

2009

Jeff Stamper, Aaron Stamper, David Stamper, Chirstopher Stamper v. Rebecca Johnson : Brief of Appellants

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

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.

Case No.: 20090062-~~SC~~ CA

BRIEF OF APPELLANTS

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

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UTAH APPEALS

FILED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
ISSUES PRESENTED AND STANDARDS OF REVIEW	1
CONTROLLING STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
STATEMENT OF RELEVANT FACTS	4
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. THE FELLOW SERVANT DOCTRINE WAS NEVER INTENDED TO APPLY TO FACTS OF THIS CASE.	8
II. UTAH LAW DISFAVORS SUMMARY JUDGMENT WHEN THERE ARE DISPUTED MATERIAL FACTS.	18
CONCLUSION AND PRECISE RELIEF SOUGHT	25
ADDENDUM	29

TABLE OF AUTHORITIES

UTAH CASES

Peterson v. Fowler, 493 P.2d 997 (Utah 1972)	1, 8, 9, 11, 18, 24
Bambrough v. Bethers, 552 P.2d 1286, (Utah 1976)	8, 11
Bearden v. Croft, 201 UT 76, 31 P.3d 537 (Utah 2001)	1
Blue Cross & Blue Shield v. State, 779 P.2d 634, 636-637 (Utah 1989)	1
Bowen v. Riverton City, 656 P.2d 4334, 436 (Utah 1982)	19
Braegger v. Oregon S.L.R.R., 24 Utah 391, 396 (1902)	19
Ferree v. State, 784 P.2d 149, 151 (Utah 1989)	2
Goheen v. Yellow Freight Sys., 32 F.3d 1450 (10 th Cir. 1994)	8
Merrill v. Oregon S.L.R.R., 29 Utah 264 (1905)	19
Robinson v. Mount Logan Clinic, LLC, 2008 UT 21, 182 P.3d 333 (2008)	2
Salt Lake City Corp. v. James Constructors, Inc., 760 p.2d 42 (Utah Ct. App. 1988) . . .	3
Sandberg v. Klein, 576 P.2d 1291 (Utah 1977)	18
Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 519 (Utah 1997)	1, 2
Toone v. Weber County, 2002 UT 103, 57 P.3d 1079	2
Wilcox v. Geneva Rocks Corporation, 911 P.2d 367, 368 (Utah 1996)	2

UTAH STATUTES

Utah Code Ann. §34A-2-105(1)	3
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STATEMENT OF JURISDICTION

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

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue #1: Did the district court err in determining that the undisputed material facts established that the Defendant and Plaintiff's decedent, Ms. Stamper, were co-employees at the time of the accident giving rise to this action for wrongful death?.

This issue was raised inter alia in Plaintiffs' Memorandum in Opposition of Defendant's Motion for Summary Judgement (R. 118-158).

In reviewing a grant of summary judgment, an appellate court reviews "the facts in the light most favorable to the losing party below" and gives "no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness." Bearden v. Croft, 201 UT 76, 31 P.3d 537 (Utah 2001) citing to Blue Cross & Blue Shield v. State, 779 P.2d 634, 636-637 (Utah 1989).

Correctness is also the standard of review for questions of statutory interpretation. Id.; Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 519 (Utah 1997).

Issue #2: Did the trial court misapply the law in concluding that Plaintiffs' claims for the wrongful death of their mother, as applied to the facts of this case, were barred by the exclusive remedy provision of the workers compensation act?

This issue was raised inter alia in Plaintiffs' Memorandum in Opposition of

Defendant's Motion for Summary Judgement (R. 118-158.)

The proper interpretation of a statute is a question of law, which is reviewed for correctness. Toone v. Weber County, 2002 UT 103, 57 P.3d 1079.

In reviewing a grant of summary judgment the appellate court must determine whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact. Stephens Supra, 935 P.2d at 519, quoting Wilcox v. Geneva Rocks Corporation, 911 P.2d 367, 368 (Utah 1996), quoting Ferree v. State, 784 P.2d 149, 151 (Utah 1989).

Issue #3: Did the trial court err in finding as a matter of law that there were no genuine issues as to any material fact as to whether Decedent and Defendant were fellow servants or engaged in the same employment at the time of the crash and Decedent's death?

This issue was raised in Plaintiffs' Memorandum in Opposition of Defendant's Motion for Summary Judgement (R. 118-158).

When determining whether the trial court properly found as a matter of law that there were no genuine issues as to any material fact as to whether Decedent and Defendant were fellow servants or engaged in the same employment at the time of the crash and Decedent's death the appellate court must review all facts and inferences in the light most favorable to the non-moving party, in this case the Appellants. E.g., Robinson

v. Mount Logan Clinic, LLC, 2008 UT 21, 182 P.3d 333 (2008). Submission of evidence must be looked at in the light most favorable to the non-moving party. E.g., Salt Lake City Corp. v. James Constructors, Inc., 760 p.2d 42 (Utah Ct. App. 1988).

