

1998

# Workmen's Auto Insurance Company v. Chubb Customer Center, Inc., dba Chubb Group of Insurance Companies : Reply Brief

Utah Court of Appeals

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WORKMEN'S AUTO INSURANCE	)		
COMPANY,	)		
	)		
Plaintiff and Appellant,	)	Case Number:	981413 - CA
	)		
vs.	)	District Court No:	960013632 CV
	)		
CHUBB CUSTOMER CENTER, INC.,	)		
dba CHUBB GROUP OF INSURANCE	)		
COMPANIES,	)	Priority Number:	15
	)		
Defendant and Appellee.	)		
	)		

Counsel for:  
Workmen's Auto Insurance Company,  
Appellant

**ORAL ARGUMENT REQUESTED**

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**IN THE UTAH COURT OF APPEALS**

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WORKMEN'S AUTO INSURANCE  
COMPANY,

Plaintiff and Appellant,

vs.

CHUBB CUSTOMER CENTER, INC.,  
dba CHUBB GROUP OF INSURANCE  
COMPANIES,

Defendant and Appellee.

Case Number: 981413 - CA

District Court No: 960013632 CV

Priority Number: 15

---

**REPLY BRIEF OF APPELLANT**  
**WORKMEN'S AUTO INSURANCE COMPANY**

---

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE WILLIAM W. BARRETT, PRESIDING

---

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**ORAL ARGUMENT REQUESTED**

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## **INTRODUCTION**

Catherine Jacobsen negligently caused an accident as she was driving her own vehicle to the hospital to retrieve a co-worker. Ms. Jacobsen's excursion was undertaken at the request and direction of her employer. The parties stipulate that Ms. Jacobsen was acting within the course and scope of her employment with Chubb's insured — Wagon Tongue — at the time of the accident.

Workmen's Auto Insurance Company ("Workmen's Auto") had issued an owner's policy covering the vehicle Catherine Jacobsen was driving and covering all members of the named insured's household. See UTAH CODE ANN. § 31A-22-303(1)(b)(i). Chubb Group ("Chubb") insured Wagon Tongue, Inc., and its business auto policy included an operator's policy covering the use of non-owned vehicles for business purposes. See UTAH CODE ANN. § 31A-22-303(1)(b)(ii).

The sole issue presented for review is whether the two insurance companies provided concurrent primary liability insurance coverage for the event in question. Wagon Tongue was performing its business through its employee, Catherine Jacobsen, at the time of the accident. A corporation only acts through its employees, and the acts of the employees are the acts of the corporation as a matter of law. The corporate actions were covered under Chubb's insurance policy, but its policy provided only secondary

coverage for the event unless Wagon Tongue's liability was assumed under an insured contract (as that term is defined in Chubb's policy).

Wagon Tongue's liability for Catherine Jacobsen's negligence was constructively assumed through the act of hiring Catherine Jacobsen and exercising the right to control her actions. In other words, Wagon Tongue's liability was constructively assumed under the employment contract pursuant to the doctrine of *respondeat superior*.

## ARGUMENT

### **I. AN EMPLOYER/EMPLOYEE RELATIONSHIP IS CONTRACTUAL IN NATURE AND INCORPORATES DUTIES (AND CORRESPONDING LIABILITIES) WHICH ARE IMPOSED BY LAW, THUS WAGON TONGUE'S EMPLOYMENT OF CATHERINE JACOBSEN CONSTITUTED AN "INSURED CONTRACT."**

Chubb acknowledges the employer/employee relationship between Wagon Tongue and Catherine Jacobsen, but it argues that Wagon Tongue never entered into a contract with Catherine Jacobsen whereby it assumed her liability. Chubb's Opposition Brief at p. 8. Chubb misunderstands the duties and obligations which are constructively assumed by an employer when it forms an employment relationship with an employee. It is axiomatic that an employer (Wagon Tongue) assumes liability of its employees (Catherine Jacobsen) for negligent acts committed during the course and scope of employment. No written contract stating the foregoing is required. See Dowsett v. Dowsett, 207 P.2d 809 (Utah 1949) (recognizing that the relationship of master and servant arises out of a contract of employment).

The employment contract which formed the relationship between Wagon Tongue and Catherine Jacobsen was not a written contract. Ms. Jacobsen worked in Wagon Tongue's Iceberg Restaurant. She did not negotiate a contractual clause pursuant to which Wagon Tongue agreed to assume her liability to third parties. Instead, such a

contractual clause forms a part of every employment contract, and it cannot be waived by either party.

