2010

# EJ Sutton v. Byer Excavating, Inc., a Utah Corporation, Lowell Construction Co., a utah Corporation, James H. Diamond Concrete, a Utah Corporation, and John Does 1 though 3 : Brief of Appellee

Utah Court of Appeals

## IN THE UTAH COURT OF APPEALS

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| EJ SUTTON,<br><br>Plaintiff and Appellant,<br><br>vs.<br><br>BYER EXCAVATING, INC., a Utah Corporation, LOWELL CONSTRUCTION CO., a Utah Corporation, JAMES H. DIAMOND CONCRETE, a Utah Corporation, and JOHN DOES 1 through 3.,<br><br>Defendants and Appellee. | Appellate Case No. 20100830 |

APPEAL FROM THE ORDER OF SUMMARY JUDGMENT OF THE THIRD DISTRICT COURT OF SALT LAKE COUNTY, HON. ROBERT K. HILDER

# BRIEF OF APPELLEE BYER EXCAVATING, INC.


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**ORAL ARGUMENT REQUESTED**

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## LIST OF ALL PARTIES

Plaintiff/Appellant: E.J. Sutton

Defendant/Appellee: Byer Excavating, Inc.

Other Defendants not party to this Appeal: Lowell Construction Co.
James H. Diamond Concrete

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## JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal, transferred from the Utah Supreme Court, pursuant to UTAH CODE ANN. § 78A-4-103.

## ISSUES PRESENTED

Issue 1: Whether Bob Miles ("Miles") was acting in the course and scope of his employment for Byer Excavating, Inc. (such that Byer may be held vicariously liable for Miles's alleged conduct) where Miles left his work assigned by Byer Excavating on Lot 174 to assist Lowell Construction with its operation on a different project on Lot 173.

Issue 2: Whether Miles's course and scope of employment can be inferred to include apparent authority to leave his duties assigned by Byer on Lot 174 and become part of Lowell Construction's operations in unloading rebar on Lowell's project on Lot 173 absent any act or conduct of Byer indicating such apparent authority.

## STANDARD OF REVIEW

A trial court's grant of summary judgment is reviewed for correctness. *Francisconi v. Union Pacific Railroad*, 36 P.3d 999, 1001-02 (Utah Ct. App. 2001).

The trial court granted summary judgment to Byer Excavating, finding that it could not be held vicariously liable for Bob Miles's acts because, as a matter of law, Bob Miles was acting outside of the course and scope of his employment. Summary judgment is appropriate where "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." Utah R. Civ. P. 56(c). Summary judgment is not precluded merely because some facts may be disputed, but only when

there is a genuine dispute as to a material fact. *Heglar Ranch, Inc. v. Stillman*, 619 P.2d 1390 (Utah 1980). Reasonable inferences regarding facts are viewed in a light favorable to the nonmoving party but the Court is not required to draw unreasonable inferences that are not supported by the facts. *Surety Underwriters v. E&C Trucking, Inc.*, 2000 UT 71, ¶37; 10 P.3d 338. The Court is not required to ignore reasonable inferences favorable to the moving party, based on uncontested facts. *Id.*

## RELEVANT STATUTORY PROVISIONS

UTAH CODE ANN. § 78A-4-103(2)(j):

> The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals over: . . .
>
> (j) cases transferred to the Court of Appeals from the Supreme Court.

Utah R. Civ. P. 56(c):

> (c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

## STATEMENT OF THE CASE

Plaintiff E.J. Sutton brought this suit against Byer Excavating, Inc. ("Byer Excavating" or "Byer"), Lowell Construction Company ("Lowell Construction" or

"Lowell"), and James H. Diamond Concrete to recover for injuries sustained during Lowell Construction's operations of unloading a load of rebar for its Project on Lot 173. Byer Excavating's trackhoe operator had left his work for Byer on the separate project on Lot 174 to assist in Lowell's operations on Lot 173. Sutton was injured when he ran toward the unstable load of rebar he had rigged and suspended from the trackhoe bucket and the load fell and struck Sutton. Byer defended on the basis that Miles was not negligent, that the accident was primarily caused by Sutton's own negligence, and that any alleged conduct of Miles was outside the course and scope of Miles's employment with Byer.

Sutton settled with Lowell Construction and Diamond Concrete. Byer Excavating moved for summary judgment on the grounds that at the time of the accident Bob Miles was not within the course and scope of his employment for Byer. The trial court granted Byer's motion and entered an order dismissing Sutton's claims against Byer on September 27, 2010. This appeal followed.

## STATEMENT OF FACTS

### Sutton's Injury in Lowell Construction's Operations on Lot 173

This case arises out of a construction site injury which occurred August 1, 2007, on Lot 173 at the Colonies Subdivision in Park City, Utah. (R. 3.) Appellant E. J. Sutton ("Sutton") was injured in the course of Lowell Construction's operation of unloading rebar delivered for Lowell Construction's construction project on Lot 173. Lowell Construction was the general contractor in charge of the work on Lot 173. (R. 788.)

Don Jones ("Jones") was Lowell Construction's superintendent on Lot 173. (R. 641.) Jones confirms that Lowell "was in charge of the unloading operation as opposed to...anybody else" and that "Byer Excavating had absolutely no involvement with the Thorpe residence project on Lot 173." (R. 786-89.) Sutton admits Lowell was in charge of its rebar unloading. (R. 814.) Sutton's expert, Don Rigtrup, testified that Lowell was in charge of, in control of, and had the final say regarding, Lowell's rebar unloading operation. (R. 817-20.)

**Byer Excavating's Work on Lot 174**

Byer was an earthwork subcontractor performing clearing, grubbing and excavation work for M.H. Allred, the general contractor on the separate and unrelated project located on Lot 174. (R. 3, 741, 766-67.) Byer Excavating had no work, operations, contract or other involvement on Lot 173. (R. 595-96, 741-42, 767.) There was no agreement between Byer and Lowell. (R. 787.) Jones never had any conversations with anyone at Byer. (R. 786.) Indeed, Jones did not even know who Byer was. (R. 786.)

Bob Miles was employed by Byer to operate a trackhoe to excavate Lot 174 and clear trees and debris. (R. 797.)

**August 1, 2007 Accident on Lot 173**

On August 1, 2007, the date of the accident, a load of rebar ordered by Lowell Construction was delivered to Lot 173. (R. 784-85.) Lowell needed to unload the rebar from the delivery truck on Lot 173. (R. 785.)

On the day of the accident, E.J. Sutton was working as a framing superintendent for R.W. Construction, which was also a subcontractor for M.H. Allred Construction on the construction project on Lot 174. (R. 3, 685.) R.W. Construction had no agreement with Lowell regarding the project on Lot 173. (R. 784-85.)

Lowell Construction's superintendent, Jones, asked Sutton to ask the trackhoe operator to help off-load Lowell's rebar on Lot 173. (R. 603.) Sutton acknowledged that Lowell's request to help unload its rebar on Lot 173 was outside the scope of work he was hired to do on Lot 174. (R. 810.)

As Miles was performing his work for Byer on Lot 174, Sutton approached him and asked him to take the trackhoe to Lot 173 and assist Lowell Construction in unloading its rebar. (R. 602-03, 805.) Miles responded "no, I don't want to do that, but I will." (R. 799.) Miles testified regarding his reluctance to assist Lowell that ***"I shouldn't be doing that because that's not what I'm paid to be doing."*** (R. 801.) Miles also testified that he did not want to go help Lowell on Lot 173 ***"because I didn't think that's where I should be. I should have been down there doing my job for Byer."*** (R. 800.)

Sutton also understood Miles's reluctance to become part of Lowell's operations on Lot 173 was because "he was, you know, kind of busy doing what he did...kind of having to stop and go do something for somebody else...." (R. 809.) Sutton acknowledged that Lowell's request to help unload its rebar on Lot 173 was outside the scope of work he was hired to do on Lot 174. (R. 810.)

Bob Miles left his work for Byer on Lot 174 and took the trackhoe to Lot 173, where he became part of Lowell Construction's operation in unloading Lowell Construction's rebar. (R. 3, 791.) Jones understood that in doing so, Miles would be leaving his work on Lot 174 and would become part of Lowell Construction's operation in unloading the rebar. Jones testified "that goes without saying, to be able to help me they would have had to stop their operation....***In helping me, they became part of my operation.***" (R. 791.) Byer had no work to do at the location where the trackhoe was located during the rebar unloading and there was no reason for Bob Miles to be at that location in his employment for Byer. (R. 747-48, 773-74.)

Byer was not aware that Bob Miles had left Lot 174 and taken the trackhoe to Lot 173 to assist Lowell Construction until after the accident occurred. Byer was not authorized and did not retain any right to supervise Bob Miles regarding activities on Lot 173. (R. 582, 586, 589, 592, 596-97.)

During Lowell's rebar unloading on Lot 173, E.J. Sutton was injured when he went near the suspended load of rebar which he had rigged to the trackhoe. (R. 617.) When the load became unstable and began to tilt, Sutton ran next to the load rather than stay away and clear of the unstable load. Although asked twice by the rebar delivery truck driver if Sutton was going to lower the load to the ground before going near it, Sutton declined and decided to go near the suspended load without lowering it to the ground. (R. 616, 621.)

