

2001

Guardian Title Company of Utah, a corporation v.  
Stacy Mitchell, formerly known as Stacey Howell;  
Tebbs and Smith P.C., a corporation; Douglas L.  
Rex; Stagg and Associates, a corporation : Brief of  
Appellee

Utah Supreme Court

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#### Recommended Citation

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**IN THE UTAH SUPREME COURT**

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GUARDIAN TITLE COMPANY  
OF UTAH, a corporation,

Plaintiff/Appellant,

vs.

STACEY MITCHELL, formerly  
known as STACEY HOWELL;  
TEBBS & SMITH P.C., a  
corporation; DOUGLAS L. REX;  
STAGG & ASSOCIATES, a  
corporation,

Defendants/Appellees.

**BRIEF OF APPELLEE**

**Supreme Court No. 20010283-SC**

Priority No. 15

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Appeal from the Third District Court  
Salt Lake County, State of Utah  
Honorable Anne M. Stirba, District Court Judge

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## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to § 78-2-2(3)(j), Utah Code Ann.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

### I. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in granting summary judgment in favor of Defendants/Appellees upon a finding that, as a matter of law, Guardian, based upon the undisputed material facts, could not proceed on an action framed in contract.

2. Whether the trial court erred in granting a summary judgment in favor of Defendant/Appellees upon a finding that, as a matter of law, Guardian's alleged breach of the implied covenant of good faith and fair dealing was based upon a breach of a tort duty.

3. Whether the trial court erred in granting a summary judgment in favor of Defendant/Appellees upon a finding that, as a matter of law, an employer is not liable for the illegal acts of an employee which were undertaken for no one's benefit but her own.

### II. STANDARD OF APPELLATE REVIEW

Appellee accepts as accurate the Appellant's statement of the appropriate standard of review.

CONSTITUTIONAL PROVISIONS. STATUTES.  
ORDINANCES, RULES, AND REGULATIONS

The Appellee submits that there are no constitutional provisions, statutes, ordinances, rules or regulations at issue before the Court.

STATEMENT OF THE CASE

For the purposes of this appeal, the appellee, Tebbs, is not dissatisfied with the Appellant's statement of the case, and will continue to reference the parties in the same manner as the Appellant. However, the Appellee submits the following additional points.

**I. NATURE OF CASE, COURSE OF PROCEEDINGS  
AND DISPOSITION BELOW**

Guardian and Rex have now entered into a stipulation for a dismissal with prejudice of Guardian's complaint against Rex, which has resulted in an order of dismissal.<sup>1</sup> Tebbs is the sole remaining defendant (and appellee) in this case.

**II. STATEMENT OF FACTS**

1. Guardian is a Utah corporation in the title insurance business. (R. at 182.)

2. In the mid-1970's, Guardian retained Tebbs to provide accounting

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<sup>1</sup> This Order of Dismissal was entered by the trial court on August 1<sup>st</sup>, 2001.



services. Initially, these services included reconciling bank accounts, handling taxes, including income tax returns, and preparing financial statements. Sometime later, these services were expanded to include payroll services. (*Id.*)

3. Guardian kept a separate bank account only for payroll, including payroll taxes. (R. at 183.)

4. In 1996, Mr. Curlis, Guardian's President, moved to St. George, but continued to run Guardian's Salt Lake City office from St. George. (*Id.*)

5. The pre-signed check procedure came about as a convenience to Curlis because he had moved to St. George. (R. at 184.)

6. Guardian gave Tebbs a copy of its employee payroll sheet so Tebbs knew how many employees Guardian had and how many checks would be given to Curlis to pre-sign. Curlis did not count the printed payroll checks before distributing them to Guardian employees. (*Id.*)

7. Curlis instructed [an employee] Yolanda Carroll, to pre-stamp those checks that were sent over from Tebbs in blank and then send them back to Tebbs. Curlis did not require Yolanda Carroll to count the number of checks and compare them with the number of employees who were supposed to get a check. (R. at 185.)

8. Guardian did not use Curlis' signature stamp other than for payroll purposes. (*Id.*)

9. Rex was not totally in favor of pre-signed checks or in using a signature stamp. Rex indicated to Curlis that it was not a good idea. But this was a procedure that Curlis wanted. (R. at 186.)

