

2009

# Jeff Stamper, Aaron Stamper, David Stamper, Christopher Stamper, Sharon Stamper v. Rebecca Johnson : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

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JEFF STAMPER, AARON STAMPER,  
DAVID STAMPER, CHRISTOPHER  
STAMPER, the heirs and children of  
SHARON STAMPER, deceased,

Plaintiffs and Appellants,

v.

REBECCA JOHNSON, an individual,

Defendant and Appellee.

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Case No.: 20090062-~~SC~~ **A**

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REPLY BRIEF OF APPELLANTS

---

APPEAL FROM A DECISION OF THE FIFTH JUDICIAL DISTRICT COURT  
JUDGE ERIC A. LUDLOW

---

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## ARGUMENT

### A. THE UNDISPUTED FACTS OF THIS CASE DEMONSTRATE THAT MS. STAMPER'S CLAIM MAY NOT BE SUMMARILY BARRED BY THE FELLOW SERVANTS DOCTRINE

#### 1. Ms. Stamper and Ms. Johnson Cannot be Considered Co-Employees at the Time of the Accident Pursuant to the Fellow-Servant Doctrine.

Johnson argues that “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 they were engaged.” Appellee’s Brief at 1. In support of this position, Johnson argues that facts in Peterson v. Fowler, 493 P.2d 997,1000 (Utah 1972); Bambrough v. Bethers, 552 P.2d 1286, (Utah 1976); and Goheen v. Yellow Freight Sys., 32 F.3d 1450 (10<sup>th</sup> Cir. 1994) are not readily distinguishable from those in the present case.

In the Peterson case, Johnson argues 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.” Appellee’s Brief at 15. This analysis ignores the facts that in Peterson, Mr. Peterson had the opportunity to view the scaffolding and consider whether it had been assembled or constructed with sufficient skill or caution. Mr. Peterson’s opportunity to consider the condition of the scaffolding is inherently different from Ms. Stamper’s lack of opportunity to do anything in response to Ms. Johnson’s sudden failure to control the vehicle she was driving.

Similarly, Johnson argues that “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.” Appellee’s Brief at 15. Plaintiff respectfully disagrees with Johnson’s interpretation of the facts in Bambrough which are as follows:

The plaintiff and Mr. Shimizu (an employee of Bethers) undertook the work of transferring the load from the Bether’s trailer onto the one owned by D & L Corporation. Mr. Shimizu was operating a fork lift and the plaintiff was placing pieces of 2 X 4 lumber underneath the bundles being lifted onto his trailer. When the load had been transferred, Mr. Shimizu undertook to place a tarpaulin cover on top of the wood paneling. The tarpaulin did not come off the fork, and the plaintiff attempted to climb onto the fork to disengage the tarpaulin. The fork, while being operated by Mr. Shimizu, ran over the plaintiff causing such injuries as to require amputation of his left leg.

552 P.2d at 1290.

These facts are easily distinguished from those of the present case. The plaintiff in Bambrough clearly was an active participant in the process of unloading the load in question. He was able to see how the forklift was being operated and was in charge of how the 2 x 4 planks were being placed beneath the load. He observed a problem with a tarp being stuck in a fork of the forklift and attempted to mount the fork to get the tarp loose. Id.

The present case is inapposite to the Plaintiff in Bambrough, who was not able to appreciate the manner in which the work was being executed and was able to calculate how to best proceed. As a passenger, Ms. Stamper did nothing to place herself in harm’s



way versus the Plaintiff in Bambrough who mounted the forklift while it was in use.

Similarly, Johnson argues that in “Goheen v. Yellow Freight Sys., 32 F.3d 1450 (10<sup>th</sup> 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.” Appellee’s Brief at 15. This argument is misplaced. The facts of Goheen are as follows:

On the day of Ms. Goheen's accident, May 23, 1988, she was working on the loading dock at Electro Controls. A driver for Yellow Freight Systems arrived at the loading dock to deliver a crate containing an Electro Controls product. As such receiving clerk, Appellant Goheen was to inspect the shipment and unload the crate. When Goheen observed the position of the crate on the back of the truck, she determined that the crate was positioned so that there was insufficient room to safely place her pallet jack underneath the crate and remove the crate from the truck. She informed the Yellow Freight driver that he could either reload the crate on the truck so as to make it safe for unloading or unload the crate himself. The driver chose to unload the crate himself with Ms. Goheen assisting. While both parties were in the truck, the driver put the pallet jack under the crate and began to raise the jack while Goheen 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 Goheen.