**Bob Miles's Employment with Byer Excavating; Nature of Responsibilities**

Bob Miles's employment with Byer was limited to earthwork and did not include unloading rebar or other materials with the trackhoe. (R. 583-85, 589-90, 595-96.) Miles has never been involved with rigging, hoisting or unloading rebar as part of his employment with Byer. (R. 590.)

Miles was not hired or paid to leave Byer's work and use Byer's equipment to assist another contractor on another separate project where Byer has not contracted to work. (R. 583-84, 589-90, 595-96, 747, 758-59, 773-74.)

Bob Miles was not authorized to use Byer's trackhoe other than in furthering the scope of Byer's excavation and earthwork on Lot 174. Bob Miles was not authorized to use the trackhoe to perform any assistance or activity on Lot 173. (R. 583-85, 589-92, 595-97.)

Byer has two licenses and divisions, (1) its excavation and grading operations which performs work under the S310 Excavation and Grading license and (2) its utility crews which perform work under its S390 Sewer and Waste Water Pipeline license.[1] (R. 775.) Byer employs a number of different employees in these two divisions with different job descriptions to perform a variety of different tasks and activities. (R. 775).

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[1] Byer does not have an S260 – General Concrete Contractor license which involves "placing and erection of steel bars for reinforcing." (R. 584.) Unloading rebar and materials on Lot 173 was outside the scope of Byer's excavation and grading business and the scope of Byer's S310 contractor's license. (R. 768.) Byer's earthwork business under its S310 contractor's license does not involve handling or unloading rebar or other materials with trackhoes or cranes. (R. 768.)

Bob Miles was hired to perform excavation and grading work. (R. 748, 775, 758. 768) Bob Miles's employment with Byer does not include Byer's utility work which sometimes involves movement of pipe and materials for that work. (R. 748, 775.) This work is performed by different work crews with different equipment and different scope of employment responsibilities from what is involved in Bob Miles's excavation work. (R. 775.) Bob Miles's scope of employment does not include the construction of sewer and utility lines. (R. 748, 775.)

Sutton asserts that other Byer employees, in Byer's utility crews, use excavation equipment to unload materials on other projects. None of the activities alleged by Sutton involved Bob Miles. (R. 749-50, 776-79.) These activities are performed by utility crews and not by Bob Miles. Bob Miles's scope of employment with Byer is limited to excavation and grading work. (R. 583-84, 589-90, 595-96, 748, 775, 758.) Whenever Bob Miles was involved with a sewer and utility project, his work was limited to the excavation and grading work on those projects. (R. 775.) The Byer utility work crews would then come to the project to perform the utility and pipe work. Bob Miles did not participate in the utility and pipe work on these projects. (R. 749, 759, 776-77.)

The activities asserted by Sutton regarding movement of pipe and other utility materials involved Byer's underground utility crews and are unrelated to Bob Miles's employment in Byer's excavation work. (R. 776.) The utility work involves different types of crews and equipment than Bob Miles's excavation and grading work. For example, the utility work crews include a machine operator and at least one or two other

persons to assist with the pipe and utility work. The utility crews are equipped with rigging equipment for use in working with the pipes and utility materials. (R. 748,776, 758.) In contrast, Bob Miles typically worked alone and was not equipped with rigging equipment because he was not hired to engage in any activity that would involve unloading pipe or other materials. (R. 748, 776.) Bob Miles's employment with Byer was limited to earthwork and did not include unloading rebar or other materials with the trackhoe. (R. 741-42, 767-68, 595-96.)

**Hours and Spatial Boundaries of Miles's Employment with Byer**

**Hours of Employment with Byer**

Bob Miles knew that assisting Lowell unload its rebar was not time for which he would be paid by Byer. (R. 801.) Bob Miles did not submit time to Byer for payment for the time he spent taking the trackhoe to Lot 173 to assist Lowell in unloading the rebar. (R. 590-91, 595.) Byer did not pay Bob Miles for the time in taking the trackhoe to Lot 173 and helping Lowell Construction unload the rebar. (R. 590-91, 595.)

Bob Miles day working for Byer on August 1, 2007 began at about 7:30 a.m. He helped load the trackhoe and transport Byer's trackhoe to Lot 174. This took about three hours. Miles then began the earthwork and grading work on Lot 174 and worked on this for about two hours until he left Lot 174 to assist Lowell Construction unload the rebar. Bob Miles submitted only five hours of time (approximately 7:30 a.m. to 12:30 p.m.) to Byer for payment on August 1, 2007. None of this time represented time assisting Lowell Construction unload its rebar. (R. 590-91, 595.)

**Spatial Boundaries of Miles's Employment with Byer**

Any activities by Bob Miles on Lot 173 were outside the ordinary spatial boundaries of Bob Miles's employment with Byer. (R. 585, 591-92, 596.) Byer had no work to do at the location where the trackhoe was located during the rebar unloading and there was no reason for Bob Miles to be at that location in his employment for Byer. (R. 747-48, 774.)

Sutton admits in his Complaint that the rebar was unloaded "to Lot #173." (R. 3-4.) Sutton was injured on Lot 173. (R. 783.) Bob Miles left the location of Byer's work on Lot 174 and went to the physical location of Lowell's operation and became part of Lowell's operation in unloading the rebar onto Lot 173. (R. 791.) Sutton testified that this location was "up the hill from us, probably 50 to 100 yards..." from where Miles was working. (R. 805.) With respect to the location of Lowell's rebar unloading operation, Miles testified that he did not want to go help Lowell there ***"because I didn't think that's where I should be. I should have been down there doing my job for Byer."*** (R. 800.)

Sutton raises the issue of whether the tracks of the trackhoe actually left Lot 174. Sutton relies upon Don Jones's hand drawing in his deposition. Mr. Jones testified that his drawing was a "rough estimate" and "inaccurate." (R. 784.) Regardless of whether the track portion of the trackhoe was technically on Lot 174 or 173, Sutton admits that the trackhoe was physically situated so the boom of the trackhoe could swing over Lot 173 and place the rebar on Lot 173. (R. 642-44, 783.) Byer had no work to do at the location

where the trackhoe was located during the rebar unloading and there was no reason for Bob Miles to be at that location in his employment for Byer. (R. 747-48, 774.)

**Byer's Interests Were Not Furthered by Lowell Construction's Rebar Unloading**

There is no evidence that Miles was motivated by any Byer interest to assist Lowell in unloading its rebar on Lot 173. To the contrary, Miles testified ***"I shouldn't be doing that because that's not what I'm paid to be doing"*** and ***" I didn't think that's where I should be. I should have been down there doing my job for Byer."*** (R. 800).

Byer did not benefit in any fashion from the unloading of the rebar or from any of the activities relating to unloading the rebar on Lot 173. (R. 583-85, 589-92, 595-97.) More importantly, Bob Miles could not imagine any interest of Byer that was served by unloading Lowell Construction's rebar. (R. 590.)

Sutton's expert, Don Rigtrup, was unable to identify any specific benefit to Byer regarding the unloading of Lowell's rebar. (R. 821-28.) With respect to a benefit to Byer from unloading Lowell's rebar, Mr. Rigtrup admits that he is "just speculating." (R. 822.) Sutton suggests without any factual basis that Lowell's porta-potty may have been a benefit to Byer. Byer and Miles, however, were unaware of Lowell's porta-potty as of the date of the accident. (R. 750, 780.)

Don Jones of Lowell Construction confirmed that "the unloading of the steel did not benefit, in any way, Byer Excavating " and that what Miles "was doing in assisting with unloading the rebar was purely for the benefit of Lowell Construction." (R. 787.)

Sutton also testified that the activities on Lot 173 to move the rebar did not confer any benefit to the work that was to be performed on Lot 174. (R. 813.) Byer did not benefit in any fashion from the unloading of the rebar or from any of the activities relating to unloading the rebar on Lot 173. (R. 583-85, 589-92, 595-97.)

**Alleged Industry Custom to Help Other Contractors and Informal Bartering System**

In his 30 or so years of experience in the excavation business, 17 of which were with Byer Excavating, Bob Miles had never been asked to leave his jobsite to help out on another jobsite. (R. 589, 797-98.)

Sutton asserts that Miles acknowledged that contractors on projects help each other "from time to time." This statement was not in the context of his specific employment with Byer. (R. 802.) In his decades of construction employment, Lowell's request to assist unload its rebar was the first time he had been asked to assist on another contractor's project. (R. 590, 797-98.) Bob Miles testified:

> Q: Okay. Have you ever worked, in your 30-some years, on job sites where another contractor or entity asked you to help out with their jobs ? Has that ever happened to you ?
> A. Not that I can remember.
> Q. ***This is the first time you were asked to assist on another contractor's project ?***
> A. (Witness nods head up and down.)
> Q. Okay.
> MR. HANSEN: He was nodding his head.
> THE WITNESS: ***Oh, yes.***

(R. 797-98.)