10. Curlis did not discuss with Rex any kind of controls that would be put in place to make sure that a check was not signed to be used for something other than payroll. (*Id.*)

11. Bank account statements for Guardian's payroll were sent directly to the accounting firm. Guardian did not charge anyone from its company to look at bank account statements and no one at Guardian was charged with reviewing the accounting services. (R. at 188.)

12. Curlis never asked to have a reconciliation sent to him and never asked for a cash disbursement or bank draft journal. (*Id.*)

13. Guardian's payroll procedure did not change when Guardian shifted its accounting services from Tebbs to Rex, and later from Rex to Stagg. (R. at 190, 191).

### SUMMARY OF ARGUMENTS

Guardian's claim and case against the last remaining defendant in this case, Tebbs, is for breach of contract; more specifically, for breach of an implied covenant based upon an agreement to provide accounting services. Guardian

makes no claim that Tebbs breached the express terms to provide accounting services, and there is no claim that Tebbs did not provide the accounting services contracted for. The only claim is that Mitchell's criminal acts are a breach of the implied covenant of good faith and fair dealing.

Guardian attempts to blur the long established distinctions that have long defined the covenant of good faith and fair dealing as it relates to contract actions and tort claims. The trial court clearly saw the distinction between the claims that Guardian was actually making as to the manner in which the claims were pleaded and, accordingly, granted Appellees' motion a summary judgment.

The reasons for Guardian's are quite clear. The law does not make an employer liable for the criminal acts of an employee, which illegal acts were such as to further her own interests and in no way advanced the interests of the employer. Guardian also seeks to eliminate the risk that its own negligence will reduce, if not eliminate, the damages it seeks.

## ARGUMENT

### **I. THE TRIAL COURT DID NOT CONCLUDE THAT A CONTRACT ACTION BROUGHT AGAINST A PROFESSIONAL ACCOUNTING FIRM IS TREATED IN ALL RESPECTS AS A TORT ACTION**

The trial court did not conclude, nor did the Defendants argue, that Guardian could only assert a negligence cause of action in claims made against

professional accounting firms. What the Defendants did argue, and what the trial court did conclude, is that based upon the undisputed material facts in this case that despite how Guardian had framed its pleadings Guardian's claims against the accountant Defendants were tort and not contract claims; and, that there was no contractual provisions between the parties upon which Guardian could prevail.

Guardian hired Tebbs, initially, to reconcile bank accounts, handle taxes, including income tax returns, and to prepare financial statements. Later, the services that Tebbs agreed to perform for Guardian included payroll preparation and other payroll services. The agreement was, apparently, never reduced to writing, nor does Guardian contend that the express agreement between itself and Tebbs includes anything else. It did not include, for an example, a provision that a Tebbs' employee would not write checks to herself or that Tebbs would indemnify Guardian for the criminal acts of an employee.<sup>2</sup>

Guardian has pleaded this case as a contract action. The trial court therefore analyzed this case purely as a contract claim and nothing more. Thereafter, the trial court concluded, as a matter of law, that Tebbs did not breach any agreement with Guardian and that Guardian could not establish the requisite causation.

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<sup>2</sup> Arguably, Guardian could have contracted for such provisions, but did not.

Guardian's Complaint alleges two express agreements relevant to this motion. First, Guardian alleges that it hired Tebbs to perform accounting services. Second, Guardian alleges that, "Tebbs expressly and implicitly covenanted and agreed that it would charge and commission the performance of said services and duties by such of its employees as would perform the same accurately, properly, competently and with honesty and fidelity." It is undisputed in this case, however, that the contract Guardian made with Tebbs was, "[R]econciliation of bank accounts such as general office, trust account, handling our income tax returns, preparation of financial statements." (R. at 210, pp. 11-12.) This "express" agreement was never in writing and was, even then, only of a general nature as to the type of accounting services that would be, and were thereafter, provided.

