

2009

Jeff Stamper, Aaron Stamper, Christopher Stamper v. Rebecca Johnson : Brief of Appellee

Utah Court of Appeals

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JEFF STAMPER, AARON STAMPER,	:	
DAVID STAMPER, CHRISTOPHER	:	
STAMPER, the heirs and children of	:	BRIEF OF APPELLEE
SHARON STAMPER, deceased,	:	REBECCA JOHNSON
	:	
Plaintiffs/Appellants,	:	
	:	Case No. 20090062-SC
v.	:	
	:	
REBECCA JOHNSON, an individual,	:	
	:	
Defendant/Appellee.	:	

**Appeal of Order Granting Summary Judgment of the Fifth District Court, for
Washington County, Honorable Eric A. Ludlow, Presiding**

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IN THE UTAH SUPREME COURT

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STATEMENT OF JURISDICTION

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

STATEMENT OF ISSUE AND STANDARD OF REVIEW

I. Whether the trial court correctly concluded that the negligence claims of Plaintiffs/Appellants (the “Stampers”) against Defendant/Appellee Rebecca Johnson (“Ms. Johnson”) are barred by the exclusive remedy provision of the Utah Worker’s Compensation Act because Ms. Johnson and the Stampers’ decedent, Sharon Stamper (“Ms. Stamper”), were co-employees under the fellow servant doctrine at the time of the accident giving rise to the claims.

Preservation of Issue: The parties preserved this issue by Ms. Johnson’s Motion for Summary Judgment and memorandum in support [R. at 55-70], Plaintiffs’ Memorandum in Opposition of Defendant’s Motion for Summary Judgment [R. at 135-138], and Ms. Johnson’s Reply Memorandum in Support of Defendant’s Motion for Summary Judgment. [R. at 167-177.]

Standard of Review: The trial court’s order of summary judgment is reviewed for correctness, and the facts and all reasonable inferences drawn therefrom are viewed in a light most favorable to the non-moving party. Orvis v.

Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (citations omitted). The trial court's interpretation of a statute is reviewed for correctness. Bearden v. Croft, 2001 UT 76, ¶ 5, 31 P.3d 537.

DETERMINATIVE STATUTE

Utah Code Ann. § 34A-2-105(1), is determinative, or of central importance to this appeal. That section provides:

The right to recover compensation pursuant to this chapter for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any . . . employee of the employer and the liabilities of the employer imposed by this chapter shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to the employee or to the employee's spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated, or incurred by the employee in the course of or because of or arising out of the employee's employment, and no action at law may be maintained against an employer or against any officer, agent, or employee of the employer based upon any accident, injury, or death of an employee.

Utah Code Ann. § 34A-2-105(1)(2005).

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings Below

This appeal is from an Order of the Fifth Judicial District Court, Washington County, Utah, granting Ms. Johnson's Motion for Summary Judgment. [R. at 202-206.]

Statement of Facts

This case arises from a single car rollover accident which occurred on Friday, May 6, 2005, on the highway between Toquerville, Utah, and Mesquite, Nevada. [R. at 63.] The accident killed Stamper's decedent, Ms. Stamper, and severely injured Ms. Johnson. [R. at 69.]

On the date and time of the accident, Ms. Stamper and Ms. Johnson were both employed by Steve and Cyndi Gilbert through two separate corporate entities. [R. at 63 and 69.] Ms. Stamper was paid by Gilbert Development Corporation ("GDC"), and Ms. Johnson was paid by Diamond G Rodeos, Inc. ("Diamond G"). [Id.]

Both GDC and Diamond G are closely held corporations owned and managed by Mr. Gilbert, who also owns related entities Crusher Rental & Sales, Inc. ("CRS") and Diamond "G" Ranch (the "Ranch") located in Toquerville,

Utah. [Id.; R. at 76.] Mr. Gilbert's wife, Cyndi Gilbert, is an attorney and serves as corporate counsel for GDC. [R. at 76].

Mr. Gilbert described Ms. Johnson's job duties as a "gofer" who reported to Mr. and Mrs. Gilbert on a daily basis for job assignments:

Q [By Mr. Sutterfield] Okay. And what was her [Ms. Johnson's] title or duties and job description?