Sutton asserts various instances from separate and unrelated instances of Byer assisting other contractors. However, none of these instances involved any assistance to other contractors on separate projects where Byer had not contracted to perform work. None of the instances asserted by Sutton involved Bob Miles. (R. 748-50, 786-90.) There is no evidence of any instance where Byer authorized Miles to leave Byer's work to use Byer's equipment on another unrelated project where Byer was not working. (R. 797-98.) Bob Miles left Byer's work on Lot 174 and became part of Lowell's operation in unloading the rebar onto Lot 173. (R. 791.) There is no evidence that Byer authorized this. (R. 747, 773.)

Sutton relies upon deposition testimony of its expert, Don Rigtrup, for the proposition that sharing equipment and exchanging favors is commonplace on construction sites. Sutton alleges the existence of an "industry standard barter system." However, Mr. Rigtrup testified that he is not familiar with the actual operations or practices of Byer. (R. 822, 828.) There was no agreement between Byer and Lowell. (R. 787.) Jones never had any conversations with anyone at Byer. (R. 786.) Indeed, Jones did not even know who Byer was. (R. 786.)

**No Apparent Authority to Work on Lot 173**

Sutton asserts that Miles had "apparent authority" to perform the unloading work as part of Lowell's operations on Lot 173 because "Sutton presumed that Miles had authority." Sutton offers no evidence of any Byer conduct indicating that Miles was authorized to stop Byer's work on Lot 174 and, on behalf of Byer, become part of Lowell

Construction's operations in unloading rebar on Lot 173.

Sutton relies on Miles's testimony that he was not "instructed by anybody at Byer Excavating to call them and run any problems by them, any concerns that you have on the site." (R. 801.) There is no testimony of Miles, and no evidence of any kind, that Miles thought he had authority to use Byer's trackhoe in Lowell's operations regarding the Lot 173 project. There is no evidence that Miles was authorized to represent Byer or do anything on behalf of Byer in Lowell's operations and activities on the unrelated project on Lot 173. Miles was never authorized to enter into any agreements on behalf of Byer. (R. 747.)

Miles's undisputed testimony on this point is that ***"I shouldn't be doing that because that's not what I'm paid to be doing."*** (R. 801.) Miles also testified that he did not want to go help Lowell on Lot 173 ***"because I didn't think that's where I should be. I should have been down there doing my job for Byer."*** (R. 800.)

Bob Miles was not authorized to use the Byer Excavating trackhoe on a jobsite other than the one where he was employed to work. (R. 582-82, 589-90, 747.) Sutton acknowledged that Lowell's request to help unload its rebar on Lot 173 was outside the scope of work he was hired to do on Lot 174. (R. 810.) Bob Miles knew that helping someone else on a different job site was outside the scope of his employment with Byer Excavating. (R. 589-91, 800.)

## SUMMARY OF THE ARGUMENT

The salient issue on appeal is whether Byer Excavating can be held liable for Bob

Miles's involvement in the accident where Miles left his work for Byer on Lot 174 and became part of Lowell Construction's operations to unload rebar onto Lot 173. Summary judgment on this issue is proper "when the employee's activity is so clearly . . . outside the scope of employment that reasonable minds cannot differ." *Newman v. White Water Whirpool*, 197 P.3d 654, 658 (Utah 2008). It is difficult to conceive any reasonable theory how Miles's scope of employment could be expanded to include abandoning his work for Byer and leaving that work to become part of another contractor's operation with whom Byer had no relationship on a project with which Byer had no involvement.

To hold Byer Excavating vicariously liable for Miles's acts, Sutton must show that, at the time of the accident, there was a respondeat superior relationship between Byer and Miles, and that Miles was operating within the course and scope of his employment. At the time of the accident, Byer Excavating had no control over the details of Miles's work for Lowell Construction on lot 173, and thus respondeat superior relationship with Bob Miles. Miles also was not acting within the course and scope of his employment because he was not doing the general work he was hired to do, was outside the time and ordinary spatial boundaries of his employment, and was not motivated by Byer's interests. At the time of the accident, Bob Miles was part of Lowell Construction's operation and was under the control of Lowell Construction and its superintendant, Don Jones. (R. 791.)

Bob Miles was employed by Byer Excavating to perform excavation and grading work on Lot 174, and that at the time of the accident, Bob Miles was doing a task at a jobsite for another contractor that all had no relation to the excavation and grading he was

to perform on Lot 174 for Byer. Bob Miles's employment with Byer did not include unloading rebar or other materials from delivery trucks, and certainly did not involve helping other contractors on unrelated projects. Lowell's request to assist with the rebar unloading was the first time in Miles's 17 years of employment for Byer that he had been asked to stop his work and assist another contractor on another project. He knew that he should not have been helping Lowell because that was not what he was paid to do.

Bob Miles had no apparent authority from Byer to do anything on behalf of Byer, as an employee, agent or otherwise, with respect to Lowell Construction or Lot 173. More specifically, there was no conduct on Byer's part giving rise to such authority. He was not hired or authorized to use Byer's equipment on projects where Byer was not under contract to work, and he was not hired to use Byer's equipment to unload materials. He was hired to clear debris on and excavate Lot 174.

Bob Miles's acts were so clearly outside of the scope of his employment that no reasonable juror could find otherwise, and summary judgment should be affirmed.

## ARGUMENT

When Bob Miles was assisting Lowell Construction unload its rebar on Lot 173, he was not where Byer Excavating hired him to be, and was not doing what Byer hired him to do on Lot 174. At the time of the accident, he was part of Lowell Construction's operation, and under Lowell's control. Miles testified "I shouldn't be doing that because that's not what I'm paid to be doing," and "I didn't think that's where I should be, I should have been down there doing my job for Byer." (R. 670, 800-801).

Sutton acknowledged that Lowell's request to help unload its rebar on Lot 173 was outside the scope of work he was hired to do on Lot 174. (R. 810.) Because Lowell, not Byer, controlled the details of Miles's work unloading the rebar, and because unloading rebar for an unrelated contractor on an unrelated project was outside the scope of Miles's employment, Byer Excavating cannot be held vicariously liable.

## I. BYER EXCAVATING CANNOT BE HELD VICARIOUSLY LIABLE FOR BOB MILES'S ACTS WHERE, AT THE TIME OF THE ACCIDENT, BYER HAD NO RESPONDEAT SUPERIOR RELATIONSHIP WITH MILES AND BECAUSE MILES WAS ACTING OUTSIDE OF THE COURSE AND SCOPE OF HIS EMPLOYMENT.

Byer Excavating can only be held liable for alleged conduct of Miles if Sutton establishes that at the time of the accident, (1) a respondeat superior or employment relationship existed between Miles and Byer and (2) that Miles's conduct was in the course and scope of such employment relationship with Byer.[2] *Glover by & Through Dyson v. BSA*, 923 P.2d 1383, 1385-1386 (Utah 1996). These essential elements are not present.

The undisputed facts show that no respondeat superior relationship existed between Byer Excavating and Miles at the time of the accident because Miles, by abandoning his work to go help Lowell Construction, had become part of Lowell's operation, subject to Lowell's control. (R. 788, 791, 814, 817-820)

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[2] The trial court did not expressly address the issue of whether a respondeat superior relationship existed between Byer and Miles at the time of the accident. However, this issue was fully briefed, and this Court may affirm on any ground that the trial court could have relied on. *Afridi v. State Farm Mut. Auto. Ins. Co.*, 2005 UT 53, ¶5, 122 P.3d 596.

Further, Miles was clearly outside the course and scope of his employment to perform excavation and grading on Lot 174. The rebar unloading for Lowell Construction was not excavation and grading work, was not part of the job tasks Byer assigned him to perform, was unrelated to Byer's business, was outside of the ordinary time and spatial bounds of his particular work on Lot 174, and was not done with the motive to further Byer's interests. *See Birkner v. Salt Lake County*, 771 P.2d 1053, 1057 (Utah 1989). The Utah Supreme Court has upheld summary judgment in cases where, as here, an employee clearly acted in a way that was unauthorized, not part of his duties, and not motivated by accomplishment of his employer's interests. *See Jackson v. Righter*, 891 P.2d 1387 (Utah 1995); *Birkner*, 771 P.2d 1053.

### A. Byer Cannot be held Vicariously Liable for Miles's Conduct Because, at the Time of the Accident, No Respondeat Superior Relationship Existed Between Byer and Miles.

A respondeat superior relationship is determined by whether, at the time of the acts in question, the employer had the right to control the employee. *Glover,* 923 P.2d at 1385. There was no respondeat superior relationship between Byer and Miles when Miles physically left the Byer worksite and became part of Lowell's operations for the project on Lot 173. Sutton must show that unloading Lowell's rebar was in furtherance of Byer's excavation business or that Byer retained control over Lowell's unloading operation. *Kunz v. Beneficial Temporaries*, 921 P.2d 456, 461 (Utah 1996). The *Kunz* court found that, in a multiple-employer context, where one employer relinquishes control over the details of an employee's work, and where the employee's work does not benefit

that employer, there is no vicarious liability. *Id.* at 462.

