

1992

Jeff Christensen and Kyle James Fausett v. Gloria Swenson and Burns Security Systems, Inc. : Reply Brief

Utah Court of Appeals

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DOCKET NO.

IN THE UTAH COURT OF APPEALS

Plaintiffs and Appellants

v.

GLORIA SWENSON and
BURNS SECURITY SYSTEMS, INC

Defendants and Appellees.

10

Appellate No. 920172-CA

Priority No. 16

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, UTAH
COUNTY

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TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
POINT 1: DEFENDANT BURNS FAILS IN ITS ‘STATEMENT OF RELEVANT FACTS’ TO RESOLVE THE FACTUAL CONFLICT IN THIS CASE	3
POINT 2: MS. SWENSON ACTED FOR THE CONVENIENCE OF HER EMPLOYER AND THUS HER VISIT TO THE FRONTIER CAFE CANNOT BE CONSIDERED WHOLLY A PERSONAL ENDEAVOR	8
POINT 3: DEFENDANT BURNS MISCHARACTERIZES THE SECOND CRITERION OF THE <u>BIRKNER/CLOVER</u> TEST AND PLAINTIFFS’ ARGUMENT	11
POINT 4: THE SECOND TRIP TEST DOES NOT APPLY TO THE FACTS OF THIS CASE	13
CONCLUSION	15

TABLE OF AUTHORITIES

CASES:

<u>Alma v. Oakland Unified School Dist.</u> 176 Cal. Rptr. 287, 289 (Cal Ct. App. 1981).	9
<u>Birkner v. Salt Lake County</u> 771 P.2d 153 (Utah 1990)	2, 11, 14,
<u>Brown v. Anzalone</u> 300 F.2d 177 (3d Cir. 1963)	9
<u>Carter v. Bessey</u> 97 Utah 427, 93 P.2d 490 (Utah 1939)	3, 14
<u>Clover v. Snowbird Ski Resort</u> 808 P.2d 1037, (Utah 1991)	2, 10, 11, 12, 13, 14, 15
<u>DeMirjian v. Ideal Heating Corp.</u> 278 P.2d 114, 118 (Cal. Dist C. App. 1955)	10
<u>George v. Bekins Van & Storage Co.</u> 33 Cal.2d 834, 205 P.2d 1037 (1949)	9
<u>J.C. Penny Co. v. McLaughlin</u> 137 Fla. 594, 188 So. 785 (1939)	9
<u>Singer v. Wadman</u> 595 F. Supp. 188, 269 (D.Utah 1982) .	1
<u>Travelers Ins. Co. v. SCM Corp.</u> 600 F. Supp. 493, 500 (D.D.C. 1984)	9
<u>Whitehead v. Variable Annuity Life Ins.</u> 801 P.2d 934 (Utah 1989).	13, 15

Plaintiffs Jeff Christensen and Kyle James Fausett submit the following Reply Memorandum in support of this appeal.

SUMMARY OF ARGUMENT

In the Brief of Appellants, Mr. Christensen and Mr. Fausett challenged Defendant Burns to demonstrate that this case has no genuine issues of material fact and that it is entitled to summary judgment as a matter of law. Defendant Burns' brief fails to answer this challenge. Thus, for example, in response to the assertion that it lacks the facts necessary to support its motion, Burns adds four more statements and alters the wording of the other six. However, Defendant still furnishes only a smattering of facts which simply fail to outline Ms. Swenson's scope of employment. Since the critical issue in this case concerns whether Ms. Swenson acted within the scope of employment while on a short break, the Court must consider the employer's policies and instructions involving breaks from work, as well as employee practice on these matters.

"The burden of showing that there is no 'genuine issue of material fact' rests with the party seeking a summary judgment in its favor." Singer v. Wadman, 595 F. Supp. 188, 269 (D. Utah 1982). In their Brief of Appellants, Mr. Christensen and Mr. Fausett cite testimony from the depositions to refute various facts presented by Defendant. Instead of responding to each of these charges, Defendant Burns merely selects a few of Mr. Christensen and Mr. Fausett's facts and attacks them, all the while maintaining that no dispute exists. Moreover, three of the four new facts which Defendant added in its Brief of Appellee are either misleading or inadequate.

Besides failing to establish the lack of factual disputes, Defendant

also fails to establish that it is entitled to prevail as a matter of law. The facts simply demonstrate that Ms. Swenson planned and carried out her visit to the Frontier Cafe in a manner suited to her employer's convenience. Therefore, it cannot be said that she acted in a wholly personal endeavor. If anything, the short break she took to pick up a cup of soup was merely incidental to job responsibilities.