CONTROLLING STATUTORY PROVISIONS

Utah Code Ann. §34A-2-105(1)

The right to recover compensation pursuant to this chapter for injuries sustained by an employee, whether resulting in death or not, is the exclusive remedy against the employer and is the exclusive remedy against any officer, agent, or employee of the employer and the liabilities of the employer imposed by this chapter is 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 an action at law may not 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. Nothing in this section prevents an employee, or the employee's dependents, from filing a claim for compensation in those cases in accordance with Chapter 3, Utah Occupational Disease Act.

STATEMENT OF THE CASE

This is an appeal in a civil case from an order of the Fifth Judicial District Court granting Defendant's Motion for Summary Judgement, entered December 11, 2008. (R. 201-206.) Plaintiffs timely filed their notice of appeal on January 9, 2009, and it was entered on the District Court's docket on January 12, 2009. (R. 207-208.)

STATEMENT OF RELEVANT FACTS

1. On May 6, 2005, Rebecca Johnson was driving a Ford Explorer owned by Gilbert Development south on I-15 in Washington County, Utah at or near mile marker 23. (R. 5)

2. Sharon Stamper was a passenger in that vehicle. (R. 69, 125.)

3. Johnson negligently failed to control the vehicle in that she ran of the right side of the road causing the vehicle to over turn. (R. 69, 125.)

4. The Explorer rolled over one and 1/4 times and landed on the passenger side causing Sharon Stamper to die as a result of her injuries. (R. 5.)

5. The auto crash in question happened in such an abrupt and unexpected way that Ms. Stamper had no opportunity to influence or exercise upon Defendant to use proper caution. (R. 145)

6. Defendant while allegedly driving below the speed limit simply and without warning negligently failed to safely negotiate a turn in the road. (R. 145.)

7. For several years prior and at the time of the accident, Sharon Stamper was employed by Gilbert Development Corporation ("GDC"), and Rebecca Johnson was employed by Diamond G Rodeos, Inc. ("Diamond G"). (R. 69, 120, 130, 155)

8. Both GDC and Diamond G are closely held corporations largely or solely owned by Steve Gilbert. (R. 69-68)

9. GDC is a general engineering and general contractor company generally involved in heavy equipment leasing and land development. (R. 122, 69-68.) It has several offices, including one in Mesquite, Nevada and one in Toquerville, Utah. (R. 127, 128.)

10. Diamond G is a company which is involved in producing and providing services for rodeos. (R. 154). Its main office is in Toquerville, Utah, but some of its files are kept in Mesquite, Nevada. (R. 128, 127.)

11. As an employee of Diamond G, Rebecca Johnson had work duties and specialized skills that were distinct from those of Sharon Stamper; including working with computers, welding, electrical work, and landscaping. (R. 143, 126, 67.)

12. Additionally, Defendant Johnson was principally involved in work for Diamond G including traveling out of state for Diamond G to help produce rodeos by setting up arenas, checking on textures, sorting, feeding, watering and otherwise caring for the animals, as well as doing public relations work, data entry, compiling statistics on the animals, getting clowns and bull fighters, administering medications to the livestock, and used equipment. (R. 155-154, 146, 130-128, 126, 121, 66.)

13. In contrast, Ms. Stamper was heavily and principally involved in cooking and cleaning. (R. 154, 143, 120, 67.)

14. Ms. Stamper and Ms. Johnson sometimes worked together and overlapped

tasks, but were usually engaged in different tasks and work. In the 18 months prior to the crash, they often carpooled together from Toquerville to Mesquite. For example, Ms. Johnson would sometimes help transport records to Toquerville and then work on Gilbert development projects as directed by Mr. and/or Mrs. Gilbert. Johnson's duties for Diamond G. included general business errands and anything Gilbert needed her to do. (R. 143, 67, 65-63.)

15. For the six months prior to the crash, as an employee of Diamond G., Defendant Johnson drove between Toquerville and Mesquite almost every day, sometimes with Stamper as a passenger and sometimes without Stamper. (R. 146, 64, 63.)

16. On May 6, 2005, Johnson was expected to work on several specialized duties, some of which would benefit the businesses of Gilbert and Diamond G, and at least one of which would be of benefit only to Diamond G. Stamper was expected to cook, clean, and run errands. (R. 75-74.)

17. Johnson was paid by Diamond G. on a weekly basis for her duties, whether she worked in Toquerville or Mesquite. (R. 155, 146.)

18. When working on jobs where there was some crossover in job duties performed between Johnson and Stamper, neither person supervised the work of the other. (R. 152, 151, 143, 142, 120.)

19. Johnson drove any available vehicle and Stamper was always a passenger when they rode together. (R. 136, 130-129, 127.)