Byer could not be in control because it was not aware that Miles had left Byer's work on Lot 174 to join Lowell in its rebar unloading operation on Lot 173. (R. 585, 591-92, 596, 747-748, 774, 791.) Bob Miles left Byer's work on Lot 174 and became part of Lowell's operation in unloading the rebar on Lot 173. (R. 791.) There is no evidence that Byer had any control over Lowell's operation or that it could direct Miles with respect to the details of that operation.

Miles was under Lowell's control in unloading Lowell's rebar. Sutton admits Lowell was in charge of the unloading. (R. 814). Sutton's expert, Don Rigtrup, testified that Lowell was in charge of, in control of, and had the final say regarding, Lowell's rebar unloading operation. (R. 817-820). Lowell's superintendant confirms that Lowell "was in charge of the unloading operation" and that ***"Byer Excavating had absolutely no involvement with the Thorpe residence project on Lot 173."*** (R. 786-789).

Further, Miles was not being paid by Byer for the time spent assisting Lowell with Lowell's project. Where Miles abandoned his responsibilities for Byer on Lot 174 and became part of Lowell's operation, there is no respondeat superior relationship and Byer cannot be held vicariously liable. *Jackson*, 891 P.2d at 1391.

Although Byer had not authorized Miles to act on its behalf in assisting other contractors on unrelated projects, this case is analogous to those cases discussing the

"loaned employee" doctrine within the context of vicarious liability[3]. *See Kunz*, 921 P.2d at 461. In that context, Byer Excavating cannot be liable for Bob Miles's acts because it did not have the right to "direct, supervise, and control the details of [Miles's] work," because that right belonged to Lowell, and because Miles's work for Lowell was not "performed in whole or in part in furtherance of [Byer's] business." *Id.* at 462. There is no evidence that Byer had any right to control any aspect of Lowell Construction's operations on Lot 173, including the rebar unloading. There is no evidence that Lowell's rebar unloading furthered any business of Byer.

Further, at the time of the accident, Miles was not doing Byer's work, or anything that furthered Byer's business. (R. 768.) Instead, he was working as "part of [Lowell's] operation." (R. 791.) Lowell had the right to control the details of Miles's work. Lowell decided where to position the rebar truck, and thus, where Miles needed to position his excavator. (R. 786). Lowell decided where the rebar should be unloaded. (R. 604.) Lowell provided the chain to connect the rebar to the trackhoe bucket. (R. 606, 776.)

It was Lowell's responsibility to see that the rebar was unloaded. (R. 602.) The undisputed facts in the record clearly show that Lowell Construction was in charge of, in control of, and had the final say regarding Lowell's rebar unloading operation. Just as in

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[3] The focus in *Kunz* was not the agreement between the "primary employer" and the "special employer," but rather which employer retained control over the employee at the time of the accident. Simply because Miles agreed to leave his work and become part of Lowell's operation without consulting with Byer should not affect the result. Lowell Construction, not Byer Excavating, retained control over the details of Miles's work at the time of the accident.

*Kunz*, the details of Miles's work for Lowell were under Lowell's control, and Lowell had "primary supervisory responsibility" over Miles's acts while working for Lowell.

Under the principles in *Kunz*, it is clear that Byer had no control over Miles when he became part of Lowell's unloading operation. The present case is militates more strongly against respondeat superior than in *Kunz* because Miles was not authorized to act on behalf of Byer in Lowell's operations as opposed to being a "loaned" as in *Kunz*. Thus, Byer Excavating had no respondeat superior relationship with Miles at the time of the accident.

### B. The Trial Court Correctly Found that Bob Miles Was Acting Outside of the Course and Scope of his Employment for Byer Excavating when he Abandoned his Duties on Lot 174, and Went to Perform a Task he was Not Hired to Do for an Unrelated Contractor on Lot 173.

A respondeat superior relationship between Byer Excavating and Bob Miles, by itself, is not sufficient to support Sutton's claim to hold Byer vicariously liable. Sutton must also show that Miles's conduct in stopping his work for Byer on Lot 174, leaving Byer's work-site, going to Lowell Construction's work-site and becoming part of Lowell's operation in unloading Lowell's rebar for Lowell's project on Lot 173 was within the course and scope of his employment with Byer.

Both Sutton and Miles understood that Lowell's request for help in unloading Lowell's rebar for Lot 173 was outside the scope of what either of them were hired to do. Sutton acknowledged that Lowell's request to help unload its rebar on Lot 173 was outside the scope of work he was hired to do on Lot 174. (R. 810.) Bob Miles also

testified ***"I shouldn't be doing that because that's not what I'm paid to be doing"*** and ***"because I didn't think that's where I should be. I should have been down there doing my job for Byer."*** (R. 800, 801.)

Sutton must show that Miles's acts while assisting another contractor, Lowell Construction, on an unrelated project "are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.'" *Christensen v. Swenson*, 874 P.2d 125, 127 (Utah 1994), *quoting Birkner*, 771 P.2d at 1056. Sutton and Miles both knew that helping Lowell on Lot 173 was outside what they were hired to do by their respective employers and unrelated to any objective of their employers. The undisputed facts are that the activities relating to the accident on Lot 173 have no connection whatsoever with what Miles was employed to do for Byer or any conceivable objective of Byer.

Utah courts look to three criteria articulated in *Birkner v. Salt Lake County* to determine whether an employee's acts fall within the course and scope of his employment. 771 P.2d at 1056-57. First, an employee's conduct must be of the general kind the employee is employed to perform, directed toward accomplishment of the objectives of the employees duties . *Id.* at 1056-57. This requires that the employee be "about the employer's business and the duties assigned by the employer." *Id.* Second, the employee's conduct must occur within the hours of the employee's work and the ordinary spatial boundaries of employment. *Id.* at 1057. Third, the employee's conduct

must be motivated, at least in part, by the purpose of serving the employer's interest. *Id.*

Sutton must establish all these elements. The undisputed facts manifest that none of these required and essential elements of Sutton's claims are present in this case.

### *1. The Undisputed Facts of this Case Show that Miles was Hired to Perform Excavation and Grading Work on Lot 174, Not to Help Another Contractor Unload Rebar on a Separate and Unrelated Jobsite. Therefore, Miles's Conduct While Assisting Lowell was Not of the General Kind He was Employed to Perform.*

The first factor is that the "employee must be about the employer's business and the duties assigned by the employer" *Christensen,* 874 P.2d at 127 (Utah 1994), and "directed toward the accomplishment of objectives within the scope of the employee's duties." *Birkner*, 771 P.2d at 1056-57. It is undisputed that Miles was about Lowell Construction's business, not Byer Excavating's, in unloading Lowell's rebar. Unloading Lowell Construction's rebar on Lot 173 was not directed to accomplish any objective of Miles's employment with Byer. Miles was assigned and employed to perform excavation work, not unload rebar for other contractors.

Miles left Byer's work assignments on Lot 174 and became part of Lowell's operation unloading Lowell's rebar for Lowell's project on Lot 173. (R. 791.) Lowell's superintendant confirms "Byer Excavating had absolutely no involvement with the Thorpe residence project on Lot 173." (R. 786.) Jones did not even know who Byer was. (R. 786.) Unloading Lowell's rebar "did not benefit, in any way, Byer Excavating" and what Miles "was doing in assisting with unloading the rebar was purely for the benefit of Lowell Construction." (R. 787.) There is no dispute regarding Miles's testimony that he

knew he should not have left Byer's work to help Lowell because ***"I shouldn't be doing that because that's not what I'm paid to be doing"*** and ***"because I didn't think that's where I should be. I should have been down there doing my job for Byer."*** (R. 800, 801.)

In this case, Bob Miles's conduct was so clearly different from what he was hired to perform that, as the trial court properly concluded, he was not within the course and scope of his employment as a matter of law. Miles was employed by Byer to perform excavation and grading work pursuant to Byer's S310 Excavation and Grading license. (R. 775.) His job did not include using the trackhoe to unload equipment or materials. (R. 777.) On the day of the accident, Miles was assigned by Byer to clear trees, build a road on Lot 174, and dig a foundation on that lot. (R. 796-97.) Byer's business did not include concrete work or any work having to do with rebar. In fact, Byer does not have a concrete license which involves placement of rebar. (R. 775.)

More important, Bob Miles was not hired or authorized to leave his work to help other contractors on unrelated projects. Miles was employed to perform work on projects Byer contracted to perform, not to assist any contractor on any project who may happen to ask for his help. Byer Excavating had absolutely no involvement with the home being built on Lot 173. (R. 767, 787.) It had not contracted with Lowell construction to perform any work on that lot, and its work on Lot 174 was completely unrelated to any work occurring on Lot 173. *Id.* In fact, Lowell's superintendent was completely unaware of who Byer Excavating was prior to this litigation. (R. 786.) Byer never authorized Bob

Miles to assist other contractors on other lots, and it was Byer's policy that its employees were not to use its equipment on jobsites other than those on which they were employed to work. (R. 766.) When Bob Miles left his work on Lot 174 to work for Lowell on Lot 173, he did so without Byer's permission, and as Vic Byer put it, he "misappropriated Byer's trackhoe." (R. 766-67.)