In outlining the second criterion under the Clover/Birkner analysis, Defendant emphasizes that an employee must be within the normal spatial boundaries of employment. This clearly is not the standard. As the Clover Court emphasized, the employee need only be *substantially* within those boundaries. Not only does Defendant distort the Clover/Birkner analysis, it also mischaracterizes Mr. Christensen and Mr. Fausett's arguments made on this point. Mr. Christensen and Mr. Fausett do not argue that in the Clover case Mr. Zulliger's duties restricted him to one restaurant, nor do they argue that the Clover Court ignored this alleged fact. To the contrary, Mr. Christensen and Mr. Fausett acknowledge that Mr. Zulliger's duties took him to both restaurants. They emphasize, however, that the accident occurred at a some distance away from the locale of his responsibilities and that the Clover Court did not find this departure significant. Similarly, in this case, Ms. Swenson brief departure from the area of her duties does not take her outside the "substantial normal spatial boundaries."

Finally, Defendant argues that the second trip test must be applied in this case. It does not make sense to apply this test every time an employee deviates from his or her immediate work responsibilities. Thus for example, whether an employee takes a latrine break, gets up to stretch, or walks to the vending machine to buy a cup of soup, it would be ridiculous to ask if a second person would need to make the same trip.

These incidental actions of the employee briefly attending to personal comfort needs do not take him or her out of the scope of employment. Whether as an incidental action or under the personal detour approach, Ms. Swenson could not be said to have totally abandoned her responsibilities. Carter v. Bessey, 97 Utah 427, 93 P.2d 490, 492 (Utah 1939) (“A slight deviation from order or attending incidentally to other business than the master’s, but which does not dissever the servant from the master’s business does not relieve the master from liability for the servant’s negligence.”).

ARGUMENT

POINT I: DEFENDANT BURNS FAILS IN ITS ‘STATEMENT OF RELEVANT FACTS’ TO RESOLVE THE FACTUAL CONFLICT IN THIS CASE.

In its Brief of Appellee, Defendant Burns offers a Statement of Relevant Facts with the alleged purpose of “adding to the Statement of Facts set forth in Appellants’ Brief.” (Brief of Appellee at 3). Rather than merely adding to Mr. Christensen and Mr. Fausett’s account of the events, however, Defendant’s Statement of Relevant Facts serves to cement the conflict and dispute over the facts in this case. In response to the argument that Defendant’s list of facts is inadequate, Burns not only alters the wording of its original six statements, it also adds four more facts. Even with these additions, however, Defendant’s statement of facts stands incomplete, and in dispute.

Thus, for example, Mr. Christensen and Mr. Fausett point to new fact 8 as inaccurate and misleading. There Defendant states that Ms. Swenson

admitted that picking up a cup of soup was a personal choice. (Brief of Appellee at 4). However, when asked again and pushed to admit that obtaining the soup involved a personal choice, Ms. Swenson finally responded “I guess if you are hungry, that’s your choice.” (Swenson Depo. at 24, lines 6-7, attached as Addendum 1). More importantly, this statement does not mean that Ms. Swenson viewed her actions as abandoning work. In fact, when asked if she believed she was on a personal errand, Ms. Swenson testified: “No. I was doing my job.” (Swenson Depo. at 23, lines 16-19, Addendum 1).

Similarly, Defendant’s new facts 2 and 3 give only part of the material information in this case. In these statements, Defendant attempts to limit Ms. Swenson’s scope of employment to actions that take place solely within the geographical boundaries of the Geneva Plant. (Brief of the Appellee at 3). As discussed in Point 2B of Appellants’ Brief, and Point 3 of this brief, the test for scope of employment not only encompasses actions on the premises, but also those *substantially* within the spatial boundaries. Hence, while Defendant’s statements setting out those boundaries may reflect the truth, they do not provide the whole picture.

Not only does Defendant furnish disputed facts,¹ it also challenges the facts in this case by directly attacking some of the facts offered by Mr. Christensen and Mr. Fausett. (Brief of Appellee at 6, stating that “Appellants’ Statement of Facts are mischaracterized, misleading or immaterial”). As the evidence demonstrates, Defendant cannot discount the facts while maintaining that no dispute exists.

1 Mr. Christensen and Mr. Fausett challenge Defendant’s original statement of facts in the Brief of Appellant, Point 1.

Defendant's assault on Mr. Christensen and Mr. Fausett's Statement of the Facts comes in two forms. First, Defendant tries to discredit the facts which concern actions taken by employees in Ms. Swenson's role, i.e., gate guards. Second, Defendant endeavors to eliminate facts involving the use of the Frontier Cafe by Burns employees other than gate guards.