The doctrine of *respondeat superior* expands the tort remedies available to injured parties by providing that a remedy sounding in tort shall be available in certain situations. The remedy is provided through the imposition of vicarious tort liability on non-negligent employers by and through the application of agency law. Chubb correctly notes that this assumption of liability is based upon principles of equity. Chubb's Opposition Brief at p. 7. What Chubb and the district court fail to understand is that the imposition of tort liability (or, conversely, access to a tort remedy against a negligent agent's principal) does not transform the equitable doctrine of *respondeat superior* into "a mechanism in tort law." Chubb's Opposition Brief at p. 7 (quoting Amended Ruling of the district court).

Tort liability is only assumed by non-negligent parties where the non-negligent party and the negligent party are parties to an agency relationship. An agency relationship is created where one party contracts or agrees to act on behalf of and for the benefit of the other party. The party acting is the "agent" and the party on whose behalf the agent acts is the "principal." In sum, the basis of the tort liability assumed by a principal for the acts of its agent is the contract forming the principal/agent (sometimes

hereinafter employer/employee or master/servant) relationship. See Dowsett v. Dowsett, 207 P.2d 809 (Utah 1949).

The contract forming the principal/agent relationship may be express or implied. Regardless of the form of the contract, the law imposes certain obligations on parties to an employment contract. For example: (1) The duty of good faith and fair dealing; and (2) Third party tort liability pursuant to the doctrine of *respondeat superior*. This Court has described the nature of the duty of good faith:

“While it is true that courts impose an obligation of good faith in every aspect of the contractual relationship . . . the obligation of good faith is ‘constructive’ rather than ‘implied’” because the **obligation is imposed by law** and cannot be disclaimed.

PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792 (Utah App. 1997) (quoting Olympus Hills Shopping Ctr., Ltd. v. Smith’s Food & Drug Ctrs., Inc., 889 P.2d 445, 450 n.4 (Utah App. 1994) (quoting 3A Arthur L. Corbin, Corbin on Contracts § 654A(B) (2d ed. 1993) (emphasis added))); see also Savage v. Educators Ins. Co., 908 P.2d 862 (Utah 1995) (citing Broadwater v. Old Republic Sur., 854 P.2d 527, 535 (Utah 1993) (“Even though the remedy set out in *Ammerman* sounds in tort because the relationship of the contracting parties is a fiduciary one while that in *Beck* is purely contractual, both first- and third-party claims **arise only because of the contractual relationship of the parties.**”) (emphasis added)).

The same principle described by this Court with respect to the duty of good faith and fair dealing is applicable to the doctrine of *respondeat superior*. The liability which may be imposed upon a principal for the negligent acts of those contractually obligated to act on the principal's behalf arises out of the contract forming the principal/agent relationship and is imposed only for actions actually taken for the benefit of the principal (i.e., within the "course and scope" of the actor's employment). Tort liability of an agent to pay for damages suffered by a third party is thus assumed by the principal (jointly and severally) under the principal's contract with its agent by operation of the doctrine of *respondeat superior*. See 77 C.J.S. *Respondeat Superior*, pp. 317-320.

Of course, the parties are free to enter into a contractor/contractee relationship which would not give rise to the imposition of vicarious liability. But upon forming an agency relationship, the law constructively imposes on the principal (and thus the principal constructively assumes under its contract or agreement) the tort liability of its agent toward third parties.

Under Wagon Tongue's insurance policy, Chubb provided primary liability insurance coverage for damages suffered by a third party so long as Wagon Tongue assumed the liability for the damages under "any . . . contract or agreement" pertaining to its business. Chubb Coverage Form at Section IV(B)(5)(c) and V(F)(5). In sum, Chubb

formed an employment contract with Catherine Jacobsen, and assumed the tort liability of Catherine Jacobsen to third parties because the employment agreement imposed Catherine Jacobsen's tort liability on Wagon Tongue.

If the foregoing recitation is a reasonable<sup>1</sup> application of the facts of this case to the language of the insurance contract within the framework of the law, then Chubb provided concurrent primary coverage. See Fuller v. Director of Finance, 694 P.2d 1045, 1047 (Utah 1985) (“An insured is entitled to the **broadest protection he could have reasonably understood** to be provided by the policy.”) (emphasis added)).

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<sup>1</sup> Workmen's Auto does not have to be absolutely right, just arguably right. See Geico v. Dennis, 645 P.2d 672 (Utah 1982) (“the interpretation of the terms involved is not fixed but varies according to the circumstances of the case. \* \* \* [M]ost courts will interpret the terms so as to extend the coverage if this can be done under **any reasonable interpretation** of the facts.” (quoting Hardware Mutual Casualty Co. v. Home Indemnity Co., 241 Cal. App. 2d 303, 50 Cal. Rptr. 508, 511-12 (1976) (other citations omitted))).