No reasonable juror could conclude that part of Bob Miles's job description was to accept invitations to go to different job sites and, using Byer's machinery, help other contractors with whatever needs they may have. Indeed, throughout his employment for Byer, and throughout his entire 30 year career, he had never been asked to leave his work to help another contractor on another jobsite. (R. 797.) He was hired to do Byer's excavation work on Lot 174, and when he left his work there to join Lowell's operation to unload its rebar on Lot 173, he was outside the course and scope of his employment.

### *a. Miles's Scope of Employment is Determined by the Tasks and Objectives Assigned by Byer, not the Possible Uses of Equipment Used in Miles Employment.*

Sutton asks this Court take an expansive view of Bob Miles's job duties. Specifically, Sutton asks the Court to infer that because Bob Miles was a trackhoe operator, and Byer's trackhoe has the capability "to attach objects and lower them to the ground" that his job duties assigned by Byer necessarily included helping another contractor on an unrelated project unload rebar from a truck. There is no basis in fact or law for an inference that an employee's scope of employment must be equated to the full spectrum of capabilities of equipment used by that employee. The elements of

determining whether acts are within the course and scope of employment depend upon the tasks and objectives assigned by the employer, not the potential uses of equipment used by the employee. *Christensen*, 874 P.2d at 127; *Birkner*, 771 P.2d at 1056-57.

The vast potential for absurd results under such a principal is obvious. On summary judgment, only reasonable inferences are allowed and the Court is not required to draw unreasonable inferences that are not supported by the facts. *Surety Underwriters*, 2000 UT 71, ¶37.

***b. Miles's Scope of Employment is Not Determined by What Other Byer Employees in Different Divisions of Byer's Business Were Employed to Perform.***

Sutton relies upon Miles's statement that he has unloaded rebar in the past. However, Bob Miles has never unloaded rebar as part of his employment with Byer. Byer does not use rebar as part of its business, particularly in the excavation and grading work Miles was hired to perform. (R. 583-84, 589-90, 595-96.)

Sutton points to instances where other Byer employees on Byer utility projects allegedly moved or unloaded materials using a trackhoe. None of the alleged activities involved Bob Miles. The activities asserted by Sutton involved Byer's utility crews which perform different work and functions than the excavation and grading work Miles was employed to perform. Utility work crews include a machine operator and at least one or two other persons to assist with the pipe and utility work. The utility crews are equipped with rigging equipment for use in working with the pipes and utility materials. In contrast, Bob Miles typically worked alone and was not equipped with rigging

equipment because he was not hired to engage in any activity that would involve unloading pipe or other materials. (R. 583-84, 589-90, 595-96, 747-750, 758-58, 774-79.)

### *c. Miles Scope of Employment Did Not Include Taking Direction from Sutton to Assist other Contractors on Unrelated Projects.*

Sutton argues that Miles assisted Lowell because he was asked by Sutton as his "supervisor." However, Sutton argued before the trial court that "Mr. Miles unfounded perception" that Sutton was his supervisor on the project "is not relevant to the argument of whether he was in the course and scope of his employment with Byer." (R. 645.)

While Sutton was hired to generally oversee work on Lot 174, Sutton recognized his involvement with Miles was limited to Miles's scope of work on Lot 174 and did not extend to Lot 173. (R. 809-10.) Byer was hired by M.H. Allred in a limited capacity—to provide earthwork, excavation, and grading work on Lot 174. (R. 766.) Sutton acknowledged that Lowell's request to help unload its rebar on Lot 173 was outside the scope of work he was hired to do on Lot 174. (R. 110.)

### *d. Miles's Scope of Employment is Determined by Byer's Assigned Tasks and Objectives, Not by any Alleged "Barter System" or Custom of "Doing Favors" for other Contractors.*

Sutton asserts the existence of an undefined "industry standard barter system" which expands all construction worker's scope of employment to include doing "favors" for other contractors on whatever unrelated projects may be in the vicinity of the employer's project. There are no facts that show that such a system was in place here because there was no agreement between Byer and Lowell, (R. 787) Jones never had any

conversations with anyone at Byer, (R. 786) and in fact, Jones did not even know who Byer was. (R. 786.) Miles had no authority to enter into agreements for Byer. (R. 747.)

Again, the determinative elements of the scope of an employee's employment are governed by the employer's assigned tasks and objectives and do not include undefined trade customs or whatever casual practices other employers may follow. *Christensen*, 874 P.2d at 127; *Birkner*, 771 P.2d at 1056-57.

Sutton asserts that Miles acknowledged that contractors on projects help each other "from time to time." However, this statement was not in the context of his specific employment with Byer. (R. 88.) It also does not address the issue of Miles leaving his work on Lot 173 to assist Lowell Construction on the unrelated project of Lowell on Lot 173 where Byer was not working. The undisputed material fact is that in his 30 or so years of experience in the excavation business, 17 of which was for Byer Excavating, Bob Miles had never been asked to leave his jobsite to help out on another jobsite. (R. 797-798.) Byer Excavating gave its employees no authorization to do so. (R. 773.)

Miles was not hired to perform "favors" for other contractors. Sutton's "custom" allegations do not give rise to an issue of fact. Byer is not bound by this amorphous and undefined "custom" and it has no bearing on Miles's scope of employment. *Elmore v. Sullivan Advertising & Design, Inc.* 2008 Texas App. LEXIS 7121 (2008) (reproduced in the Addendum)(Evidence of industry custom does not determine scope of employment). In Elmore, the court held that "It is unreasonable to assume that all...contracts are the same and that all...firms undertake the same responsibilities." *Id.* What other contractors

may do on other construction projects is immaterial. See *Id.*; *Leger Construction, Inc. v. Roberts, Inc.*, 550 P.2d 212, 214 (Utah 1976)(Evidence of other projects requires identical circumstances); *Busker v. Sokolowski*, 203 N.W.2d 301, 303 (Iowa 1972)("Custom" on other construction projects inadmissible).

In *United States, etc. v. Guy H. James Construction Company*, 390 F.Supp. 1193 (M.D. Tenn. 1972), the Court held:

> Testimony of what is usually or generally done is not of the imperative, compulsory and universal character required to establish a custom. ***Existence of usage or custom can only be proved by numerous instances of actual practices, and not by opinion of a witness. A person seeking to establish custom or usage has the burden of proving it by evidence so clear, uncontradictory and distinct as to leave no doubt as to its nature and character.***

Id. at 1209 (Emphasis added). Further, such evidence must include numerous examples of "systematic or "semi-automatic conduct" in order to be admissible. Mere "tendency" to act in a given manner is not sufficient. *G.M. Brod & Company, Inc. v. U.S. Home Corp.*, 759 F.2d 1526, 1533 (11th Cir. 1985); *Simplex, Inc. v. Diversified Energy Systems, Inc.*, 847 F.2d 1290, 1293-1294 (7th Cir. 1988). There is no evidence to support the existence or parameters of any alleged "gratuitous bartering system" or that it has any bearing on the actual scope of Miles employment with Byer.

Sutton relies upon deposition testimony of its expert, Don Rigtrup, for the proposition that sharing equipment and exchanging favors is commonplace on construction sites. However, Mr. Rigtrup testified that he is not familiar with the actual operations, custom, practice or experience of Byer Excavating. (R. 822-28.)

Accordingly, Rigtrup's "assumed facts which vary materially from the actual, undisputed facts" are insufficient to give rise to an issue of fact. *Elmore,* 2008 Texas App. LEXIS 7121 (2008).

Sutton's unsupported allegations of an "industry standard bartering system" and doing favors for contractors on unrelated projects is insufficient to give rise to an issue of fact. Sutton's argument creates the untenable and unworkable problem of defining the parameters and limits of the alleged custom of "gratuitous bartering" and "doing favors" within the construction industry. Sutton's theory would place undefined and potentially unlimited burdens and liability on contractors by effectively extinguishing the limits of their employee's scope of employment. Again, the undisputed fact is that Miles was not hired to do favors for other contractors on unrelated projects, was not authorized to do so, and had never been asked to do so in 30 years of work in the construction industry.

### *2. The Accident Occurred Outside the Hours and Ordinary Spatial Boundaries of Bob Miles's Employment. Therefore, Byer Excavating Cannot be Held Vicariously Liable for Bob Miles's Acts.*

The second factor which Sutton must establish is that at the time of the accident, Bob Miles was "substantially within the hours and ordinary spatial boundaries of the employment." *Christensen*, 874 P.2d at 127. In other words, Miles must have been acting "within the authorized limits of time and space" of his employment." *Birkner,* 771 P.2d at 1056. When Miles became part of Lowell's operation of unloading Lowell's rebar on Lot 173, Miles was not within the hours of his employment for Byer or the ordinary spatial boundaries of his assigned tasks for Byer.

### *a. Miles was Not within the Hours of Employment for Byer.*

The time Bob Miles spent assisting Lowell unload rebar on Lot 173 was not within the hours of Miles's employment for Byer. Bob Miles knew that was not what he was to be paid for by Byer. (R. 801.) Bob Miles did not submit time to Byer for payment for the time he spent taking the trackhoe to Lot 173 to assist Lowell in unloading the rebar. (R. 590-91, 595.) Byer did not pay Bob Miles for the time in taking the trackhoe to Lot 173 and helping Lowell Construction unload the rebar. (R. 590-91, 595.) Therefore, because Miles was not on Byer's clock, he was not within the hours of his employment.