SUMMARY OF ARGUMENT

The lower court ruled that Ms. Stamper and Ms. Johnson were engaged in the “same employment,” and that Plaintiffs’ claims are therefore barred by the exclusive remedy provision of the Workers’ Compensation Act. (R. 202.)

The fellow servant doctrine, as identified and interpreted by Utah Courts, was never intended to apply to the facts of this case. Stampers’ claims for the wrongful death of their mother, a passenger in a single car rollover, cannot be barred by the Workers Compensation Act.

Ms. Stamper and Ms. Johnson were not fellow servants or engaged in the same employment at the time of Ms. Stamper’s death. Ms. Stamper and Ms. Johnson were employed by different companies, had different skill sets, and Stamper had no opportunity to influence Johnson, the driver, to use proper caution in the short instant leading to her death. Under these facts, they cannot properly be considered fellow-servants as defined by Utah case law.

Assuming, *arguendo*, the fellow servant doctrine applies to this carpooling situation, there are genuine issues of material fact precluding summary judgment. The lower court ignored several genuine issues as to material facts when summarily ruling

Ms. Stamper and Ms. Johnson were fellow servants or engaged in the same employment at the time of the accident leading to Ms. Stamper's death.

ARGUMENT

I. THE FELLOW SERVANT DOCTRINE WAS NEVER INTENDED TO APPLY TO FACTS OF THIS CASE.

Generally speaking, an employee of one company may make a claim for injuries or death against an employee of another company. The fellow servant doctrine has been recognized as an exception to that general rule in limited situations to prevent that recovery. The fellow servant doctrine requires that workers be in such co-association that they may influence each other to use proper caution and safety and be situated in their labor to the 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).

A. Ms. Stamper was not in an position to influence Ms. Johnson in any way with respect to how she was driving and had no notice or warning that she was about to negligently overturn the vehicle.

Defendant's Motion for Summary Motion relied primarily upon three cases in making its argument for summary judgment, Peterson v. Fowler, 493 P.2d 997 (Utah 1972); Bambrough v. Bethers, 552 P.2d 1286, (Utah 1976); and Goheen v. Yellow Freight Sys., 32 F.3d 1450 (10th Cir. 1994). These cases all involve dangerous physical work situations where workers were laboring side by side and where the injured parties

received their injuries as a direct result of trying to accomplish the ultimate task at hand in co-association with the defendant who was working with them. In Peterson, the deceased was working with others high above the ground on suspended scaffolding attending to ceiling tile when the scaffolding collapsed and he fell to his death. In Bambrough, the injured party was transferring lumber with another worker from one trailer to another when part of the load fell on him causing his leg to be amputated. In Goheen, the injured party was working with an other worker to unload a 2,000 pound crate from a truck when it fell on her thereby causing her injury.

In these types of cases, the rule set forth in Peterson establishing what constitutes fellow servants may be logically applied to those relevant facts. Peterson states that fellow servants are those who “at the time of injury directly” operate “with each other in the particular business at hand,” whose “mutual duties bring them into such co-association that they may exercise an influence upon each other to use proper caution and be 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.” 492 P.2d at 1000 (emphasis added). The injured person in Peterson actually had the opportunity to “influence” the other workers, including those who assembled the scaffolding, to “use proper caution.” Similarly, the injured party in Peterson was “situated in [his] labor to some extent as to be able to supervise and watch the conduct of [other workers] as to skill, diligence and

carefulness.” Namely, he could observe the other workers as they worked and observe the construction and subsequent use of the scaffolding.

Similarly, in Bambrough, the injured party could see how the other worker was approaching or planning the unloading of the lumber and was positioned such that he could make suggestions or otherwise “supervise” or “influence” how the unloading of the lumber was to take place. The same can be said of the injured party in Goheen with respect to the unloading of the 2,000 pound crate.

The real test or inquiry in those cases focuses upon (1) the activities engaged in at the time of the injury, and (2) whether those separately employed employees had such co-association at the time of injury to supervise, or influence safety or skill upon each other to prevent the injury.

The facts in this case do not fall under the fellow servant doctrine. Ms. Stamper and Defendant were simply carpooling to a common job site when Stamper’s death occurred. As indicated in Defendant’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 time of the injury and failed to consider whether Stamper had any co-association relationship at that

time to exercise control or influence on the driver.

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

Further, she was not in “direct operation with Johnson in the particular business at hand.” Petersen, 493 P.2d at 1000. This scenario is not the type of scenario considered in Peterson, Bambrough, or Goheen, where workmen were engaged in common co-associated activities at such a time and in such a manner that they were afforded the opportunity to influence the behavior of each other in their working environment at the moment of injury in an attempt to maintain their own safety.