32 F.3d. at 1451.

In Goheen, the injured plaintiff had time to evaluate the manner in which the other individual was attempting to unload the crate as well as time to “exercise influence upon” him with respect to his efforts of using “proper caution in respect to their mutual safety.” See Peterson, 493 P.2d at 1000. Despite an opportunity to influence the other worker’s

attempt to use proper caution, the plaintiff in that case failed to take actions to secure her safety. She was in a position to influence how the process of unloading the crate was to be done. In fact, the plaintiff in Goheen actually proposed the ultimate manner in which the crate was to be unloaded because she felt it was the safest way to unload the crate. 32 F.3d at 1451.

In each of the three cases detailed above, the plaintiff had time and opportunity to appreciate a danger, influence other workers to implement proper caution, or to consider safer alternatives, and/or to abort the activity altogether. In other words, each plaintiff was ultimately actively involved in the mechanism of his/her own injury and had a reasonable opportunity to change the ultimate outcome by virtue of “directly operating with [the other worker] in the particular business at hand” or by being in “such co-association that they [could] 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, 493 P.2d at 1000.

The facts in this present case do not fall under the fellow servant doctrine. Ms. Stamper and Ms. Johnson were not mutually engaged in any particular business at the time of injury. Ms. Stamper had no duty to help navigate the road as passenger in the vehicle that ultimately rolled over. She was simply sitting in the car as Johnson drove to a common job site.

As indicated in Ms. Johnson's deposition, she was traveling ten miles below the speed limit on a road that she was very familiar with when she approached a right handed curve, in the rain, applied tapped her brakes, failed to negotiate the turn, and negligently caused the vehicle to roll. (R. 145, 139.) The trial court, when finding that the two persons were fellow servants, failed to properly apply the doctrine to the circumstances at the time of the injury and failed to consider whether Ms. Stamper had any co-association relationship to exercise control or influence on the driver as to her safety.

Ms. Stamper, as a passenger, had no opportunity at the time of the injury to influence Ms. Johnson to use additional caution or skill in the split seconds that the vehicle began to slide when only seconds prior Ms. Johnson was exhibiting adequate capacity to drive safely.

Finally, as a passenger, Ms. Stamper was not in "direct operation with Johnson in the particular business at hand." See Petersen, 493 P.2d at 1000.

## **2. The Coming and Going Rule is not Applicable to the Present Case**

Johnson incorrectly states that "Stampers' invoke a rule developed in the context of Worker's (*sic*) Compensation known as the 'coming and going rule'." Appellee's Brief at 17. This is not an accurate portrayal of Plaintiffs' argument.

In advancing this argument, Johnson relies upon a series of casing establishing the "coming and going rule" including Salt Lake City Corp. v. Labor Comm'n, 153 P.3d 179

(Utah 2007). In Salt Lake City Corp., Michelle Ross (“Ross”) was a police officer employed for the Salt Lake City Police Department. Id. at 181. Per department policy, Ross was permitted to drive her patrol home when not on duty. Id. Ross was returning to her home in Tooele, Utah from a police related meeting that she had attended while off duty. Id. On the way home from the meeting, Ross negligently caused an automobile accident which resulted in injuries to occupants of the vehicle she struck and to herself. Id.

Ross applied for workers’ compensation benefits. The Court reasoned that she was entitled to receive those benefits because she was engaged in an activity that was “at least incidental to [her] employment” and because the activity was in advancement of her employer’s interests. Id. at 183.

This principal, as further described in Whitehead v. Variable Annuity Life Ins. Co., 801 P.2d 934 (Utah 1989) and State Tax Comm’n v. Indus. Comm’n, 685 P.2d 1051 (Utah 1984), relied upon by Johnson, is simply not applicable to the present case. Those cases and other similar ones involve accidents that occurred as employees were either going home from work or arriving to work, usually in their own vehicle.

In the present case, both Ms. Johnson and Ms. Stamper had arrived at work before beginning their ill fated trip from Toquerville, Utah to Mesquite Nevada. (R. 72-76.) There is no dispute that they were working at the time of the accident. They were both

formally “on the clock” during their commute. At that time, Ms. Johnson was employed paid by Diamond G Rodeos and Ms. Stamper was employed by Gilbert Development Corporation (“GDC”). (R. 69, 120, 130, 155). While they were traveling in a vehicle owned by GDC, it was not unusual for them to take whatever vehicle was available for this trip regardless of what business entity formally owned it. (*See* R. 75 & 147.)

Johnson’s somewhat forced application of the coming and going rule distracts from the critical question in this case: whether Ms. Stamper can be considered to be a fellow servant by riding as a passenger from one job site to another with an employee from another company. This Court must consider whether that activity by Ms. Stamper meets the narrow test of “directly operating with [Ms. Johnson] in the particular business at hand” or by being in “such co-association that [Ms. Stamper could] exercise an influence upon [Ms. Johnson] 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.” *See Peterson*, 493 P.2d 1000. The facts compel that no such relationship existed at the time of the crash.