### *b. Miles was Not Within the Area of His Work for Byer.*

Byer had no work to do at the location where the trackhoe was located during the rebar unloading and there was no reason for Bob Miles to be at that location in his employment for Byer. (R. 747-48, 774.) Any activities by Bob Miles on Lot 173 were outside the ordinary spatial boundaries of Bob Miles's employment with Byer. (R. 585, 591-92, 596.)

Sutton alleges in its Complaint that the rebar was unloaded "to Lot #173." (R. 3-4.) Sutton was injured on Lot 173. (R. 783.) Bob Miles left Byer's work on Lot 174 and went to the physical location of Lowell's operation and became part of Lowell's operation in unloading the rebar onto Lot 173. (R. 791.) Sutton testified that this location was "up the hill from us, probably 50 to 100 yards..." from where Miles was working. (R. 805.) With respect to the location of Lowell's rebar unloading operation, Miles

testified that he did not want to go help Lowell there ***"because I didn't think that's where I should be. I should have been down there doing my job for Byer."*** (R. 800.)

Sutton asserts that the fact that he asked Miles to help Lowell somehow transforms Lowell's project site into Byer's work on Lot 174. However, Sutton also acknowledged that Lowell's request to help unload its rebar on Lot 173 was outside the scope of work he was hired to do on Lot 174. (R. 810.)

Sutton raises the issue of whether the tracks of the trackhoe actually left Lot 174.[4] Regardless of whether the track portion of the trackhoe was technically on Lot 174 or 173, Sutton admits that the trackhoe was physically situated so the boom of the trackhoe could swing over Lot 173 and place the rebar on Lot 173. (R. 642-44, 783.) The undisputed material fact is that Byer had no work to do at the location where the trackhoe was located during the rebar unloading and there was no reason for Bob Miles to be at that location in his employment for Byer. (R. 747-48, 774.)

Sutton relies upon the decision in *Christensen*, 874 P.2d at 127. However, that case is dramatically distinguishable from this case. In *Christensen*, a security employee at Geneva Steel was involved in an accident while traveling back from a brief, paid lunch break. The employer knew that employees regularly drove to a nearby café during the paid breaks. The court found that reasonable minds could differ as to whether the

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[4] In *Christensen,* the court found that simply inquiring whether the employee is on the employer's premises at the time of the incident is insufficient to determine whether the employee is within the ordinary spatial boundaries. Instead "[s]ome flexibility is required . . .." *Id.* at 128 n. 1.

employee was within the spatial boundaries of her employment because the employee was hired to "see and be seen" on and around Geneva Property, her employer tacitly sanctioned employees traveling from the guard post to obtain lunch from the café, and that she was in the geographic area accessible during her fifteen minute paid break. *Id.*

By contrast, in this case Miles was not paid during the time assisting Lowell on Lot 173, Miles was not hired to "see and be seen" around Lot 173, Byer did not know that Miles left his work for Byer on Lot 174 to help Lowell on Lot 173, and there was no reason for Miles to be at the location where the rebar was unloaded. Accordingly, Miles was not within the spatial boundaries of his employment for Byer.

### *3. Bob Miles's Conduct when he Left His Work on Lot 174 to help Lowell Construction with its Project was not Motivated by the Purpose of Serving Byer's Interests, and in Fact Did Not Serve Byer's Interests.*

Finally, for an employee to be within the course and scope of his employment, his conduct "must be motivated, at least in part, by the purpose of serving the employer's interests." *Christensen,* 874 P.2d at 127 *quoting Birkner,* 771 P.2d at 1057. There is no evidence that Miles was motivated to unload Lowell's rebar on Lot 173 by any interest of Byer. Again, Bob Miles testified ***"I shouldn't be doing that because that's not what I'm paid to be doing"*** and ***"because I didn't think that's where I should be. I should have been down there doing my job for Byer."*** (R. 800-01.) Accordingly, he did not submit any time to Byer for payment for the time spent assisting Lowell unload its rebar on Lot 173.

Sutton offers no evidence, and there is no evidence, that Miles's motivation to assist Lowell on an unrelated project was to serve any interest of Byer. "Specific facts are required to show whether there is a genuine issue for trial." *Reagan Outdoor Advertising v. Lundgren*, 692 P.2d 776, 779 (Utah 1984). There are no facts indicating Miles was motivated to serve any interest of Byer.

Sutton speculates that Byer benefitted from an undefined "gratuitous barter system common on construction projects by having the use of Lot 173's port-a-potty for its employees working on Lot 174." *Sutton Brief, p. 9.* There is no evidence that Miles was motivated by the existence of the port-a-potty on Lot 173. In fact, Miles and Byer were unaware of the existence of the port-a-potty. (R. 755, 780.)

Sutton also asserts that Miles was motivated by an interest to appear to be "a team player" to the benefit of Byer. This is not a reasonable inference because Lowell was not aware of who Byer was or its existence until well after the incident when this lawsuit was filed. (R. 786.) Miles simply decided to help someone who asked for help. Miles said he acted simply because "you know, the guy [Lowell's superintendent, Don Jones] needs some help, I guess I'll go help him." (R. 760.) Miles stated that he could not imagine any interest of Byer that was served by unloading Lowell Construction's rebar. (R. 590.) At the same time, it is clear that Miles knew that that was not what he should be doing in his employment for Byer.

To be within the course and scope of employment, an employee's conduct must be motivated by the purpose of serving the employer. *See Christensen,* 874 P.2d at 127.

Sutton appears to argue that any conduct meets this standard so long as it is not "highly unusual, and quite outrageous." Sutton Brief, p. 16. However, this is not the standard set forth in *Birkner, Christensen*, or any other Utah decision. Sutton relies upon *Christensen* where the court considered that the paid breaks benefitted the employer's interest of speed and efficiency and more satisfied, productive employees. *Id.* No such interest of Byer was served by the unloading of Lowell's rebar.

Miles stated in his affidavit that he could not imagine any interest of Byer that was served by unloading Lowell Construction's rebar. (R. 590.) He admitted in his deposition that he knew he should not have been helping Lowell, but "should have been down there doing my job for Byer." (R. 800.) He recognized that his work for Lowell did not benefit Byer, so he did not submit time for that work. (R. 595.) He further confirms that he was not motivated by serving Byer's interests when he went to help Lowell. (R. 743.)

## II. THE RECORD CONTAINS NO FACTS TO SUGGEST THAT BYER EXCAVATING ACTED TO VEST BOB MILES WITH APPARENT AUTHORITY. THEREFORE, IT CANNOT BE HELD VICARIOUSLY LIABLE ON THIS THEORY.

Sutton also claims Miles had apparent authority to agree on behalf of Byer to assist Lowell. Sutton claims he "presumed" that Miles had such authority because he had possession of Byer's trackhoe. This is not sufficient to give rise to an issue of fact.

In *Jackson*, 891 P.2d at 1392, the court held:

> To be vicariously liable for the acts of an employee under a theory of apparent authority, an employer must conduct itself in such a way as to clothe its employee with apparent authority to perform the torts committed and there must be reasonable reliance on that apparent authority on the part of the injured party.

There is no evidence of any conduct on the part of Byer to indicate that Miles was authorized to leave his work for Byer on Lot 174 and join Lowell's operation of unloading rebar on Lot 173. Byer had nothing to do with the project on Lot 173. There is no evidence suggesting that Miles was authorized to represent or act on behalf of Byer with respect to any activity with Lowell's rebar unloading on Lot 173. There is also no evidence of any reasonably reliance by Sutton on any conduct of Byer which could conceivably clothe Miles with such authority.

Even managerial status, which Miles did not have, does not entitle a third person to assume a managerial employee is authorized to engage in all activities on behalf of the employer. *Jackson*, 891 P.2d at 1392. The Utah Supreme Court has held that even use of the employer's name in the course of business does not give rise to apparent authority. *Bodell Constr. Co. v. Stewart Title Guar. Co.*, 945 P.2d 119 (Utah App. 1997).

Apparent authority must be based upon the conduct of the alleged principal, Byer, and not on the conduct of Miles or Sutton's subjective presumptions. *Zions First Nat. Bank v. Clark Clinic Corp.*, 762 P.2d 1090, 1094-95 (Utah 1988). In *City Elec. v. Dean Evans Chrysler-Plymouth*, 672 P.2d 89 (Utah 1983), the Court held:

> It is well settled law that the apparent or ostensible authority of an agent can be inferred only from the acts and conduct of the principal. Where corporate liability is sought for acts of its agent under apparent authority, liability is premised upon the corporations knowledge of and acquiescence in the conduct of its agent which has led third parties to rely upon the agent's actions. Nor is the authority of the agent "apparent" merely because it looks so to the person with whom he deals. It is the principal who must cause third parties to believe that the agent is clothed with apparent authority.... It follows that one who deals exclusively with an agent has the responsibility to ascertain that agent's authority despite the agent's representations.