A [By Mr. Gilbert] Well, I don't think she had a title. If I'd title her, I'd call her gofer. . . . She went for that and gofer that. Go here, go there. She helped us with the rodeos, the ranching, helping me with faxing, and basically just anything you needed done. . . .

. . .

Q Okay. I understand you're her [Johnson's] ultimate boss. Is there someone that supervised her work on a day to day basis?

A Me. . . . [¶] Well, there again, it depends on, one, if I'm here. Then she would report to my wife [Cyndi Gilbert]. And secondly, if I or if we happen to be out of town, we'd leave her what my wife calls a to-do list of things that needed to be accomplished.

[R. at 67-68.]

Similarly, Ms. Johnson testified: "I pretty much did anything Steve [Gilbert] needed me to do, whether it was with Diamond G Rodeos or Gilbert Development, anything that had to do with animals, helping with construction at

his new house, running . . . general business errands for Steve and/or for Cyndi [Gilbert].” [R. at 67.]

Ms. Stamper performed primarily cooking and cleaning duties for GDC. [R. at 67.] Although Ms. Johnson and Ms. Stamper were paid by different entities and had different skill sets, Mr. Gilbert testified that there was “continuous crossover” between the corporate entities Ms. Johnson and Ms. Stamper did work for:

Q [By Mr. Sutterfield] When I say you, I understand you made it clear she [Ms. Stamper] worked for Gilbert Development Corporation?

A Yes, and overlapped into all the other corporations somehow or another at times.

. . .

A I don't think that when you say “I work for Gilbert Development” that means she [Ms. Johnson] wasn't on their payroll. She never received a payroll check. I will say that she [Ms. Johnson] did Gilbert Development chores or intermediate stuff periodically all the time, but she got paid by Diamond G Rodeos. But there was continuous crossover. There is today and always will be with any employees.

[R. at 66-67.]

Mr. Gilbert went on to testify that although the two women worked for different entities and had some different duties “[t]here was overlap all time.” [R. at 66.] For example, when Ms. Stamper cooked for large corporate functions, Ms. Johnson “would certainly jump in and help . . . with whatever [Ms. Stamper]

needed.” [Id.] Ms. Johnson testified that “I would assist Sharon [Stamper] sometimes in cleaning the house and running errands for Cyndi [Gilbert]. . . . [¶] As for . . . working side by side, that’s pretty much it, Steve, Cyndi, myself, and Sharon [Stamper].” [R. at 126.]

As the district court noted and as the Stampers do not dispute on appeal, “while Plaintiffs list a number of duties that Ms. Johnson performed that were outside of Ms. Stamper’s expertise, it is not controverted that GDC’s business was often mixed with Diamond G, and Diamond G’s with that of GDC.” [R. at 204.]

More crucially to the issues presented by this appeal, Mrs. Gilbert described what the two employees were doing, and for which corporate entity, during the week immediately preceding, and then on the day of, the accident. By un rebutted affidavit, she states as follows:

2. I am an attorney, licensed to practice law in the State of Utah and have done so since 1985. I am corporate counsel for Gilbert Development Corporation (“GDC”), an entity owned and managed by my husband Steve M. Gilbert, who also owns related entities including Crusher Rental & Sales, Inc. (“CRS”), Diamond “G” Rodeos (“Diamond G”), and Diamond “G” Ranch (the “Ranch”).

3. During 2004 and 2005, my husband and I spent a majority of our time in Mesquite, Nevada finishing a residential subdivision project, Vista Del Monte (“VDM”), which Steve had purchased from the original lender after the original developer filed for bankruptcy.

4. GDC had completed approximately 1.5 million dollars worth of earth-moving and underground utilities work on the VDM Project that had not been paid when the original developer filed for bankruptcy protection and invoked the automatic stay on the project. Steve had to purchase the project in order to allow GDC to be paid for its past work and allow the VDM project to be completed.

5. GDC's purchase of the VDM subdivision raised many legal and logistical issues that required the immediate attention of Steve, myself and the individuals who worked closely to assist us in our day to day activities – especially Rebecca (Becky) Johnson (now Bradford) [Ms. Johnson] and Sharon Stamper [Ms. Stamper]. The unexpected development project presented a number of logistical problems.