The undisputed facts in this case demonstrate that Tebbs did not breach this agreement with Guardian. There is no allegation that Tebbs failed to provide reconciliation of bank accounts, the handling of Guardian's income tax returns, the preparation of financial statements, or did not provide payroll services. To the extent prior oral conversations are even material, Curlis' testimony establishes that such oral conversations did not include an express representation of the "covenant" of fidelity alleged in the Complaint. Accordingly, Guardian's claim based on a breach of express agreement was dismissed as a matter of law.

Guardian concedes that its claim is for breach of an implied covenant. The parties even agree on the law governing how to analyze a claim. Utah courts follow the rule that if a cause of action arises from a breach of a promise set forth in a contract, the action is *ex contractu* (from a contract), but if it arises from a breach of duty growing out of the contract it is *ex delicto* [from a tort]. See *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433, 435 (Utah 1983); *Peterson v. Browning*, 832 P.2d 1280, 1284 (Utah 1992). They disagree, however, on its application in this case.

The “implied” duty Guardian seeks to enforce in this case is the professional standard of care inherent in and “growing out of” the contract for accounting services. In other words, Tebbs had a duty imposed by law, arising out of any contract it had with Guardian, to conform to the standards of care of an accounting professional, the breach of which gives rise to a cause of action. The trial court recognized Guardian’s claim for what it is and analyzed it accordingly. Thereafter, the trial court granted the Defendants’ motion for a summary judgment.

The case law supports the trial court’s ruling. In *Peterson v. Browning*, relied upon by Guardian, this Court held that an action based on the public policy exception to at-will employment “sounds in tort,” despite the fact that it arises from the termination of an employment contract. *Peterson*, 832 P.2d at 1284.

*Peterson* explained that “[c]haracterizing a case as a tort or contract . . . focuses on the duty which has allegedly been breached, asking whether the duty arises from a promise set forth in the contract or is one imposed by law, independent of contract.” *Id.* The court concluded that the “obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied promise arising from the employment contract. Instead, the tort cause of action arises out of the contractual relationship.” *Id.* (quoting *DCR, Inc.*, 663 P.2d at 437).

Likewise, the professional duty to deal honestly with funds entrusted by a client is a duty imposed by law, independent of any agreement between the parties. Such an obligation is implied in every professional relationship, regardless of the terms formed by the parties’ meeting of the minds. Guardian’s own citations confirm as much. See *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290 (Utah Ct. App. 1996) (“In all relationships with clients, attorneys are required to exercise impeccable honesty, fair dealing, and fidelity.”); 1 Am. Jur. 2d *Accountants* sec. 19 (“[I]t is implied in all contracts for the employment of public accountants that they will render their services with that degree of skill, care, knowledge, and judgment usually possessed and exercised by members of that profession in the particular locality . . . .”).

Guardian's case citations also reveal that the heart of the Court's analysis in this case is the same regardless how the claim is pleaded. In *Kilpatrick*, which Guardian argues is "directly on point," the plaintiffs advanced a claim of breach of fiduciary duty against the law firm based on the alleged conflict of interest. The Court observed (in dicta) that while the law "has grown chiefly around actions based on negligence," clients may frame their claims for wrongdoing in either contract, tort, or fiduciary duty. *Id.* at 1289, 1290; *see also Dunn v. McKay, Burton, McMurray & Thurman*, 584 P.2d 894, 902-03 (Utah 1978) (Maughn, J., dissenting) (opinion same in dissenting opinion). The *Kilpatrick* court concluded, however, that regardless how the claim is pleaded, the causation analysis that is at issue in the instant case is always the same.

A vital rule of legal malpractice actions is that the alleged wrong of the attorney must proximately cause the client's injury. Although breach of fiduciary duty actions concern different wrongs from the negligence actions, the *same standard of causation applies* whether the alleged wrong is a negligent act, a fiduciary breach, or even a contractual breach.

*Kilpatrick*, 909 P.2d at 1291 (emphasis added). To prevail on a claim, a plaintiff must establish not only actual cause (i.e., but-for the wrong, the injury would not have occurred), but also proximate cause (i.e., the "thread of causation" between fault and damages is "unbroken"). *Id.* at 1291, 1293.