**II. CHUBB DID NOT FILE A CROSS-APPEAL; THEREFORE, THE COURT HAS NO SUBJECT MATTER JURISDICTION WITH RESPECT TO CHUBB'S NO-COVERAGE ARGUMENT.**

Where subject matter jurisdiction does not exist, neither the Court nor the parties “can do anything to fill the void.” Crump v. Crump, 821 P.2d 1172, 1173-74 (Utah App. 1991). A lack of subject matter jurisdiction can be raised at any time. Id. Chubb raises the same argument that it raised at the district court level, namely that Subsection (b)(2) “excepts” Catherine Jacobsen from her status as an insured. The district court did not agree with this argument. Chubb argues that the district court did not expressly disagree with the argument, rather the court was silent. Chubb's Opposition Brief at p. 6.

The district court's silence may not raise a justiciable inference that the court's ruling was based upon Chubb's argument. On the contrary, if the court had accepted Chubb's argument, its analysis would have immediately stopped. See Goetz v. American Reliable Ins. Co., 844 P.2d 366 (Utah App. 1992) (“Undertaking such analysis, one never gets to the ‘excess coverage’ provision”); see also Hind v. Quilles, 745 P.2d 1239, 1239 (Utah 1987) (per curiam) (“Inasmuch as all other issues depend on a finding of coverage under the policy, we do not address them.”).

Rule 4(d) of the Utah Rules of Appellate Procedure explicitly requires that a notice of cross-appeal be timely filed. There is no record of such a filing. Absent a cross-appeal,

Chubb may not attack the judgment of the district court. “[I]f a respondent desires to attack the judgment and change it in his favor, he must timely file a cross-appeal. . . .”

Terry v. Zions Coop. Mercantile Inst., 617 P.2d 700, 701-02 (Utah 1980); see also Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608, 613 (Utah 1982); Halladay v. Cluff, 739 P.2d 643, 644-45 (Utah App. 1987), cert. denied, 765 P.2d 1277 (Utah 1987).

For this reason, the Court must decline to consider the merits of Chubb’s purported cross-appeal.

### **III. WITH RESPECT TO CONDUCT WITHIN THE COURSE AND SCOPE OF HER EMPLOYMENT, CATHERINE JACOBSEN WAS AN INSURED UNDER CHUBB’S INSURANCE POLICY ISSUED TO HER EMPLOYER.**

Wagon Tongue purchased an insurance policy<sup>2</sup> covering its business’s vehicles and all other vehicles used in its business. The coverages purchased included an operator’s policy covering non-owned autos including Catherine Jacobsen’s vehicle at the time of her accident. Defendant’s Opposition Brief at pp. 9-10; see also UTAH CODE ANN. § 31A-22-303(1)(b)(ii).

Wagon Tongue was a corporation. A corporation is not a natural person. It is an artificial entity created by law, and as such it cannot act in person. It must act in its

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<sup>2</sup> See UTAH CODE ANN. § 16-10a-908.

affairs through its agents and representatives. See Tuttle v. Hi-land Dairyman's Assoc., 350 P.2d 616 (Utah 1960). Therefore, Chubb knew when it insured Wagon Tongue that it was issuing liability coverage for the negligence of Wagon Tongue's employees. This knowledge is imputed to Chubb by law:

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

2A C.J.S. Agency § 2, p. 549. In other words, it could be said that Catherine Jacobsen was not negligent; but rather Wagon Tongue was negligent because, as a matter of law, Wagon Tongue was driving Catherine Jacobsen's vehicle through her.<sup>3</sup>

Catherine Jacobsen was insured as a "you" under Chubb's insurance policy. The "person" defined as a "you" in Chubb's policy was the corporation named on the declarations page — Wagon Tongue. It is not reasonable to believe that Chubb issued an operator's policy to a corporation which only covered non-owned vehicles when actually operated by the incorporeal legal fiction.

Moreover, identifying Wagon Tongue, Inc. as the named insured makes the definition of "you" sufficiently broad to include persons through whom actions are taken

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<sup>3</sup> Nevertheless, Wagon Tongue was a permissive user of Catherine Jacobsen's vehicle and was, thus, Workmen's Auto's insured. Therefore, Workmen's Auto properly provided primary insurance coverage for its negligence.

by the corporation (i.e., the corporation's employees while the employees are acting within the course and scope of their employment). Catherine Jacobsen was, as a matter of law, Wagon Tongue ("you") when she negligently injured Patti Zimmerman. Therefore, Chubb insured the driver and the vehicle. And Chubb's coverage for its insureds' liability to Ms. Zimmerman was primary as explained above.

