrongful death claim brought by the widow

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

and surviving child of Walter W. Tennon, who had been killed in a traffic accident in a head-on collision with a gasoline truck owned by Harold Snowhite and driven by his employee-driver Clarence Henderson. The employer, Snowhite, who operated a bulk oil and gasoline business, claimed that he should not be held liable for the negligent acts of Henderson because Henderson had not taken the truck in the course of his employment. It appears that after having completed some of his gasoline deliveries, Henderson had returned the truck to the place he normally parked it. He then went to a bar where he drank almost a pint of whisky, picked up a girl whom he then took in Snowhite's truck to a place nearby for some "sporting." The accident occurred when he was coming back to pick up a kerosene truck to make some other deliveries. During the trial the trial court permitted the reading of portions of Henderson's deposition as substantive evidence against Snowhite on the issue of negligent entrustment of the gasoline truck. The evidence related to Henderson being regularly allowed to use the trucks at his own pleasure and for his own purposes. The court set forth the issues to be decided as follows:

> "Snowhite earnestly contends that the admission of a portion of Henderson's deposition as substantive evidence against Snowhite on the issue of negligent entrustment was both erroneous and prejudicial. On the question of admissibility, Snowhite's argument has three prongs: (a) that the trial court misconstrued Maryland Rule 413 which, when read in its

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

entirety, does not permit the use of a party's deposition when that party is present and available as a witness at the trial; (b) that although Henderson and Snowhite were joined as co-defendants they did not share identity of interests and the deposition of Henderson could not be used against Snowhite on a separate and distinct issue in the absence of such identity of interest; and, (c) on the issue of negligent entrustment Henderson was not an adverse party to the plaintiffs and his deposition is controlled for use at the trial by Section (a) (3) of Maryland Rule 413."

After quoting the Maryland Rule 413 which corresponds in all its applicable provisions with Utah Rule 32, the court observed that because the Maryland Rule was so closely patterned after the Federal rule, the court should appropriately look to federal decisions for guidance. The court then goes on to rule as follows:

> " . . . The federal cases have indicated that the federal rule is to be interpreted literally and means just what it says, i.e., that the deposition of an adverse party may be used *"for any purpose."* The deposition or relevant parts thereof of an adverse party may, therefore, be used as substantive evidence against other adverse parties even though that adverse party is present and available for giving testimony. Its use is not limited to impeachment of the testimony of the adverse party, although it may be used for that purpose too, if the adverse party testified. As stated by the United States Court of Appeals for the Ninth Circuit in Pursche v. Atlas Scrapper & Engineering Co., 300 F2d 467, 488 (9th Cir. 1962):

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

'Atlas had taken Pursche's testimony pursuant to Fed. Rules Civ. Proc., Rule 26, 28 U.S.C.A. in connection with its discovery and at the trial offered the depositions en masse as original evidence. But the court refused their admission. It does not appear that the depositions were irregularly taken or that the court rejected them because they were lengthy and no doubt contained much that was repetitious, extraneous or otherwise inadmissible. Rather, it appears the court was of the opinion that since Pursche was present Atlas was required to call him as a witness and could not use his deposition to prove any fact or facts therein stated. This conclusion is manifest for in ruling, the court flatly said: 'You are not entitled to have the depositions introduced if the witness is here except for impeaching purposes.' This was error. The use of depositions is regulated by Rule 26(d); subsection one permits 'any party' to use a deposition to impeach the deponent as a witness, while subsection three permits 'any party' to use the deposition of any person as primary proof of the facts stated there provided the deponent is first shown to be unavailable as a witness; but subsection two permits 'an adverse party' to use the deposition of 'a party . . . for any purpose' and imposes no preliminary conditions to this use of the testimony. This is but a tacit way of saying that the deposition can be used as original evidence regardless of the presence or absence of the deponent. Pfotzer v. Aqua Systems, Inc., 162 F. 2d 779 (2d Cir. 1947); Merchants Motor Freight, Inc. v. Downing, 227 F. 2d 247 (8th Cir. 1955); 4 Moore Fed. Prac. p. 1190.'