B. Defendant and Ms. Stamper were not Engaged in the “Same Employment” as Contemplated by the Utah Supreme Court.

The Utah Supreme Court in Bambrough held that fellow servants are those engaged in the “same employment.” 552 P.2d at 1293. As discussed at length above, the court defines those who are in the same employment as those who can influence each other to exercise care, safety, skill, diligence, etc.

In the present case, there is ample evidence that Ms. Stamper and Defendant simply carpooled to Mesquite together and then engaged primarily in distinct work. The act of these two separately employed persons carpooling together happened 3-5 times per

week for the prior 6 months, regardless of their duties on those days. (R. 146, 127)

For example, Defendant stated in her deposition that, “I would take Gilbert Development files with Sharon to Mesquite and hand them over to Cindy. And then me and Steve would do Gilbert Development projects.” (R. 138.)

Here, Defendant indicates that it was normal for her to separate herself from Ms. Stamper upon arriving in Mesquite and then go and do “Gilbert Development projects” and some Diamond G work with Mr. Gilbert. In other words, Defendant and Ms. Stamper would carpool to Mesquite and then do independent assignments.

The most illustrative evidence showing this division of labor between Defendant and Ms. Stamper is set forth in Ms. Gilbert’s Affidavit, wherein she states:

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 [Defendant] 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.

Affidavit of Cyndi W. Gilbert. (R. 137-138, 75-74.)

This list details specific chores or assignments that **Defendant** was to accomplish. In other words, this list describes the work or nature of employment in which Defendant was engaged. In contrast, Ms. Gilbert's sets forth a list of chores or as assignments that Ms. Stamper was to accomplish:

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

Affidavit of Cyndi W. Gilbert (emphasis added). (R. 137, 75.)

Clearly, Defendant and Ms. Stamper had distinct assignment which they were to complete. Defendant had mechanical work, new phone set up and training, errands, light

bulb replacement, transporting mail, files and legal supplies, ordering flowers, and handling issues for the Rodeo.

On the other hand, Decedent's tasks were almost entirely spent in cleaning and running errands. Carpooling to an office together, after which you separate, work with other persons, and do separate tasks requiring separate skills for separate and sometimes related companies, can hardly be deemed to be acting as fellow servants. At no time has Defendant argued that decedent did Diamond G Rodeo work. It was negligent driving that killed Stamper, which had nothing to do with any tasks of Johnson and Stamper which may have had some overlap later in the day in Mesquite.

Further highlighting the distinction between the work and responsibilities is testimony by Mr. Steve Gilbert, owner of Gilbert Development and Diamond G Rodeo, as follows:

Q. [By Mr. Sutterfield] I understand they were employed by different companies. You explained that to us, right?

A. [By Mr. Gilbert] Well, Sharon [**Stamper**] **has always been by Gilbert Development Corporation** because she has **cleaned the offices**, and there are several offices. . . . And **cooked for a lot** of corporate -- well, for almost -- I don't think there was ever a corporate party that she wasn't over. And even if they were catered, she did all the setup. I mean there have been

times we've got three, four hundred people at the party. . . . And just a corporate deal. And so she would set up the tables, make sure everything there is in place, and of course there was a place for Becky [Johnson], Fred and the ranch hands would jump in and help them set up corporate things for Gilbert Development, whatever. . . . But she's -- **Sharon's always worked for Gilbert Development and Becky always worked for the rodeo [Diamond G Rode] because Sharon took care of for the most part Gilbert Development Corporation, and Becky took care of getting rodeo clowns and bullfighters and things of that nature** (emphasis added.)

(R. 154.)

It seems clear that Ms. Stamper was almost exclusively involved in cooking and cleaning for Gilbert Development while Defendant was almost exclusively engaged in the work of Diamond G Rodeos.

Plaintiffs do not dispute that Mr. Gilbert testified that there was “continuous crossover” between duties assigned to Ms. Stamper and Defendant. Plaintiffs do dispute that in fact there was “continuous crossover” between the assignments given to Ms. Stamper and Defendant, especially on the day of the crash. The depositions of Mr. Gilbert and of Defendant, when read as a whole, suggest that Ms. Stamper was usually involved in cooking and cleaning for Gilbert Development while Defendant was almost

exclusively engaged in the work of Diamond G Rodeos which included some overlap in common projects. See Johnson Depo. pages 19-27 and Gilbert Depo. pages 25-27. (R. 120, 152, 128-126.) The fact that separately employed persons were involved in similar work in cleaning and organizing offices and transporting various files in both Diamond G and Gilbert Development does not make them shared or fellow servants under the law for injury claims.