6. Steve and I owned a home in Mesquite on North Lakeview with a small “home office.” The acquisition of the large VDM project made that office immediately too small for both Steve and I to accomplish the legal, development and corporate issues we were working on. Steve and I had built a new home within the VDM subdivision on Chaparral Drive primarily so that we would each have a separate office from which to work.

7. VDM had soil problems and the original developer's engineer, Kleinfelder, had been sued for damages incurred to homes built on the site. Depositions were scheduled for Kleinfelder executives on Tuesday, May 10, 2005, in my new Mesquite home/office on Chaparral.

8. Because of these depositions and other business, it was imperative that my new office in the Chaparral Drive home be ready for my use by May 6th in order to prepare for the coming Kleinfelder depositions.

9. Friday, May 6, 2005, was to have been a “finish-up” day for moving from our previous home in Mesquite to the new home/office in the VDM subdivision. During the week of May 2nd- 5th either Steve or myself assigned [Ms. Johnson] a number of tasks in Mesquite, and those which I recall included:

- a. assisting me in getting Pacer up and running so we could do some legal research on the GDC California fraudulent conveyance case;
- b. getting the office telephone system up and running in our Chaparral Drive offices;
- c. teaching Steve and I how to use the telephone system once it was installed;
- d. picking up an “architectural variance” from the VDM Homeowners’ Association for Steve’s review and requested approval;
- e. determining what light bulbs would work only in our “old” house and leaving them at that home while bringing extra light bulbs that would work in the “new” home/office to that home;
- f. ordering flowers for a executive of Sun-Cor (the entity GDC was currently working for at Coral Canyon, Washington, Utah) who had just had surgery;
- g. transporting mail and files to and from Toquerville;
- h. transporting legal supplies (bate stamp, discovery looseleafs, boxes for shipping, etc.) to the Mesquite office;
- i. handling logistical issues for the rodeo (i.e. acquisition of judging sheets from past rodeo/bull riding events, locating pictures of independent contractors for publicity, verifying hotel reservations for the Diamond “G” crew, etc.); and
- j. working with Steve as his emergencies required.

10. We had also sent [Ms. Stamper] to Mesquite during that week of May 2nd - 5th. [Ms. Stamper] had been working with my mother in cleaning the previous home and transporting items to the new home/office.

[Ms. Stamper] had also been irreplaceable in helping me set up the my new office so that it would be ready for the Kleinfelder depositions the coming Tuesday. While [Ms. Stamper] worked for us, she also ran errands, picked up the mail, and did whatever was asked of her to help make our life easier. Among other things, [Ms. Stamper and Ms. Johnson] were to ensure that a carpet cleaner was retrieved from the North Lakeview house for use at the house on Chaparral Drive, take a mirror and other items out of the Lakeview house and install a key box at the Chaparral Drive house.

11. The accident occurred on Friday, May 6th 2005. On that day, [Ms. Johnson and Ms. Stamper] were again coming from Toquerville to Mesquite at my direction to finish the tasks necessary to complete the office move. [Ms. Johnson and Ms. Stamper] often traveled together in company vehicles, and were driving a vehicle owned by GDC at the time of the accident.

12. . . . On May 6, 2005, the two employees were together and traveling to Mesquite for the benefit of GDC and the VDM project. Both employees were to be working in Mesquite that day primarily because of issues arising from the office move, and both would have worked there until the job was finished.

[R. at 72-76.]

The accident occurred while the two employees were traveling to Mesquite, approximately 10 minutes after they had left the Toquerville location.

Ms. Stamper's sister, Judy Bradshaw, made a workers' compensation claim and received workers' compensation benefits from the Workers' Compensation Fund on behalf of Ms. Stamper's Estate. [R. at 49-50, 60.]

The Stamper's filed their Complaint on February 12, 2007, alleging that Ms. Johnson negligently drove the GDC vehicle too fast for the existing conditions, which negligence caused Ms. Stamper's death. [R. at 2-6.]

After a period in which the parties conducted discovery, Ms. Johnson filed her Motion for Summary Judgment on June 30, 2006. [R. at 46-47.] She argued that Ms. Stamper and Ms. Johnson were co-employees under the fellow servant doctrine, and as a result, the Stampers' claims were barred by the exclusive remedy provision contained in Utah Code Ann. § 34A-2-105(1). [R. at 49-70.]