The latter part of statement 13 illustrates Defendant's direct attack on the role of gate guards. There, Defendant disputes Mr. Christensen and Mr. Fausett's claim that Ms. Swenson and other guards checked with each other before ordering lunch and that they occasionally brought lunches back for those who ordered. (Brief of Appellee at 7). While admitting that Ms. Swenson distributed lunches to guards at the gates, Defendant argues that she did so only as a rover, on graveyard shift, and only after the accident. (Id.)

The depositions describe, however, that even before the day of the collision the gate guards inquired with each other when ordering and picking up lunches. Specifically, on page 55 of her deposition, Ms. Swenson confirms that "people at Gate 4 would take turns to go over to the Frontier Cafe and pick up lunches for each other." (See Exhibit 5, Brief of Appellants). Moreover, she testified that the guards sometimes walked across the street for this task and sometimes drove. (Id.)

In statement 14, to support of its position that the gate guards did not pick up lunches for each other, Defendant refers to Oreon Olsen's deposition in which he claims that he doesn't recall any of the guards bringing back food from Frontier Cafe to other guards. (See Exhibit 4, Brief of Appellants, Olsen Depo. at 27-28). However, Ms. Swenson's testimony disputes this, as shown in the preceding paragraph. Furthermore, Mr. Olsen himself testifies later in his deposition that "I could go over and get a

lunch or *have someone pick it up.*” (See Exhibit 4, Brief of Appellants, Olsen Depo. at 33, lines 6-7, emphasis added). In addition, although he refused her offer, Ms. Swenson testified that on the day of the accident she checked with Mr. Olsen to see if he wanted her to bring back lunch for him. (See Exhibit 5, Brief of Appellants, Swenson Depo. at 17, lines 21-23).

In statement 17, Defendant refers to Eugene Bezzant’s deposition to establish that the gate guards considered a visit to Frontier Cafe to pick up lunch as a personal errand. (Brief of Appellee at 8). Yet, as discussed above, Ms. Swenson emphatically rejected this position. She considered the task as part of her job. (“I was doing my job.” Swenson Depo. at 23, lines 16-19, Addendum 1).

Finally in statement 18, Defendant disputes Mr. Christensen and Mr. Fausett’s claim that Burns Management knew that the gate guards used Frontier Cafe for breaks. (Brief of Appellee at 8, arguing that Mr. Transtrum observed such use among rovers only.) Eugene Bezzant testified, however, that the management knew because, “occasionally they would come to the gate at the time we were at the place picking up a lunch or whatever we were picking up.” (See Exhibit 7, Brief of Appellants, Bezzant Depo. at 18, lines 14-23). Moreover, when asked whether the management knew that the guards used their own vehicles to “hustle over” to the Frontier Cafe, Ms. Swenson declared, “I’m sure they did.” (See Exhibit 5, Brief of Appellants, Swenson Depo. at 55, lines 18-22). In addition, Ms. Swenson reaffirmed that the management must have known that prior to the accident, Burns employees, including gate guards, used Frontier Cafe. (“I’m sure they did. The lieutenants themselves went there.” See Exhibit 5, Brief of Appellants, Swenson Depo at 43, 15-20).

Not only does Defendant dispute Mr. Christensen and Mr. Fausett’s

facts concerning the role of the Frontier Cafe in relation to gate guards, it also attempts to exclude the link between other Burns employees and the Cafe. Specifically, Defendant labels the relationship between the Cafe and rovers, management, and those on other than day shifts as immaterial. As Mr. Christensen and Mr. Fausett argued in their previous brief, these facts are material. They serve to define the arena in which Ms. Swenson's scope of employment exists.

Consequently, contrary to Defendant's position in its Brief of Appellee, material facts include the following uses of the Frontier Cafe:

1) Ms. Swenson brought food back from the Frontier Cafe to her lieutenant while on graveyard shift (Brief of Appellee at 6);

2) rovers picked up lunches from the Frontier Cafe for single staffed posts (Brief of Appellee at 6-7);

3) company officials from Salt Lake City held meetings with lieutenants at the Frontier Cafe (Brief of Appellee at 7);

4) lieutenants picked up food from the Frontier Cafe for meetings with lieutenants and captains (Brief of Appellee at 8); and

5) Captain Transtrum observed rovers using Frontier Cafe for lunch and latrine breaks (Brief of Appellee at 8).