Additionally, Ms. Stamper and Defendant had widely varying skills sets which indicates that they actually did not do as much “crossover” work as suggested by Defendant. Defendant describes herself in her deposition as a “computer specialist” and indicates that she did welding, landscaping, electrical work, and data entry. Similarly, Defendant was heavily involved in rodeo production for Diamond G Rodeo. Defendant was engaged in a wide range of activities concerning the rodeo production including: feeding, sorting, unloading, vaccinating and scoring animals, marketing, and scheduling of clowns, See Johnson Depo. pages 12, 14-17, 19, 28. (R. 130-128.) In contrast, Ms. Stamper was heavily involved in cooking and cleaning:

Q. [By Mr. Sutterfield]: Was there a pecking order in terms of their relationship in terms of who was more of the boss? Were they on an equal footing if they did things together: Did you mostly rely on [Defendant] to direct the affairs of the work and tell her what to do or was it [Ms.

Stamper]?

- A. [By Mr. Gilbert]: No. **[Defendant] had nothing to do with [Ms. Stamper] as far as direction. [Ms. Stamper] basically handled cleaning offices and taking care of catering for anything for Gilbert Development Corporation parties**, cleanup after them, cook (emphasis added). [Ms. Stamper] did a lot of cooking either in Mesquite or in our . . . A lot of the time, you know, large corporations will say we're going to have a meeting and we just eat it at the house and sit on the patio and talk, and [Ms. Stamper] would cook. She was a great cook. So she would cook and clean up and all that. But she had nothing to do with [Defendant].

Gilbert Depo. pages 25-26. (R. 20.)

In short, the evidence suggests that Ms. Stamper and Defendant operated in distinct spheres, doing distinct work for different companies, and sometimes Defendant was engaged in minimal or nominal “crossover” work.

On the day of the accident, “Becky and Sharon were again coming from Toquerville to Mesquite at [Ms. Gilbert’s] direction to finish the tasks necessary to complete the office move.” Affidavit of Cyndi W. Gilbert. (R. 136, 75-74.) In sum, during the days leading up to the auto accident Defendant and Ms. Stamper were given distinct and separate assignments to assist in the move. Ms. Stamper was to finish her

assignments and Defendant was to finish her assignments.

On the day of the accident, Ms. Stamper and Defendant began to carpool to Mesquite so as to finish their individual work. This division of labor is hardly the working situation, nexus in time, and manner of activities where influence and conduct can be effected relating to the injury contemplated by the Utah Supreme Court in the cases cited by the parties.

Each woman had distinct tasks to perform. At the time of her death, Stamper had no opportunity to “exercise an influence upon [Johnson] to use proper caution and be 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, 492 P.2d at 1000. This is especially true when Defendant **always drove** the vehicle when she was with the Decedent. See Johnson depo at 21-22. (R. 136). “Sharon [Stamper] never drove.” For the foregoing reasons, Ms. Stamper and Defendant may not properly be defined as “fellow servants.”

II. 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).

A. The Lower Court Improperly Granted Defendant's Motion for Summary Judgment When Disputed Material Facts Exist.

Assuming, *arguendo*, the fellow servant doctrine applies to the facts of this case, there are genuine issues of material fact precluding summary judgment. The “fellow servants” doctrine is one based in common law. The Supreme Court of Utah has long held that while the definition of “fellow servants” may be a question of law, whether individuals of any particular case fall under that definition is generally a question of fact.

Doubtless the question whether two or more servants, **working for the same master**, are fellow-servants, **usually depends upon a variety of facts and is therefore a question of fact**. The definition of fellow-servants, however, may be a question of law for the court, but it is a question of fact, to be determined from the proof, whether the case is such as to fall within the definition (citations omitted). In the case at bar the court stated the definition of fellow-servants in the language of the statute, and submitted the question whether, under the facts and circumstances in evidence, the relation of fellow-servants existed, to the jury. This was proper . . . (emphasis added).

Braegger v. Oregon S.L.R.R., 24 Utah 391, 396 (1902); See also Merrill v. Oregon S.L.R.R., 29 Utah 264 (1905).

In describing its reasoning in its Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion to Amend, the lower court cited numerous facts

that it deemed to be undisputed.

First, the lower court stated, “the course of dealing within the two closely held corporations demonstrates a substantial overlap between the duties of each employee performed.” (R. 205.) In support of this proposition, the court cites to testimony by the Mr. Steve Gilbert, owner of Gilbert Development and Diamond G Rodeo, as follows:

Mr. Gilbert testified about Ms. Johnson, “I will say she did Gilbert Development chores or intermediate stuff periodically all the time, but she got paid by Diamond G Rodeos. But there was continuous crossover.

(R. 205.)