Id. at 90 (Emphasis added). Sutton has offered no evidence of Byer's conduct to support its apparent authority to use Byer's equipment to perform other contractors' work on other projects. It is not enough that Sutton "presumed" Miles had authority. It is undisputed that Miles acted without Byer's knowledge. There is no evidence that Sutton took any action to ascertain the scope of Miles's authority.

In this case, Appellant bases his claim of apparent authority entirely on the conduct of Bob Miles, and upon his own presumptions. There are no facts to indicate that Byer acted in any way to clothe Miles with apparent authority. Instead, the record shows that Bob Miles was not authorized by Byer to use its trackhoe in the way that he did, and that Bob Miles did so without the knowledge of Byer. (R. 766, 744.)

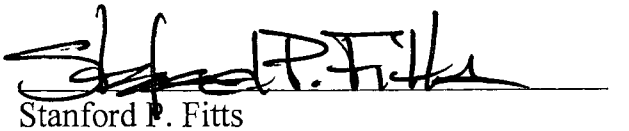
Again, Miles testified ***"I shouldn't be doing that because that's not what I'm paid to be doing"*** and ***"I didn't think that's where I should be. I should have been down there doing my job for Byer."*** (R. 800). There are simply no facts to support a case of apparent authority, and the trial court was correct to dismiss Sutton's claims.

## CONCLUSION

For the foregoing reasons, Appellee Byer Excavating, Inc. requests that this Court affirm the trial court's grant of summary judgment, and find that Byer Excavating cannot be held vicariously liable for the actions of Bob Miles.

DATED this 29 day of April, 2011.

STRONG & HANNI



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# ADDENDUM

*Elmore v. Sullivan Advertising & Design, Inc.* 2008 Texas App. LEXIS 7121 (2008)

(Produced pursuant to Utah R. App. P. 24(a)(11)(B))

LEXSEE 2008 TEXAS APP. LEXIS 7121

**JACQUELYN ELMORE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF RON ELMORE, DECEASED, AND INTERVENOR, RONNIE ELMORE, Appellants v. E. SULLIVAN ADVERTISING & DESIGN, INC., Appellee**

**No. 11-07-00118-CV**

**COURT OF APPEALS OF TEXAS, ELEVENTH DISTRICT, EASTLAND**

***2008 Tex. App. LEXIS 7121***

**September 25, 2008, Decided**
**September 25, 2008, Opinion Filed**

**SUBSEQUENT HISTORY:** Petition for review filed by, 12/16/2008

**PRIOR HISTORY: [*1]**

On Appeal from the 172nd District Court, Jefferson County, Texas. Trial Court Cause No. E-171,096.

**JUDGES:** Panel consists of: Wright, C.J., McCall, J., and Strange, J.

**OPINION BY:** TERRY McCALL

**OPINION**

**MEMORANDUM OPINION**

Jacquelyn and Ronnie Elmore, the parents of Ron Elmore, filed a wrongful death action against Heath Channing Hebert and his employer, E. Sullivan Advertising & Design, Inc. Hebert and his family were on their way to a Labor Day Music Festival in Beaumont when Hebert missed a turn. Hebert was in the process of making a U-turn when Ron Elmore's motorcycle struck Hebert's Toyota Sequoia. Ron subsequently died from his injuries. The trial court granted E. Sullivan Advertising's motion for summary judgment on the ground that Hebert was not acting within the course and scope of his employment when the collision occurred. [1] We affirm.

1 In addition to Heath Hebert and his wife, Aspen Hebert, and E. Sullivan Advertising, the Elmores also sued a number of other defendants. The trial court granted summary judgments for all of the defendants except the Heberts. The court severed the claims against E. Sullivan Advertising, and the Elmores filed this appeal from that final judgment.

*Background Facts*

E. Sullivan Advertising **[*2]** was a Beaumont advertising agency that had been hired by Perfect Day Enterprises to handle the media advertising for the Labor Day Music Festival. Eric Sullivan, the president and owner of E. Sullivan, testified that he had personally pursued the account by contacting Angela Baker of Perfect Day Enterprises.

Hebert testified that he was the business manager for E. Sullivan Advertising and that it was his job to run the office, oversee internal employees, and handle the finances and the books. His responsibilities did not involve selling advertising or the production and design aspects of the business. It was not part of his job to obtain

clients or discuss with clients of E. Sullivan Advertising whether they were happy with the firm's work. Hebert was authorized to sign certain types of contracts on behalf of E. Sullivan Advertising, and he did sign a contract to design laminated backstage passes for the festival.

Eric Sullivan testified that he was Hebert's supervisor, that Hebert was off work on that Labor Day, and that Hebert was not under the supervision of anyone at E. Sullivan Advertising on that Labor Day. Eric Sullivan said that he had not directed any of his employees, including **[*3]** Hebert, to go to the concert. As it turned out, the other two employees of the firm, Tish Kimball and Kari Riley, also went to the concert. Sullivan went to the concert by himself to hear the musical group "Bad Company," and his wife was to join him later when the singer Tracy Byrd performed.

Hebert testified that he was driving his own Toyota Sequoia when the accident occurred. Hebert was taking his wife and daughter to attend the Tracy Byrd concert and Labor Day festival at Ford Park. Hebert said it was his own idea to go to the concert and festival. Although he knew that Eric Sullivan planned to go to the festival, he had no plans to meet Eric there. Hebert stated that he bought his own tickets during a lunch break a week before the accident. Hebert explained that E. Sullivan Advertising placed the media for the event, but when the festival started on Labor Day, the firm's work had been completed. The firm did not have any business or anything to do with the event itself.

*Standard of Review*

A movant for a traditional summary judgment has the burden to show that there are no genuine issues of material fact and that it is entitled to summary judgment as a matter of law. *TEX. R. CIV. P. 166a(c)*; **[*4]** *City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979)*. An appellate court reviewing a summary judgment must consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts against the movant. *Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754 (Tex. 2007)*. Evidence that favors the movant's position will not be considered unless it is uncontroverted. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965)*.

Plaintiffs who rely on the doctrine of respondeat superior to hold an employer liable have the burden of proving at trial that the employee was acting within the course and scope of his employment at the time of the accident. *Dunlap-Tarrant v. Ass'n Cas. Ins. Co., 213 S.W.3d 452 (Tex. App.--Eastland 2006, no pet.)*; *Soto v. Seven Seventeen HBE Corp., 52 S.W.3d 201, 204 (Tex. App.--Houston [14th Dist.] 2000, no pet.)*; *Mata v. Andrews Transp., Inc., 900 S.W.2d 363, 366 (Tex. App.--Houston [14th Dist.] 1995, no writ)*. However, a defendant moving for a traditional summary judgment has the burden of establishing that, as a matter of law, **[*5]** the plaintiff has no cause of action against the defendant. The defendant may carry that burden by conclusively negating one of the elements of plaintiff's cause of action or by establishing all elements of an affirmative defense to each claim. *Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 425 (Tex. 1997)*. Once the defendant movant presents evidence to establish his or her right to a summary judgment, the nonmovant must come forward with evidence or law that precludes summary judgment. *City of Houston, 589 S.W.2d at 678-79*; *Seelin Med., Inc. v. Invacare Corp., 203 S.W.3d 867, 869 (Tex. App.--Eastland 2006, pet. denied)*.

Because E. Sullivan Advertising moved for a traditional summary judgment, it had the initial burden to establish that Hebert was not acting within the course and scope of his employment at the time of the accident.

*Doctrine of Respondeat Superior*

The essential elements of a negligence cause of action are (1) a legal duty owed by one person to another, (2) a breach of that duty, and (3) damages proximately caused by the breach. *Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990)*; *Ginther v. Domino's Pizza, Inc., 93 S.W.3d 300, 303 (Tex. App.--Houston [14th Dist] 2002, pet. denied)*. **[*6]** The existence of a legal duty is the threshold requirement.

Generally, a person has no duty to control the conduct of another. *Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983)*. Under the theory of respondeat superior, however, an employer may be vicariously liable for the negligent acts of its employee if the employee's actions are within the course and scope of his employment. *Mayes, 236 S.W.3d at 756*. An employer is liable for the tort of its employee only when the tortious act falls within the scope of the employee's general authority in furtherance of the employer's

business and for the accomplishment of the object for which the employee was hired. *Id.; Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573, 577 (Tex. 2002)*. Thus, the employee's act (1) must be committed within the scope of the general authority of the employee (2) in furtherance of the employer's business and (3) for the accomplishment of the object or purpose for which the employee was hired. *Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569 (Tex. 1972)*; *Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354, 357 (Tex. 1971)*; *Bell v. VPSI, Inc., 205 S.W.3d 706, 715 (Tex. App.--Fort Worth 2006, no pet.)*.

E. [*7] Sullivan Advertising moved for summary judgment on the grounds that its evidence negated the duty and breach of duty elements essential to the Elmores' claims. In their depositions, Hebert and Eric Sullivan testified to facts that demonstrated that Hebert was not acting within the course and scope of his employment at the time of the collision. The trial court granted E. Sullivan Advertising's motion.