The trial court entered its Order Granting Ms. Johnson's Motion for Summary Judgment on December 11, 2008. [R. at 202-206.] It is from this Order that the Stampers appeal. [R. at 207-208.]

SUMMARY OF ARGUMENT

I. The Stampers' claims against Ms. Johnson are barred under the exclusive remedy provision of the Utah Worker's Compensation Act because at the time of the accident Ms. Stamper and Ms. Johnson were co-employees working for Cyndi Gilbert and GDC. Although Ms. Stamper and Ms. Johnson were paid by different corporate entities, the undisputed facts demonstrate that at the time of the accident, Ms. Stamper and Ms. Johnson were co-employees, working on a common

project for a common employer. Thus, the Stammers' right to recover Worker's Compensation benefits from GDC is the Stammers' exclusive remedy and their claims against Ms. Johnson are barred under Utah Code Ann. § 34A-2-105(1).

ARGUMENT

I. THE STAMPERS' CLAIMS AGAINST MS. JOHNSON ARE BARRED BY THE EXCLUSIVE REMEDY PROVISION OF THE UTAH WORKERS' COMPENSATION ACT BECAUSE THE TWO EMPLOYEES WERE CO-EMPLOYEES PURSUANT TO THE FELLOW-SERVANT DOCTRINE.

This Court has made clear that the Utah Workers' Compensation Act "is intended not only to compensate employees for job-related injuries, but also to protect them against liability for job-related conduct." Utah Home Fire Ins. Co. v. Manning, 1999 UT 77, ¶ 21, 985 P.2d 243. "The protection against suit provided by this [exclusive remedy] section extends to any employee." Utah Home Fire Ins. Co., ¶ 21 (emphasis original). Put simply, if an employee is injured during the course of her employment by a fellow employee, Worker's Compensation benefits are her exclusive remedy and she is precluded from pursuing damages from her fellow employee. Id.

This court has long recognized the policy that "the Worker's Compensation Act should be liberally construed to effectuate its purposes." Utah Home Fire Ins.

Co., ¶ 18. Consistent with that policy, this Court has stated that it is “proper to resolve doubt as to whether a worker was an employee in favor of [the worker being] an employee.” Id.; quoting Bennett v. Indus. Comm’n, 726 P.2d 427, 430 (Utah 1986). “It would indeed be inconsistent to resolve doubts in favor of a worker being considered an employee when the worker is seeking coverage but not in other situations, such as here, where the worker is being sued by another employee.” Id.

In the instant case, the trial court correctly concluded that the undisputed material facts demonstrate that the Stammers’ claims against Ms. Johnson are barred under section 34A-2-105(1) because Ms. Stamper and Ms. Johnson were co-employees when the subject accident occurred. [R. at 202-06.]

A. Ms. Stamper And Ms. Johnson Were Co-employees at the Time Of The Accident Pursuant to the Fellow-servant Doctrine.

This Court has defined “fellow servants” as individuals:

engaged in the same line of work and labor together in such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety. They should be at the time of the injury directly operating with each other in the particular business at hand, or they must be operating so that mutual duties bring them into such co-association that they may exercise an influence upon each other to use proper caution and be so situated in their labor to some

extent as to be able to supervise and watch the conduct of each other as to skill, diligence and carefulness.

Peterson v. Fowler, 493 P.2d 997, 1000 (Utah 1972); in accord, Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976).

If a fellow-servant relationship is found to exist, an injured fellow servant or her heirs are required to accept only worker's compensation benefits for injuries and cannot not maintain an action against either the employee's own actual employer or the employer of a fellow servant for negligence or wrongful death. Bambrough, 552 P.2d at 1293.

Pursuant to the cases cited above, the district court found that "[Ms. Johnson] and Ms. Stamper were, in carrying out the errand at Ms. Gilbert's direction, 'directly operating with each other in the particular business at hand.' The undisputed facts demonstrate that Ms. Johnson and Ms. Stamper were engaged in the 'same employment,' and [the Stampers'] claims are therefore barred by the exclusive remedy provision of Workers' Compensation Act." [R. at 202-03.]