"See also Riley v. Layton, 329 F 2d 53, 58 (10th Cir. 1964).

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

> "In our opinion, the trial court correctly interpreted Maryland Rule 413(a) to permit the use of Henderson's deposition as substantive evidence even though Henderson was in court and available as a witness.
>
> "Although it is true that parties are not necessarily 'adverse' because they appear to be so by their alignment in the pleadings, it seems clear that the interest of the plaintiffs and Henderson was adverse and the plaintiffs were 'adverse parties' to Henderson within the meaning of the Maryland Rule 413. As such they had the right to introduce 'any part or all' of Henderson's deposition 'for any purpose.' There is no limitation upon the use of the adverse party's deposition other than that contained in Maryland Rule 413 (a) itself, i.e., that it may be used only 'so far as admissible under the rules of evidence.' If Henderson had testified in person, the substance of his testimony in the deposition would have been admissible, and hence was admissible by use of his deposition under Maryland Rule 413(a). The weight of the testimony as it might apply to a co-defendant with whom there was no identity of interest on one of the issues in the case would be for the jury." (pages 352 and 353)

The court in Snowhite v. State correctly applied the rule, as did the trial court in this action, and its reasoning should be followed by this court.

In Reilly v. Layton (1964) 329 F. 2d 53, a tenth circuit court of appeals decision arising out of a medical malpractice claim, the court was called upon to apply Utah law in making a determination of whether or

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

not the defendant's treatment of plaintiff's fractured arm, which was ultimately amputated, in order to determine if expert testimony of a medical doctor met the necessary qualifications as an expert witness. In the course of the trial the judge had allowed plaintiff's counsel to read from the deposition of one appellant, Dr. Sanella, in cross-examining the other defendant, Dr. Reilly. The appellant urged on appeal that since the deposition had not been received into evidence, it was prejudicial error to allow the deposition to be used in cross examination in order to impeach Dr. Reilly. The respondent asserted that the deposition had not been used to impeach Dr. Reilly but rather that it was used to test Dr. Reilly's knowledge of the existence of the symptom of blueness in the patient's hand and impairment of blood circulation in the arm that was later amputated. In making its ruling on the issue, the court stated as follows:

> " . . . be that as it may, the deposition was that of a party to the action, and under the express terms of Rule 26 (d) (2), F.R. civ. P. 28 U.S. C.A., the deposition of a party ' . . . may be used by an adverse party for any purpose.' We find no error on this point."

In applying the California rule which contains the same provisions as the Utah Rule, the Supreme Court of California held in Mayhood v. LaRosa, 24 Cal Rptr. 837, 374 P. 2d 805, that the trial court had erred in preventing defendant from introducing into evidence plaintiff's deposition except for purposes of impeachment, and stated:

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

> " . . . Section 2016 subdivision (d), paragraph (2), provides that, 'so far as admissible under the rules of evidence,' any part or all of the deposition of a party 'may be used by an adverse party for any purpose.' Thus, insofar as plaintiff's deposition and answers to interrogatories contained admissions, they should have been admitted in evidence. (Dini v. Dini, 188 Cal. App. 2d 506, 512 10 Cal. Rptr. 570, 574; Murry v. Manley, 170 Cal. App. 2d 364, 367, 338, P. 2d 976, 978). As stated in the two cited cases, an adverse party's deposition 'may be used to establish any material fact, a prima facie case, or even to prove the whole case.' Consequently, a party is not limited to using an adverse party's deposition or answers to interrogatories for the purpose of impeaching his testimony."

Wright and Miller, in their treatise, Federal Practice and Procedure, (1970) West Publishing, Vol 8, Section 2145, made it clear that the Federal Rule 32 (a) (2) with which our rule corresponds has been consistently applied to allow the deposition of a party to freely be used by an adverse party literally for any purpose, and Merchants Motor Freight, Inc. v. Downing, C.A. 8th, 1955, 227 F.2d 247, at page 250 makes it clear that this rule is broad and is to be liberally construed. In Community Counseling Service, Incorporated v. Reilly, C.A. 4th, 1963, 317 F. 2d 239, at page 243 the court stated in reference to this rule:

> " . . . It has been consistently held that the Rule permits a party to introduce, as part of his substantive proof, the deposition of his adversary, and it is quite immaterial that the adversary

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

> is available to testify at the trial or has testified there . . . "

In 1969 the Sixth Circuit Court expressed approval of that same rule in an action for personal injuries by an injured customer and her husband against the owners of two stores, where the owners of the first store cross claimed against the second store in Pingatore v. Montgomery Ward & Co. v. F. W. Woolworth Co., 419 F. 2d 1138. To that same effect, see Dexter v. United States, D.C. Miss 1969, 306 F. Supp. 415, 425. In following the rule the Washington State Supreme Court stated:

> " . . . The rule has been interpreted by the Federal Courts to permit the deposition of a party to be used by an *adverse party for any legal purpose.*" Young v. Liddington, 50 Wash. 2d 78, 309 P. 2d 761.

Appellant contends that the trial court should not have allowed the deposition testimony because it went to the question of the scope of the employment of Craig Kempton, and it would be no admission as against Givan Ford. In so contending Appellant seems to ignore the fact that Kempton was competent to testify on the scope of his authority. It is a well settled rule that at the trial this fact of agency can be proven by the testimony of the agent himself. That rule was affirmed in Johnson v. Associated Seed Growers, 240 Wis. 278, 3 N.W. 2d 332, 324,

> " . . . although the declarations of an agent made to third persons, who are called to prove

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

them, are, in general, no evidence of the existence of an agency, the authority of an agent, when not in writing or so required to be, may be proven by testimony given on the trial by the agent himself."

The court, in Montgomery Production Cred. Assn. v. Hohenburg & Co., 12 So. 2d 865, at 867 stated:

> "Agency may be proved by the testimony of the agent in the case in which the question of agency arises."

And the California Court said in Boone v. Hall, 100 Cal. App. 2d 738, 224 P. 2d 881, 883:

> "The fact of agency where it rests on parol may be established at the trial by the testimony of the agent himself."

See also, 3 American Jurisprudence 2nd, Agency, Section 354, Testimony of Agent.

As shown above, the trial court did not commit reversible error in admission of evidence.

POINT II

THE JURY VERDICT WAS AMPLY SUPPORTED BY THE EVIDENCE AS SHOWN BY THE RECORD.

In spite of Appellant's urging that the liability of Givan Ford Sales, Inc., was not clearly shown, the

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

record clearly demonstrates that Craig D. Kempton was acting well within the scope of his employment at the time of the accident. Respondent has referred extensively to the applicable facts in the record, both in the statement of facts and the sixteen different items of evidence enumerated under Point I above. That itemization was set forth in response to appellant's claim that the only evidence of the liability of appellant came out of the brief amount of testimony from the deposition, which was read to the witness and the jury. Respondent has also set forth in verbatim the total amount of testimony that was read from the deposition.

As this court stated in Douglas v. Duvall, 5 Utah 2d 429, 304 P. 2d 373, after a jury trial this court is not bound to accept Appellant's statement in its brief of the facts most favorable to itself. In fact, on appeal from a jury verdict, all evidence and inferences the jury could reasonably draw therefrom are reviewed in the light most favorable to the sustaining of the verdict. Wardell v. Jarmon, 18 Utah 2d 359, 423 P. 2d 485; Howe v. Jackson, 18 Utah 2d 269, 421 P. 2d 159. This court will assume the jury believed the evidence which supported their verdict. Hindmarsh v. O. P. Skaggs Foodliner, 21 Utah 2d 413, 446 P. 2d 410.

It is startling to have Appellant urge that a careful examination of the record will reveal no substantial evidence upon which the jury could have made a finding of liability against Givan Ford Sales, Inc. It is interesting to note that Appellant introduced no evidence

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

at the trial that Craig Kempton had ever been instructed that he was not to take cars from the lot to warm them up to check the antifreeze. The record is clear that he was required to drain the radiators in the street where it would drain into the gutter, and that he usually drove them a few blocks to warm them up. It is also clear that when he was hired, Ernie Earl told him to "keep them running," which he understood to include frequent driving of the vehicles to inform his employer of any problems relative to how they ran or their sales condition. Furthermore, Appellant introduced no evidence to the effect that Mr. Kempton was ever told that he should not have driven the particular car involved in the accident, or that any supervisor at any time, even after the accident, expressed any objection to his having taken the car to that intersection.