Guardian argues on appeal that the trial court misunderstood *Kilpatrick*, apparently because the trial court looked beyond the way the case was pleaded to the actual nature of the claims. Just because a malpractice claim may be pleaded based upon breach of contract, breach of fiduciary duty, or negligence does not mean that the trial court is bound to analyze the case as pleaded when the facts show that the claims are of a different nature. The trial court applied the correct analysis.

In determining whether Tebbs' alleged wrongdoing proximately caused Guardian's damages, the Court should take into consideration Guardian's own role in causing the loss. *See Steiner Corp. v. Johnson & Higgins*, 996 P.2d 531, 534 (Utah 2000) (holding in suit against accounting firm that plaintiff's fault can be considered in determining causation and damages, and damages may be reduced proportionately if plaintiff's fault is causally connected to the injury). Guardian tries to distinguish the law in *Steiner* on the grounds that the action there involved a negligence claim. As *Kilpatrick* makes clear, however, the tort-based causation analysis this Court should use is identical whether the claim is framed as a tort, contract, or fiduciary duty action.

Here, Guardian cannot establish that the "thread of causation" is "unbroken" between its injury and Tebbs' alleged wrongdoing in assigning Mitchell to the Guardian account. It is undisputed in the record that Guardian

provided Mitchell one more blank, signed check than it had employees during each pay period in question, and received back one fewer than it provided; that Guardian itself distributed the payroll checks; and that Guardian itself consistently transferred more money to its payroll account than it distributed to its employees.

Despite its unsupported factual argument to the contrary, Guardian had in its possession all information necessary to verify its own payroll, but simply failed, unreasonably, to do so. The law does not allow a party under such circumstances to shift to someone else the loss attributable to its fault. *See* Utah Code Ann. § 78-27-38(3).

Guardian further alleges that Tebbs “*implicitly*” covenanted and agreed that it would charge and commission the performance of said [accounting] services and duties by such of its employees as would perform the same accurately, properly, competently and with honesty and fidelity.” Guardian can produce no evidence showing that Tebbs in fact implicitly agreed to this term – except to the extent such a duty is independently imposed by law.

The record facts in this case unequivocally establish as much. Such a covenant was not implied in any written contract between these parties, as there was none. Such a covenant was not implied in any oral communications between these parties at the time Guardian hired Tebbs, as there were none. As a matter of law, the arrangement for accounting services did not contain the implicit terms

Guardian alleges, except to the extent implied by law. There is no record evidence to support any other factual implications, even viewing all facts in the light most favorable to Guardian.

Contractual liability is based on a duty created by the mutual assent of the parties. The parties simply did not contract to shift all risk of loss to Tebbs, either impliedly or otherwise, in the circumstances of this case. "It is fundamental that a meeting of the minds on the integral features of an agreement is essential to the formation of a contract." *Richard Barton Enters., Inc. v. Tsern*, 928 P.2d 368, 373 (Utah 1996). "An agreement cannot be enforced if its terms are indefinite or demonstrate that there was no intent to contract." *Id.* The terms of the alleged implied contract in this case do not meet this reasonable certainty requirement, at least to the extent Guardian suggests the Court should derive such implications as a factual matter from the parties' communications and not from professional duties imposed by law on Tebbs.

Contract damages are recoverable only for losses caused by the contract breach. *Restatement (Second) of Contracts* §§ 346-347. Moreover, damages are not recoverable for loss the plaintiff could have avoided without undue risk, burden, or humiliation. *Id.* § 350. As set forth in paragraphs of the undisputed facts and argued more fully below, Guardian would have avoided the losses it now claims had it employed the simplest common sense and basic business

judgment. It did not, however, and now seeks to lay the consequences of its actions exclusively at the feet of Tebbs. The trial court reject that effort as a matter of law given Guardian's indisputable unreasonableness under the circumstances of this case and properly dismiss Guardian's contract claim against Tebbs.

## II. IN THE INSTANT CASE AN ACTION FOR BREACH OF AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SOUNDS IN TORT

In an effort to stave off a dispositive legal ruling, Guardian suggests that Tebbs breached an implied covenant of good faith and fair dealing. Guardian did not plead this claim in its Complaint, however.