In an effort to avoid the exclusive remedy provision, the Stamper's make an argument based essentially on three assertions: (1) the accident occurred while the employees were driving to a job site, and Ms. Stamper had no opportunity to

influence Ms. Johnson to use additional caution or skill in the split second before the accident occurred (Aplt. Br. at 10-11); (2) Ms. Stamper and Ms. Johnson were paid by different corporate entities (Id. at 14-15); and (3) the two employees had different job skills and duties. Id. at 11-18. The Stamper's arguments fail under Utah law and the undisputed material facts.

1. Ms. Stamper and Ms. Johnson Were So Situated That They Could Influence One Another To Use Skill And Caution While Accomplishing the Task in Which the Two Employees Were Engaged.

The Stampers first attempt to avoid application of the exclusive remedy provision by arguing that “in the short instant leading to her death” and “in the split second the vehicle began to slide,” Ms. Stamper did not have the opportunity to influence Ms. Johnson to use additional caution or skill. Aplt. Br. at 8-11. Stampers also attempt to distinguish the “dangerous physical work situations” present in the cases the district court relied upon from the activity Ms. Johnson and Ms. Stamper were engaged in, which Stampers characterize as “simply carpooling to a common job site.” Id. However, there is no basis for the Stampers' attempt to construe the holding in Peterson so narrowly.

First, the Court will note that there was no suggestion in the facts of the Peterson case that Mr. Peterson had the ability to influence his fellow workers to

use additional caution or skill in the very instant before the scaffolding fell. Peterson, 493 P.2d at 998. Likewise, in Bambrough, there is no indication that the truck driver had the ability to influence the forklift operator to use additional caution or skill in the split second before the forklift rolled over his leg. See Bambrough, 552 P.2d at 1289. In Goheen v. Yellow Freight Sys., 32 F.3d 1450 (10th Cir. 1994), it is also highly unlikely that the receiving clerk had any opportunity to influence the truck driver to use additional caution or skill in the instant before the crate fell on her. Goheen, 32 F.3d at 1451.

Moreover, Stampers have offered nothing but their own bald characterization to support the implication that there was anything more dangerous about the “physical work situations” present in these cases than there is in driving a vehicle without proper use of seat belts, traveling at appropriate speeds for conditions, etc.

In fact, whatever the task at hand the fellow-servant doctrine simply requires that the employees involved be “in such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety.” Peterson, 493 P.2d at 1000. They can be either “directly operating with each other in the particular business at hand, or” in “such co-association that they may exercise an influence upon each other to use proper caution and be so situated

in their labor to some extent as to be able to supervise and watch the conduct of each other as to skill, diligence and carefulness.” Id. (emphasis added).

As a factual matter, it is undisputed that on May 6, 2005, Ms. Stamper and Ms. Johnson were in “co-association” that required travel from Toquerville to Mesquite “to finish the tasks necessary to complete the office move” for Mrs. Gilbert and GDC.¹ [R. at 73.] As the district court noted, they were “directly operating with each other in the particular business at hand.” [R. at 202.] Moreover, the two were “so situated” that “to some extent” they could exercise “an influence” on the conduct of the “skill, diligence and carefulness” of such activities as where and how to load the vehicles, what route to take, use or non-use of seatbelts, attentiveness to the road and driving conditions, speed, etc.

Ms. Stamper and Ms. Johnson were thus able to “watch the conduct of each other,” so as to be fellow servants whatever may or may not have been possible in the “split second” before the accident. Peterson, 493 P.2d at 1000. Indeed to limit the Peterson holding as Stampers suggest would defeat the purpose of the

¹ It is also undisputed that in the six months immediately prior to the accident, Ms. Stamper and Ms. Johnson traveled between a Toquerville work site and a Mesquite work site approximately three to five times per week transporting corporate files, mail and generally assisting Mrs. Gilbert with changing office locations in Mesquite. [R. at 63-64; 72-74.]

exclusive remedy provision contrary to this Court's guidance in Utah Home Fire Ins. Co. v. Utah Home, ¶ 18 ("It would indeed be inconsistent to resolve doubts in favor of a worker being considered an employee when the worker is seeking coverage but not in other situations, such as here, where the worker is being sued by another employee.").