The Elmores raise two issues on appeal. First, they argue that the trial court erred when it struck the affidavit testimony of their expert, Holly DeLaune, that the Elmores relied on to show that Hebert was acting in the course and scope of his employment. Second, they argue that the trial court erred in granting the motion for summary judgment because E. Sullivan Advertising failed to conclusively prove that Hebert was not acting within the course and scope of his employment at the time of the collision and that there is a genuine issue of material fact as to whether Hebert was acting within the course and scope of his employment at that time.

*Analysis*

E. Sullivan Advertising's summary judgment evidence showed that it was closed for business on that Labor Day; that Hebert was off work and [*8] did not have the authority to conduct any business for E. Sullivan Advertising that day; that Hebert's boss, Eric Sullivan, did not direct or request Hebert to go to the concert or do anything on behalf of the firm on that day; that Hebert's responsibilities with the firm did not include working with clients on their events; that Hebert decided on his own to take his family to the concert and festival; and that Hebert was driving his own car at the time of the accident. The evidence showed that Hebert's actions that day were not within his general authority, were not in furtherance of his employer's business, and were not made for the accomplishment of the object or purpose for which he was hired. Therefore, E. Sullivan Advertising established its right to a standard summary judgment by conclusively negating the duty element of the Elmores' cause of action against it.

The burden then shifted to the Elmores to come forward with evidence or law that would preclude summary judgment for E. Sullivan Advertising. The Elmores attempted to introduce the affidavit of DeLaune, an advertising executive and partner with the firm of Erickson USA LP. DeLaune stated that she had reviewed the depositions [*9] of Eric Sullivan, Hebert, and "the exhibits relating to the promotion of the Labor Day Festival at Ford Park." She then concluded:

> Based on industry standards and practices with which I am familiar and have used in my work, it would be imperative for Sullivan Advertising to have persons present who could act on behalf of Sullivan Advertising at the Labor Day Festival to ensure things run smoothly and vendors and customers would be satisfied.

We have reviewed the portions of those depositions and exhibits that were introduced as summary judgment evidence. The facts set forth in the uncontroverted testimony of Hebert and Eric Sullivan do not support DeLaune's conclusions.

The Elmores state that DeLaune "was hired to review the issues and events of this case . . . to determine whether or not, based on industry custom and practice, Heath Hebert was in the course and scope of his employment." Despite the testimony of Hebert and Eric Sullivan that Hebert was off work that day, that Hebert was not directed or requested to attend the concert and festival, and that Hebert's employee responsibilities did not involve working with the firm's clients, DeLaune concluded that Hebert must have been going [*10] to the festival to "facilitate or accomplish the smooth running of the event, troubleshoot client concern and promot[e] . . . client retention." That conclusion is not a reasonable inference from the facts testified to by Hebert and Eric Sullivan. The only basis for DeLaune's conclusion was her assumption that she would have attended the event for those purposes; therefore, Hebert must have done so.

When an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value. *Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995)*. DeLaune stated that her conclusions concerning Hebert's duties were based on her knowledge of the media industry and her actual work of promoting events. DeLaune did not provide a reasonable basis for such an assumption concerning industry custom and practice. It is unreasonable to assume that all media contracts are the same and that all media firms undertake the same responsibilities. DeLaune did not show how E. Sullivan Advertising's media contract with Perfect Day Enterprises required E. Sullivan Advertising to have personnel there on Labor Day "to troubleshoot," promote the **[*11]** concert, or work with vendors. DeLaune stated that Hebert was attending "a Labor Day Festival that was being promoted solely by his employer, Sullivan Advertising." The uncontroverted testimony was that Perfect Day Enterprises was the promoter of the festival and ran the event; E. Sullivan Advertising's role was to place the media, and its work had been completed when the event began.

The Elmores rely on *Allbritton v. Gillespie, Rozen, Tanner & Watsky, P.C., 180 S.W.3d 889 (Tex. App.--Dallas 2005, pet. denied)*, a legal malpractice case. However, the expert in *Allbritton* based his conclusion on underlying facts. Allbritton and a fellow employee had sued their employer for breach of contract. The jury found that the employer had breached the contract but awarded no damages to Allbritton despite awarding $ 4,000,000 to the other employee. In the subsequent legal malpractice suit, Allbritton's expert concluded that the former attorneys should have hired an expert witness to both calculate and testify as to Allbritton's damages. The expert explained the basis for his opinion, pointing out such facts as Allbritton not having the background or education to calculate his damages and having tried **[*12]** to use a methodology to calculate damages that was not correct. In contrast, DeLaune's conclusory opinions were not supported by underlying facts. The trial court did not err in excluding her affidavit.

The Elmores attempt to create a fact issue on course and scope of employment by pointing out that Hebert was the business agent and could sign contracts on behalf of E. Sullivan Advertising. The Elmores' burden was to show that Hebert was acting within the course and scope of employment at the time of the accident. *Bell, 205 S.W.3d at 715*. Stated another way, the Elmores had to show that E. Sullivan Advertising had the right of control over Hebert's physical movements at the time of the accident. *Brown v. Am. Racing Equip., Inc., 933 S.W.2d 734, 735 (Tex. App.--San Antonio 1996, no writ)*; *Graham v. McCord, 384 S.W.2d 897, 898-99 (Tex. Civ. App.--San Antonio 1964, no writ)*. Hebert's status as business manager and his authority to sign contracts were not sufficient evidence to raise a fact question on whether Hebert was acting within the course and scope of employment at that time.

The Elmores also argue that the question of whether an employee is acting within the course and scope of his **[*13]** employment is usually a question of fact. We agree. However, there needed to be some testimony of facts that contradicted the facts as related by Hebert and Eric Sullivan. Although the Elmores attempt to draw an analogy between this case and this court's opinion in *Sw.-Tex. Leasing Co. v. Denise,* No. 11-99-00127-CV, 2000 WL 34235126 (Tex. App.--Eastland Aug. 3, 2000, no pet.) (not designated for publication), *Denise* demonstrates what was missing from the Elmores' summary judgment proof.

*Denise* involved conflicting testimony as to the underlying facts; this case does not have such conflicting testimony. The trial court had granted Raylin Ann Denise a partial summary judgment that Donnie Taylor was, as a matter of law, in the course and scope of his employment with Advantage Rent-A-Car at the time of Taylor's collision with Denise. Denise's summary judgment evidence included an affidavit by Taylor that stated that he had heard that the Advantage vehicle he was driving at the time of the accident had brake problems, that he was test driving it to see if there were in fact brake problems, and that that was part of his job. Advantage attached an affidavit sworn to by Donald Livesay, the **[*14]** manager of the Advantage location where Taylor worked, to its response to Denise's motion for summary judgment. Livesay stated that Taylor was a service agent, that service agents were not authorized to test drive vehicles unless specifically instructed to do so, and that Taylor had not been instructed to test drive the vehicle. Livesay also stated that no complaints had been made concerning any problem with the vehicle. Advantage also attached an affidavit sworn to by the customer who had rented and returned the vehicle just prior to the accident; he stated that he had no problems with the brakes. Thus, the summary judgment evidence in *Denise* contained

conflicting testimony as to the critical facts, and this court reversed and remanded for a new trial.

In the case before us now, there was no testimony contradicting the facts as related by Hebert and Eric Sullivan. Even though they were interested witnesses, their testimony was clear, positive, direct, otherwise credible, and free from contradictions and consistencies and could have been readily controverted. *See Trico Techs. Corp. v. Montiel, 949 S.W.2d 308, 310 (Tex. 1997)*. The Elmores could have effectively countered their testimony **[*15]** by opposing evidence if any existed. The Elmores did not attempt to controvert their testimony through additional deposition testimony, interrogatories, or other discovery. The depositions of Hebert and Eric Sullivan were competent summary judgment evidence.

The Elmores attempt to discredit their testimony by pointing out that Hebert and Eric Sullivan were brothers-in-law. That fact does not controvert their testimony or mean that they were not truthful in their testimony. The Elmores also make a point that Eric Sullivan's children did not have tickets to the festival even though Eric testified that he had purchased tickets. Hebert also testified that he had purchased tickets to the festival. Whether the Sullivan children had free tickets to the festival is not evidence that is relevant to a determination of whether Hebert was within the course and scope of his employment at the time of the accident. Both of the Elmores' issues are overruled.

*This Court's Ruling*

The judgment of the trial court is affirmed.

TERRY McCALL

JUSTICE

September 25, 2008

## MAILING CERTIFICATE

I hereby certify that on this 29 day of April, 2011, a true and correct copy of the foregoing document was served by the method indicated below to the following:

| | | |
|---|---|---|
| John Hansen<br>Jonathan H. Rupp<br>SCALLEY READING BATES HANSEN &<br>RASMUSSEN, P.C.<br>15 West South Temple, Suite 600<br>P.O. Box 11429<br>Salt Lake City, UT 84147-0429 | ( )<br>(X)<br>( )<br>( ) | U.S. Mail, Postage Prepaid<br>Hand Delivered<br>Overnight Mail<br>Facsimile |