Even if this unpleaded claim were at issue, the covenant of good faith and fair dealing "cannot be construed . . . to establish new, independent rights or duties not agreed upon by the parties." *Breyhany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991). Here, Guardian would have this Court add a new contract term that was not the express subject of the parties' agreement: that Stacey Mitchell would not secretly write checks to herself on Guardian's account. Guardian's attempt fails as a matter of law. The duty of a professional not to take money from a client without authorization is a duty imposed by law. The good faith covenant cannot be used to somehow turn this independent duty into a contractual provision.

The substantial majority of courts require a claim for a breach of an accountant's professional standards to be brought as a negligence or professional malpractice action. *See e.g., F.D.I.C. v. Ernst & Young*, 967 F.2d 166, 172 (5<sup>th</sup> Cir. 1992) (contract claim merely asserts that auditor violated its common law duty of care, which is a tort claim); *Clark v. Milam*, 847 F. Supp. 409, 420-21 (S.D. W. Va. 1994) (applying West Virginia law); *Askanase v. Fatjo*, 838 F. Supp. 465, 469 (S.D. Tex. 1993) (complaint stated claim in tort); *Robertson v. White*, 633 F. Supp. 954, 972-74 (W.D. Ark. 1986) (noting that majority rule and better rule was that claim sounded only in tort); *Baehr v. Touche Ross & Co.*, 62 B.R. 793, 797 (E.D. Pa. 1986) (rejecting argument that contract statute of limitations should apply to claim for professional malpractice because the claim arose from a contractual relationship); *Sato v. Van Denburgh*, 599 P.2d 181, 183 (Ariz. 1979) (complaint sounds in tort). Guardian has not pleaded a tort claim, however, nor has it produced evidence to establish the relevant professional standard or a breach thereof by Tebbs. Consequently, Guardian cannot prevail, as a matter of law.

Guardian cites a 1940 Kansas case to support its assertion that accountants have an implied duty of, "skill, accuracy and fidelity." *Board of County Comm'rs v. Baker*, 102 P.2d 1006, 1009 (Kan. 1940). In a case decided 42 years later, however, the Kansas Supreme Court held that such claims sound in tort and not

in contract. *Brueck v. T.R. Krings*, 638 P.2d 904, 907-08 (Kan. 1982). The court held that the gravamen of the allegations regarding performance of an audit was a violation of “a duty imposed by law as a result of the contractual relationship between the parties.” *Id.* at 907.

Tebbs does not dispute that by performing accounting services for Guardian it was required to “render [its] services with that degree of skill, care, knowledge, and judgment usually possessed and exercised by members of that profession in the particular locality.” 1 Am. Jur. 2d, *Accountants* § 19. This Court will recognize such a standard, however, as a quintessential tort duty. Despite scattered law to the contrary, the vast majority of jurisdictions treat this standard for what it is – a duty of care imposed by law. Moreover, as already shown, Utah case law treats the critical tort-based causation analysis the same regardless how the plaintiff attempts to frame its case. Finally, Guardian itself contradictorily disavows that it is advancing such a claim. Guardian argues that Utah professional malpractice case law is “directly on point” and that Tebbs is held to the standard of “skill, care, knowledge, and judgment” in the relevant profession while simultaneously arguing that this is not a malpractice action. Guardian’s claim is undeniably one for malpractice, despite its label. Notwithstanding Guardian’s legal maneuverings, the Court should look past the

form of the claim and examine its substance. In sum, the separate implied duties alleged by Guardian serve only to confirm Tebbs' legal position in every respect.

The mischief inherent in indulging the plaintiff's creative pleading attempt is apparent: Guardian seeks to circumvent the inevitable consequences of established tort law. Under well-established negligence principles, the trier of fact may compare the negligence of the plaintiff to any negligence of the defendants and bar plaintiff's claim if the plaintiff's negligence exceeds that of the defendants. Furthermore, under well-established agency law, a principal is not liable for acts of its employees performed outside the scope of the employment. These time-honored principles allow a court to adjust liability, apportion damages, and shift losses based on notions of reasonableness and fairness under all the circumstances. This is especially important when, as here, a defendant in Tebbs' shoes has itself been victimized by a third party – Mitchell – aided in large part by the plaintiff's own deliberate carelessness.