Each of these admitted facts, plus the numerous others already cited by Mr. Christensen and Mr. Fausett in the Brief of Appellants, come together to create an impression in the minds of Burns employees. Through their use of the Cafe, in official, semi-official, and casual ways, Burns employees endow it as an extension of their workplace, much like a company cafeteria. Hence, facts on how Burns generally used the Frontier Cafe are important, as Defendant notes, in determining the legal rights of the parties and to establish liability of the employer. (Brief of Appellee at

10-11).

Finally, in their Brief of Appellants, Mr. Christensen and Mr. Fausett refer to and quote from testimony in the depositions to refute the original facts provided by Defendant. Defendant simply fails to respond to most of these charges. (See, e.g., Brief of Appellants at 7-8, attacking original fact 6).

POINT 2: MS. SWENSON ACTED FOR THE CONVENIENCE OF HER EMPLOYER AND THUS HER VISIT TO THE FRONTIER CAFE CANNOT BE CONSIDERED WHOLLY A PERSONAL ENDEAVOR.

Incredibly, Defendant argues that Ms. Swenson's visit to the Frontier Cafe was wholly "a matter of personal convenience." (Brief of Appellee at 14.). Ignoring the following factors, Defendant persists in maintaining that Burns had no control or influence in Ms. Swenson's actions:

1. Burns gave no scheduled breaks.
2. The company provided no place on the premises for employees to purchase their food.
3. The company expected its employees to work as much as possible throughout their shifts but paid them during any breaks taken.
4. On the day of the collision, Ms. Swenson waited for a slow time in her responsibilities.
5. Following company practice, she checked to see if fellow-guard Oreon Olsen wanted something to eat.
6. Ms. Swenson telephoned the nearest food facility using a menu posted at Gate 4.
7. She ordered a cup of soup and then drove across the street in order to be back at Gate 4 as quickly as possible.

8. She stayed only long enough to pay for the soup.

9. She intended to bring the soup back to her post rather than eat it at the cafe.

Obviously, if Ms. Swenson had taken her lunch break as a matter of personal convenience, she might of at the very least taken more time, eaten at the cafe, or even selected a different time, or place, or manner of transportation. In fact, as both Ms. Swenson's direct supervisor, Kim Hancey, and her captain, Mike Transtrum, testified: a Burns employee taking a lunch break benefits the company. (Hancey Depo. at 50, lines 21 through 51, line 10, attached as Addendum 2; Transtrum Depo. at 80, line 16 through 82, line 3, attached as Addendum 3). Although it might be argued that a lunch break benefits the employer no matter what the circumstances, in this case where Ms. Swenson planned and conducted her hurried break specifically out of concern for and at the convenience of her employer, the break becomes merely incidental to work.

Even with personal acts, many courts have held that when this conduct is tied to the workplace, it falls within the scope of employment. As the court in Travelers Ins. Co. v. SCM Corp., explained:

In determining the scope of employment for purposes of the *respondeat superior* doctrine, courts have long considered certain "personal" activities to be so necessary, usual, and closely tied in to the workplace that they are considered to be within the scope of employment. See, e.g., Brown v. Anzalone, 300 F.2d 177 (3d Cir. 1962) (lighting a fire to stay warm); George v. Bekins Van & Storage Co., 33 Cal.2d 834, 205 P.2d 1037 (1949) (smoking); J.C. Penney Co. v. McLaughlin, 137 Fla. 594, 188 So. 785 (1939) (going to restroom).

600 F. Supp. 493, 500 (D.D.C. 1984). Similarly, in Alma v. Oakland Unified School Dist., the court stated that acts necessary to an employee's "comfort,

convenience, health, and welfare while at work, though strictly personal,” do not take him or her outside the scope of employment. 176 Cal. Rptr. 287, 289 (Cal Ct. App. 1981).

Nonetheless, Defendant argues that it did not direct Ms. Swenson to go to the cafe nor were there duties for her to perform there. Consequently, Defendant asserts, she must have been on a personal errand completely outside the scope of employment. Under this reasoning, however, every small departure would be a personal errand outside the scope of employment. As noted in the preceding paragraph, the cases simply reject such a strict standard. See also, DeMirjian v. Ideal Heating Corp., 278 P.2d 114, 118 (Cal. Dist C. App. 1955) (“Cessation of work for eating, drinking, warming himself, and similar necessities are necessary incidents of employment.”).