Plaintiff does not disagree that Mr. Gilbert made this statement; however, Plaintiffs dispute that this characterization of Ms. Johnson’s work is accurate. There are material facts that indicate that Ms. Stamper always worked for GDC doing cleaning and cooking type work while that Ms. Johnson was primarily and almost exclusively involved with Diamond G Rodeo affairs, which included, from time to time, work on GDC projects. Mr. Gilbert testified:

Q. [By Mr. Sutterfield] I understand they were employed by different companies. You explained that to us, right?

A. [By Mr. Gilbert] Well, Sharon [**Stamper**] **has always been by Gilbert Development Corporation** because she has **cleaned the offices**, and there are several offices. . . . And **cooked for a lot** of corporate -- well, for

almost -- I don't think there was ever a corporate party that she wasn't over. And even if they were catered, she did all the setup. I mean there have been times we've got three, four hundred people at the party. . . . And just a corporate deal. And so she would set up the tables, make sure everything there is in place, and of course there was a place for Becky [Johnson], Fred and the ranch hands would jump in and help them set up corporate things for Gilbert Development, whatever. . . . But she's -- **Sharon's always worked for Gilbert Development and Becky always worked for the rodeo [Diamond G Rode] because Sharon took care of for the most part Gilbert Development Corporation, and Becky took care of getting rodeo clowns and bullfighters and things of that nature** (emphasis added).

(R. 154.)

The record indicates that Ms. Stamper and Defendant had widely varying skills sets which indicates that they actually did not do as much “crossover” work as suggested by Defendant. See Johnson Depo. pages 19, 28 (R. 155, 154, 146, 129, 128, 126, 66.) Defendant describes herself as a “computer specialist” and indicates that she did welding, landscaping, electrical work, telephone set up, and training. Similarly, Defendant was heavily involved in rodeo production for Diamond G Rodeo including: traveling, marketing, scheduling of clowns and bull fighters, scoring, and feeding and vaccinating

animals. Id. In contrast, Ms. Stamper was heavily involved in cooking and cleaning:

Q. [By Mr. Sutterfield]: Was there a pecking order in terms of their relationship in terms of who was more of the boss? Were they on an equal footing if they did things together: Did you mostly rely on [Defendant] to direct the affairs of the work and tell her what to do or was it [Ms. Stamper]?

A. [By Mr. Gilbert]: No. **[Defendant] had nothing to do with [Ms. Stamper] as far as direction. [Ms. Stamper] basically handled cleaning offices and taking care of catering for anything for Gilbert Development Corporation parties**, cleanup after them, cook (emphasis added). [Ms. Stamper] did a lot of cooking either in Mesquite or in our. A lot of the time, you know, large corporations will say we're going to have a meeting and we just eat it at the house and sit on the patio and talk, and [Ms. Stamper] would cook. She was a great cook. So she would cook and clean up and all that. But she had nothing to do with [Defendant].

Gilbert Depo. pages 25-26. (R. 120.)

In short, the lower court ignored evidence suggesting that Ms. Stamper and Defendant operated in distinct spheres, doing distinct work for different companies and only engaged in minimal or nominal “crossover” work.

The lower court also held that “the undisputed facts show Ms. Stamper and Ms. Johnson traveled together between various job sites during working periods frequently during six months preceding this accident.” (R. 204.) However, the court ignored the date and time of the injury and evidence that upon arrival in Mesquite, Ms. Stamper and Defendant did distinct work with other persons upon arriving at those destinations. It is clear from the record that Defendant and Ms. Stamper routinely engaged in different tasks and work after carpooling together from Toquerville to Mesquite, and that these distinct tasks occurred during the week of May 2-5, 2005 as described by Ms. Gilbert’s affidavit.

These facts contradict the conclusion that Ms. Stamper and Defendant engaged in the same work after arriving in Mesquite or that they were or would have been fellow servants in their duties on May 6, 2005. Ms. Gilbert’s own affidavit indicates, or at the very least raises issues of fact, that Johnson was intended to do separate work for Diamond G. Rodeo on May 6, 2005, including:

- (a) getting the phone system up and running (benefitting both GDC and Diamond G) and training the Gilberts on its use;
- (b) determining what light bulbs worked in the two homes and office (benefitting both GDC and Diamond G);
- (c) transporting mail and files to and from Toquerville (benefitting both);
- (d) transporting legal supplies (benefitting both);

- (e) handling rodeo logistical issues (benefitting Diamond G. Rodeo only) (emphasis added); and
- (f) working with Steve Gilbert as required (benefitting one or both entities). (R. 75-74.)

Assuming *arguendo*, the fellow servant doctrine applies, the jury should be allowed to determine whether the relationship of fellow servants existed as to Stamper and Johnson's duties on May 6, 2005. (R. 149-147.)

The lower court ignored these disputed facts and did not view them in the light most favorable to the Plaintiffs as required by law.

Ms. Stamper and Defendant are fellow servants if, among other considerations, they had "such personal relations" which allowed them to "exercise an influence upon each other of proper caution in respect of their mutual safety." This determination must be made "at the time of injury directly operating with each other in the particular business at hand." Peterson v. Fowler, 493 P.2d 997, 1000 (Utah 1972) (emphasis added).