#### **IV. SUBSECTION b(2) DOES NOT EXCLUDE COVERAGE FOR THE ACCIDENT.**

Chubb argues that Subsection b(2) applies to exclude Catherine Jacobsen from the definition of insureds. Defendant's Opposition Brief at pp. 9-10. Coverage is not excluded by Subsection b(2) because coverage is not extended by Section b.

As explained above, Section II(A)(1)(a) makes Catherine Jacobsen an insured while she was driving her vehicle within the course and scope of her employment. Section II(A)(1)(b) declares, in addition, that an insured is anyone using a covered auto **"you [do] own hire or borrow."** The auto driven by Catherine Jacobsen, however, was a nonowned auto ("9") which is defined in Chubb's policy as an auto **"you do not own . . . hire . . . or borrow."** Therefore, Section II(A)(1)(b) does not apply to the particular covered auto, and, hence, Subsection II(A)(1)(b)(2) cannot "except" coverage from a section that does not grant coverage.

In addition, while it is true that coverage is not granted through the non-applicability of an exclusion, Chubb's policy includes a number of exceptions which do not apply to the current situation:

Where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof.

LDS Hospital v. Capital Life Ins. Co., 765 P.2d 857, 858 (Utah 1988) (quoting Phil Schroeder, Inc. v. Royal Globe Ins. Co., 659 P.2d 509, 511 (Wash. 1983)).

**V. ALTERNATIVELY, WAGON TONGUE IS INSURED FOR ITS SEVERAL LIABILITY, AND CATHERINE JACOBSEN IS A COINSURED FOR THE LIMITED PURPOSE OF DEFEATING CHUBB'S RIGHT OF SUBROGATION.**

At minimum, Wagon Tongue was insured for *its* liability with respect to the accident. "Under the principle of *respondeat superior*, the employer and its employee are jointly and severally liable for the negligent torts of the employee in the course of employment." Nelson v. Corporation of the Presiding Bishop, 935 P.2d 512 (Utah 1997) (Howe, J., concurring). All of the foregoing analysis regarding the assumption of liability through an employment contract is applicable to the joint and several liability of Wagon Tongue, and Wagon Tongue's liability is still assumed under an "insured contract" giving rise to Chubb's primary coverage. However, if only Wagon Tongue were insured under

Chubb's policy for its several liability, Chubb might be able to assert a right of subrogation against Catherine Jacobsen (which would be defended and paid by Workmen's Auto) thus mooting this litigation.<sup>4</sup>

If the Court were to find that primary coverage was based solely on the fact of Wagon Tongue's common law liability and Chubb's coverage for Wagon Tongue's joint and several liability, the Court would then consider whether Wagon Tongue's employees are coinsureds under the insurance policy for actions taken within the course and scope of their employment. "An insurer which accepts a premium based partially on the inclusion of a coinsured under a policy of insurance has assumed the risk of [her] negligence." Board of Educ. of Jordan Sch. Dist. v. Hales, 566 P.2d 1246, 1247 (Utah 1977); see also Fashion Place Inv., Ltd. v. Salt Lake County, 776 P.2d 941 (Utah App. 1989) (citing 16 Couch on Insurance 2d § 61:137 (Rev. Ed. 1983) ("Where the insured is required by contract or lease to carry insurance for the benefit of another, the other party may attain the status of a *de facto* coinsured even if not named as an insured in the policy obtained.")).

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<sup>4</sup> The employer's liability is derivative liability and, thus, the employer normally is entitled to be reimbursed by the employee for sums paid because of the employee's negligence (unless the employee's conduct is part of the employer's core duties). However, the fact of the employer's excess *liability* should not be confused with its insurer's primary *coverage*.

Whether an employee is presumed to be a coinsured with her employer when there is no written or oral agreement between the parties regarding responsibility for insurance coverage is an issue of first impression in Utah. The Utah case which comes closest to being on point is *GNS Partnership vs. Fullmer*. See GNS Partnership v. Fullmer, 873 P.2d 1157 (Utah App. 1994). *Fullmer* only discussed coinsured status with respect to tenants of apartment buildings. While some of the reasoning employed by the Court in that case is inapposite to the instant matter, the major idea compels the same result of coinsured status — at least insofar as Chubb’s potential right of subrogation is concerned.

Chubb insured Wagon Tongue knowing that it was a corporation with employees who would perform its business. Wagon Tongue paid a premium to Chubb in order to provide non-owned auto coverage during those periods when Wagon Tongue had a possessory interest in its employees’ vehicles.