Moreover, Defendant’s attempt to classify Ms. Swenson’s rushed break as wholly a personal errand ignores the plain facts in Clover v. Snowbird Resort, 808 P. 2d 1037 (Utah 1991). There, the employer instructed the employee to check on a restaurant part way up the ski slope. *After* performing his duties, and *in a different locale*, the employee engaged in personal skiing and at that time collided with another skier. Like Ms. Swenson, the employee in Clover received no directives to ski to another part of the mountain, nor did he have duties that would require him to continue skiing for four additional runs. At the time of the collision, the Clover employee clearly was not on company business. Nonetheless, the Utah Supreme Court found that neither was he wholly on a personal errand. Id. at 1041.

POINT 3: DEFENDANT BURNS MISCHARACTERIZES THE SECOND CRITERION OF THE BIRKNER/CLOVER TEST AND PLAINTIFFS' ARGUMENT.

Defendant's position throughout this case has been that Ms. Swenson left the physical boundaries of the Geneva plant and therefore cannot be found within the scope of her employment. In attacking Mr. Christensen and Mr. Fausett's arguments on this point, Burns asserts that "[i]t would be disingenuous for plaintiffs to argue that the *normal spatial boundaries* of the employment of Ms. Swenson were beyond the physical boundaries of the Geneva plant" (Brief of Appellee at 17, emphasis added).

The Utah Supreme Court in Clover v. Snowbird Ski Resort, however, explicitly rejected the narrow standard now advocated by Defendant. There, like Defendant in this case, Mrs. Clover argued for a holding that employees who have fixed places of work should be considered acting outside of their employment when off the employer's premises. 808 P.2d 1037, 1043 (Utah 1991). The court declined to adopt the approach, noting that to do so would focus the analysis on one criterion to the exclusion of the other two criteria listed in Birkner. Id. Instead, the Court held that an employee need only be *substantially* within the normal spatial boundaries of his or her employment. Id. at 1040. In other words, an employee may act outside the physical parameters of employment and still be substantially within its boundaries, and hence, within the scope of employment.

In addition to mischaracterizing the second criterion of the Birkner/Clover test, Defendant also falsely summarizes Mr. Christensen and Mr. Fausett's arguments. In referring to their analysis of the Clover case, Burns claims that "Plaintiffs mistakenly argue that the Supreme Court

ignored the fact that Mr. Zulliger's spatial boundaries restricted him to the Plaza Restaurant." It also points out that the Court recognized that Mr. Zulliger had responsibilities at both the Plaza and the Mid-Gad restaurants. (Brief of Appellee at 17). Significantly, Defendant fails to cite the pages in the brief where Mr. Christensen and Mr. Fausett make this argument.

In actuality, Mr. Christensen and Mr. Fausett explicitly refer to the Court's recognition that Mr. Zulliger had duties at both restaurants. See Brief of Appellants at 17 ("On the day of the accident, the Court found it important that Mr. Zulliger had been following instructions to inspect the second restaurant"); and 21 (The Court pointed out that Mr. Zulliger "was on property owned by his employer and at times he had been asked to monitor the other restaurant when not working"). In fact, this element is essential to Mr. Christensen and Mr. Fausett's point, which Defendant appears to have missed. The brief explains that Mr. Zulliger had completed his duties at *both* of these restaurants and the collision with Mrs. Clover occurred at a spot *above* either restaurant. (Brief of Appellants at 21; Clover, 808 P.2d at 1042.). Nonetheless, even though Mr. Zulliger no longer attended to duties at either restaurant and was no longer in their immediate vicinity, the Court still held that he was substantially within the normal boundaries of his employment.²

² Defendant provides no support for its unusual premise that the "entire Snowbird Ski Resort" constitutes the *normal* spatial boundaries of employment for chefs at the resort's restaurants. (Brief of Appellee at 17). By contrast, the Utah Supreme Court merely holds that while skiing, Mr. Zulliger was *substantially* within those boundaries. Clover, 808 P.2d at 1042.

Moreover, nowhere in the Clover opinion does the Court hold that Mr. Zulliger's normal job included "skiing the slopes." (Brief of Appellee at 17). The most that can be drawn from the Court's opinion is that employees skied as a mode of travel between the restaurants. Clover, 808 P.2d at 1043. And, when he collided with Mrs. Clover, Mr. Zulliger was not between the two restaurants. Id. at 1042. It simply does not fit the facts to argue, as Defendant has, that Snowbird hired Mr. Zulliger to ski outside the areas between the two restaurants.