Similarly, Johnson misapplies this Court’s opinion in Utah Home Fire Ins. Co. v. Manning, 985 P.2d 243 (Utah 1999) to the facts of the present case. Appellee Brief at 17. In Manning, this Court articulated the principal that any doubt of workers compensation coverage should be resolved in favor of the injured worker. That is not the inquiry in this

case. Both Johnson and Stamper had workers compensation coverage through their respective employers.

The Manning case considered the difference between an employee and an independent contractor. In the present case, there is not a question whether Ms. Stamper or Ms. Johnson were independent contractors. The question before this Court is whether they were fellow servants at the time of the crash and of Ms. Stamper's death.

Ms. Stamper had no real opportunity to influence Ms. Johnson to use additional caution in any meaningful way. Further, the two were not in "direct operation with [each other] in the particular business at hand", that of driving the vehicle. The fact that there may have been some similar work when they arrived later in the day in Mesquite is not the test. Petersen, 493 P.2d at 1000. Peterson states that fellow servants are those who "at the time of injury directly" operate "with each other in the particular business at hand . . ." 492 P.2d at 1000, (emphasis added). At the time of the accident, Ms. Stamper and Ms. Johnson were not working together in such a way as to be considered fellow servants.

Arguably, had Ms. Johnson and Ms. Stamper arrived in Mesquite safely and began moving a filing cabinet together or engaging in some other type of work where they were physically working together which resulted in Ms. Stamper's injury, then the fellow servant doctrine might apply.

It is undisputed there were numerous occasions where Ms. Stamper and Ms.

Johnson carpooled to and from Toquerville, Utah and Mesquite, Nevada, and, upon arriving, performed work independent of each other which benefitted GDC or Diamond G Rodeos. (*See* R 137-38, 74-75.)

**B. UTAH LAW DISFAVORS SUMMARY JUDGMENT WHEN THERE ARE DISPUTED MATERIAL FACTS**

As the Court is well aware, summary judgment is disfavored when there are disputed material facts and even when the understanding, intention and consequences of facts are disputed. Sandberg v. Klein, 576 P.2d 1291 (Utah 1977). Similarly, when considering a motion for summary judgment, all facts must be viewed in the light most favorable to the non-moving party. E.g., Bowen v. Riverton City, 656 P.2d 4334, 436 (Utah 1982).

The trial court erred in granting Johnson' Motion for Summary Judgment, because it is uncontroverted that at the time of the accident Ms. Johnson was traveling on a road that she was very familiar with when she approached a right handed curve in the rain, tapped her brakes, and negligently failed to negotiate the turn, causing the vehicle to roll. (R. 145, 139.)

Assuming, arguendo, this Court finds that the issue of fellow servant should be submitted to the jury, based on the above facts, a jury could reasonably conclude that due to the unanticipated nature of the rollover, there may have been nothing Ms. Stamper could have done to exercise any meaningful influence upon Ms. Johnson with respect to

“proper caution” or “their mutual safety.”

There also exists a jury issue regarding whether the work the two were to engage in upon arriving in Mesquite was for the exclusive benefit of one company or another given the facts that (a) the two had different skill sets, (b) Johnson was to perform some work for Diamond G that day and, (c) the history that Johnson’s work for Diamond G often included work that benefitted other Gilbert companies.

Arguendo, a jury should receive an instruction giving it the legal definition or test of what constitutes “fellow servants” and be allowed to apply the facts of this case in determining if Ms. Stamper and Defendant fall within that definition.


### **CONCLUSION AND PRECISE RELIEF SOUGHT**

Appellants request this Court reverse the trial court’s Order Granting Summary Judgment and rule that the fellow servant doctrine does not apply to the facts of this case. Alternatively, this Court should reverse the trial court and order the court to allow the Complaint to be amended to include Johnson’s employer, Diamond G, and order a trial to be held on the issue of whether the activities engaged in by the two persons in this case at the time of Stamper’s death constitute them working as fellow servants for the same employer.



DATED this 27 day of July, 2009.

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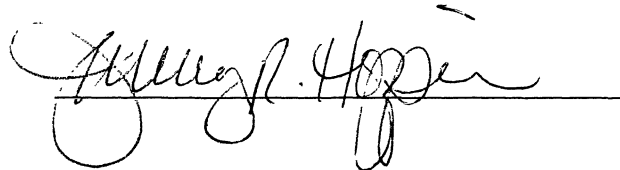
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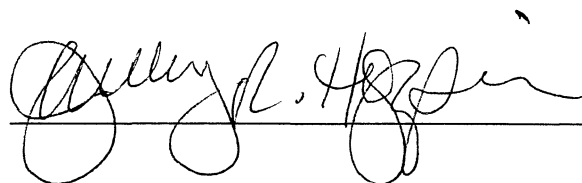
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