While appellants believe this Court can determine the issue for correctness that the fellow servant doctrine does not apply to this case, assuming, *arguendo*, it has application, this type of fact intensive inquiry is precisely the type of question to be presented to a trier of fact.

A jury could find that (a) because the death of Ms. Stamper was caused by the

sudden and unanticipated rolling over of a vehicle there would have been nothing Ms. Stamper could have done to exercise any meaningful influence upon Defendant with respect to “proper caution” or “their mutual safety”; (b) there did not exist such a personal relationship to allow such influence by Stamper who never drove; (c) the anticipated duties of each person to be performed on May 6, 2005 would not have placed these two separately employed persons in such co-association that Stamper could exercise an influence upon Johnson to use proper caution or to watch Johnson’s conduct; or (d) there was insufficient crossover in their expected duties that day with Johnson primarily engaged in Diamond G. work and Stamper engaged in GDC office and home cleaning work. A positive jury finding on any of the four alternatives would defeat the fellow servant exclusion and allow Plaintiffs relief for the death of their mother.

A jury should receive an instruction giving them 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.

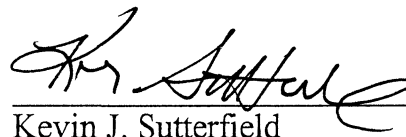
CONCLUSION AND PRECISE RELIEF SOUGHT

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 18 day of May, 2009.

FLICKINGER & SUTTERFIELD


Kevin J. Sutterfield

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2009, I caused the foregoing **BRIEF OF APPELLANT** to be delivered for filing at the Utah Supreme Court, and caused a true and correct copy of the foregoing to be delivered to each of the following additional parties, by the method indicated below:

Sent Via:

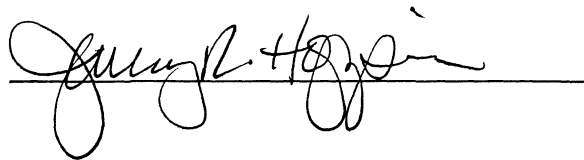
- ☐ U.S. Mail (postage prepaid)
- ☐ Personal/Hand Delivery
- ☐ Federal Express Delivery

Clerk of Court
UTAH SUPREME COURT
450 S. State Street
Salt Lake City, UT 84114

Sent Via:

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- ☐ Federal Express Delivery

Robert C. Keller
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145
Attorneys for Appellee Rebecca Johnson



CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2009, I caused compact disks containing copies of the **BRIEF OF APPELLANT** in searchable PDF format to be delivered for filing at the Utah Supreme Court and to each of the following additional parties, by the method indicated below:

Sent Via:

- ☐ U.S. Mail (postage prepaid)
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Clerk of Court

UTAH SUPREME COURT

450 S. State Street

Salt Lake City, UT 84114

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Robert C. Keller

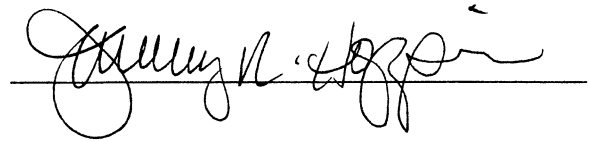
WILLIAMS & HUNT

257 East 200 South, Suite 500

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Salt Lake City, UT 84145

Attorneys for Appellee Rebecca Johnson

A handwritten signature in black ink, appearing to read "Robert C. Keller", is written over a horizontal line.

ADDENDUM

1. A copy of the Fifth Judicial District Court's Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiffs' Motion to Amend

FILED
FIFTH DISTRICT COURT
2008 DEC 11 PM 1:33
WASHINGTON COUNTY

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, ~~STATE OF UTAH~~

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

Plaintiffs,

vs.

REBECCA JOHNSON,

Defendant.

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFFS' MOTION
TO AMEND**

Case No. 070500331

Judge Eric A. Ludlow

The Court held a hearing on Defendant's Motion for Summary Judgment and Plaintiffs' Motion to Amend on October 22, 2008. Plaintiffs were represented by Kevin J. Sutterfield of Flickinger & Sutterfield, P.C.; Defendant was represented by Robert C. Keller of Williams & Hunt. The Court, having considered the arguments of counsel at the hearing and in the briefs, and having reviewed the motions, the pleadings, and the other documents in this matter, now rules as follows:

Under Utah Rule of Civil Procedure 56(c), summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." However, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this

rule, must set forth *specific facts* showing that there is a genuine issue for trial,” *id.* at (e) [emphasis added.] It is not sufficient, then, to merely offer an alternate interpretation of uncontroverted facts.