Furthermore, based upon its treatment of the working hours in Clover, the Utah Supreme Court clearly rejected a rigid rule for determining whether an employee acts substantially within the normal boundaries of employment. In Clover, Mr. Zulliger had arrived at the resort in order to spend time skiing before his normal working hours. Clover, 808 P.2d at 1039. Once there, his employer asked him to check the second restaurant, and after doing so he began to ski on his own time. The Court noted that Mr. Zulliger was heading down the mountain to “begin” work. Id. at 1039. That is, he was not within the normal hours of his employment.

POINT 4: THE SECOND TRIP TEST DOES NOT APPLY TO THE
FACTS OF THIS CASE

Defendant argues that Ms. Swenson’s conduct in visiting the Frontier Cafe was not motivated in part by the purpose of serving her employer. (Brief of Appellee at 20). To analyze Ms. Swenson’s motivations, Defendant contends that the Court must use the second trip test. (Id. at 20-21). As the Utah Supreme Court in Clover noted, this test is useful when an employee travels away from work with both a personal and a business motive. 808 P.2d at 1041, citing Whitehead v. Variable Annuity Life Insurance, 801 P.2d 934 (Utah 1989). Thus, for example, the employee in Whitehead was commuting to home when he became involved in an accident that injured the plaintiff. In those type of circumstances, the court asks whether the employer would have had to send another employee over the same route or to perform the same task if the trip had

not been made. Id.

Nothing constrains a court to use the second trip test. In fact, as the Clover court emphasized, this variation from Birkner criterion merely serves as a method of applying the facts in specific circumstances. 808 P.2d at 1040-41. The important requirement remains, whether the employee's conduct is motivated at least in part by the purpose of serving the employer's interests. Id. at 1040.

Because the second trip test focuses on travel away from the workplace, in cases where the employee remains substantially within the normally spatial boundaries of employment, the test provides little help.³ For example, it makes no sense to ask whether the employer would have needed to send a second employee on a latrine break if the first employee had not made such a trip. This would be true whether the employee used a latrine on the premises, or one equally close but outside the physical boundaries of work.⁴ Similarly, in this case, Ms. Swenson's momentary break from work to pick up a cup of soup was such a slight departure from her work responsibilities, the second trip test does not make sense given the facts. Carter v. Bessey, 97 Utah 427, 93 P.2d 490, 492 (Utah 1939) ("A slight deviation from order or attending incidentally to other business than the master's, but which does not disserve the servant from the master's business does not relieve the master from liability for the servant's negligence.").

³ Although the Clover court at first analyzed Mr. Zulliger's actions under the second trip test, it recognized that the case was better suited to the personal detour approach. 808 P.2d at 1042.

⁴ Eugene Bezzant testified that Gate 4 lies equally distant from the Frontier Cafe and Lower Gate 4, which is the site of the nearest on-premise restroom facility. Bezzant Depo. at page 9, line 22 through page 10, line 13, attached as Addendum 4.

The critical inquiry remains whether Ms. Swenson was motivated at least in part, by the purpose of serving Defendant's interest. And, as the facts discussed in Point 2 above, illustrate--Ms. Swenson took her break at Burns convenience and in a way that at least partly served its needs. However, if another approach is merited, a better method for analyzing Ms. Swenson's conduct appears under the personal detour doctrine. Courts may follow this approach when the employee's activity does not involve a commute, as in Whitehead, or a journey away from work.

In the personal detour approach, and under circumstances like this one, the court looks to see if in taking a personal detour away from work responsibilities the employee completely abandons his or her employment. Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1042 (Utah 1991). In this case, Ms. Swenson's own testimony reflects her belief about picking up the soup in relation to her work. Instead of viewing her decision to obtain the soup as abandoning work, she resolutely stated: "No. I was doing my job." (Swenson Depo. at 23, lines 16-19, Addendum 1).⁵

CONCLUSION

For all of the reasons set forth above, and those detailed in the Brief of Appellants, Mr. Christensen and Mr. Fausett respectfully requests the Court to overturn the lower court's grant of summary judgment.

⁵ See also Brief of Appellant at Point 2C for a more detailed analysis of the personal detour approach as applied to the facts in this case.

DATED this 30th day of July, 1992.



LYNN C. HARRIS
Attorney of Record for
Plaintiff Christensen

DATED this 30th day of July, 1992.



THOMAS R. PATTON
Attorney of Record for
Plaintiff Fausett

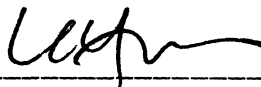
MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing on this 30th day of July, 1992, by first-class, U.S. Mail, postage prepaid to the following:

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~~Secretary~~

ADDENDUM 1

EXCERPTS OF GLORIA SWENSON'S DEPOSITION

1 your lunch; is that a fair assessment?