In *Fashion Place*, the Court reasoned:

When [the corporation] agreed to provide insurance for [its business] it assumed the risk of its coinsureds’ negligence. “The insurer, which has accepted one premium covering the entire [business] and has assumed the risk of the negligence of each insured party, ought not to be allowed to shift the risk to any one of them.”

Fashion Place Inv., Ltd. v. Salt Lake County, 776 P.2d 941, 945 (Utah App.), cert. denied, 783 P.2d 53 (Utah 1989) (quoting Board of Educ., 566 P.2d at 1248). Equity will not

permit Chubb to insure a corporation for liability assumed because of the negligent acts of its agents and simultaneously retain its equitable right of maintaining a subrogation action against those agents for damages arising out of the risk Chubb had agreed to take upon itself in exchange for payment of the premium.

**VI. THE COURT MAY NOT AFFIRM THE DISTRICT COURT'S JUDGMENT ON ANY THEORY WHICH IS NOT APPARENT FROM THE RECORD.**

The appellate courts often stake a claim to authority allowing them to affirm a lower court's judgment "on any basis." See, e.g., Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1993) (cited in Chubb's Opposition Brief at p. 2). The Court may not rely on the artless "on any basis" jargon to defeat a party's right to due process. See Utah Const. Art. I, § 7.

It is true that the appellate courts retain the right to affirm a lower court's judgment, but only "on any legal ground or theory **apparent on the record.**" Limb v. Federated Milk Producers Ass'n, 461 P.2d 290, n. 2 (Utah 1969) (quoting 5 C.J.S. Appeal & Error § 1464(1) (emphasis added)). In other words, the Court may not affirm the lower court's judgment on the basis of legal theories raised by the Court *sua sponte*. See Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp., 850 P.2d 447, 455 (Utah 1993) (holding the failure to raise issue below precludes its consideration on appeal); accord John Deere Co. v. A &

H Equip., Inc., 876 P.2d 880, 888 (Utah App. 1994). If the Court affirmed the lower court's judgment on its own theory, it would violate the losing party's due process right to be heard and would destroy the adversarial model upon which our legal system is based. Wells v. Children's Aid Soc. of Utah, 681 P.2d 199, 204 (Utah 1984) (stating that due process involves "procedural requirements, notably notice and [an] opportunity to be heard."); see also Winter v. Northwest Pipeline Corp., 820 P.2d 916, 919 (Utah 1991) (refusing to act as an advocate for a party who did not present more than conclusions contained in affidavits, even for a party who was acting *pro se*, because such conduct by the court would be "both highly improper and unfair to opposing parties"); see also In re Cassity, 875 P.2d 548 (Utah 1994) (holding that because our judicial system is the adversarial model, lawyers are bound by rigid ethical standards designed to preserve that system's integrity).

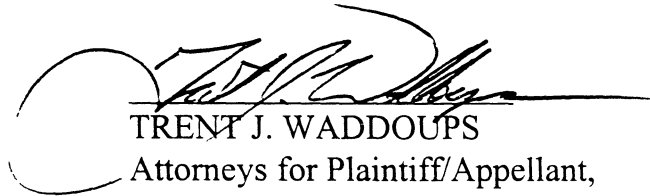
The record is void of any basis upon which the Court may affirm the district court's ruling. Therefore, the district court's ruling must be reversed.

### **CONCLUSION**

Based upon the foregoing, the Court should reverse the district court's ruling and enter a summary judgment in favor of Workmen's Auto. Because Chubb's coverage was concurrently primary, Chubb should be ordered to pay the sum of \$3,790.95 plus prejudgment interest to Workmen's Auto.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of December, 1998.

**CARR & WADDOUPS**

A handwritten signature in black ink, appearing to read "Trent J. Waddoups", is written over a horizontal line. To the left of the signature is a large, stylized circular flourish.

TRENT J. WADDOUPS

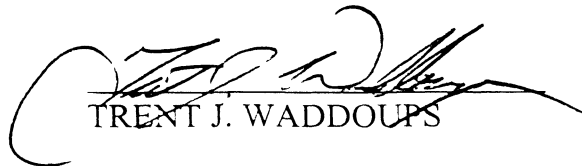
Attorneys for Plaintiff/Appellant,  
Workmen's Auto Insurance Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 1<sup>st</sup> day of December, 1998, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT WORKMEN'S AUTO INSURANCE COMPANY was mailed, via U.S. Mail, postage prepaid, to the following:

Eric C. Singleton, Esq.  
201 South Main Street, Suite 900  
Salt Lake City, Utah 84111

Brett Marshall Godfrey, Esq.  
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4643 South Ulster, Suite 920  
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TRENT J. WADDOUPS