In this regard the Court will note that by the assertion throughout their brief that the two employees were "simply car pooling to a common job site" (see Aplt. Br. at 10, 11, 14, 18, and 23), Stampers' invoke a rule developed in the context of Worker's Compensation known as the "coming and going rule." Generally, an employee's injury does not occur in the course of employment for purposes of applying the provisions of the Worker's Compensation Act if the injury is sustained while an employee is simply going to or coming from work (Salt Lake City Corp. v. Labor Comm'n, 2007 UT 4, ¶ 19, 153 P.3d 179); thus Stampers impliedly argue that the accident did not occur during the course and scope of Ms. Stamper's and Ms. Johnson's employment.

To the extent this is Stampers' argument, it fails pursuant to the undisputed facts. The underlying premise of the "coming and going rule" is that:

it 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. Therefore, the major focus in determining whether or not the general rule should apply in a given case is on the benefit the employer receives and his control over the conduct.

Whitehead v. Variable Annuity Life Ins. Co., 801 P.2d 934, 937 (Utah 1989);

accord Salt Lake City Corp., ¶ 20. In State Tax Comm'n v. Indus. Comm'n, 685

P.2d 1051 (Utah 1984), this Court recognized that the rule should not be applied:

where transportation was furnished by the employer to the benefit of the employer; where the employer requires the employee to use a vehicle as an instrumentality of the business; where the employee is injured while upon a “special errand” or “special mission” for the employer . . .

State Tax Comm'n v. Indus. Comm'n, 685 P.2d at 1053.

Here, there is no dispute that on the day of the accident Ms. Stamper and Ms. Johnson were traveling from Toquerville to Mesquite “at [Mrs. Gilbert’s] direction to finish the tasks necessary to complete the office move” for Mrs. Gilbert and GDC, and had been provided a GDC corporate vehicle in order to complete the tasks. [R. at 73.] Thus Ms. Stamper was killed while on a “special errand” or “special mission” for her employer, namely, “to finish the tasks necessary to complete the office move” in Mesquite. The accident occurred while Ms. Stamper and Ms. Johnson were engaged in an activity that was not only incidentally beneficial to their employer, it was directly beneficial, and they were within the

course and scope of employment notwithstanding Stampers' "merely carpooling" characterization. Whitehead, 801 P.2d at 937; Salt Lake City Corp., ¶ 20.

2. The Fact That Ms. Stamper And Ms. Johnson Were Paid By Different Corporate Entities Has No Effect on Their Status As Co-employees Under the Fellow-servant Doctrine.

The fact Ms. Stamper and Mrs. Johnson were paid by distinct corporate entities does not effect their status as fellow servants. In Bambrough, for example, the plaintiff was generally employed and paid by D&L Corporation as a truck driver. Bambrough, 552 P.2d at 1289. Defendant Bethers had contracted with D&L to pick up and transfer a load of wood paneling from Bethers' business and to haul the load to Denver, Colorado. Id. When the plaintiff arrived at Bethers' business, the plaintiff employee of D&L Corporation assisted an employee generally employed and paid by Bethers in transferring the load from Bethers' trailer onto the one owned by D&L Corporation. Id. at 1289-90. During that task, the plaintiff was injured by Bethers' employee so as to require the amputation of a leg. Id. After discussing jury instructions concerning the right to control, this Court went on to affirm a judgment of dismissal based on the exclusive remedy provision, noting in pertinent part that the plaintiff and Bethers' employee were in

the “same employment” although they were paid by entirely separate companies.

Id. at 1293.

Similarly and more recently, applying Utah law the Tenth Circuit Court of Appeals found that employees paid by entirely different employers were fellow servants for purposes of the exclusive remedy provision in Goheen. In Goheen, the plaintiff was employed as a receiving clerk by Electro Controls, Inc. Goheen 32 F.3d at 1451. On the day of her accident, plaintiff was working on the loading dock and a driver employed by Yellow Freight Systems arrived to deliver a crate containing an Electro Controls product. Id. Plaintiff assisted the Yellow Freight driver in unloading the crate, and while both parties were in the truck, the driver put the pallet jack under the crate and began to raise the jack while the plaintiff pushed the crate from behind. As the driver pulled the crate from the truck, the crate became unstable and fell off the pallet jack, injuring the plaintiff. Id.