2 A Yes.

3 Q That was up to the guard to determine whether he or
4 she would go off the premises and get the lunch or just bring
5 their lunch in?

6 MR. HARRIS: Objection. Leading.

7 Q Do you understand the question?

8 A Well, I can tell -- what I can tell you, there is
9 some days we had lunches, some days we did not. One or the
10 other of us went for a cup of soup. That was our lunch. That's
11 what you had time for.

12 Q Sometimes the guard would bring his or her own lunch
13 in; is that right?

14 A Yes. A lot of time it was shared because you never
15 got a break to have anything.

16 Q Did you consider that if you chose to go across and
17 get a cup of soup that you were on a personal errand?

18 MR. HARRIS: That's leading again.

19 A No. I was doing my job.

20 Q Were you told to go get a cup of soup?

21 A No, I was never told to go get a cup of soup.

22 Q Did you consider that part of your --

23 A But I know that you are entitled to a lunch hour.

24 Q Okay. Let me ask you this. And you made the
25 personal choice to go get a cup of soup, right?

1 A I went for lunch, yes.

2 Q And you were not directed to go get a cup of soup by
3 anyone at Burns?

4 A No.

5 MR. HARRIS: Objection. Leading still.

6 Q That was your personal choice, was it not?

7 A I guess if you are hungry, that's your choice.

8 Q Sure. And that wasn't part of your job description
9 to go get a lunch at the Frontier, was it?

10 MR. HARRIS: Same objection. Leading.

11 A I don't know what you are reaching for other than --

12 Q Just answer the question is all I'm asking.

13 MR. HARRIS: If you don't understand the question,
14 don't answer it. Have him reask it.

15 A Reask it again.

16 Q Was it your understanding that you had the personal
17 choice to either bring your lunch in or to go off and get it?

18 A Yes.

19 MR. HARRIS: Objection. Leading.

20 Q Tell me what you did from the time that you left to
21 the time that you got involved in the accident. Tell me what
22 happened. Just walk us through that sequentially.

23 A I made a phone call over to have the cup of soup
24 ready. That's what I had, one cup of soup. And I walked in
25 picked it up.

ADDENDUM 2

EXCERPTS OF KIM S. HANCEY'S DEPOSITION

1 gate?

2 A Right.

3 Q Under that circumstance, the rover comes over
4 and sits there for 15 minutes while he takes his break or
5 eats his lunch or smokes a cigarette?

6 A No, nobody gets by.

7 Q Exactly. Now, leaving that, we've already
8 established that going to where you have two people at gate
9 4, for example, I don't know that there's two people at
10 other posts, but gate 4 during a day shift when one person
11 leaves and leaves at such a time to go on break, leaves at
12 such a time that it isn't in violation of the shift change,
13 they aren't needed over on the other area, okay, when that
14 person leaves for those 10 or 15 minutes and you still have
15 the other person at gate 4, all right?

16 A Okay.

17 Q Under those circumstances, it is true, is it
18 not, that your contract, your meaning Burns' contract, is
19 being met with regards to Geneva Steel?

20 A Yeah.

21 Q Thank you. And you also agree, do you not, that
22 it is important that employees are given a few minutes,
23 we've talked about here, to have a break during the day?

24 A Uh-huh.

25 Q That's beneficial to the employee, obviously?

1 A Yes, it is.

2 Q And it's always beneficial to Burns Security?

3 A Yes.

4 Q Correct?

5 A Uh-huh.

6 Q And whether that break is to relieve themselves
7 or just get a breath of fresh air, whether it's to eat, all
8 those things are important to the individual and to Burns
9 Security?

10 A Yes, it is.

11 Q Are you familiar with any security employees,
12 lieutenants or otherwise that have been disciplined for
13 leaving the facility?

14 MR. WILLIAMS: That's asked and answered.

15 THE WITNESS: Excuse me

16 MR. WILLIAMS: It's just an objection. I
17 believe it's been asked and already answered.

18 THE WITNESS: Yeah.

19 Q (By Mr. Harris) My previous question was very
20 limited with regards to the specifics of what Gloria did
21 that day, where she was just gone a very few minutes over
22 and back. I'm talking about -- I'm not limiting my
23 question to that. I'm talking about are you familiar with
24 anyone who has been disciplined under your watches for
25 leaving the facility?

ADDENDUM 3

EXCERPTS OF MICHAEL TRANSTRUM'S DEPOSITION

1 A Except as directed by specific instructions,
2 that would be an exception.

3 MR. HARRIS: Thank you. I also asked last
4 time, I guess I need to write a letter to get it
5 memorialized, because you and I may have forgotten
6 about it, I wanted to see the guard reports for thirty
7 days prior and the log book for thirty days prior.