Guardian attempts an end run around these principles by, in effect, seeking to impose strict liability on Tebbs. Guardian's view of its case is that only Tebbs should bear the burden of the loss, despite overwhelming, significant contributory negligence on Guardian's part. Guardian's approach is not and should not be the law. "In determining whether a tort or contract claim has been pled, the court must look to the substance of the allegations, not the labels attached to them."

*Thomas v. Goudreault*, 786 P.2d 1010, 1014-15 (Ariz. Ct. App. 1989). The trial court recognized substance over form and analyze Guardian's "implied contract" case for what it is; a claim sounding in tort that has not been pleaded or proved, and that is barred by common law principles in any event.

The case law universally recognizes that using pre-signed blank checks and/or a signature stamp (both of which Guardian used in this case) are negligent acts. *See, e.g.* 2 White & Summers, *Uniform Commercial Code* § 19-3, at 240-45 (4<sup>th</sup> ed. 1995) (collecting numerous cases, and noting in UCC commentary that "leaving a large blank space at a critical spot on a check would be failure to exercise ordinary care substantially contributing to an alteration"). In this case, Guardian's negligent acts are the primary cause of its loss. Guardian "opened the door" to its loss by providing Mitchell with blank, pre-signed and pre-stamped checks.

This substantially negligent act is even more egregious in this case because Guardian is itself a fiduciary to third parties, closely regulated by the State of Utah and charged with handling escrow monies. Guardian knows the importance of handling such matters with care. Notwithstanding this fact, Guardian used a dangerous pre-signed check policy it was advised against with virtually no oversight – for the sole sake of "convenience" – paving the way for that theft that led to this lawsuit.



Guardian was negligent in failing to even cursorily inspect or pay attention to its payroll matters. Guardian did not count the payroll checks, ask for a reconciliation, compare amounts or persons paid with its employee payroll, look at bank statements or checks, or take any other step to verify a matter as important as its internal payroll. Here, Guardian's failure to act reasonably caused the loss it now seeks to shift to Tebbs. Had Guardian exercised ordinary care, it should have and would have caught the "extra" checks. *Cf.* Utah Code Ann. §§ 70A-4-306, 406; *Zion's First Nat'l Bank v. Clark Clinic Corp.*, 762 P.2d 1090, 1097 (Utah 1988) (bank customer has duty to exercise reasonable promptness in examining statement or checks for forgery, unauthorized signatures, or alterations).

Utah courts recognize that comparative negligence principles apply in actions against accountants. "For a client to be contributorily negligent, his negligence must relate or contribute to the alleged injury caused by the professional stemming from the professional relationship." *Steiner Corp. v. Johnson & Higgins*, 996 P.2d 531, 532 (Utah 2000) (accountant malpractice). "[W]hen the negligence of the plaintiff is 'causally connected' to the injury . . . the damages awarded to the plaintiff [can] be reduced proportionately" and the plaintiff's negligent acts "can be considered in determining causation and damages." *Id.* at 534.

In Utah, a plaintiff may only recover in a negligence action if the defendants' fault exceeds its own. This is the analysis that Guardian attempted to avoid as it framed its pleadings in this case. For the reasons set forth above, the trial court, again, correctly concluded that Guardian's claims against Tebbs were barred as a matter of law.

### III. TEBBS IS NOT LIABLE FOR THE ILLEGAL ACTS OF MITCHELL

The parties agree that the principals are bound by the acts of their agents which fall within the scope of the authority of the agents. *See Horrocks v. Westfalia Systemat*, 892 P.2d 14, 15 (Utah Ct. App. 1995). However, an employer is not liable for an employee's acts committed outside the scope of her employment, and certain acts fall outside the scope as a matter of law. *See, e.g., Jackson v. Richter*, 891 P.2d 1387, 1391 (Utah 1995). Illegal acts by an employee, for the sole benefit and purpose of the employee and not the employer, designed to further her own interests only, are not within the actual or apparent scope of authority. The employer, therefore, cannot be liable for such illegal acts. Such criminal acts are outside the scope of employment. *See Los Ranchitos v. Tierra Grande, Inc.*, 861 P.2d 263, 269 (N.M. Ct. App. 1993) (collection case).