In upholding the district court’s summary judgment order dismissing plaintiff’s complaint against Yellow Freight, the court noted that:

the undisputed facts of the case indicate that Appellant Goheen participated with the Yellow Freight driver in the unloading of the crate so as to establish a fellow servant relationship between the Appellant and the driver as found by the district court.

Id. at 1452 (citing Peterson v. Fowler, 493 P.2d 997 (Utah 1972); and Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976)).

3. Similarly, the General Differences In Ms. Stamper's and Ms. Johnson's Skills And Job Duties Do Not Effect Their Status As Fellow Servants At The Time Of The Accident.

Although Stampers emphasize the fact that Ms. Johnson and Ms. Stamper had generally different job skills and duties, this Court has found fellow servant relationships to exist in situations where the employees were not only paid and employed by different employers as discussed above, but where the employees in question had completely different job skills and job duties. See e.g., Bambrough, 552 P.2d at 1293 (finding fellow servant relationship between a truck driver and fork lift operator); see also Goheen, 32 F.3d 1450 (applying Utah law to find fellow servant relationship between truck driver and receiving clerk). Indeed, the central issue in determining whether employees are fellow servants is how closely the employees were working together on a common task. Thus, even if Ms. Stamper and Ms. Johnson had completely different job duties and skills, these facts are irrelevant to their status as fellow servants under Utah law. Id.

The undisputed facts demonstrate that Ms. Johnson's and Ms. Stamper's working relationship was actually much closer than the relationship between the

employees in either the Bambrough or Goheen cases. For example, Ms. Johnson and Ms. Stamper routinely worked together on common tasks for their common employer, the Gilberts. There was “continuous crossover” between the corporate entities they worked for and job duties [R. at 66-67], and “[a]s for . . . working side by side, that’s pretty much it, Steve, Cyndi, [Johnson], and Sharon [Stamper].” [R. at 126.]

Most importantly, it is undisputed that when the accident occurred, Ms. Stamper and Ms. Johnson were engaged in a common task for their common employer, GDC through Mrs. Gilbert. Mrs. Gilbert’s uncontroverted testimony is that “[o]n that day, [Ms. Johnson] and [Ms. Stamper] were again coming from Toquerville to Mesquite at my direction to finish the tasks necessary to complete the [GDC] office move.” [R. at 73.] Whether Ms. Stamper and Ms. Johnson had generally different skills and had different job duties is irrelevant to the determination that they were co-employees when the accident occurred.

II. SUMMARY JUDGMENT BASED ON THE FELLOW SERVANT DOCTRINE IS APPROPRIATE WHEN MATERIAL FACTS ARE NOT CONTROVERTED.

Finally, the Stampers cite Braegger v. Oregon S.L.R.R., 24 Utah 391, 396 (1902) (noting that “whether two or more servants . . . are fellow servants usually

depends upon a variety of facts and is therefore a question of fact.”), and argue that “the lower court improperly granted defendant’s motion for summary judgment when disputed material facts exist.” Aplt.’ Br. at 19-25. Stampers’ argument fails because more recent precedent amply demonstrates summary judgment is appropriate if material facts are not controverted, and Stampers can point to no material facts that are genuinely disputed.

For example, in Peterson v. Fowler, 493 P.2d 997 (Utah 1972), this Court upheld the trial court’s determination that two employees were fellow servants on summary judgment and as a matter of law. See Peterson, 493 P.2d at 1000.

Although there was a trial and a dispute about jury instructions in Bambrough, this Court went beyond those issues to cite Peterson v. Fowler with approval and to imply that a fellow servant relationship existed as a matter of law “quite aside from the above discussion.” See Bambrough, 552 P.2d at 1293. And finally, in Goheen the 10th Circuit upheld the federal district court’s application of Utah law to determine a fellow servant relationship existed as a matter of law on summary judgment. Goheen, 32 F.3d at 1452.

Thus the question of whether a fellow servant relationship exists is not automatically a question for the jury as the Stampers argue. Indeed, as the rule

states, summary judgment is appropriate 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). Accordingly, where the material facts regarding whether two employees are fellow servants are undisputed, the question is appropriately resolved on summary judgment. See e.g., Peterson, 493 P.2d at 1000; Goheen, 32 F.3d at 1452.