The Court determines that the undisputed material facts establish that Defendant and Plaintiffs’ decedent, Ms. Stamper, were co-employees at the time of the accident giving rise to this action. The Court notes, as Plaintiffs point out, that Ms. Stamper’s paycheck came from Gilbert Development Corporation (GDC), while Ms. Johnson’s came from Diamond G Rodeos, Inc., and that Ms. Stamper’s work involved a somewhat distinct “skill set” from Ms. Johnson’s, and vice-versa. However, the course of dealing within the two closely-held corporations demonstrates a substantial overlap between the duties each employee performed. Mr. Gilbert testified about Ms. Johnson, “I will say that she did Gilbert Development chores or intermediate stuff periodically all the time, but she got paid by Diamond G Rodeos. But there was continuous crossover.” (Steve Gilbert Depo. 57:20-23.)¹ In paragraph 10 of her affidavit, Ms. Gilbert states regarding the circumstances of the office move the week before the accident,

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 item out of the Lakeview house and install a key box at the Chaparral Drive house.

In regard to her job responsibilities, Ms. Johnson testified, “I pretty much did anything Steve [Gilbert] needed me to do, whether it was with Diamond G Rodeos or Gilbert Development,

¹ Mr. Gilbert also testified in his deposition that though the women worked for different entities and had different duties, “There was overlap all the time” (27:17). When Ms. Stamper cooked for large corporate functions, for example, “Becky would certainly jump in and help ... with whatever Sharon needed” (25:7-8).

anything that had to do with animals, helping with the construction at his new house, running ... general business errands for Steve and/or for Cyndi [Gilbert].” (Johnson Depo. 12:8-13.)² While Plaintiffs list a number of duties that Ms. Johnson was performed that were outside Ms. Stamper’s expertise, it is not controverted that GDC’s business was often mixed with that of Diamond G, and Diamond G’s with that of GDC.

More crucially, the undisputed facts also reveal that the accident occurred during a common errand at the direction of the employer. Ms. Gilbert’s affidavit states, “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 office move. [Ms Stamper and Ms. Johnson] often traveled together in company vehicles, and were driving a vehicle owned by GDC at the time of the accident,” ¶ 11. While Plaintiffs characterize the trips from the Toquerville operation to Mesquite as merely incidental “carpooling,” the undisputed facts show Ms. Stamper and Ms. Johnson traveled together between the various job sites during working periods frequently during the six months preceding the accident.

The Utah Workers’ Compensation Act is a legislative determination that its provisions should be an injured worker’s exclusive remedy against her coworkers and employer in most cases. Utah Code Ann. § 34A-2-105(1) states,

The right to recover compensation pursuant to this chapter for injuries sustained by an employee, whether resulting in death or not, is the exclusive remedy against the employer *and is the exclusive remedy against any officer, agent, or employee of the employer* and the liabilities of the employer imposed by this chapter is in place of any and all other civil

² Ms. Johnson also stated in her deposition, “I would assist Sharon sometimes in cleaning the house and running errands for Cindy” (27:12-14); and, “[A]s for ... working side by side, that’s pretty much it, Steve, Cindy, myself, and Sharon”(28:20-21).

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 an action at law may not 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....*

[Emphases added.] In *Black v. McDonald's*, 733 P.2d 154, 156 (Utah 1987), the Utah Supreme Court discussed the “in the course of or because of or arising out of” language. It stated,

To be embraced within the ambit of “course of employment,” the injury must be received while the employee is carrying on the work which he is called upon to perform or doing some act incidental thereto. *Nadeau v. Town of South Berwick*, 412 A.2d 392 (Me. 1980). It must occur within the period of employment, at a place or area where the employee may reasonably be, and while the employee is engaged in an activity at least incidental to his employment. *Ski World, Inc. v. Fife*, 489 N.E.2d 72 (Ind. App. 1986). The activity will be considered incidental to the employee's employment if it advances, directly or indirectly, his employer's interests. *Id.* at 75.

Ms. Stamper and Ms. Johnson were “called upon” to perform a particular task at the direction of Ms. Gilbert, benefitting GDC and Diamond G.

The Utah Supreme Court 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.”

Goheen v. Yellow Freight Sys., 32 F.3d 1450, 1452 (10th Cir. Utah 1994), quoting *Peterson v.*

Fowler, 27 Utah 2d 159, 493 P.2d 997, 1000 (Utah 1972); *in accord*, *Bambrough v. Bethers*, 552 P.2d 1286 (Utah 1976). At the time of the accident, Defendant 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 Plaintiffs' claims are therefore barred by the exclusive remedy provision of the Workers' Compensation Act.

Defendant's Motion for Summary Judgment is therefore GRANTED. Plaintiff's Motion to Amend is moot and is DENIED.

Dated this 11th day of December, 2008.

A handwritten signature in black ink, appearing to read "Eric A. Ludlow", written over a horizontal line.

JUDGE ERIC A. LUDLOW
FIFTH DISTRICT COURT

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on this 15 day of Dec, 2008, I provided a true and correct copy of the foregoing **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION TO AMEND** to each of the parties/attorneys named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

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DEPUTY CLERK OF COURT