8 MR. WILLIAMS: We made that request and Mr.
9 Transtrum indicates to me that he did look for that.

10 THE WITNESS: I made an effort to find that.
11 I do not know where that old log book would be.

12 Q (By Mr. Harris) You can't find it at all?

13 A No. I don't know as there was necessarily
14 any provision to keep those for any period of time when
15 they are filled up. I haven't kept them.

16 Q A couple of follow up questions on breaks
17 that I failed to ask you. We talked about what the
18 general practice was about breaks, rest rooms, what I
19 characterize as a coffee break, how long they took and
20 how many of them there were. You would agree, do you
21 not, that these types of breaks are necessary and
22 beneficial to the employee?

23 A Oh, absolutely.

24 Q And they have got to have them?

25 A Yes.

1 Q Whether they be relieving themselves or
2 getting some nourishment, or just a few minutes of
3 quiet time, it is helpful to the employee?

4 A It would be helpful.

5 Q And also the same question with regards to
6 the employer, you also agree that having employees have
7 these types of breaks to do the things that we have
8 talked about were contained in the practice of Burns
9 there at Geneva is also important to Burns Security?

10 A Well, it is important that these people be
11 comfortable while they are on the job, yes.

12 Q And that allows them to perform their job
13 adequately?

14 A I would except that their break would be
15 taken in such a manner that they can perform their job
16 adequately, yes.

17 Q And the fact that they would get a break
18 would help them perform their job adequately?

19 A I would say yes.

20 Q It would help everything from their
21 disposition to how they treat customers and the
22 clients?

23 A Yes, they are people and people do like
24 breaks.

25 Q And there is no question that there is some

1 benefit to these breaks to Burns Security, the
2 employer?

3 A Yes.

4 Q With regard to Oreon Olson, does he still
5 work there at the plant?

6 A Yes.

7 Q I mean at Burns Security?

8 A Yes.

9 Q And does Jim Bezzant still work there?

10 A Yes.

11 MR. HARRIS: I would like to take both of
12 their depositions, if I could. My understanding is
13 Mark Nielson works for BMT and Ben Olson is retired.

14 THE WITNESS: That is true.

15 MR. HARRIS: I have no further questions.

16 EXAMINATION

17 BY MR. WILLIAMS: Q I have just a few
18 questions. Based on your knowledge and your current
19 position as captain and as lieutenant when you first
20 started in 1988, and upon your review of the Post
21 Orders, did you have any understanding from that review
22 of the Post Orders if the duties of a security guard
23 included using his or her private or personal vehicle
24 for Gate 4 for breaks in order to go off the plant
25 site?

ADDENDUM 4

EXCERPTS OF EUGENE S. BEZZANT'S DEPOSITION

1 Q Why not necessarily?

2 A Because, I mean we can be off out of that building
3 and down checking a steel load or some other problem.

4 Q And how far would you be checking a steel load?

5 A Could be as far as a quarter of a mile to half a
6 mile.

7 Q And so how long would you be away from the building
8 itself?

9 A It depends on what the problem is.

10 Q Could it be as long as 30 minutes?

11 A No, sir.

12 Q As long as 20 minutes?

13 A Possibly.

14 Q So it could be as long as 20 minutes, but usually
15 not as long as 30?

16 A Generally.

17 Q Do you know this gentleman who was just here whose
18 deposition we just took?

19 A Yes.

20 Q That was Oreon Olsen?

21 A Yes, sir.

22 Q Oreon said occasionally guards from gate four would
23 have to go down to lower gate four.

24 A Correct.

25 Q Okay. How far is that?

1 A I would say four or 500 yards. I mean going by a
2 block I'd say a block at least, a city block.

3 Q Is the Frontier Cafe a city block away from gate
4 four?

5 A Yes, sir.

6 Q Is it more than a city block?

7 A No, sir.

8 Q So it's about the same as a city block?

9 A That's correct, sir.

10 Q It's about the same distance as going to lower gate
11 four?

12 A That's right.

13 Q Did you have occasion to work gate four regularly
14 during the summer months of 1988?

15 A Yes.

16 Q Did you know Gloria Swenson at that time?

17 A Yes.

18 Q Did you consider her to be a good employee?

19 A Yes.

20 Q Did you consider her to be a good guard?

21 A Yes.

22 Q Do you have occasion to work in that little building
23 next to gate four?

24 A I don't understand the question, sir.

25 Q Well, you said there was like a five by five little