Here, Stampers argue conclusorily that there are disputes of fact concerning 1) the extent to which there was “continuous crossover” between the two employees because of their “widely varying skill sets (although they are forced to admit there was some “crossover” (Aplts.’ Br. at 21-22); 2) the extent to which the two employees may have been involved in “distinct tasks” when they arrived in Mesquite on the day of the accident (id. at 23-24); and 3) the extent Stamper could have exercised “any meaningful influence” on Ms. Johnson with respect to “proper caution” or “their mutual safety” because a jury could find there was nothing Ms. Stamper could have done in the “sudden and unanticipated rolling over of a vehicle.” Id. at 24-25. None of these constitute genuine disputes of material fact sufficient to overturn the district court’s order of summary judgment.

First, as set forth above, neither the extent of past “continuous cross-over” nor the two employees’ “widely varying skill sets” is determinative. As the Peterson, Bambrough and Goheen cases teach, whatever past experience the employees had working together and whether they usually performed different tasks does not prevent a finding that the two were co-employees on the occasion in question.

Nor are the other “disputes” Stampers allude to material given the facts that they cannot controvert. The undisputed evidence is that on the day in question and at the time of the accident, the employees’ supervisor, Mrs. Gilbert, who was preparing for depositions in Mesquite as corporate counsel for GDC, had directed the two employees to travel in a GDC company vehicle from Toquerville to Mesquite to complete an office move necessary for GDC’s benefit. During the travel, which is when and where the accident occurred, the employees were engaged together in the “task” of traveling to Mesquite. [R. at 73.]

In so doing, and as set forth above, they were situated “in such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety.” Peterson, 493 P.2d at 1000. They were either “directly operating with each other in the particular business at hand,” or in

“such co-association that they” could “exercise an influence upon each other to use proper caution.” Id.

The fellow servant doctrine does not require more. Thus whether, when they arrived at Mesquite one or the other of the two employees might have performed some task benefitting another of the closely held corporate entities, or whether, in the instant the car started rolling Ms. Stamper could have influenced the outcome, are not determinative facts.

CONCLUSION


The undisputed facts establish that Ms. Stamper and Ms. Johnson were fellow servants in the “same employment” at the time of the accident. At the direction and control of Cyndi Gilbert, they were both engaged to finish the tasks necessary to complete a move into the GDC office for use by GDC’s counsel in upcoming depositions. In order to complete their mutual tasks, Stamper and Johnson were situated together in a GDC vehicle together and in such a relationship that they could exercise influence on each other to promote proper caution in handling the vehicle, seat belt use, etc., so as to affect their mutual safety. Under such circumstances, the Workers’ Compensation Act provides Plaintiffs’ exclusive remedy for the accident and the district court correctly ruled

Stampers' Complaint here is barred. Peterson, 493 P.2d at 1000. See also
Bambrough, 552 P.2d at 1289; Goheen, 32 F.3d at 1451-53.

Respectfully submitted this 22nd day of June, 2009.

WILLIAMS & HUNT

By

A handwritten signature in black ink, appearing to be 'R. C. Keller', written over a horizontal line.

ROBERT C. KELLER

STEPHEN T. HESTER

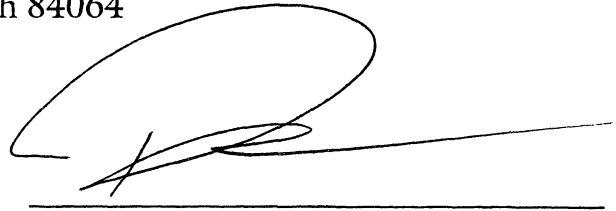
Attorneys for Defendant/Appellee

Rebecca Johnson

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2009, I caused two (2) true and correct copies of the foregoing **BRIEF OF DEFENDANT/APPELLEE REBECCA JOHNSON** to be mailed postage prepaid thereon, by first class mail in the United States mail, to the following:

Kevin J. Sutterfield
FLICKINGER & SUTTERFIELD
300 Esquire Building
3000 North University Avenue
Provo, Utah 84064

A handwritten signature in black ink, appearing to be 'KJ Sutterfield', is written over a horizontal line.