Ernie Earl testified that when he hired Craig and gave him instructions as to his duties, he told Craig, among other things, that he was to keep the cars running (Tr. 219), and that after two or three days he would be on his own without someone showing him what to do (Tr. 222). The record is clear that Mr. Kempton was free to drive the cars on and off the lot throughout the day, as he serviced them, moved them about, warmed them up, and otherwise checked them to keep them in sales condition. His driving the Sunbeam Alpine to that intersection, three blocks away from the lot the morning of the accident in order to warm it up to check the antifreeze was consistent with his usual

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

practice when checking antifreeze, and was clearly within the scope and course of his employment.

Appellant quotes from Saltas v. Affleck, 99 Utah 65, 102 P. 2d 493 (1940), asserting it is practically indistinguishable on its facts from the present case. Such an assertion is clearly erroneous. In that case plaintiff attempted to rely on a presumption derived from evidence that the employer was the owner of the truck which displayed his name as the *only* basis for his argument that the judge should have submitted the question of agency to the jury for its determination. The action involved a collision by a grocery delivery truck driven by an employee of the defendant. The employee regularly made six delivery trips a day following a route prepared by the manager on each trip. On the day in question, he had made his deliveries and was to return to the store, but he gave two girls a ride well beyond the employer's store and ten blocks away from his route. He had instructions that he should not take passengers without permission. There was no passenger seat in the truck, and the girls sat on an empty packing box. The trial court decided that the driver was acting outside the scope of his employment "on a frolic of his own," as a matter of law, and directed the jury to return a verdict of no cause of action against the employer. As stated by the Supreme Court:

> "The question involved in this appeal is whether the presumption that the agent was acting within the scope of his employment arising from proof of ownership of the car and agency, and

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

> the affirmative evidence rebutting this presumption, raise a question of law for the court to decide, or a question of fact to be submitted to the jury." (page 68)

As noted by the court, when plaintiff introduced no evidence in support of his theory that the employee acted within the scope of his employment other than the presumption of mere ownership of the automobile:

> " . . . the evidence offered in rebuttal of the presumption of the agency of the driver from proof of ownership may be so uncontradicted and conclusive as to entitle the court to say as a matter of law, that the presumption has been rebutted." (page 70)

The court further stated:

> "In the present case plaintiff did not offer any evidence contradicting that offered by the dedefndant to rebut the presumption. So the court properly did not submit the case to the jury."

The Saltas case stands only for the proposition that where plaintiff relies on a presumption arising from proof of ownership of a car and agency, and presents no further evidence in support of his theory that the employee acted within the scope of his agency, affirmative evidence rebutting that presumption, if uncontradicted, can be sufficient for the court to determine the question as a matter of law.

The rule of the Saltas case is clearly not applicable in our instant case. Plaintiff, Coburn, did not rely exclusively upon a presumption arising out of owner-

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

ship of the vehicle, but presented other extensive and substantial evidence showing Craig Kempton was acting within the scope of his authority.

Finally, as stated by Justice MacDonaugh in Hall v. Blackham, 18 Utah 2d 164, 417 P. 2d 664:

> "Where the parties have been afforded a trial, a presumption arises that the judgment should not be disturbed unless the one attacking it meets the burden of showing error substantial and prejudicial in the sense that there is a reasonable likelihood that the result would have been different in the absence of such error." (page 167)

CONCLUSION

The jury verdict in this case was appropriate. The facts and evidence support the judgment and counsel for plaintiff respectfully submits that the defendant has failed to show any prejudicial error or any reasonable likelihood that the result would be different if defendant were awarded a new trial.

Respectfully submitted,

A. DEAN JEFFS of JEFFS AND JEFFS
Attorney for Plaintiff and Respondent

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

RECEIVED
LAW LIBRARY

DEC 1 7 1975

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.