This principle is a matter of agency law that applies in the contract as well as the tort arena. Traditional agency rules apply to all areas of law, where the particular facts so indicate, unless otherwise agreed. *See, e.g., Restatement*

(*Second of Agency*, §§ 35-81 & sc. n. at 4 (1958) (agency principles generally apply “unless otherwise agreed”). Guardian itself invokes such principles in arguing that Tebbs is bound by Mitchell’s actions (arguing that basic agency law dictates that a principal is bound by the acts of an agent clothed with apparent authority). Even if Guardian’s claim were classified as a contract claim, the alleged breach arises only if Mitchell’s bad acts can properly be characterized as binding on Tebbs and therefore only if she were acting within the scope of her authority and in furtherance of her employment duties. *See Id.*; *see also Id.* at §§ 228-237 (defining agency rules regarding scope of employment).

Here, Guardian has not even suggested that Mitchell’s willful personal acts were undertaken for anyone’s benefit but her own. While Mitchell should clearly be held liable, Tebbs should not be held responsible for Mitchell’s criminal acts – period. *See, e.g. Wells v. Walker Bank & Trust Co.*, 590 P.2d 1261, 1264 (Utah 1979) (“[I]f the employee is not so authorized and is acting for his own interests, and not in the furtherance of the employer’s business, the latter would not be bound by his act.”); *Birkner v. Salt Lake County*, 771 P.2d 1053, 1056-57 (Utah 1989) (to be within the scope of employment, “an employee’s conduct must be of the general kind the employee is employed to perform,” and “the employee’s conduct must be motivated, at least in part, by the purpose of serving the employer’s interest”); *Sweatman v. Linton*, 241 P.2d 309, 310 (Utah 1925) (“[B]ut

if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but he master or employer is not.”); *Gottlieb v. Sullivan & Cromwell*, 609 N.Y.S.2d 344, 344-45 (N.Y. App. Div. 1994) (“We note, in any event, that the criminal acts committed by the defendant’s employees were outside the scope of their employment and in no way advanced the interests of the defendant, so that the defendant could not be held liable . . . .”). Some conduct, such as that at issue here, “is so clearly outside the scope of employment that the issue may properly be decided by the trial judge as a matter of law.” *Birkner*, 771 P.2d at 1057.

Were the Court to hold as Guardian desires, the law applied in embezzlement cases would be forever altered. No plaintiff would ever again allege anything but breach of “implied contract” terms, thereby avoiding pesky roadblocks to recovery, such as the plaintiff’s own fault, proximate causation, and firmly established agency principles. The Utah Supreme Court clearly signaled just the opposite result should be obtained when, in a non-tort case, it applied standards identical to those it had developed over many years in the tort field. See *Kilpatrick*, 909 P.2d at 1291.


As a matter of law, Mitchell’s criminal acts cannot impose liability on her employer, Tebbs, and cannot form the basis for Guardian’s claim against Tebbs. This is true notwithstanding Guardian’s creative pleading attempt.

For each of these reasons, the trial court correctly viewed Guardian's implied contract claims as sounding in tort and barred the claims as a matter of law.

### CONCLUSION

The trial court correctly concluded that there were no disputed issues of material fact and that Tebbs was entitled to a summary as a matter of law. This Appellee respectfully requests that following its review of the trial court's grant of summary judgment for correctness, even giving no particular deference to its conclusions of law, that this Court find that the trial court did not err in applying the governing law to the undisputed issues of material fact and that it affirm the grant of summary judgment.

DATED this 17<sup>th</sup> day of August, 2001.

  
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Douglas T. Hall  
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CERTIFICATE OF SERVICE

I hereby certify that a two true and correct copies of the foregoing  
Appellee's Brief was mailed, first class postage prepaid, this 17<sup>th</sup> day of  
August, 2001, to the following:

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A handwritten signature, likely of D. Scott Crook, is written over a horizontal line. The signature is in cursive and appears to read "D. Scott Crook".